No. 89196-6
COA No. 69107-4-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

WENDY A. MCDERMOTT
Appellant

and

JUSTIN J. MCDERMOTT
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Wendy McDermott, appellant below and mother of the child at issue in this case, asks this Court to accept review of the Court of Appeals' decision terminating review. See Part B.

B. COURT OF APPEALS DECISION

Petitioner Wendy McDermott, seeks review of the Court of Appeals' decision entered on July 15, 2013, affirming the trial court's order holding Kansas to be the child's home state under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) despite that the child did not live with a parent in Kansas, or anywhere, for six months. A copy of the decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. Can the home state period, i.e., the six months a child lives with a parent in a state, begin before a child is present in the state?

2. Does construing "temporary absence" broadly to include periods of time before a child ever lives in a state (i.e., when the child is born in different state) blur the bright line definition of "home state," and do so in a way that undermines the legislative purposes?

3. Does the definition of "home state" depend on the intent of one or both parents, as do residence or domicile, or does the legislature's

choice of the phrase "lived with a parent" mean instead to focus the inquiry on the child's physical presence?

4. Does construing "home state" to depend on the intent of one or both parents blur the bright line definition of "home state," and do so in a way that undermines the legislative purposes?

5. Should this Court, instead, adopt a "physical presence of the child" rule, as have other state courts facing similar facts?

6. Once a court declares temporary emergency jurisdiction, must the court comply with the mechanisms provided by the statute, including the requirement for immediate communication with any other state where proceedings are pending?

7. Does the UCCJEA concern subject matter jurisdiction, with all the implications of that longstanding usage, and, if not, should the court clarify whether objections to "jurisdiction" may be waived, whether the court's authority to act may be challenged at any time, and whether orders entered without UCCJEA compliance are void?

D. STATEMENT OF THE CASE[1]

Wendy and Justin had one child during their brief marriage, H.J.M. The child was born in Costa Rica, where Wendy had lived and worked for

[1]Citations to the record and additional facts may be found in the mother's briefs.

years and where other members of her family live, though she also has ties to Washington. Justin lives in Kansas, where his parents live.

Justin was present for the birth of their child, but then returned to Kansas. After about six weeks, Wendy and their son joined him there. The marriage was contentious. Within months, the parties began to discuss moving to Washington, where Wendy could work in her profession as a mariner. To pursue a job with the Washington State Ferries, Wendy left for Washington with the child after spending 5.5 months in Kansas.

Justin came to Washington two months later to look for housing. The parties argued, including in a vehicle with the child present. Justin is much larger than Wendy and he has a history of abusive, intimidating and violent behavior. Wendy felt threatened and called the police. Justin left the state and Wendy filed for divorce and for a domestic violence protection order (DVPO).

In response to her petition, Justin admitted the child had no home state and that it would be easier to dissolve the marriage in Washington and asked the court to enter a decree and his proposed parenting plan. Two weeks later, he asked the court to dismiss for lack of jurisdiction. Wendy's petition and Justin's motion proceeded in the superior court on different tracks. A commissioner denied Wendy a DVPO, but a judge

revised the commissioner, found domestic violence, asserted temporary emergency jurisdiction, held there was no home state, and issued a protection order. A week later, the same commissioner declared there was no home state and no temporary emergency jurisdiction, but declined jurisdiction in favor of Kansas, where Justin had filed for dissolution (on the same day as Wendy), though he had not yet served her (and did not serve her until June 28, three months after filing, near the end of the Washington proceedings). Another judge revised the commissioner on the jurisdiction issue, declaring Kansas to be the home state. The court never communicated with the Kansas court, where the proceeding was essentially dormant and where the temporary ex parte orders entered in April had not been entered in compliance with the UCCJEA because Wendy had no notice or opportunity to be heard.

Wendy appealed and Division One affirmed, reading the home state definition to depend on the intent of the parents to live in Kansas in the future and disregarding the mechanism established in the temporary emergency jurisdiction provision of the UCCJEA, including the requirement for judicial communication.

Wendy seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Uniform Child Custody Jurisdiction and Enforcement Act seeks to expedite child custody proceedings, and serve the best interests of children, by eliminating multi-state jurisdictional conflicts. For this it depends on the priority of home state jurisdiction and, by extension, on clarity in defining what is the home state. In this case, Division One defeats these goals with terrible consequences for this mother and child and for the UCCJEA. Instead of a sensible, straightforward construction of the statutory terms, the court adopted a rule that invites precisely the kind of time-consuming, fact-intensive litigation the UCCJEA seeks to prevent.

Twenty-five years ago, this Court remarked on the problems with using domicile in child custody proceedings and anticipated with approval the imminent passage of the UCCJA with its home state rule. *In re Marriage of Myers,* 92 Wn.2d 113, 594 P.2d 902 (1979). Unfortunately, Division One's ruling in this case sharply diminishes the benefit of the home state rule, contrary to the statute's requirement that the UCCJEA be interpreted to effectuate its purposes. For this reason, this case presents an issue of substantial public interest. RAP 13.4(b)(4). Moreover, although the precise question posed by this case has not arisen in Washington, regarding whether the home state calculation may begin before a child is

ever present in a state, Division One's decision conflicts with numerous state cases declaring the rules of statutory construction. RAP 13.4(b)(1) and (2). The decision also conflicts with cases from other jurisdictions addressing the same or related facts as here, which affects the development of a common UCCJEA jurisprudence and, thus, also presents an issue of substantial public interest. RAP 13.4(b)(4). The court's failure to give effect to the temporary emergency jurisdiction provisions shares these same defects and likewise merits review.

Finally, Division One also called into question whether the UCCJEA concerns subject matter jurisdiction. Both state and federal cases speak of it in those terms. Accordingly, the court's ruling invites confusion in the lower courts as to the nature of the court's authority in interstate child custody proceedings, including the availability of challenges to jurisdiction and the nature of the remedies available. For that reason, this case merits review under RAP 13.4(b)(1) and (2).

1. THE HOME STATE HAS PRIORITY JURISDICTION.

The UCCJEA gives priority in jurisdiction to the child's "home state," which is defined as "the state in which a child lived with a parent ... for at least six consecutive months immediately before the

commencement of a child custody proceeding. RCW 26.27.021(7).[2] Alternatively, a state may be the home state if it 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;..." RCW 26.27.201. This latter provision sometimes is called the "extended home state provision." *See,* UCCJEA § 201, U.L.A. *Comment.*

By declaring priority to the home state, the UCCJEA harmonizes with federal law, the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.S. § 1738A, and eliminates the confusion that arose from concurrent jurisdiction, since a proper home state analysis will resolve most cases. Thus, the statute's purposes, as set forth at RCW 26.27.101(1), are effectuated, but only if the statute is interpreted according to those purposes, as it must be. *In re Marriage of Greenlaw & Smith,* 123 Wn.2d 593, 598, 869 P.2d 1024 (1994).

Here, the legislative intent can be furthered by a construction of the relevant terms in a straightforward, objective manner – in other words, a bright line. Most states have adopted this approach. Or the legislative

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[2] An alternative definition applies "[i]n the case of a child less than six months of age," and defines "home state" as "the state in which the child lived from birth with a parent or person acting as a parent." RCW 26.27.021(7). Though Justin argued this definition, it does not apply because when the proceedings here commenced, the child was nine months old.

intent can be defeated by a construction that depends on a totality of the circumstances and invites inquiry into the subjective intent of the parents, including, as here, their intent regarding where they will live in the future. This is the course chosen by Division One.

2. THE HOME STATE DETERMINATION FOCUSSES ON A CHILD'S PHYSICAL PRESENCE, NOT ON RESIDENCE OR DOMICIILE.

The UCCJEA was written and has been construed for the most part to reinforce the bright line approach. For example, the statute defines homes state according to a minimum six month period, a choice made "in order to have a definite and certain test," which also roughly corresponds to the time it takes for a child to integrate into a community. UCCJA 1968 *Comment* § 3.[3] This case involves a child who did not live with a parent in any state for the requisite six months.

Just as the computation of time is definite, certain, and objective, so, too, is the "lived with a parent" aspect of the definition. That is, the home state definition reflects a deliberate rejection of residence or domicile as determinative, relying instead on where a child "lived with a parent." As the New Mexico court observed, in an oft-cited passage, "the Legislature used the word 'lived,' rather than 'resided,' or 'was domiciled,' precisely to avoid complicating the determination of a child's home state

[3]The home state definition has not varied substantively since the original uniform act, which is why the original comments are cited. See UCCJEA, § 3.

with inquiries into the states of mind of the child or the child's adult caretakers." *Escobar v. Reisinger,* 64 P.3d 514, 517 (N.M. Ct. App. 2003). As another court put it, the proposition that a child's home state status follows the parent's residence is "nonsensical," and would render "meaningless" the UCCJEA. *In re K.R.,* 735 S.E.2d 882, 891 (W. Va. 2012). *See, also, Karam v. Karam,* 6 So. 3d 87, 91 (Fla. Dist. Ct. App. 3d Dist. 2009) (French court erred when it focused on the location of the children's 'usual and permanent centre of interest,'" rather than on where the children had lived); *In re Welfare of the Children of D.M.T.-R.,* 802 N.W.2d 759, 764 (Minn. Ct. App. 2011) (likewise, citizenship is irrelevant to home state analysis); *Carter v. Carter,* 758 N.W.2d 1 (Neb. 2008) (determination of home state is separate and distinct from determination of either the parents' or the child's legal residence).

Here, for example and contrary to Division One's decision, it does not matter where either or both parents intended to live in the future with the child. *Prizzia v. Prizzia,* 707 S.E.2d 461, 468 n.6 (Va. Ct. App. 2011); *accord In re Tieri,* 283 S.W.3d 889 (Tex. App. Tyler 2008). Otherwise, as here, a state could be a child's home state before and/or without the child ever being physically present in the state. This is the path Division One took, and it leads in the wrong direction.

The statute's "lived with a parent" language focuses on physical presence and is critical to the UCCJEA purposes of clarity and certainty. In this case, two out of three judicial officers in the superior court took that approach and determined H.J.M. had no home state. The last judge to rule decided Kansas was the home state because H.J.M.'s presence in Costa Rica at birth and for six subsequent weeks was a "temporary absence" from Kansas. If nothing else, these differing results in one county court say something about the need for clarity and an objective test.

3. TEMPORARY ABSENCE MUST BE CONSTRUED NARROWLY TO AVOID THE PROBLEMS ARISING FROM USE OF RESIDENCE OR DOMICILE TO DETERMINE HOME STATE.

As this case makes clear, the need for clarity applies with equal force to the interpretation of "temporary absence," or this exception will swallow the rule, as happened here and will certainly happen again in our highly mobile society. The definition of home state provides that "[a] period of temporary absence of a child, parent, or person acting as a parent is part of the [six month] period." RCW 26.27.021(7). In other words, the home state clock does not stop when a child, or a parent or parents, temporarily leaves the state where she or he lives, as, for example, to visit relatives or to receive medical care.

Here the court applied the temporary absence provision, not to an interruption in the period of time a child lives with a parent in a state, but to a period of time before the child ever lived in the state. This interpretation unnecessarily and unhelpfully complicates the home state definition, which is why courts in other states have rejected it.

For example, the Texas court rejected an argument identical to the father's in this case, noting that "[r]egardless of how we define the word 'live,' at the very least one must be physically present in a place to live there." *In re Calderon-Garza,* 81 S.W.3d 899, 904 (Tex. App. El Paso 2002). In *Calderon,* the mother attended medical school in Mexico. She returned to Texas, where she had lived and where her parents lived, for the birth of the child. The court declined to construe the time spent in Texas as the child's "temporary absence" from Mexico, regardless of the mother's intent to return to Mexico.[4] Instead, correctly, the court found Texas was the home state, since the child had lived in Texas from birth until commencement of the proceedings (i.e., for its entire two-month life). (The father had never lived in Texas.)

Applied here, this reasoning results in a conclusion that there is no home state, which is the conclusion the court reached in *In re Marriage of*

[4] Division One said the Texas case is distinguishable, but in the relevant aspects, it actually is not.

Diaz, 845 N.E.2d 935 (Ill. App. Ct. 2d Dist. 2006). There, as in this case, the parents and child split time between states, sometimes living with the child together and sometimes separately. Although the parties in *Diaz* waived the temporary absence argument, the court noted the issue, when reached, was disapproved elsewhere. 845 N.E.2d at 942.

This is the position reached by other state courts in cases where children are born in states other than the parents' states of residence. *See, e.g., B.B. v A.B.,* 31 Misc. 3d 608, 916 N.Y.S.2d 920 (N.Y. Sup. Ct. 2011) (no home state where child born in state where neither parent resides); *In re Leona A.D.,* 2011 Conn. Super. LEXIS 673 (no home state where parents' resided in Florida but child born in Connecticut while mother visiting);[5] *Carl v. Tirado,* 945 A.2d 1208, 1210 (D.C. 2008) (no home state where child born in state next to mother's state of residence, where she returned after birth); *In re E.T.,* 137 P.3d 1034 (Kan. App. 2006), *disapproved of on other grounds by In re B.D.-Y.,* 187 P.3d 594 (Kan. 2008) (court specifically rejects as lacking authority state's argument that

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[5] The Connecticut decision, though unpublished, is cited on the authority CT R RAP § 67-9, which provides:

> Citation of Unreported Decisions. A decision not officially reported may be cited before the court only if the person making reference to it provides the court and opposing counsel with copies of the decision. If it is cited in a brief, a copy of the text of the decision must be included in the appendix to the brief.

Accordingly, a copy of the decision is attached to this petition.

father's state of residence was home state because he intended to return there with child from hospital in state where child born); *People v. Hollis (In re D.S.),* 217 Ill. 2d 306, 317, 840 N.E.2d 1216 (Ill. 2005) (no home state where child born in state next to mother's state of residence, while she was in process of relocating to father's state of residence).

Taken together, these cases, and others like them, reject the construction of the "temporary absence" provision to include periods before the child was first present in the home state. In doing so, they promote an objective, physical presence rule that starts the home state clock when a child lives with a parent in a state, and not before, regardless whether one or both parents intends to take the child there in the future.

4. THE OBJECTIVE PHYSICAL PRESENCE RULE BEST ACHIEVES THE LEGISLATIVE PURPOSE OF CLARITY AND CERTAINTY.

The important principle in these cases, the need for a simple, objective and broadly applicable rule, is echoed widely in cases around the country. Prominently, the Texas Supreme Court declared the UCCJEA was "intended to give prominence to objective factors." *Powell v. Stover,* 165 S.W.3d 322, 326 (Tex. 2005). The court noted that tests focused either on intent or on the totality of the circumstances "seek to promote flexibility at the expense of the jurisdictional certainty that the home-state provision was intended to provide." *Id.,* at 327. A proper focus on the

child's physical location makes "the determination of jurisdiction more straightforward." *Id.*, at 326. The court noted that where flexilibity is needed, it can be found in the provisions that apply when there is no home state or when a parent has acted illegally or improperly. *Id.*, at 327. In other words, it is both unnecessary and dangerous to complicate the home state definition.

This physical presence rule was likewise applied by the New Mexico Supreme Court in *Escobar, supra.* There, the parents married in New Mexico, then moved to Missouri, where the wife became pregnant. The parties separated. The wife returned to New Mexico and gave birth. The father petitioned for custody in Missouri and the court ordered the mother to return to Missouri with the child. She complied and lived in Missouri until the father's petition was dismissed on procedural grounds. He promptly re-filed in Missouri; she left for New Mexico and filed for custody there. The New Mexico court held Missouri to be the home state, because the child lived there with a parent in the six months prior to commencement of the (second) proceeding; it did not matter that the mother lived in Missouri only to comply with the court's order. The physical presence rule controlled, regardless of the mother's intent.

This is the sensible solution. The home state computation must be triggered by the physical presence of a child living in a state with a parent.

Otherwise, a state might be a home state even if the child never lived in the state, so long as one or both parents intended to return with the child there. Because this latter approach, taken here by Division One, defeats the purposes of the statute, this Court should accept review and announce Washington joins those states that have adopted a physical presence rule.

5. ONCE THE COURT DECLARED TEMPORARY EMERGENCY JURISDICTION, THE PROVISIONS OF THAT SECTION CONTROLLED, INCLUDING THE REQUIREMENT FOR A JUDICIAL CONFERENCE.

Once Judge Ellis declared temporary emergency jurisdiction ("TEJ") under the UCCJEA and entered a DVPO, the TEJ provisions directed the court's next actions. Unfortunately, the superior court ignored the statute and Division One voided the TEJ jurisdiction provisions, eviscerating one of the most important functional features of the UCCJEA – the requirement of communication between the courts.

Judge Ellis found domestic violence and entered a DVPO, invoking the UCCJEA provision which authorizes jurisdiction "if the child is present in this state and ... it is necessary in an emergency to protect the child because the child, or a sibling or a parent of the child, is subjected to or threatened with abuse." RCW 26.27.231(1). That is, the reason for jurisdiction is "to protect the child." Justin did not appeal this order, so the finding contained therein is a verity.

Once a court asserts temporary emergency jurisdiction, that assertion "remains in effect" unless and until certain conditions are met justifying deferring to a court in another state.

None of the conditions requiring (or allowing) Washington to defer to Kansas are met here, even if Kansas was the home state. In the first place, the statute imposes upon the court a duty to consult with the court in another state "upon being informed" that another proceeding has been commenced or a custody determination has been made. RCW 26.27.231(4). This requirement applied to Commissioner Stewart who, instead, simply declared an end to the emergency Judge Ellis had found to exist a week earlier. Judge Ellis's order should have "remained in effect" until the courts communicated, which would have revealed there was no active litigation in Kansas and no order entered in compliance with the UCCJEA (i.e., because Wendy had no notice or opportunity to be heard, as required under RCW 26.27.241(1) and (2) and the PKPA). In other words, there was nowhere really to send this case. By contrast, in Washington, the parties had been litigating for three months.

The language requiring the court to communicate is plain and unambiguous and requires the court to act immediately. *See In re Parentage of Ruff,* 168 Wn. App. 109, 123, 275 P.3d 1175 (2012) (noting courts have interpreted the provision to require strict compliance).

Sensibly, a court may not enter final orders under temporary emergency jurisdiction without first communicating with its sister state. Just as sensibly, a court should not dismiss a case without the same compliance, since, the court has a duty to protect the child. Here, not only had the court found domestic violence, the Kansas proceeding was essentially dormant. Indeed, Justin did not serve Wendy until after the commissioner declined jurisdiction on an improper analysis (substantively and procedurally) of significant connections and inconvenient forum. It appears the commissioner's decision effectively spurred Justin to effect service of process on Wendy, fully three months after filing and after he initially agreed to litigate in Washington, and, thus, to expand and prolong the litigation. The UCCJEA commands an orderly progression through specified steps. Completely evading the statute's requirement for communication between the courts undermines the statute's purposes of expediting resolution of child custody cases.

6. DOES THE UCCJEA CONCERN SUBJECT MATTER JURISDICTION?

Division One took pains to dispute that the UCCJEA involves subject matter jurisdiction. This Court has previously noted that "subject matter jurisdiction" might not be an accurate description of the authority regulated by the UCCJEA. *In re Custody of A.C.,* 165 Wn.2d 568, 573

n.3, 200 P.3d 689 (2009); *see, also, In re Marriage of Schneider,* 173 Wn.2d 353, 370, 268 P.3d 215 (2011) (regarding the UIFSA). In *A.C.,* this Court declined to work a wholesale revision of this usage, and wisely. Into the phrase "subject matter jurisdiction" is packed considerable and consequential content. Collateral attacks are permitted and at any time. Orders may be void. And the phrase is used to describe the UCCJEA in state and federal cases around the country, affecting the development of a common jurisprudence. A cursory search reveals 2,054 state court cases reported on a search of UCCJEA or UCCJA and "subject matter jurisdiction." The same search resulted in 74 cases in the federal courts and another 64 federal cases when the search was for PKPA and "subject matter jurisdiction." A departure from this usage should be undertaken carefully, given the implications.

Here, for example, if the issue is not one of subject matter jurisdiction, the court should consider whether Justin waived his objection to jurisdiction when he agreed it would be "easier" to litigate in Washington and sought affirmative relief from the Washington court.

Certainly, this Court should clarify the usage going forward, including, if the usage is abandoned, whether the same functionality remains.

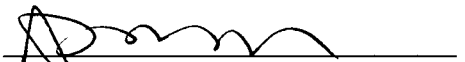
F. CONCLUSION

This case involves domestic violence, a very short marriage, and a family in transit from its inception. Under the UCCJEA, properly applied, the child had no home state. Under the UCCJEA, properly applied, Washington had temporary emergency jurisdiction. It also has significant connections jurisdiction. The mother is the primary parent and has lived in Washington with the child since January 2012. The court's failure here to properly interpret and apply the UCCJEA allowed the father, with his history of domestic violence, to open up a second front in the child custody litigation, in Kansas, despite his own initial admission that Washington was an "easier" venue and his own plea to the Washington court for affirmative relief. The consequences to the mother and the child are profound, present and future. For example, as a virtual single parent, she has had to litigate in Kansas, despite that she and the child have hardly any ties to the state. If Kansas enters final orders, she faces years of long-distance litigating with the father, if past is prologue, including as to child support (e.g., the mother will not be able to seek postsecondary education support, because Kansas does not permit a court to order it). This result has occurred only because the UCCJEA was interpreted contrary its purposes, instead of in a sensible and straightforward manner.

For these reasons, Wendy respectfully requests this Court to take review and to reverse the Court of Appeals and remand this case to the Snohomish County Superior Court for compliance with the temporary emergency jurisdiction provision and the significant connections and inconvenient forum provisions of the UCCJEA.

Dated this 12th day of August 2013.

RESPECTFULLY SUBMITTED,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:	)	
	)	
WENDY A. MCDERMOTT	)	DIVISION ONE
	)	
Appellant,	)	No. 69107-4-I
	)	
and	)	
	)	
JUSTIN J. MCDERMOTT,	)	PUBLISHED OPINION
	)	
Respondent.	)	FILED: July 15, 2013
	)	

DWYER, J. — The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), chapter 26.27 RCW, stipulates that Washington courts may properly exercise jurisdiction to enter a child custody determination when Washington is the child's "home state." When Washington is not the child's "home state," our courts may nevertheless exercise jurisdiction where the courts of the child's "home state," if one exists, decline to exercise jurisdiction and certain other conditions are met. A child's "home state" is "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." RCW 26.27.021(7). Where a child is temporarily absent from his or her home state,

the time of absence is part of the period measured in order to determine the child's home state. The parents' intent is relevant in determining whether a period of absence was intended to be temporary or permanent.

Here, Wendy McDermott appeals from a superior court judge's revision of a commissioner's order, in which the superior court judge determined that Kansas is Wendy's child's "home state."[1] In so determining, the judge concluded that the child's time in Costa Rica, where he was born and remained for the first six weeks of his life, was a "temporary absence" from Kansas, the state in which the child's parents each lived both before and after the birth. Based upon its unchallenged factual findings, which were based on evidence that both parents intended to return with their newborn child to Kansas soon after the birth, the judge's determination was correct. Because the courts of Kansas have not declined to exercise jurisdiction, the courts of Washington should not make custody determinations involving the child. We affirm the superior court judge's order to this effect.

I

Wendy and Justin McDermott were married in Miami, Oklahoma, on March 17, 2011. Their only child, H.M., was born on June 15, 2011. H.M. was born in Costa Rica, where Wendy had previously worked, because his parents wanted him to enjoy dual citizenship. At the time of H.M.'s birth, both Wendy and Justin were residents of Kansas and intended to return to Kansas with H.M. The

[1] In order to avoid confusion, the parties are referred to by their first names throughout this opinion.

family returned to Kansas approximately six weeks after H.M.'s birth, on or about July 28, 2011. H.M. remained in Kansas with his parents until January 15, 2012, when Wendy and H.M. moved to Washington. Thus, prior to the move to Washington, H.M. was physically present in Kansas for five-and-one-half months.

On March 29, 2012, two-and-one-half months after Wendy and H.M. moved to Washington, Wendy filed a petition for dissolution of marriage in the Snohomish County Superior Court. H.M. was nine months old at the time. Wendy requested that the court grant a domestic violence protection order, the petition for which was to be separately filed. She asserted that the superior court should exercise jurisdiction over H.M. both because H.M. had no other home state and Wendy had significant connections with Washington and, alternatively, because it was necessary to protect H.M. or Wendy from abuse and, thus, an exercise of temporary emergency jurisdiction was warranted. Justin was served with the dissolution petition on April 17, 2012.

On the same day that Wendy filed a petition for dissolution in the superior court, March 29, 2012, Justin filed for divorce in Kansas. The Kansas court thereafter entered a temporary support order and a temporary custody order on April 2, 2012, before Justin was served with Wendy's dissolution petition. Wendy was not served with the Kansas pleadings and orders until June 28, 2012.

In Washington, on May 4, 2012, Wendy filed a petition for entry of a domestic violence protection order and a proposed temporary parenting plan. Justin denied that the alleged incidents of domestic violence had occurred and asserted that there was no basis for entry of a protection order. On May 22,

2012, he filed a proposed temporary parenting plan with the superior court.

On May 30, 2012, a superior court commissioner entered an order denying Wendy's petition for a domestic violence protection order and postponing a decision on issues regarding a parenting plan for H.M. The commissioner reserved ruling on issues regarding jurisdiction pursuant to the UCCJEA but ordered that Washington would "maintain jurisdiction in the meantime."

On June 5, 2012, Justin filed a motion to dismiss the dissolution action for lack of jurisdiction. He asserted that, pursuant to the UCCJEA, the court did not have jurisdiction over H.M. both because Washington was not H.M.'s "home state" and because Wendy and H.M. did not have a "significant connection" to Washington and there was not "substantial evidence" concerning H.M.'s care and relationships available in Washington. He also asserted that, even if Washington had jurisdiction pursuant to the UCCJEA, it should decline to exercise jurisdiction because Kansas was a more convenient forum. Wendy responded that, pursuant to RCW 26.27.201(1)(b),[2] the Washington superior court had

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[2] RCW 26.27.201 provides in relevant part:
(1) Except as otherwise provided in RCW 26.27.231, a court of this state has jurisdiction to make an initial child custody determination only if:
(a) 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;
(b) A court of another state does not have jurisdiction under (a) of this subsection, 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 RCW 26.27.261 or 26.27.271, and:
(i) 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

jurisdiction based on a "significant connection" with the state and the existence of "substantial evidence" within the state. She additionally asserted that, pursuant to the factors set forth in the UCCJEA, Kansas was not a more convenient forum.

The next day, Wendy filed a motion for revision of the commissioner's May 30 order, asserting that the commissioner had erred by denying her request for a domestic violence order of protection. On June 14, 2012, a superior court judge granted Wendy's motion for revision and entered an order of protection. The order of protection excluded Justin from Wendy's residence and H.M.'s day care center and prohibited him from coming within 500 feet of either location. However, it did not restrain Justin from contacting or visiting H.M.; in fact, the order stated that visitation would be determined pursuant to temporary orders entered by the court. The court stated that it was exercising both temporary emergency jurisdiction and jurisdiction due to H.M.'s lack of a home state and his presence in Washington.

On June 21, 2012, the superior court commissioner entered an order regarding jurisdiction in response to Justin's motion to dismiss. The commissioner ruled that H.M. had no home state because he had not lived in any state for six consecutive months and that the Washington court could not properly exercise temporary emergency jurisdiction. Referencing RCW 26.27.201(1)(b), the order stated that the commissioner relied upon "significant contacts" and "substantial evidence" in determining jurisdiction. The

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(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

commissioner determined that, due to the greater amount of time that H.M. had lived in Kansas, Washington "should decline jurisdiction to Kansas" because "there are likely to be more witnesses to the child's upbringing" in Kansas than in Washington. The commissioner ordered that H.M. should remain in Wendy's custody until a Kansas court order was entered.

The next day, Wendy moved for revision of the commissioner's June 21 order. On July 6, 2012, Justin filed in the superior court, for the first time, copies of the Kansas pleadings, including his petition for divorce and the Kansas court's temporary support order and temporary custody order entered on April 2, 2012.

On July 9, 2012, a superior court judge entered an order on Wendy's motion to revise the commissioner's June 21 order.[3] The court determined that, pursuant to the UCCJEA, Kansas was H.M.'s home state "in that he resided in Kansas for at least six consecutive months in that his absence from Kansas from his date of birth on June 15, 2011 was a temporary absence as to both [H.M.] and his parents." Thus, the court concluded that "Washington does not have jurisdiction unless Kansas declines to exercise its jurisdiction on the ground that Washington is the more appropriate forum." The judge ordered:

> 1. The Commissioner's order is revised in so far as it found that there was no home state. The court finds that Kansas was the child's home state on the date of commencement of this proceeding.
> 2. The court denies the motion to revise in so far as it declined to exercise jurisdiction in favor of Kansas.
> 3. The court denies the motion to revise with regard to all other provisions ordered by the commissioner.

[3] Different superior court judges entered the June 14, 2012 and July 9, 2012 orders.

Wendy appeals from the superior court's July 9 order.

II

As an initial matter, we note that both parties discuss the UCCJEA's use of the term "jurisdiction" as though it were a matter of subject matter jurisdiction. As the parties frame it, either the Washington courts have subject matter jurisdiction over the dispute or the Kansas courts have subject matter jurisdiction over the dispute. To the contrary, this dispute involves a statute (the UCCJEA) that restricts, in some instances, a court's *exercise* of its subject matter jurisdiction. The UCCJEA, as adopted by the Washington legislature, does not—and cannot—divest a superior court of subject matter jurisdiction.

We review de novo questions of a court's subject matter jurisdiction. Cole v. Harveyland, LLC, 163 Wn. App. 199, 205, 258 P.3d 70 (2011). A party may raise a question of subject matter jurisdiction for the first time at any point in a proceeding, even on appeal. Cole, 163 Wn. App. at 205-06. Because the absence of subject matter jurisdiction is a defense that can never be waived, judgments entered by courts acting without subject matter jurisdiction must be vacated even if neither party initially objected to the court's exercise of subject matter jurisdiction and even if the controversy was settled years prior. Cole, 163 Wn. App. at 205; Shoop v. Kittitas County, 108 Wn. App. 388, 397-98, 30 P.3d 529 (2001), aff'd on other grounds, 149 Wn.2d 29, 65 P.3d 1194 (2003).

The consequences of a court acting without subject matter jurisdiction are "draconian and absolute." Cole, 163 Wn. App. at 205. "'If the phrase [subject matter jurisdiction] is to maintain its rightfully sweeping definition, it must not be

reduced to signifying that a court has acted without error.'" Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (quoting In re Marriage of Major, 71 Wn. App. 531, 534-35, 859 P.2d 1262 (1993)). Thus, appellate courts should "use caution when asked to characterize an issue as 'jurisdictional' or a judgment as 'void.'" Cole, 163 Wn. App. at 205. Judicial opinions sometimes "misleadingly" indicate that the court is dismissing an action for lack of subject matter jurisdiction when, in fact, the basis for the ruling is that "some threshold fact has not been established." Cole, 163 Wn. App. at 205.

Indeed, "[a]s the United States Supreme Court has observed, 'jurisdiction' is a word of too many meanings." Cole, 163 Wn. App. at 208 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). That Court has noted that it and other courts have "sometimes been profligate" in using the term "jurisdiction." Arbaugh v. Y & H Corp., 546 U.S. 500, 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). Where the question of jurisdiction was not "central to the case" and thus did "not require close analysis," courts have "sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations." Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010). These mischaracterizations can lead to "'drive-by jurisdictional rulings,' which too easily can miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." Reed Elsevier, 559 U.S. at 161 (alteration in original) (citation omitted) (quoting Steel Co., 523 U.S. at 91; Kontrick v. Ryan, 540 U.S. 443, 456, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)).

Similarly, our own Supreme Court has noted that "'[t]he term "subject matter jurisdiction" is often confused with a court's "authority" to rule in a particular manner,'" leading to "'improvident and inconsistent use of the term.'" Marley, 125 Wn.2d at 539 (quoting Major, 71 Wn. App. at 534-35). Indeed, a "court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order." Marley, 125 Wn.2d at 539.

A court has subject matter jurisdiction where it has authority "to adjudicate the type of controversy involved in the action." Shoop, 108 Wn. App. at 393. See also Cole, 163 Wn. App. at 209 ("The critical concept in determining whether a court has subject matter jurisdiction is the type of controversy."). Superior courts are granted broad original subject matter jurisdiction by Wash. Const. art. IV, § 6.[4] Cole, 163 Wn. App. at 206. Exceptions to this broad jurisdictional grant

[4] Wash. Const. art. IV, §6 provides in full:
Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties.

"are to be narrowly construed." Cole, 163 Wn. App. at 206. Superior courts have jurisdiction in "'all cases . . . in which jurisdiction shall not have been by law vested exclusively in some other court,'" by an explicit act of Congress or the legislature.[5] Hous. Auth. of City of Seattle v. Bin, 163 Wn. App. 367, 375, 260 P.3d 900 (2011) (quoting WASH. CONST. art. IV, § 6).

Superior courts possess "subject matter jurisdiction that cannot be whittled away by statutes." Shoop, 108 Wn. App. at 396. By protecting the superior courts' subject matter jurisdiction from statutory erosion, our state "constitution provides the foundation for an independent and coequal judicial branch of state government." Shoop, 108 Wn. App. at 396. "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." Cole, 163 Wn. App. at 209.

Our Supreme Court has noted that, notwithstanding the manner in which the UCCJEA uses the term "jurisdiction," "Washington courts d[o], in fact, have subject matter jurisdiction over the parties and the issues" in a case implicating the UCCJEA.[6] In re Custody of A.C., 165 Wn.2d 568, 573 n.3, 200 P.3d 689 (2009). The court further noted that the UCCJEA "might have more accurately

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Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

[5] It goes without saying that the Washington legislature cannot confer subject matter jurisdiction upon the trial courts of Kansas.

[6] The UCCJEA uses the term "jurisdiction" throughout its provisions. See, e.g., RCW 26.27.201; RCW 26.27.211; RCW.26.27.221; RCW 26.27.231. It does not, however, use the term "subject matter jurisdiction" in its text, although the comments to the UCCJEA do use the term once. See UCCJEA § 201 cmt. 2, 9 U.L.A. Part IA 672 (1997).

used the term 'exclusive venue.'" A.C., 165 Wn.2d at 573 n.3.[7] Nevertheless, for consistency, the court decided to use the statutory language throughout its opinion. A.C., 165 Wn.2d at 573 n.3. As will we.[8]

III

Wendy first contends that, pursuant to the UCCJEA, H.M. has no "home state." Therefore, she asserts, the superior court judge erred by determining, first, that Kansas was H.M.'s home state and, second, that Washington courts do not have jurisdiction to make an initial child custody determination involving H.M. unless the courts of Kansas decline to exercise their jurisdiction. Specifically, Wendy contends that the six-week period that H.M. spent in Costa Rica at the beginning of his life did not constitute a "temporary absence" from Kansas pursuant to the UCCJEA and, accordingly, was erroneously counted in computing the amount of time that he lived in Kansas prior to moving to Washington. We disagree.

Whether a superior court has the authority pursuant to the UCCJEA to exercise its jurisdiction is a mixed question of law and fact. In re Parentage,

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[7] In an analogous case involving a challenge to a superior court's ability, pursuant to the Uniform Interstate Family Support Act (UIFSA), chapter 26.21A RCW, to modify a child support order entered by a court of another state, our Supreme Court similarly noted that "[t]he legislature has limited the superior courts' *authority*—not the superior courts' *jurisdiction*—to modify another state's child support order by adopting the UIFSA." In re Marriage of Schneider, 173 Wn.2d 353, 360, 268 P.3d 215 (2011).

[8] We are aware that Division Three of this court, subsequent to the opinion in A.C., has held that the UCCJEA's procedural requirements are jurisdictional in nature and, thus, that orders entered in violation of those requirements are void. In re Parentage of Ruff, 168 Wn. App. 109, 115-18, 275 P.3d 1175 (2012). Because of the significance of the question of subject matter jurisdiction and its fundamental, constitutional definition, we neither adopt nor agree with this analysis. The UCCJEA's imprecise use of the term "jurisdiction" neither erodes nor curtails the constitutionally-endowed subject matter jurisdiction of Washington's superior courts.

Parenting, and Support of A.R.K.-K., 142 Wn. App. 297, 302 n.1, 174 P.3d 160 (2007). We defer to the superior court's unchallenged factual findings but review de novo its legal conclusions. A.R.K.-K., 142 Wn. App. at 302 n.1. Moreover, we review de novo issues of statutory interpretation. J.E. Dunn Nw., Inc., v. Dep't of Labor & Indus., 139 Wn. App. 35, 43, 156 P.3d 250 (2007).

The UCCJEA was promulgated in order to reduce the occurrence of "competing jurisdictions entering conflicting interstate child custody orders, forum shopping, and the drawn out and complex child custody legal proceedings often encountered by parties where multiple states are involved." A.C., 165 Wn.2d at 574. Most states, including Washington, have now adopted the UCCJEA. A.C., 165 Wn.2d at 574. The UCCJEA "establishes a hierarchy for determining which state has jurisdiction." A.R.K.-K., 142 Wn. App. at 303.

RCW 26.27.201(1) sets forth the "exclusive jurisdictional basis for making a child custody determination by a court of this state." RCW 26.27.201(2). Unless a Washington court exercises temporary emergency jurisdiction pursuant to RCW 26.27.231, that court may properly exercise its jurisdiction and make an initial child custody determination only if certain statutory requirements are met. RCW 26.27.201(1)(a)-(d). As relevant here, a Washington court may properly exercise jurisdiction pursuant to RCW 26.27.201(1) only if:

> (a) 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;
> (b) A court of another state does not have jurisdiction under (a) of this subsection, 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 RCW 26.27.261 or 26.27.271, and:
>
> (i) 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
>
> (ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

RCW 26.27.201(1).[9]

Where a child has a home state pursuant to the UCCJEA, that state's courts have priority with respect to questions of the child's care and custody. A.R.K.-K., 142 Wn. App. at 303. Unless the courts of the home state decline to exercise their jurisdiction, no other state's courts may properly exercise jurisdiction. RCW 26.27.201(1)(b). Pursuant to the UCCJEA, a "home state" is defined 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 a parent or person acting as a parent.

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[9] At oral argument and in her briefing, Wendy labors under the misapprehension that, pursuant to the UCCJEA, a proceeding commences when service upon the opposing party is effected rather than when a pleading is first filed. This understanding runs contrary to the plain language of the UCCJEA, which provides that, "'[c]ommencement' means the filing of the first pleading in a proceeding." RCW 26.27.021(5). Applying the plain language of the statute, the Kansas and Washington proceedings both commenced on March 29, 2012, when Justin and Wendy separately filed for divorce in their respective states.

Moreover, it is apparent from the record that the superior court was aware that the Kansas proceeding had commenced well before Justin filed copies of the Kansas proceedings with the superior court on July 6, 2012. In a pleading filed June 14, 2012, Justin indicated that "[i]t was very clearly stated at the previous hearing that an action had been started in Kansas but had been stayed to resolve the jurisdiction issue and the petitioner's petition for a protection order." The date of the referenced previous hearing is unclear from the record. However, it appears to reference a hearing before the commissioner on a date prior to the date on which the order of continuance was entered. Whatever the referenced hearing's actual date, the court was plainly informed of the Kansas proceeding, at the latest, on the day that the superior court judge granted the protection order. This was a week before the commissioner entered an order on jurisdiction, and nearly a month before the superior court judge issued her order on Wendy's motion for revision (from which she now appeals). The specific date on which Wendy was served is thus immaterial.

RCW 26.27.021(7).[10] For purposes of determining the home state, "[a] period of temporary absence of a child, parent, or person acting as a parent is part of the period." RCW 26.27.021(7).

On March 29, 2012, when Wendy filed for dissolution, she and H.M. had been present in Washington for only two-and-one-half months. Prior to their move to Washington, H.M. had spent the first six weeks of his life in Costa Rica and the next five-and-one-half months in Kansas. Because H.M. was not born in Washington and had not lived in Washington for at least six consecutive months immediately prior to the commencement of the proceeding, Washington was not his home state. See RCW 26.27.021(7).

The superior court could, nevertheless, properly exercise jurisdiction over H.M. if H.M. had no home state or if a court in H.M.'s home state had declined to exercise its jurisdiction and the "significant connection" and "substantial evidence" requirements of the UCCJEA were met. See RCW 26.27.201(1)(b).

The superior court judge concluded that Kansas was H.M.'s home state. Based upon her finding that, at the time of H.M.'s birth, both of his parents were residents of Kansas and intended to return to Kansas with him, the superior court judge determined that H.M.'s six weeks in Costa Rica constituted a "temporary absence" from Kansas and, thus, that H.M. had lived in Kansas for more than six consecutive months immediately before the commencement of the proceeding—

[10] Justin asserts on appeal that Kansas is also H.M.'s home state pursuant to the "from birth" definition of "home state." Because we determine that Kansas was H.M.'s home state pursuant to the statute's "six consecutive months" provision, we do not address Justin's assertion that the "from birth" provision is applicable.

establishing Kansas as H.M.'s home state. The judge therefore determined that Washington's courts could not properly make an initial custody determination regarding H.M. unless the courts of Kansas declined to exercise their jurisdiction. They have not done so.

The UCCJEA explicitly includes "[a] period of temporary absence of a child, parent, or person acting as a parent" in the six-month time period necessary to establish a child's "home state." RCW 26.27.021(7). In evaluating whether an absence was intended to be temporary or permanent, courts of this and other states consider the parents' intent. A.R.K.-K., 142 Wn. App. at 303-04 (citing In Re Marriage of Payne, 79 Wn. App. 43, 52, 899 P.2d 1318 (1995)); In re Parentage of Frost, 289 Ill.App.3d 95, 681 N.E.2d 1030 (1997). Courts weigh a number of factors in order to determine whether an absence was temporary, including "the parent's purpose in removing the child from the state, rather than the length of the absence," "whether the parent remaining in the claimed home state believed the absence to be merely temporary," "whether the absence was of indefinite duration," and "the totality of the circumstances surrounding the child's absence." Sajjad v. Cheema, 428 N.J. Super. 160, 173, 51 A.3d 146 (2012) (citing Arnold v. Harari, 772 N.Y.S.2d 727, 729-30, 4 A.D.3d 644 (2004); Consford v. Consford, 711 N.Y.S.2d 199, 205, 271 A.D.2d 106 (2000); Chick v. Chick, 164 N.C.App. 444, 449, 596 S.E.2d 303 (2004); Sullivan v. Sullivan, 2004 UT App. 485, ¶12, 105 P.3d 963, 966. Courts have found that "temporary absences include court-ordered visitations, and vacations and business trips." Sajjad, 428 N.J. Super. at 173 (citing Alley v. Parker, 1998 ME 33, ¶ 5, 707 A.2d

77, 78; In re Lewin, 149 S.W.3d. 727, 739 (Tex. App. 2004)).

Here, the superior court judge correctly determined that the six weeks H.M. spent in Costa Rica at the beginning of his life constituted a temporary absence from Kansas because his parents intended that time to be merely a temporary visit. Cf. Payne, 79 Wn. App. at 52 (concluding that, where a father moved to Washington "with the intention of moving permanently," his absence from Virginia was not temporary).

The superior court judge found that, during the time that Wendy, Justin, and H.M. were in Costa Rica, both Wendy and Justin were Kansas residents and that both parents intended to return to Kansas with H.M. The court further found that H.M. was born in Costa Rica because his parents wanted him to enjoy dual citizenship. Moreover, the court found no evidence that Wendy had established Costa Rica as her permanent residence. Wendy has not challenged these factual findings; they are, therefore, verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). These findings support the trial court judge's conclusion that H.M.'s "absence from Kansas from his date of birth on June 15, 2011 was a temporary absence as to both [H.M.] and his parents."[11]

Wendy argues, however, that H.M.'s time in Costa Rica was not a "temporary absence." This is so, she asserts, because H.M. had never been "present" in Kansas. Thus, she avers, H.M. cannot have been absent from

[11] The temporary absence provision refers to both "a child" and "a parent." Pursuant to RCW 26.27.021(7), both parents (Wendy and Justin) were "temporarily absent" from Kansas while in Costa Rica. The superior court judge rightfully concluded that the status of the parents supported the same finding with regard to their child, who had been in the physical custody of one or both parents during the entire time that the child was in Costa Rica.

Kansas. Wendy bases this contention on her assertion that the UCCJEA's use of the term "lived" mandates that a child be physically present somewhere before a temporary absence can begin.[12] However, this strained interpretation of the statute would lead to the absurd result that a newborn child does not "live" in the same state as that in which the child's parents both "live" when the mother gives birth outside of the state of which she and the father are both resident even when both parents intend to return to that state with the child. When construing statutes, "[i]t is fundamental that . . . we avoid absurd results." Lowy v. PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). The superior court judge correctly rejected this untenable interpretation of the UCCJEA.

Because H.M.'s time in Costa Rica was a temporary absence from Kansas, the superior court judge properly included that six-week period in determining the length of time that H.M. had "lived" in Kansas prior to the commencement of the dissolution proceeding. RCW 26.27.021(7) (defining "home state").[13] H.M. thus "lived with a parent" in Kansas "for at least six

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[12] Wendy cites to numerous out-of-state decisions in asserting that, in order to establish Kansas as H.M.'s home state, H.M. was required to be physically present in Kansas throughout the six-month period. See Sajjad, 428 N.J.Super. 160; In re Marriage of Marsalis, 338 S.W.3d 131 (Tex. App. 2011); Karam v. Karam, 6 So.3d 87 (Fla. App. 3 Dist. 2009); Escobar v. Reisinger, 133 N.M. 487, 64 P.3d 514 (2003); In re Calderon-Garza, 81 S.W.3d 899 (Tex. App 2002). However, because these cases do not address the specific question here—whether a newborn child is temporarily absent from the state in which his or her parents live when both parents are, by definition, temporarily absent from the state and both parents intend to return with the child to that state—they are unhelpful.

[13] The "six consecutive months" definition of "home state" could be read to provide that a state may only be the home state if the child lived in that state on the date that the proceeding was commenced. See RCW 26.27.021(7) (defining "home state" as "the state in which a child lived . . . for at least six consecutive months *immediately before* the commencement of a child custody proceeding" (emphasis added)). However, such a reading conflicts with the "initial child custody jurisdiction" provision of the UCCJEA, which provides that a court may properly exercise jurisdiction if it "was the home state of the child *within six months before the commencement of*

consecutive months immediately before the commencement of [the] child custody proceeding." RCW 26.27.021(7). As a result, Kansas was H.M.'s "home state . . . within six months before the commencement of the proceeding," RCW 26.27.201(1)(a), and, although H.M. was absent from Kansas when the proceeding commenced, Justin, his father, continued to live in that state. Accordingly, the superior court judge properly determined that Washington's courts could exercise their jurisdiction to make a custody determination involving H.M. only if Kansas's courts "declined to exercise jurisdiction on the ground that this state is the more appropriate forum." RCW 26.27.201(1)(b). No Kansas court has done so.

The superior court judge thus correctly determined that, where both parents intend a child's absence from a state to be temporary, the duration of

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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." RCW 26.27.201(1)(a) (emphasis added). This court must "give effect to all statutory language, considering statutory provisions in relation to each other and harmonizing them to ensure proper construction." Evergreen Washington Healthcare Frontier LLC v. Dep't of Soc. & Health Servs., 171 Wn. App. 431, 444, 287 P.3d 40 (2012), review denied, 176 Wn.2d 1028 (2013). "Immediately" does not necessarily refer to temporal proximity; rather, it also means "without intermediary," "in direct connection or relation," or "closely." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1129 (2002). The conflicting home state provisions of the UCCJEA are harmonized when the term "immediately" is interpreted as meaning "without intermediary."

Numerous courts in other states have resolved this conflict similarly. These courts have concluded that a state may properly exercise jurisdiction where it was the home state of the child within six months before the commencement of the proceeding. See In re Matter of Christine L. v. Jason L., 23 Misc.3d 1039, 874 N.Y.S.2d 794 (2009); Rosen v. Celebrezze, 117 Ohio.St.3d 241, 883 N.E.2d 420 (2008); Stephens v. Fourth Judicial Dist. Court, 331 Mont. 40, 128 P.3d 1026 (2006); Welch-Doden v. Roberts, 202 Ariz. 201, 42 P.3d 1166 (2002). A literal reading of the "home state" definition, the courts reasoned, would render superfluous the language found in the initial child custody jurisdiction provision. Christine L., 23 Misc.3d at 1043; see also Welch-Doden, 202 Ariz. at 205. Moreover, "[g]iven the fundamental purpose of the UCCJEA to establish the certainty of home state jurisdiction," the initial child custody jurisdiction provision "acts to enlarge and modify the definition of home state." Welch-Doden, 202 Ariz. at 208. Thus, these courts resolved the "statutory conflict in the application of home state jurisdiction in a manner consistent with the UCCJEA's intent of strengthening the certainty of home state jurisdiction." Stephens, 331 Mont. at 44.

that absence must be counted toward the establishment of a home state pursuant to the UCCJEA, even if the child is born during that absence.[14]

IV

Wendy further contends that the superior court judge was precluded by the UCCJEA from declining to exercise jurisdiction to make a custody determination involving H.M. because a different superior court judge had previously entered a protection order indicating that Washington was exercising temporary emergency jurisdiction. However, the UCCJEA does not preclude a superior court that has exercised temporary emergency jurisdiction from later determining that it cannot, in fact, properly exercise non-temporary jurisdiction. Thus, Wendy's claim is unavailing.

Where a superior court is not authorized to exercise its jurisdiction pursuant to RCW 26.27.201, it may nevertheless exercise "temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with abuse." RCW 26.27.231. If there is no previous child custody determination entitled to be

[14] Wendy additionally contends that the superior court judge erred by adopting the commissioner's decision to decline to exercise jurisdiction in favor of Kansas because, she asserts, Washington has jurisdiction pursuant to the "significant connection" provision of RCW 26.27.201. However, once the superior court judge determined that Kansas was H.M.'s home state pursuant to the UCCJEA, it could not properly exercise its jurisdiction unless a Kansas court first declined to exercise its jurisdiction. No Kansas court has done so. Therefore, the superior court judge correctly determined that Washington courts could not properly exercise jurisdiction pursuant to RCW 26.27.201(1)(b).

Similarly, Wendy contends that the commissioner failed to properly consider the factors necessary to determine whether Washington was an "inconvenient forum" pursuant to RCW 26.27.261(1). Because we determine that the superior court judge correctly found that Kansas was H.M.'s home state, we need not reach this question.

enforced pursuant to the UCCJEA and no custody proceeding has been commenced in a court having jurisdiction pursuant to RCW 26.27.201 through RCW 26.27.221, then a "child custody determination" made by a court exercising temporary emergency jurisdiction "remains in effect until an order is obtained from a court of a state having jurisdiction under RCW 26.27.201 through RCW 26.27.221." RCW 26.27.231(2). If, on the other hand, there *is* a previous child custody determination entitled to be enforced, or a custody proceeding has been commenced in a state having jurisdiction pursuant to RCW 26.27.201 through RCW 26.27.221, then an order issued by a Washington court while exercising temporary emergency jurisdiction "must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction" pursuant to RCW 26.27.201 through RCW 26.27.221. RCW 26.27.231(3).

A "child custody determination" is "a judgment, decree, parenting plan, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." RCW 26.27.021(3). It is not a court's determination of its own jurisdictional authority. Indeed, the UCCJEA does not bind a superior court to an initial, temporary determination of its own jurisdictional authority. Wendy cites to no authority indicating otherwise.

The superior court judge was therefore not precluded by the prior judge's earlier exercise of temporary emergency jurisdiction from later finding that the court could not properly exercise jurisdiction pursuant to the UCCJEA and,

therefore, could not further exercise authority over custody determinations regarding H.M.

V

Wendy finally asserts that, because the superior court had exercised temporary emergency jurisdiction, the superior court judge was required to communicate with the Kansas court prior to determining that the superior court could not properly exercise its jurisdiction pursuant to the UCCJEA. We disagree.

In making this claim, Wendy relies upon two distinct UCCJEA provisions regarding communication between courts of different states. Both provisions, RCW 26.27.251(2) and RCW 26.27.231(4), require judges of Washington courts to communicate with judges of courts of another state before performing or continuing to perform a specific act. A superior court, "before hearing a child custody proceeding," must examine the information provided by the parties. RCW 26.27.251(2). If the superior court determines that a proceeding has been commenced in another state's courts, the statute requires that the court "stay its proceeding and communicate with the court of the other state." RCW 26.27.251(2). Where a superior court is asked to make a "child custody determination" by exercising temporary emergency jurisdiction, the court "shall immediately communicate" with the court of another state upon being informed that a proceeding has been commenced in that state. RCW 26.27.231(4).

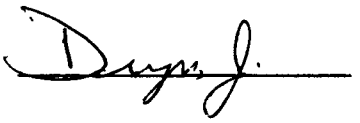
These provisions are to be interpreted in light of the legislative purpose of the UCCJEA as a whole. Optimer Int'l, Inc. v. RP Bellevue, LLC, 151 Wn. App.

954, 963, 214 P.3d 954 (2009), aff'd, 170 Wn.2d 768, 246 P.3d 785 (2011) ("The primary goal of statutory construction is to discern and carry out the legislature's intent."). The UCCJEA was enacted in order to "deal with the problems of competing jurisdictions entering conflicting interstate child custody orders." A.C., 165 Wn.2d at 574. Thus, its purpose is to "reduce conflicting orders regarding custody and placement of children." A.C., 165 Wn.2d at 574. The provisions of the UCCJEA requiring communication between the courts of different states are clearly intended to further the legislative purpose of reducing conflicting child custody orders. Indeed, RCW 26.27.231(4) requires communication prior to entry of a "child custody determination." Likewise, RCW 26.27.251(2) requires that the court confer with the court of another state "before hearing a child custody proceeding."

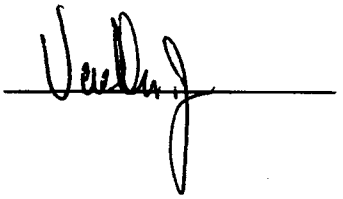
Here, the superior court judge made no "child custody determination" and heard no "child custody proceeding" when entering her July 9 order. See RCW 26.27.021(3), (4). To the contrary, the superior court judge determined that the court was not authorized to exercise its jurisdiction pursuant to the UCCJEA and, thus, should not make a child custody determination involving H.M. The judge's determination, therefore, pertained to the court's authority to exercise its jurisdiction, not to child custody. Pursuant to the plain language of the statute, the superior court judge was not required to communicate with the Kansas court in order to determine whether the Washington court had authority to exercise its jurisdiction. Requiring the superior court to communicate with the court of

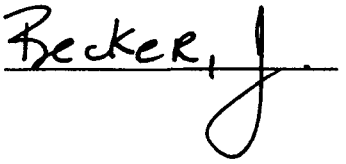
another state before determining its own authority to act would not further the legislative purpose underlying the UCCJEA.[15]

Affirmed.



We concur:





[15] Justin has filed a motion to dismiss this appeal, which has been denied by this court. In a response to Justin's motion, Wendy requests an award of Civil Rule (CR) 11 sanctions against Justin. Her request is denied.

In re Leona A.D.

Superior Court of Connecticut, Judicial District of Hartford, Juvenile Matters At Hartford
March 16, 2011, Decided; March 16, 2011, Filed
H12CP10013578A

Reporter: 2011 Conn. Super. LEXIS 673

In re Leona A.D. [1]

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

home state, custody, neglect, child custody determination, temporary, subject matter jurisdiction, child custody proceeding, inconvenient forum, birth, appropriate forum, judicial district, child protection, hospital stay, trial court

Case Summary

Overview

A neglect petition was filed for a child born in Connecticut while the mother was visiting relatives in the state. The parents, who lived in Florida, pleaded nolo contendere. The court deferred entering an adjudication of neglect because it raised sua sponte the issue of subject matter jurisdiction under the ***UCCJEA***. A Florida agency would not accept custody of the child unless the court entered a disposition. The court found it had jurisdiction over the child under the ***UCCJEA***, *Conn. Gen. Stat. § 46b-115k(a)(6)*, because no other state had jurisdiction. The child had no home state.

Outcome

Proceeding stayed.

LexisNexis® Headnotes

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***
Family Law > Child Custody > Jurisdiction > Subject Matter Jurisdiction

HN1 In general, a trial court is always required to determine whether it has jurisdiction to make a custody determination under the ***Uniform Child Custody Jurisdiction and Enforcement Act*** (***UCCJEA***). This inquiry pertains to the subject matter jurisdiction of the court. Therefore, the issue must be raised and resolved by the court on its own motion even if the parties do not raise it. Id. Furthermore, subject matter jurisdiction cannot be created by consent or waiver. Only the enabling legislation can confer subject matter jurisdiction. Under the ***UCCJEA***, jurisdiction largely depends on the status of the involved individuals on the date of the commencement of a proceeding. *Conn. Gen. Stat. § 46b-115a(5)*.

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & En-***

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[1] Pursuant to General Statutes Section 46b-142(b) and Practice Book Sections 32a-7 and 79-3, the names of the parties and children in this matter are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the court.

forcement Act
Family Law > Child Custody > Jurisdiction > Continuing Jurisdiction

HN2 *Conn. Gen. Stat. § 46b-115l(a)* applies to the continuing jurisdiction of a court of Connecticut which has made a child custody determination pursuant to *Conn. Gen. Stat. §§ 46b -115k to 46b-115m*, inclusive.

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***

HN3 See *Conn. Gen. Stat. § 46b-115l(b)*.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction
Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***
Family Law > Child Custody > Jurisdiction > Exclusive Jurisdiction

HN4 Even when a Connecticut trial court does not have exclusive jurisdiction over a child custody matter, it still may maintain concurrent jurisdiction under the ***Uniform Child Custody Jurisdiction and Enforcement Act*** pursuant to *Conn. Gen. Stat. § 46b-115l(b)*, but only if it has jurisdiction to make an initial determination under *Conn. Gen. Stat. § 46b-115k*. *Conn. Gen. Stat. § 46b-115l*.

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***
Family Law > Child Custody > Jurisdiction > In Personam Jurisdiction

HN5 *Conn. Gen. Stat. § 46b-115k* outlines the basis for a court's jurisdiction over "an initial child custody proceeding." *Section 46b-115k(a)* sets forth six jurisdictional bases for determining child custody. *Section 46b-115k(b)* states that *§ 46b-115k(a)* is the exclusive basis for making a child custody determination by a court of Connecticut . *Section 46b-115k(c)* adds that physical presence of, or personal jurisdiction over, a party or child is not necessary or sufficient to make a child custody determination.

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***
Family Law > Child Custody > Jurisdiction > General Overview

HN6 Under *Conn. Gen. Stat. § 46b-115k(a)(1)*, a court has jurisdiction if Connecticut is the home state of the child on the date of the commencement of the child custody proceeding.

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***

HN7 Florida has adopted the ***Uniform Child Custody Jurisdiction and Enforcement Act***, *Fla. Stat. § 61.501 et seq.*, and its initial jurisdictional provisions and definitions essentially mirror those of Connecticut. Fla. Stat. §§ 61.154, *61.530*.

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***

HN8 By itself, a temporary hospital stay incident to delivery is simply insufficient to confer "home state" jurisdiction under the ***Uniform Child Custody Jurisdiction and Enforcement Act***.

Family Law > ... > Custody Awards > Standards > Best Interests of Child
Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***

HN9 Allowing a temporary hospital stay to confer "home state" jurisdiction would undermine the public policy goals of the ***Uniform Child Custody Jurisdiction and Enforcement Act***, which include ensuring that a custody decree is rendered in that State which can best decide the case in the interest of the child.

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***

HN10 Under *Conn. Gen. Stat. § 46b-115k(a)(4)*, a Connecticut court can address the issue of the child and parent's significant con-

nection with Connecticut if and only if a child's home state has declined jurisdiction for the reason expressed in § 46b-115k(a)(4).

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***
Family Law > Child Custody > Jurisdiction > General Overview
Family Law > Child Custody > Venue

HN11 Even if a court does have jurisdiction over an action pursuant to Conn. Gen. Stat. § 46b-115k(6), it may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon a motion of a party, the guardian ad litem for the child or the attorney for the child, the court's own motion, or a request of another court. Conn. Gen. Stat. § 46b-115q. In turn, § 46b-115q(b) provides a list of factors that Connecticut courts should consider in determining whether a Connecticut court should have jurisdiction over a custody matter. After considering these factors the "home state" may conclude it is not the appropriate forum for resolution of custody issues in a particular matter. In that instance, the court may relinquish jurisdiction to another state's court. § 46b-115q. In addition, Connecticut courts communicate with courts in other states in instances when it is unclear which court should have jurisdiction. Conn. Gen. Stat. § 46b-115h(a).

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***
Family Law > Child Custody > Venue

HN12 See Conn. Gen. Stat. § 46b-115q.

Family Law > Child Custody > Custody Enforcement > ***Uniform Child Custody Jurisdiction & Enforcement Act***

HN13 Enforcement of foreign child-custody determinations is not a self-help process. The ***Uniform Child Custody Jurisdiction and Enforcement Act*** (***UCCJEA***) streamlines enforcement of foreign child-custody determinations in that they will be enforced in another state if, upon notice, the affected persons do not challenge the jurisdiction of the rendering court or, where they do, but the court in the enforcing state determines jurisdiction was proper. The ***UCCJEA*** does not dispense with proceedings to enforce the order in the state where it is to be enforced.

Judges: **[*1]** Stephen F. Frazzini, JUDGE OF THE SUPERIOR COURT.

Opinion by: Stephen F. Frazzini

Opinion

MEMORANDUM OF DECISION RE JURISDICTION

This court has raised sua sponte the issue of jurisdiction of the Superior Court in a child protection matter over a child born in Connecticut while her mother was here temporarily, visiting relatives. The matter was originally continued for this court to confer with a court in the state of Florida where both parents live. Since then, however, the court has reviewed the relevant law and, for the reasons set forth herein, concludes that it has jurisdiction over the child because no other state does. The court also concludes that, if all parties agree, it would be in the best interest of the child for this court, after an adjudication of neglect and a disposition committing the child, to stay the proceeding here on the condition that a corresponding proceeding be promptly commenced in Florida, after which the court would decline to continue exercising jurisdiction over the child on the grounds of inconvenient forum.

The child, Leona D., is presently in the custody of the Connecticut department of children and families (DCF) pursuant to an order of temporary custody (OTC) pursuant **[*2]** to Gen-

eral Statutes §17a-101g[2] that was issued shortly after she was born on November 19, 2010. The commissioner of DCF subsequently filed a neglect petition as to the child. Both of the child's parents reside in Florida, but attended a neglect hearing before this court at which they entered pleas of nolo contendere to a count of the child having been neglected by living under conditions injurious to its well-being. The court deferred entering an adjudication of neglect pending consideration of the court's jurisdiction. The parents and DCF agree that the matter should be transferred to Florida. DCF does not want the child to be committed to its care, and has asked the court to commit the child to its counterpart agency in Florida. At hearing before this court on February 10, 2011, counsel for DCF informed the court that the Florida agency will not accept custody of the child unless this court enters a disposition.

This matter implicates the ***Uniform Child Custody Jurisdiction & Enforcement Act*** (***UCCJEA***), codified in Connecticut at General Statutes §46b-115 et seq. Its jurisdictional provisions are contained in §§46b-115k through 46b-115t. ***HN1*** In general, a trial court is always required to **[*3]** determine whether it has jurisdiction to make a custody determination under the ***UCCJEA***. See Scott v. Somers, 97 Conn.App. 46, 903 A.2d 663 (2006). This inquiry pertains to the subject matter jurisdiction of the court. In re DeLeon J., 290 Conn. 371, 376, 963 A.2d 53 (2009). Therefore, the issue must be raised and resolved by the court on its own motion even if the parties do not raise it. *Id.* Furthermore, "[s]ubject matter jurisdiction . . . cannot be created by consent or waiver . . . Only the enabling legislation . . . can confer subject matter jurisdiction." (Citation omitted; internal quotation marks omitted.) Muller v. Muller, 43 Conn.App. 327, 331-32, 682 A.2d 1089 (1996) (discussing jurisdiction under ***UCCJA***, predecessor legislation to ***UCCJEA***). "Under the ***UCCJEA***, jurisdiction largely depends on the status of the involved individuals on the date of the commencement of a proceeding. [General Statutes] §46b-115a(5)." Graham v. Graham, Superior Court, judicial district of Middlesex, Docket No. FA 92 065185, 2002 Conn. Super. LEXIS 288 (February 6, 2002, Parker, J.).

The court clearly had temporary emergency jurisdiction over the application for an OTC as to the child pursuant to General Statutes §46b-115n.[3] The **[*4]** first issue, then, is whether the court, by ruling on the OTC, has already made a child custody determination. If it has, its jurisdiction over the neglect proceeding is governed by the "exclusive, continuing jurisdiction" provision of General Statutes §46b-115l(a).[4] If it has not done so, its jurisdiction

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[2] General Statutes §17a-101g provides in relevant part as follows: "(e) If the Commissioner of Children and Families, or the commissioner's designee, has probable cause to believe that the child or any other child in the household is in imminent risk of physical harm from the child's surroundings and that immediate removal from such surroundings is necessary to ensure the child's safety, the commissioner, or the commissioner's designee, shall authorize any employee of the department or any law enforcement officer to remove the child and any other child similarly situated from such surroundings without the consent of the child's parent or guardian . . . (f) The removal of a child pursuant to subsection (e) of this section shall not exceed ninety-six hours. During the period of such removal, the commissioner, or the commissioner's designee, shall provide the child with all necessary care, . . ."

[3] General Statutes §46b-115n provides in relevant part: "(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and (1) the child has been abandoned, or (2) it is necessary in an emergency to protect the child because the child . . . has been, or is under a threat of being, abused or mistreated " "This law confers on courts in states that do not have jurisdiction to enter or modify permanent custody orders the authority to enter temporary emergency custody orders to protect children at risk of abuse or mistreatment while the parties and courts resolve the emergency." Scott v. Somers, Superior Court, judicial district of New Haven, Docket No. FA 04 4001981, 2006 Conn. Super. LEXIS 2886 (September 22, 2006, Frazzini, J.).

[4] General Statutes §46b-115l provides in relevant part as follows: "(a) Except as otherwise provided in section 46b-115n, a court of this state which has made a child custody determination pursuant to sections 46b-115k to 46b-115m, inclusive, has exclusive, continuing jurisdiction over the determination until: (1) 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; or (2) a court of this state determines that (A) this state is not the home state of the child, (B) a parent or a person acting as a parent continues to reside in

depends upon the provisions of *General Statutes §46b-115k*. This issue is easily resolved pursuant to the plain language of *§46b-115l(a)*, which specifies that ***HN2*** it applies to the continuing jurisdiction of "a court of this state which has made a child custody determination pursuant to *sections 46b-115k to 46b-115m*, inclusive . . ." Furthermore, *§46b-115l(b)* provides that:***HN3*** "A court of this state which has made a child custody determination but does not have exclusive continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under *section 46b-115k*." ***HN4*** "Even when a Connecticut trial court does not have exclusive jurisdiction over a child custody matter, it still may maintain concurrent jurisdiction under the ***UCCJEA*** pursuant to *General Statutes 46b-115l(b)*, but only 'if it has jurisdiction to make an initial determination **[*5]** under *section 46b-115k*.' *General Statutes §46b-115l*." *Temlock v. Temlock*, 95 Conn.App. 505, 520-21, 898 A.2d 209, cert. denied, *279 Conn. 910, 902 A.2d 1070 (2006)*. Accordingly, because the court's OTC ruling was made under *§46b-115n*, and not under *§§46b-115k to 46b-115m*, the court's jurisdiction over the neglect proceeding depends on *§46b-115k*.

HN5 Section *§46b-115k* outlines the basis for a court's jurisdiction over "an initial child custody proceeding." *Section 46b-115k(a)* "sets forth six jurisdictional bases for determining child custody." [5] *Dybowski v. Skiba*, Superior Court, judicial district of Fairfield, Docket No. FA 07 4020128, 2007 Conn. Super. LEXIS 2672 (October 12, 2007, Owens, J.) (44 Conn. L. Rptr. 305). *Section 46b-115k(b)* states that "subsection (a) of this section is the exclusive basis for making a child custody determination by a court of this state." *Section 46b-115k(c)* adds that "[p]hysical presence of, or personal jurisdiction over, a party or child is not necessary or sufficient to make a child custody determination."

HN6 Under *§46b-115k(a)(1)*, the court has jurisdiction if Connecticut "is the home state of the child on the date of the commencement of the

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this state but the child no longer has a significant relationship with such parent or person, and (C) substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships."

[5] General Statutes §46b-115k(a) provides: "Except as otherwise provided in section 46b-115n, a court of this state has jurisdiction to make an initial child custody determination if:

(1) This state is the home state of the child on the date of the commencement of the child custody proceeding;

(2) This state was the home state of the child within six months of the commencement of the child custody proceeding, the child is absent from the state, and a parent or a person acting as a parent continues to reside in this state;

(3) A court of another state does not have jurisdiction under subdivisions (1) or (2) of this subsection, 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 there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships;

(4) A court of another state which is the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under a provision substantially similar to section 46b-115q or section 46b-115r, that child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships;

(5) All courts having jurisdiction under subdivisions (1) to (4), inclusive, of this subsection have declined jurisdiction on the ground that a court of this state is the more appropriate forum to determine custody under a provision substantially similar to section 46b-115q or section 46b-115r; or

(6) No court of any other state would have jurisdiction under subdivisions (1) to (5), inclusive, of this subsection."

child custody proceeding." [6] Here, the child is **[*6]** less than six months old. Although she has lived in Connecticut from the time of her birth, she was not living here with a parent or with a person acting as her parent as of the time of the commencement of this action, i.e., the time that the application for the OTC was filed. Furthermore, this state was not her home state within six months of the date this action was commenced and neither of her parents resides in this state. Although the Connecticut appellate courts have not discussed these statutory provisions in similar circumstances, courts in other states have done so. As a Missouri court stated in construing comparable provisions of the Kansas version of the ***UCCJA***, "[t]he requirement that the child 'live with' the mother from birth requires more than the mother and newborn child staying at the same hospital for a brief period. Similarly, Kansas is not the 'home state' of [the child] simply because [the child] and her mother stayed in a hospital there for two days after [the child's birth]; [the child] has never 'lived with' her parents at all. Therefore Kansas is not her home state." *State ex rel. R.P. v. Rosen* , 966 S.W.2d 292, 300 (Mo.Ct.App. 1998). This court concludes, therefore, **[*7]** that Connecticut is not the child's home state under *§46b-115k(a)(1)*. Nor does this state have jurisdiction under *§46b -115k(a)(2)*, which would allow a court to look back six months prior to the date of filing but only if the child no longer lived here.

HN7 Florida, which is the only other state that might qualify as the child's home state in this action has also adopted the ***UCCJEA***; see *Florida Statutes §61.501 et seq.*; and its initial jurisdictional provisions and definitions essentially mirror those of Connecticut. See *Florida Statutes §§61.514, 61.530*. It is apparent that because the child was not born and has not lived in Florida, that state does not qualify as her home state. Therefore, this child does not have a home state.

In this respect, this case is somewhat similar to *In re D.S* ., 217 Ill. 2d 306, 840 N.E.2d 1216, 298 Ill. Dec. 781 (2005), in which the respondent mother, who was a resident of Illinois, gave birth to her baby at a hospital in Indiana, while she was passing through that state on her way to Tennessee. After the hospital became concerned about the mother and notified authorities in Illinois, those authorities brought an emergency shelter and later a neglect action, in which the child was **[*8]** adjudicated neglected and, following a dispositional hearing, committed to the custody of the state child protection agency. *Id* ., 310-12. On appeal, the respondent argued, *inter alia*, that the trial court lacked subject matter jurisdiction over the action because, at the time that the state of Illinois commenced the proceedings, the child had never lived in that state, and Indiana was her home state. The Supreme Court agreed with the state's counter argument that the child had no home state. In doing so, the court reviewed decisions from several other jurisdictions and agreed with their conclusions that, ***HN8*** "[b]y itself, a temporary hospital stay incident to delivery is simply insufficient to confer 'home state' jurisdiction under the ***UCCJEA***." *Id* ., 317. The court explained that

> the best indication of legislative intent is the statutory language, given its plain and ordinary meaning . . . *Section 102(7)* [which is identical to

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[6] General Statutes §46b-115a(7) provides that " '[h]ome state' means the state in which a child lived with a parent or persons 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 old, the term means the state in which the child lived from birth with any such parent or person acting as a parent. A period of temporary absence of any such person is counted as part of the period." (Emphasis added.) In turn, the term " 'person' . . . shall include a public agency"; General Statutes §46b-115a(12); and the term " 'person acting as a parent' means a person, other than a parent, who: (A) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence . . . and (B) has been awarded legal custody by a court or claims a right to legal custody under the laws of this state . . ." General Statutes §46b-115a(13). The term " '[c]hild custody proceeding' means a proceeding in which legal custody [or] physical custody . . . to a child is an issue. The term includes a proceeding for dissolution of marriage . . . neglect, abuse, dependency, guardianship . . . [and] termination of parental rights . . ." General Statutes §46b-115a(4). The term " '[c]ommencement' means the filing of the first pleading in a proceeding . . ." General Statutes §46b -115a(5).

§46b-115a(7)] defines a newborn's home state as the state in which he or she has 'lived from birth' with his or her parents. The crucial question, of course, is what did the drafters of the ***UCCJEA*** mean by 'live,' a verb that can mean many different things depending **[*9]** upon the context. Did they mean . . . nothing more than 'to be alive?' See Webster's Third New International Dictionary 1323 (1993). That for the purposes of the ***UCCJEA***, a child 'lives' in every jurisdiction in which he or she draws a breath? Or did they mean, as the case law teaches, something more like 'to occupy a home?' See [*id.*]. We are convinced that they meant the latter. When people speak of where a mother and newborn baby 'live,' they do not speak of the maternity ward. Instead, they speak of the place to which the mother and baby return following discharge from the hospital . . .

As importantly, ***HN9*** allowing a temporary hospital stay to confer 'home state' jurisdiction would undermine the public policy goals of the ***UCCJEA***, which include ensuring that 'a custody decree is rendered in that State *which can best decide the case* in the interest of the child.' . . . 9 U.L.A. §101, Comment, at 657 (1999). Consider . . . [an Illinois] mother who chooses to deliver her baby in [an Iowa] hospital. In addition to living in Illinois, this mother may work in Illinois, have a husband and other children in Illinois, pay taxes in Illinois, attend church in Illinois, and send her children to Illinois **[*10]** schools. Clearly, if the occasion arose, Illinois would be the state 'which can best decide' a case involving the interest of this mother's children. Yet if . . . a mere hospital stay is sufficient to confer home state jurisdiction under the ***UCCJEA***, Iowa would possess exclusive jurisdiction over this newborn, based solely on the location of the obstetrician's practice. Such formalism turns the ***UCCJEA*** on its head, conferring jurisdiction on a state with a *de minimus* interest in the child, to the exclusion of the only state that could conceivably be called the child's 'home.' We refuse to endorse this interpretation.

For these reasons, we reject respondent's argument that Indiana is [the child's] home state for the purposes of the ***UCCJEA***. Respondent's own testimony established that she had no connection to Indiana and no intention of remaining there following [the child's] birth. On the contrary, respondent testified that she is a longtime resident of Illinois who, fearful of losing custody of [the child], intended to move to Tennessee. En route, she entered active labor and checked herself into the nearest hospital, which happened to be in . . . Indiana. By itself, a temporary hospital **[*11]** stay in Indiana is simply insufficient to confer 'home state' jurisdiction upon that state. As importantly, neither party makes any attempt to argue that any other state possessed 'home state' jurisdiction over [the child] when the wardship petition was filed. We therefore agree with the State's assessment that [the child] lacks a 'home state' for ***UCCJEA*** purposes.

(Citation omitted.) *In re D.S., supra* , 217 Ill.2d 317-19.[7]

[7] In related circumstances, "courts in several jurisdictions have decided that when a baby who is born in one State, but within days of birth is transported to another State, the baby simply has no home State." *Doe v. Baby Girl,* 376 S.C. 267, 282, 657 S.E.2d 455 (2008) (construing comparable provision of South Carolina's version of UCCJA). As the court explained in *State ex rel. R.P. v. Rosen, supra,* 966 S.W.2d 300, Missouri was not the child's home state, although it was where her parents resided and

Under the Connecticut statute, this court does not have jurisdiction over this action pursuant to §46b-115k(a)(3) because, although the child has some connection with this state, neither of her parents has "a significant connection with this state other than mere physical presence and substantial evidence is not available in this state "concerning the child's care, protection, training and personal relationships," as those factors relate to her parents. Florida would not have jurisdiction over this matter under its version of this provision because the child does not have a significant connection with that state. See *In re Najad D.*, 19 Misc. 3d 1113[A], 859 N.Y.S.2d 904, 2008 NY Slip Op 50679[U] (N.Y.Fam.Ct. 2008) (New York court does not have jurisdiction under comparable provision of state ***UCCJEA***, **[*12]** although child's parents have significant connections to that state, because "she has never been in New York State and there are no relevant records predating the filing of this petition to be found in the state").

For the same reason, and because no other state is the home state of the child and has declined to exercise jurisdiction, this court does not have jurisdiction over the action under §46b-115a(4). ***HN10*** "[U]nder §46b-115k(a)(4), a Connecticut court can address the issue of the child and parent's 'significant connection with this state . . .' if and only if a child's home state has declined jurisdiction for the reason expressed in the subsection." *Mathers v. Anglero*, Superior Court, judicial district of New Haven at Meriden, Docket No. FA 07 400771, 2007 Conn. Super. LEXIS 2723 (October 23, 2007, Rubinow, J.) Again because no other state has declined to exercise jurisdiction over the child, this court does not have jurisdiction over the action under §46b-115k(a)(5). Finally, however, the court does have jurisdiction over the action under the "catch all" provision of §46b-115k(6) in that "no court of any other state would have jurisdiction under subdivision (1) to (5) . . . of this subsection."

HN11 Even if the court does **[*13]** have jurisdiction over this action pursuant to §46b-115k(6), it "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon a motion of a party, the guardian ad litem for the child or the attorney for the child, the court's own motion or a request of another court." *General Statutes §46b-115q*. In turn, " *General Statutes §46b-115q(b)* provides a list of factors that Connecticut courts should consider in determining whether a Connecticut court should have jurisdiction over a custody matter." *Mayer v. Barrow*, Superior Court, judicial district of Waterbury, Docket No. FA 09 4021046, 2010 Conn. Super. LEXIS 445 (February 26, 2010, Buzzuto, J.).[8] "After considering these factors the 'home state' may conclude it is not the appropriate forum for resolution of custody issues in a particular matter. In that instance, the court may relinquish jurisdiction to another state's court.

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where she had been placed in a foster home by that state's child protection agency, because, "her placement by DFS, with a person acting as a parent, did not make Missouri a state in which she has lived since birth, because she was born in Kansas." See *In re E.T.*, 36 Kan.App.2d 56, 66, 137 P.3d 1035 (2006) (under Kansas UCCJEA provisions (that mirror those of this state), child who was born and remained hospitalized in Missouri for three months while her parents lived in Kansas did not have a home state at time neglect proceeding was filed in Kansas, shortly after her discharge to foster parents in Missouri, because she "had not lived from birth in either Kansas or Missouri with a parent or a person acting as a parent"), overruled on other grounds, 286 Kan. 686, 187 P.3d 594 (2008).

[8] General Statutes §46b-115q(b) provides: "In determining whether a court of this state is an inconvenient forum and that it is more appropriate for a court of another state to exercise jurisdiction, the court shall allow the parties to submit information and shall consider all relevant factors including: (1) Whether family violence has occurred and is likely to continue in the future and which state could best protect the parties and the child; (2) the length of time the child has resided outside this state; (3) the distance between the court in this state and the court in the state that would assume jurisdiction; (4) the relative financial circumstances of the parties; (5) any agreement of the parties as to which state should assume jurisdiction; (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child; (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and (8) the familiarity of the court of each state with the facts and issues in the pending litigation."

[*General Statutes] §46b-115q*. In addition, "Connecticut courts communicate with courts in other states in instances when it is unclear which court should have jurisdiction." **[*14]** *Mayer v. Barrow, supra* , Superior Court, Docket No. FA 09 4021046, 2010 Conn. Super. LEXIS 445. See *General Statutes §46b-115h(a)*.

Furthermore, the statute provides that ***HN12*** "[i]f a court of this state determines that it is an inconvenient forum, and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper." See *Lord v. Lord* , Superior Court, Judicial District of Fairfield, Docket No. FA 97 0348367, 2001 Conn. Super. LEXIS 2646 (September 14, 2001, Sheedy, J.) (upon determining that Connecticut should decline jurisdiction under *§46b-115q*, court ordered that "these proceedings are stayed upon the condition [that] a child custody proceeding is commenced in New York within forty -five (45) days of this decision. The failure of either party to commence such action shall return the matter to this courthouse").

The enforcement provisions of the ***UCCJEA*** are codified in Connecticut at *§46b-115n et seq.*, and in Florida at *§61.524 et seq.* As the Arkansas Supreme Court explained in referring to that state's version of the ***UCCJEA***, the child protection agency of one **[*15]** state does not have the authority to act upon an order from a court of another state until "the foreign order is registered [in Arkansas] and notice is given . . . ***HN13*** Enforcement of foreign child-custody determinations is not a self-help process." *Arkansas Dept. of Human Services v. Cox* , 349 Ark. 205, 218 82 S.W.3d 806 (2002).

> The ***UCCJEA*** streamlines enforcement of foreign child-custody determinations in that they will be enforced in another state if, upon notice, the affected persons do not challenge the jurisdiction of the rendering court or, where they do, but the court in the enforcing state determines jurisdiction was proper. The ***UCCJEA*** does not dispense with proceedings to enforce the order in the state where it is to be enforced.
>
> It is not up to DHS [the Arkansas child protection agency] to decide what orders it will follow and what orders it will ignore. Further it is up to Florida [the state that issued the order in question] to register and enforce the order. They might well appropriately seek DHS's help, but the process must be followed or we have chaos and acts not subject to the required supervision of the courts

Id., 220.

Accordingly, the parties are directed to notify **[*16]** the court of whether and when a child protection proceeding will be instituted in Florida and to provide documentation of the willingness and authority of a Florida child protection agency to accept commitment of the child from a Connecticut court. [9]

IT IS HEREBY SO ORDERED.

BY THE COURT

STEPHEN F. FRAZZINI

JUDGE OF THE SUPERIOR COURT

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[9] General Statutes §46b-129(j) provides, in pertinent part, as follows: "Upon finding and adjudging that any child or youth is uncared-for, neglected or dependent, the court may vest such child's or youth's legal guardianship in any . . . public agency that is permitted by law to care for neglected, uncared-for or dependent children or youths . . ." (Emphasis added.)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of: WENDY A. MCDERMOTT Appellant and JUSTIN J. MCDERMOTT Respondent	No. 69107-4-I DECLARATION OF SERVICE

Patricia Novotny certifies as follows:

On August 12, 2013, I served upon the following a true and correct copy of the Petition for Review, filed on August 12, 2013, and a true and correct copy of this Declaration, by U.S. Mail at the address below:

Shelby Lemmel
Masters Law Office
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Bainbridge Island, WA 981110-1811
206-780-5033

DATED this 11 day of August, 2013.

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