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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 284697-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In Re the Marriage of:

CAROL MARIE SCHNEIDER, f/k/a CAROL MARIE ALMGREN

Respondent/Petitioner,

v.

JEFFREY JOSEPH ALMGREN,

Appellant/Respondent.

REPLY BRIEF OF APPELLANT

WSBA No. 34711
Attorney for Appellant

Clark and Feeney
The Train Station - Suite 102
13th and Main Streets
P.O. Box 285
Lewiston, Idaho 83501
(208) 743-9516

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ISSUES

1. Post-Secondary Educational Support
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A. ARGUMENT

1. Post-Secondary Educational Support

After reading second Respondent's Brief, one has to wonder what case counsel was arguing. Respondent now cites to the pertinent statute in the Uniform Interstate Family Support Act, RCW 26.21A.550. However, the Respondent doesn't cite any case law contrary to the case law cited by Mr. Almgren, nor does Respondent cite a case or to the official commentary of the Uniform Interstate Family Support Act that supports her position.

RCW 26.21A.550(3) states...

"A tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state."

and subsection (4) states...

"In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state." (Emphasis added).

The Respondent concedes that Nebraska was the issuing state. As a result, the law of the state of Nebraska must be used in determining the duration of the obligation of support. There is no question as the Uniform

Interstate Family Support Act is clear. There is no statutory construction needed.

RCW 26.21A.550 is clear. Judge Acey was wrong, as is the Respondent. The trial court didn't have "authority" or "jurisdiction" to extend the duration of the obligation of support past the age of nineteen (19) for Amanda Almgren.

Amanda Almgren is now nineteen (19); therefore, Mr. Almgren has fulfilled his support obligation and post-secondary educational child support should not have been ordered.

There are numerous cases from around the United States that support Mr. Almgren's position. See *In re Marriage of Doetzl*, 31 Kan.App.2d 331, 65 P.3d 539 (Kan.App.,2003). The Kansas court lacked jurisdiction to modify the duration of child support obligation which was issued by a Missouri court which allowed child support beyond the age of majority.

State ex rel. Harnes v. Lawrence, 140 N.C.App. 707, 538 S.E.2d 223 (N.C.App.,2000), held that the law of the issuing state, New Jersey, must be applied by North Carolina tribunals in enforcing the support order even though the law of North Carolina was contradictory. New Jersey's law had

support continuing until the age of twenty two (22), while North Carolina ended child support at the age of eighteen (18).

In *Robdau v. Com.*, 35 Va.App. 128, 543 S.E.2d 602 (Va.App.,2001), the court, relying on section 604A of the Uniform Interstate Family Support Act, determined that a New York child support law would be enforced for child support even though the Virginia statute ended support at the age of eighteen (18) and graduation from high school. The court observed generally that if it were to rule that Virginia lacked jurisdiction to enforce the child support order after the child reached the age of majority parents obligated to pay support would be rewarded by moving to another state with a lower age requirement for support. Through such forum shopping, a parent would be able to control the duration of child support which would undermine the very purpose of the Uniform Interstate Family Support Act.

See also an Alabama case dealing with Missouri in which Missouri's termination age is twenty one (21) while Alabama's is nineteen (19), *C.K. v. J.M.S.*, 931 So.2d 724 (Ala.Civ.App.,2005). See also *Holbrook v. Cummings*, 132 Md.App. 60, 750 A.2d 724 (Md.App.,2000).

See the Oregon case, *Matter of Marriage of Cooney*, 150 Or.App. 323, 946 P.2d 305 (Or.App.,1997), in which the Oregon court determined

that it lacked authority to modify any aspect of a child support order from Nevada as Nevada's law allows child support to terminate at age eighteen (18) and not twenty one (21) as authorized under Oregon law.

The original Nebraska child support order was superceded just like any order that was modified at a later time.¹ Attached as Exhibit "A" is Idaho Code Section 7-1053 which correspondences to RCW 26.21A.550. With this Idaho code section is the official comment to the Uniform Interstate Family Support Act dealing with modification of child support from another state. The official comment specifically notes,

"The initial controlling order may be modified and replaced by a new controlling order in accordance with the terms of sections 609-615 [sections 7-1051 to 7-1057], but the duration of child support obligations remain constant, even though virtually every other aspect of the original order may be changed."

The official comment also condemns the attempt by some courts to "subvert" the policy of limiting the duration of child support to the law of the

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RCW 26.21A.565 Notice to issuing tribunal of modification.

Within thirty days after issuance of a modified child support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order, and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction.

initial state by indicating that a new time frame could be entered because completion of the original duration didn't inhibit the imposition of a new obligation. See the Uniform Interstate Family Support Act 2001 Section 611 official commentary.

The Respondent seems to fail to understand how statutory construction works. All the provisions of RCW 26.21A.550 must be read together. A party can't simply take the parts that she likes and disregard the parts that aren't helpful. In this case, as noted above, the statute is specific that the law of the state from which the initial controlling order came from, governs the duration of the child support obligation. The Court has to look at the plain language of the statute. The clear definition of "initial controlling order" would apply to the Nebraska Order. Washington is never going to be the "initial controlling order" state. The fact that Washington becomes the state with continuing exclusive jurisdiction is not really relevant to the issue of when child support ends. Washington could lose that continuing exclusive jurisdiction if mother and child move to Texas or Connecticut or wherever it might be. Washington would no longer have the needed contacts for continuing exclusive jurisdiction.

One would have to wonder what Mr. Broyles would argue if the mother had moved to a state like Idaho which ends child support at the age of 18 or until the child graduates from high school. Would Mr. Broyles say that Idaho becomes the exclusive continuing jurisdiction thus reducing child support from age 19, as required in Nebraska, to age 18? The Court will need to ask Respondent's counsel why, in his argument, he doesn't address the words "the initial controlling order governs the duration of the obligation of support". Which is language directly from subsection 4 of the statute in question. The Respondent's attorney should also explain why he didn't address the official comments that are contrary to Respondent's position.

2.

Response to Respondent's Argument Regarding RCW 26.19.090

In this case, the Respondent twists the facts and ignores the case law and actual holdings of the case law cited in her brief. Respondent cites to the recent case, *In re the parentage of Goude v. Lieser*, 152 Wash. 748, 219 P.3d 717 (Ct. App. Div. III 2009). In that particular case, the trial court set \$590 per month for Kara's post-secondary educational support by considering the basic child support obligations set in the economic table of the child support schedule, educational costs and Kara's estimated contributions to her college

expenses. In that case, Kara Goude was born February 9, 1990, and her mother and father had not had a relationship since Kara's birth. Kara resided with her mother. A child support order was entered eight years later ordering the father to pay \$593 per month for his child support. In December 2007, Ms. Goude sought modification for post-secondary education. In *Goude*, the adult child was going to continue to live with mother and attend a local college.

In Mr. Almgren's case, the adult child is not going to be living with mother but living in a facility called "The Grove" which is a private living establishment which is described by the exhibits in this record. RCW 26.19.090 requires that the child is, in fact, dependent and is relying upon the **parents** for the reasonable necessities of life. There is nothing on this record that indicates the child was relying on Mr. Almgren for the reasonable necessities of life.

The legislature used the word **parents** in the statute not "parent" or other relative. The court has to analyze the statute based on the language used by the legislature. Mr. Almgren provided very little of Amanda's support.

Also, in this particular circumstance, the expectation of the parties for the children when they were together is also different from the *Goude* case. There is nothing on this record that indicates that both parties assume some financial support would be provided to Amanda for college, which is different than the *Goude* case.

There is evidence that Amanda chose to abandon her relationship with her father. There is the testimony from Mr. Almgren regarding the lack of contact Amanda had with him. There is also the comments that were made at the end of the court proceeding in which Amanda, who was not a party to the case, specifically asked Judge Acey, on her own, what would happen if her father didn't pay. Judge Acey indicated he could be found in contempt of court. How many children are going to abandon their relationship with their father and ask what punishment that parent is going to receive if he doesn't pay and then expect that parent to provide support to an adult child? This behavior of an adult child flies in the face of what is reasonable or fair minded.

If Amanda's parents were still living together, as the statute notes and which is the analysis the *Goude* court used, would that support a child support order in Almgren? The answer would be no. In the case at bar, both parents are unemployed. In most circumstances, unemployed parents would

say “Honey, you probably can’t go to school right now.” or “Honey, you can’t go to school at Eastern Washington University because we can’t afford the cost of tuition and living expenses. You can just stay here, live with us and go to the local community college which also provide nursing programs.”

In the *Goude* case, there was no unemployed parents and there wasn’t the “worst recession since The Great Depression”. The *Goude* case is not a helpful case for the Respondent.

In Amanda Almgren’s situation, she is also got a car, a cell phone and a computer which are all things unemployed parents might not be able to provide. Also, the factors from the statute regarding the standard of living and current and future resources seem to be something that this court should focus on. There is no case law that supports the Respondent’s position that two unemployed parents should be required to pay for the luxury of “The Grove” and going to school away from home. This court should focus on the “what if” the parents had stayed together and were in the current circumstance. The Respondent’s counsel argues,

“What counsel for Mr. Almgren fails to recognize is that *both* parties are unemployed. Neither party is certain they will become employed in the near future. Despite counsel’s assertions, Mr. Almgren is arguably in a preferable position to Ms. Schneider as he has been granted unemployment and will be at least guaranteed that income until he can find

another job. Ms. Schneider isn't even certain of that."
(Emphasis original).

Brief at pp. 13-14.

First of all, Ms. Schneider has two college degrees and if you believe the advertising on the television, someone who has a college degree is going to have a much better ability to find a job and a higher paying job. In addition, the testimony at the time of the trial was that Ms. Schneider was employed locally in Asotin and just had to provide additional information for the benefit of the analysis of her unemployment. One would have to bet that Ms. Schneider's unemployment would be more substantial than Mr. Almgren's based on her past income.

3.

Reduction of Child Support for the Parties' Minor Child

In this particular case, the Respondent prepared the order of child support that noted the deviation from the guidelines. The order noted,

"The Court is aware that both parents have currently lost their jobs, however, there is more than enough higher levels of education and technical education that they should both be readily re-employable. The court has chosen to use 2008-2009 actual to the date of termination as imputed income for both parties."

CP, p. 326.

The trial court didn't make his own specific written findings, he simply had Judge Henry sign off on the document that was presented to him, as Judge Acey was on vacation. The trial Judge didn't make his own specific findings, he just adopted what Mr. Broyles had prepared.

Respondent indicates in her brief, "Income will be imputed to a parent who is voluntarily unemployed or underemployed." Brief at p.16. There is no evidence of either parent being voluntarily unemployed or underemployed. The case cited to by the Respondent, *State v. ex rel. Stout v. Stout*, 89 Wn.App. 118, 948 P.2d 851 (Ct. App. Div. I 1997) is instructive. The *Stout* court determined that a parent's child support obligation shall not reduce his net income below the need standards established by DSHS. The *Stout* court also noted that consideration of the minimum need standard is mandatory in all child support calculations and that a trial court has the discretion to deviate from the need standard for the reasons stated in RCW 26.19.075.

The *Stout* court went on to note that the trial court may deviate from the standard calculation after consideration of special needs of the children. There is no evidence presented in *Almgren* regarding special needs. Post-secondary educational support is not a special need. The *Stout* court also noted that absent some special need, the court could not justify forcing Mr. Stout below the monthly minimum income level. The reason behind this had

to do with the legislature presumingly concluding a child's basic needs when it considered the "floor" below which an obligor's income could not fall.

In *Stout*, the appellate court found that the trial court's \$15,000 annual income estimate was inexplicable, especially where it found no basis upon which to impute the income. In Mr. Almgren's case, the evidence was clear that his income was substantially reduced because of the termination of his employment and that he was going to make a little over \$11,000 a year from unemployment. The Almgren trial court inexplicably used an income calculation based on the parties' prior employment numbers. The trial court's reasoning in *Almgren* was that he assumed the parties would be able to get back to work within six (6) months.

The *Stout* court went on to state,

"The Court exercises its discretion in an untenable and manifestly unreasonable way when it essentially guesses at an income amount. Here there was ample reliable evidence for the court to set an accurate income estimate, but the court ignored it."

At p. 125.

The *Stout* court went on to find that the trial court's estimate of Stout's income was unreasonable and constituted an abuse of discretion. The court reversed the trial court's order and remanded for calculation of support to conform to the evidence. Judge Acey provided no written findings why he

required Mr. Almgren to pay 85% of his gross income towards support of an adult child and a minor child.

Respondent's brief then goes into a discussion regarding RCW 26.19.065 but doesn't state any fact or a case that supports her conclusionary statements that mixes educational needs noted in RCW 26.19.065(1)(c) with the provisions for post-secondary education. Respondent's Brief at p. 17. The educational needs noted in RCW 26.19.065(1)(c) are not the needs noted for post-secondary education. The court will have to decide whether Respondent's counsel's recitation of findings is sufficient to meet the requirements of the statute. One wonders whether Judge Acey actually read the pleadings prior to Judge Henry signing off on them.

Mr. Broyles argues, "The trial court specifically notes in it's findings that while it is unfortunate that both parties are unemployed, the children are still growing and have need of support." Brief at p. 16. It is unclear to counsel exactly what this means. Amanda Almgren is an adult, we could say we're all "still growing" no matter if we are eighteen (18) or a hundred and five (105). Whether this is a basis to require an unemployed father to pay out 85% of his gross income is a horse of a different color altogether. Since the trial Judge didn't specifically note anything about deviating from the need

standard established by DSHS, it is hard to imagine that this court should, on appeal, find the trial court made a decision that was nothing more than an abuse of discretion.

3.

Attorney's Fees

Finally, the Respondent raises the issue of attorney's fees being awarded to Ms. Schneider. First of all, the court knows that on appeal that Mr. Almgren is unemployed and will make approximately \$11,000 for the twelve month period from June 2009 to June 2010. He is currently paying out 85% of his gross unemployment income to Ms. Schneider and to Eastern Washington University. In the *Stout* case cited by the Respondent, it discusses the standard for attorney's fees. The court stated,

“In determining whether to award such fees, this court examines the arguable merit of the issues raised on appeal and the financial resources of the parties. Stout has raised meritorious issues on appeal. He has served and filed an updated financial declaration as required by RAP18.1(c).”

At p. 127.

At this point in time, the Respondent has not filed an updated financial declaration. In addition, RCW 26.09.140 allows the court to order one party to a marriage dissolution action to pay attorney's fees and costs to

the other for enforcement or modification proceedings after entry of judgment. The court also has to consider the financial resources of the parties. In the cases cited by the Respondent, the appellate courts have determined that, for the most part, no attorney's fees would be awarded.

The court, in this case, may want to consider the frivolousness of the Respondent's position. The Respondent's first brief did not discuss the pertinent statute dealing with modification of a foreign judgment. The current brief cites no case law or legal authority regarding the statutory construction of RCW 26.21A.550. The Respondent failed to discuss the official commentary fo the Uniform Interstate Family Support Act which supports Mr. Almgren's position regarding the age of nineteen (19) limiting child support. Respondent misstates the facts with regard to the issue of deviation from child support.

Respondent doesn't address at all the issues of changing who was to receive the tax deduction benefits and ordering additional medical benefits for the adult child. These points were not argued to the trial court but yet the Respondent submitted an order to the trial court which modified medical costs provisions and tax benefit deductions to the detriment of Mr. Almgren. The court may want to sanction the Respondent for these frivolous actions.

Mr. Almgren has presented facts, argument, case law and statutory construction that support his position on appeal. The Respondent has not cited one case that supports her position regarding the interpretation of RCW 26.21A.550 and the fact that the superior court ignored the reality of the financial condition of the father. The Respondent had the audacity to ask this court for attorney's fees to be awarded against Mr. Almgren, which is beyond the pale. Respondent should be sanctioned by this court.

D. CONCLUSION

Based on the law, statutory construction, case law and the facts, the court must determine that the trial court abused its discretion with regard to the award of support to the parties' minor child and the parties' adult child. In addition, the court on a *de novo* review must determine that the interpretation of the Uniform Interstate Family Support Act, RCW 26.21A.550 by the trial court was incorrect. The matter must be remanded back to the trial court with instructions that the trial court take the unemployment income of the parties and calculate a child support award for the minor child alone.

The adult child should not be awarded any post-secondary educational support at all based on the financial circumstance of Mr. Almgren or, in the

alternative, child support should just continue until Amanda turns nineteen (19) and then it terminates based on law provided in the state of Nebraska. The court should deny attorney's fees to the Respondent and potentially consider the frivolousness of the Respondent's argument and briefing and award attorney's fees pursuant to RAP Rule 18.1 to Mr. Almgren. Counsel realizes that a request for attorney's fees was not made in the opening brief, however, counsel did not expect Respondent to completely ignore the pertinent statute and make frivolous argument in the brief. Counsel was hoping for much more since Washington doesn't seem to have any case law interpreting RCW 26.21A.550.

DATED this 15th day of April, 2010.

Respectfully submitted,

s/Charles M. Stroschein

Charles M. Stroschein
Attorney for Appellant
WSBA No.34711

EXHIBIT A

§ 7-1062 by S.L. 2006, ch. 252, § 62. The 2006 amendment, by ch. 252, renumbered this section from § 7-1049; updated the first section reference, and inserted "7-1055 or 7-1057."

Section 63 of S.L. 2006, ch. 252 provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

An order registered for purposes of modification may be enforced in the same manner as an order registered for purposes of enforcement. But, the power of the forum tribunal to

modify a child-support order of another tribunal is limited by the specific factual preconditions set forth in Sections 611, 613, and 615 [§§ 7-1053, 7-1055, and 7-1057].

7-1053. Modification of child support order of another state.

(1) If section 7-1055, Idaho Code, does not apply, except as otherwise provided in section 7-1057, Idaho Code, upon petition a tribunal of this state may modify a child support order issued in another state which is registered in this state if, after notice and hearing, the tribunal finds that:

(a) The following requirements are met:

(i) Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;

(ii) A petitioner who is a nonresident of this state seeks modification;

(iii) The respondent is subject to the personal jurisdiction of the tribunal of this state; or

(b) This state is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.

(2) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.

(3) Except as otherwise provided in section 7-1057, Idaho Code, a tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state, including the duration of the obligation to support. If two (2) or more tribunals have issued child support orders for the same obligor and same child, the order that controls and must be so recognized under section 7-1011, Idaho Code, establishes the aspects of the support order which are nonmodifiable.

(4) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

(5) On the issuance of an order by a tribunal of this state modifying a child support order issued in another state, the tribunal of this state becomes the tribunal having continuing, exclusive jurisdiction. [I.C., § 7-1045, as added by 1994, ch. 207, § 2, p. 639; am. and redesign. 1997, ch. 198, § 29, p. 556; am. and redesign. 2006, ch. 252, § 53, p. 764.]

Compiler's Notes. Former § 7-1053, enacted by Laws 1997, ch. 198, § 32, was redesignated as § 7-1056, pursuant to S.L. 2006, ch. 252, § 56.

The 2006 amendment, by ch. 252, renumbered this section from § 7-1050 and rewrote

the section to the extent that a detailed comparison is impracticable.

Section 63 of S.L. 2006, ch. 252 provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

Under the procedure established by RURESA, after a support order was registered for the purpose of enforcement it was treated as if it had originally been issued by the registering tribunal. Most States interpreted these registration provisions as also authorizing prospective "modification" of the registered order. However, except in circumstances in which both States had the same version of RURESA and the formalities were scrupulously followed, the registering tribunal did not have the legal authority to replace the original order with its own order. In short, most often the purported modification in essence established a new obligation. In sum, by its very terms RURESA contemplated, or even encouraged, the existence of multiple support orders, none of which were directly related to any of the others. Although the issuing tribunal under RURESA retained a version of continuing, exclusive jurisdiction to modify its own order, that power was not exclusive. The typical scenario of those days was that an obligee would seek assistance from a local court, which would determine a duty of support existed and forward a certificate and order and petition to a responding court. The subsequent proceeding in the responding State would bring the obligor before the court. The obligor typically sought modification of the support obligation (which almost always was not being paid) in a forum which presented him with the "hometown advantage." Thus arose the common practice of the issuance of a new, lower child-support order.

Under UIFSA, as long as the issuing State has continuing, exclusive jurisdiction over its child-support order, see Section 205(a) [§ 7-1009(1)], *supra*, a registering sister State is precluded from modifying that order. Without doubt, this is the most significant departure from the multiple-order system established by the prior Uniform Act. However, if the issuing State no longer has a sufficient interest in the modification of its order under the factual circumstances described in Section 205(b) [§ 7-1009(2)], *supra*, and restated in this section, after registration the responding State may assume the power to modify the controlling order.

Registration is subdivided into distinct categories: registration for enforcement, for modification, or both. UIFSA is based on recognizing

the truism that when an out-of-state support order is registered, the rights and duties of the parties affected have been previously litigated. Because the obligor already has had a day before an appropriate tribunal, an enforcement remedy may be summarily invoked. On the other hand, modification of an existing order presupposes a change in the rights or duties of the parties. The requirements for modification of a child-support order are much more explicit under UIFSA, which allows a tribunal to modify an existing child-support order of another State only if certain quite limited conditions are met. First, the tribunal must have all the prerequisites for the exercise of personal jurisdiction required for rendition of an original support order. Second, one of the restricted fact situations described in Subsection (a) [(1)] must be present. This section, which is a counterpart to Section 205(a) [§ 7-1009(1)], establishes the conditions under which the continuing, exclusive jurisdiction of the issuing tribunal is released.

Under Subsection (a)(1) [(1)(a)], before a tribunal in a new forum may modify the controlling order three specific criteria must be satisfied. First, the individual parties affected by the controlling order and the child must no longer reside in the issuing State. Second, the party seeking modification must register the order in a new forum, almost invariably the State of residence of the other party. A colloquial (but easily understood) description of this requirement is that the modification movant must "play an away game on the other party's home field." This rule applies to either obligor or obligee, depending on which of those parties seeks to modify. Proof of the fact that neither individual party nor the child continues to reside in the issuing State may be made directly in the registering State; no purpose would be served by requiring the petitioner to return to the original issuing State for a document to confirm the fact that none of the relevant persons still lives there. Third, the forum must have personal jurisdiction over the parties. This is supplied by the movant submitting to the personal jurisdiction of the forum by seeking affirmative relief, almost always coupled with the fact that the respondent resides in the forum. On rare occasion, the personal jurisdiction over the respondent may be supplied

by other factors, see Section 201 [§ 7-1005] and the comment thereto, *supra*.

The policies underlying the change affected by Subsection (a)(1) [(1)(a)] contemplate that the issuing State no longer has an interest in exercising its continuing, exclusive jurisdiction to modify its order. This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local tribunal to the marked disadvantage of the other party. For example, an obligor visiting the children at the residence of the obligee cannot be validly served with citation accompanied by a motion to modify the support order. Even though such personal service of the obligor in the obligee's home State is consistent with the jurisdictional requisites of *Burnham v. Superior Court*, 495 U.S. 604 (1990), the motion to modify does not fulfill the requirement of being brought by "a [petitioner] who is a nonresident of this State . . ." In short, the obligee is required to register the existing order and seek modification of that order in a State that has personal jurisdiction over the obligor other than the State of the obligee's residence. Again, almost invariably this will be the State of residence of the obligor. Similarly, fairness requires that an obligee seeking to modify or modify and enforce the existing order in the State of residence of the obligor will not be subject to a cross-motion to modify custody or visitation merely because the issuing State has lost its continuing, exclusive jurisdiction over the support order. The same is true of the obligor, who also is required to make a motion to modify support in a State other than that of his or her residence. Yet another benefit is supplied by the procedure mandated in this section. The most typical case is a motion to increase child support by the obligee, the enforcement of which ultimately will primarily, if not exclusively, take place in the obligor's State of residence. Modification and enforcement in the same forum promotes efficiency.

Several arguments sustain the jurisdictional choice made by UIFSA. First, "jurisdiction by ambush" will be avoided. That is, personal service on either the custodial or noncustodial party found within the state borders will not yield jurisdiction to modify. Thus, a parent seeking to exercise rights of visitation, delivering or picking up the child for such visitation, or engaging in unrelated business activity in the State, will not be involuntarily subjected to protracted litigation in an inconvenient forum. The rule avoids the possible chilling effect on the exercise of parental contact with the child that the possibility of such litigation might have. Second, almost all disputes about whether the tribunal has jurisdiction will be eliminated;

submission by the petitioner to the State of residence of the respondent alleviates this issue completely. Finally, because there is an existing order, the primary focus will shift to enforcement, thereby curtailing to a degree unnecessary, time-consuming modification efforts. The array of enforcement procedures available administratively to support enforcement agencies may be invoked without resort to action by a tribunal, which had constituted a bottleneck under RURESA and URESA.

There are two exceptions to the rule of Subsection (a)(1) [(1)(a)] requiring the petitioner to be a nonresident of the forum in which modification is sought. First, under Subsection (a)(2) [(1)(b)], the parties may agree that a particular forum may serve to modify the order. Second, Section 613 [§ 7-1054], *infra*, applies if all parties have left the original issuing State and now reside in the same new forum State. Subsection (a)(2) [(1)(b)], which authorizes the parties to terminate the continuing, exclusive jurisdiction of the issuing State by agreement, is based on several implicit assumptions. First, the subsection applies even if the issuing tribunal has continuing, exclusive jurisdiction because one of the parties or the child continues to reside in that State. Subsection (a)(2) [(1)(b)] also is applicable if the individual parties and the child no longer reside in the issuing State, but agree to submit the modification issue to a tribunal in the petitioner's State of residence. Also implicit in a shift of jurisdiction over the child support order is that the agreed-upon tribunal must have subject matter jurisdiction and personal jurisdiction over at least one of the parties or the child, and that the other party submits to the personal jurisdiction of that forum. In short, UIFSA does not contemplate that absent parties can agree to confer jurisdiction on a tribunal without a nexus to the parties or the child. But if the other party agrees, either the obligor or the obligee may seek assertion of jurisdiction to modify by a tribunal of the State of residence of either party.

The requirements of Subsection (a) [(1)] are demonstrated to the tribunal being asked to assume continuing, exclusive jurisdiction. No action to transfer, surrender, or otherwise participate is required or anticipated by the original order-issuing tribunal. The Act does not grant discretion to refuse to yield jurisdiction to the issuing tribunal; nor does it extend discretion to refuse to accept jurisdiction to the assuming tribunal when the statutory requisites are met. However, there is a distinction between the processes involved under Subsections (a)(1) [(1)(a)] and (a)(2) [(1)(b)]. Once the requirements of (a)(1) [(1)(a)] or Section 613 [§ 7-1055] have been met for assumption of jurisdiction, the assuming jurisdiction acts on the modification and then

notifies the tribunal whose order has been replaced by the order of the assuming tribunal, see Section 614 [§ 7-1056], *infra*. In contrast, for a tribunal of another State to assume modification jurisdiction under Subsection (a)(2) [(1)(b)] it is necessary that the individual parties first agree in a record to submit modification of child support to that tribunal and file their agreement with the issuing tribunal. Thereafter, they may then proceed to petition the assuming tribunal to take jurisdiction.

Modification of child support under Subsections (a)(1) [(1)(a)] and (a)(2) [(1)(b)] is distinct from custody modification under the federal Parental Kidnapping Prevention Act, 42 U.S.C. Section 1738A, which provides that the court of continuing, exclusive jurisdiction may "decline jurisdiction." Similar provisions are found in the UCCJA, Section 14. In those statutes, the methodology for the declination of jurisdiction is not spelled out, but rather is left to the discretion of possibly competing courts for case-by-case determination. The privilege of declining jurisdiction, thereby creating the potential for a vacuum, is not authorized under UIFSA, see *Rosen v. Lantis*, 938 P.2d 729, 734 (N.M. App. 1997). Once a controlling initial child-support order is established under UIFSA, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing tribunal no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a tribunal with modification jurisdiction issues a new order in conformance with this article [§§ 7-1043 to 7-1057].

The degree to which the new standards of one tribunal with continuing, exclusive jurisdiction has been accepted is illustrated by comparing UIFSA to the UNIFORM CHILD CUSTODY JURISDICTION ACT, Sections 12 — 14, and UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT Sections 201 — 202. The UCCJA provides general principles for the judicial determination of an appropriate fact situation for subsequent modification of an existing custody order by another court. In contrast, UIFSA establishes a set of "bright line" rules which must be met before a tribunal may modify an existing child-support order. The intent is to eliminate multiple support orders to the maximum extent possible consistent with the principle of continuing, exclusive jurisdiction that pervades the Act. The UCCJEA borrows heavily, but not identically, from UIFSA. Both UIFSA and UCCJEA seek a world in which there is but one-order-at-a-time for child support and custody and visitation. Both have similar restrictions on the ability of a tribunal to modify the existing order. The major difference between the two acts results from the fact that the basic jurisdictional nexus of each

is founded on different consideration. UIFSA has its focus on the personal jurisdiction necessary to bind the obligor to payment of a child-support order. UCCJEA places its focus on the factual circumstances of the child, primarily the "home State" of the child; personal jurisdiction over a parent in order to bind that parent to the custody decree is not required. An example of the disparate consequences of this difference is the fact that a return to the decree State does "not reestablish" continuing jurisdiction under the custody jurisdiction Act, see comment to UCCJEA Section 202. But, under UIFSA similar facts permit the issuing State to exercise continuing, exclusive jurisdiction to modify its child-support order if at the time the proceeding is filed the issuing State "is the residence" of one of the individual parties or the child, see Section 205(a) [§ 7-1009(1)], *supra*.

Subsection (b) [(2)] states that when the forum has assumed modification jurisdiction because the issuing State has lost continuing, exclusive jurisdiction, the proceedings will generally follow local law with regard to modification of child-support orders.

The 2001 amendment to Subsection (c) [(3)] and the addition of Subsection (d) [(4)] are designed to eliminate scattered attempts to subvert a significant policy decision made when UIFSA was first promulgated. Prior to 1993, American case law was thoroughly in chaos regarding modification of the duration of a child-support obligation when an obligor or obligee moved from one State to another with different ages regarding the duration of the child-support obligation. In those circumstances, whether the obligation ended, extended, or was curtailed was left almost to chance. In a RURESA proceeding, on the obligee's motion some States would increase the duration of the support obligation when the obligor resided in a State with a higher age for the child support obligation. Other States decreased the obligor's duration of child support when the obligor countered with a motion that the new RURESA support order should reflect a shorter duration of the obligation in accordance with local law. Multiple durations of the support obligation, as well as multiple support amounts, were both major problem areas addressed by UIFSA.

From its original promulgation UIFSA determined that the duration of child-support obligation should be fixed by the controlling order, see *Robdau v. Commonwealth, Virginia Dept. Social Serv.*, 543 S.E.2d 602 (Va. App. 2001). If the language was insufficiently specific before the 2001, the amendments should make this decision absolutely clear. The original time frame for support is not modifiable unless the law of the issuing State provides for modification of its duration. Some courts

have sought to subvert this policy by holding that completion of the obligation to support a child through age 18 established by the now-completed controlling order does not preclude the imposition of a new obligation thereafter to support the child through age 21 or even to age 23 if the child is enrolled in higher education. Subsection (d) [(4)] is designed to eliminate these attempts to create multiple, albeit successive, support obligations. Consistent with this principle, if a domestic violence protective order has been entered with a child-support provision that has a duration less than the general child support law of the State that issues the controlling order, the law of that State determines the maximum duration. In sum, absent tribunal error the first child-support order issued under UIFSA will invariably be the initial controlling order. The initial controlling order may be modified and replaced by a new controlling order in accordance with the terms of Sections 609 and 615 [§§ 7-1051 to 7-1057], but the duration of the child-support obligation remains con-

stant, even though virtually every other aspect of the original order may be changed. This is also the standard in situations involving multiple valid child-support orders — a problem that will progressively decrease over time as RURESAs multiple orders expire or a determination of the initial controlling order is made under Section 207 [§ 7-1011], *supra*. Once a controlling order is identified under these standards, the duration of the support obligation is fixed.

Relettered Subsection (e) [(5)] provides that upon modification the new order becomes the one order to be recognized by all UIFSA States, and the issuing tribunal acquires continuing, exclusive jurisdiction. Good practice mandates that the tribunal should explicitly state in its order that it is assuming responsibility for the controlling child-support order. Neither the parties nor other tribunals should be required to speculate about the effect of the action taken by the tribunal under this section.

7-1054. Recognition of order modified in another state. — If a child support order issued by a tribunal of this state is modified by a tribunal of another state which assumed jurisdiction pursuant to the uniform interstate family support act, a tribunal of this state:

- (1) May enforce its order that was modified only as to arrears and interest accruing before the modification;
- (2) May provide appropriate relief for violations of its order which occurred before the effective date of the modification; and
- (3) Shall recognize the modifying order of the other state, upon registration, for the purpose of enforcement. [I.C., § 7-1046, as added by 1994, ch. 207, § 2, p. 639; am. and redesi. 1997, ch. 198, § 30, p. 556; am. and redesi. 2006, ch. 252; § 54, p. 764.]

Compiler's Notes. Former § 7-1054, enacted as § 7-1047 by Laws 1994, ch. 207, § 2 and redesignated as § 7-1054 by Laws 1997, ch. 198, § 33, was redesignated as § 7-1058, pursuant to S.L. 2006, ch. 252, § 58.

The 2006 amendment, by ch. 252, renumbered this section from § 7-1051; in the introductory paragraph, substituted "the uniform interstate family support act" for "this chapter or a law substantially similar to this

chapter and, upon request, except as otherwise provided in this chapter"; deleted former subsection (2), which read: "Enforce only nonmodifiable aspects of that order" and redesignated the following subsections accordingly; in present subsection (2), added "May"; and in present subsection (3), added "Shall."

Section 63 of S.L. 2006, ch. 252 provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

A key aspect of UIFSA is the deference to the controlling child-support order of a sister State demanded from a tribunal of the forum State. This applies not just to the original order, but also to a modified child-support order issued by a second State under the standards established by Sections 611, 613, and 615 [§§ 7-1053, 7-1055, and 7-1057]. For

the Act to function properly, the original issuing State must recognize and accept the modified order as controlling and must regard its prior order as prospectively inoperative. Because the UIFSA system is based on an interlocking series of state laws, it is fundamental that a modifying tribunal of one State lacks the authority to direct the original issuing