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69107-4

No. 69107-4-I

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

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

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and conflicting orders from the same Washington trial court. By order of one judge, Washington exercised temporary emergency jurisdiction based on the father's domestic violence. Washington also had significant connections jurisdiction.

Notwithstanding the temporary emergency jurisdiction, a commissioner and another superior court judge entered, sequentially, an erroneous order declining jurisdiction and an erroneous order declaring Kansas to be the child's home state. As to the commissioner's order, Washington could only decline jurisdiction after consultation with the court in Kansas and after undertaking the correct analysis as required by statute; the commissioner did neither. (The father belatedly gave notice of the Kansas proceeding, but did not file proof of it until after the commissioner ruled.)

A judge revised the commissioner, declaring Kansas to be the child's home state. This was error, since the child had not lived anywhere for six consecutive months since its birth in Costa Rica. This case should be remanded for compliance with the UCCJEA.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it did not confer with the Kansas court once it learned of those proceedings.

2. The trial court erred when it entered the following findings of fact and conclusions of law:

> [FOF] 7: ... The [domestic violence protection] order does not prohibit contact with Holden. It does restrain Mr. McDermott from coming within 500 feet of or entering Holden's day care or school. There was no finding that Mr. McDermott represented a threat to H[.].
>
> [COL] 1. Pursuant to RCW 26.27.021(7), Kansas is the home state of H[.J.M.] 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[J.M.] and his parents. The parents did not intend to relocate to Costa Rica but to maintain and return to their residence in Kansas.
>
> [COL] 2. Pursuant to RCW 26.27.201, Washington does not have jurisdiction unless Kansas declines to exercise its jurisdiction on the ground that Washington is the more appropriate forum.

CP 10.

3. The trial court erred when it entered the following orders:

> 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.

CP 10-11.

Issues Pertaining to Assignments of Error

1. Did the trial court violate the statute when it did not confer with the Kansas court?

2. Did this nine-month old child have a home state when (a) he was born in Costa Rica and lived there for six weeks; (b) he then lived in Kansas for five months; and (c) he then moved to Washington, where he had lived for two months at the time this proceeding commenced?

3. When a superior court judge enters findings of fact and conclusions of law revising the order of a commissioner, is the latter order superseded?

4. In any case, was the commissioner's decision on jurisdiction also erroneous?

III. STATEMENT OF THE CASE[1]

A. BACKGROUND

These parties married in 2011 and separated a year later. CP 83. The marriage took place in Oklahoma. CP 181. A previous marriage, performed in Costa Rica in 2010, was invalid. CP 41, 57-58. The parties spent time together in Washington, where Wendy was born and raised, and in Kansas, where Justin works a farm his parents own. CP 41. They also spent time together, and Wendy spent time by herself, in Costa Rica, where members of Wendy's immediate family live. CP 41, 165, 180-181, 220, 222-223. Wendy works as a boat captain, traveling around the world, and had lived in Costa Rica for years. CP 41.[2] During the year of their marriage, Wendy split her time between Costa Rica and Kansas. CP 179, 223. Their child was born in Costa Rica. CP 58. Wendy has been the child's primary caregiver since birth. CP 169, 228-229.

After H.J.M. was born, the parties spent five months in Kansas. CP 10. Wendy then moved to Washington, where more of her family lives and where she found employment. CP 223.

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[1] A chronology of events is included in the appendix as a table.

[2] The trial court found "[t]here is no evidence that the mother established Costa Rica as her permanent residence." CP 9. This finding is not challenged because it is not relevant to the legal analysis.

According to Wendy, the parties intended to relocate together to Washington. CP 223. As a boat captain, there was no work for her in Kansas and Justin's income was quite low (i.e., $24,000). CP 42, 224; Supp. CP _ (sub 53). Justin admitted he "agreed to the move and planned to split his time between Kansas and Washington." CP 58; see, also, CP 200 ("agreed to try and work out a two-State residential plan"). Later, he claimed the plan was for the family to move, but for him to split his time "with Holden between Washington and Kansas." CP 182. Wendy disputes there was ever a plan for the child to spend time away from her (i.e., in Kansas); rather, the plan was for Justin to return periodically to Kansas work his parents' farm. CP 42, 166.

Several months after Wendy and H.J.M. moved here, Justin came to Washington to look for housing. CP 42, 182. He stayed with Wendy at the home of her relatives in Arlington. CP 213. The first morning, these relatives overheard Justin "yelling angrily and very loudly" at Wendy for at least 15 minutes, frightening both witnesses. CP 182, 214, 218-219. Wendy and Justin left together to look for houses in Anacortes. CP 213, 219, 223-224. While doing so, they began to argue. Wendy said they argued about whether to live in Kansas or Washington. CP 224. Justin said they

argued "because [he] didn't understand" why she had not just flown out from Kansas for the job interview, instead of moving to Washington in January and, thus, separating the family. CP 182.[3] Justin grew so angry, Wendy became frightened and called the police. CP 225. The police investigated, determined there had been no physical assault, and escorted Justin away from the scene, so he could leave town for Kansas. CP 183-184, 224-225.

According to Wendy, Justin is physically much larger than she and he has a history of abusive, intimidating, and violent conduct. CP 41-42, 166, 224-228. Justin drinks too much and abuses drugs, with effects on his recollection, his driving, his mood and temper. See, e.g., CP 166-169, 224-228. In the past year, he has totaled two different vehicles and destroyed other property. CP 175, 189-190, 216. Others have witnessed Justin in various states of inebriation, belligerence, and agitation. CP 44-45, 216-217, 220-221. Justin denies being an alcoholic, which he defines as someone who "must drink daily or close to it." CP 202; see, also, CP 189. He denies his conduct is abusive. CP 184-187.

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[3] Several paragraphs before this assertion, Justin acknowledges an agreement for Wendy to come out to Washington for the application process. CP 181-182.

Justin disavows being abusive or threatening and characterizes the exchanges at issue as "arguments." CP 181. He claims Wendy has hit him during arguments and threatened to hurt herself. CP 187-189.

B. WASHINGTON COURT PROCEEDINGS

After the incident in March, Wendy petitioned for dissolution, filing in Snohomish County on March 29, 2012. CP 79-88; CP 9.[4] In her petition, she alleged the child had "no home state elsewhere" and the court "has temporary emergency jurisdiction ... because the child is present in this state and it is necessary in an emergency to protect the child because the child, or parent of the child is subjected to or threatened with abuse." CP 85; see, also, CP 222 (where the child has lived). She cited to RCW 26.27.231 and further alleged "[t]here is no previous custody determination that is entitled to be enforced" and no child custody proceeding had been commenced in a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221. CP 85-86. In her petition, and by separate petition, she also requested the court enter a domestic violence protection order (DVPO). CP 85, 88, 268-277.

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[4] Judge Krese found the petition was filed on March 18, 2012. CP 10 (Finding of Fact #6). Justin said she filed on March 20. CP 58. However, the date on the pleading and the court's "filed" stamp is March 29, 2012. CP 79-80, 88.

Justin responded to Wendy's petition and agreed the child had no home state, but denied the court had a basis for emergency jurisdiction. CP 73-74. He denied he intended to reside in Washington full-time or that the "family intended to move to Washington as a whole." CP 74. He also agreed it would be "easier" to finalize the dissolution in Washington. CP 190. He asked the court to enter a decree and his proposed parenting plan. CP 75-76, 190-191.

On March 29, 2012, a commissioner entered ex parte a temporary order maintaining the status quo. CP 77-78. The order became effective as to Justin upon service, which occurred on April 17, 2012. CP 78, 278.

Wendy sought more particularized temporary orders and an order of protection by motion and petition filed on May 4, 2012. CP 238-267, 268-277. Justin responded, as described above. CP 180-192. Due to a crowded calendar on May 30, 2012, Commissioner Lester H. Stewart was unable to hear the matter in its entirety.[5] CP 93. However, the commissioner denied the protection order and entered mutual restraining orders. CP 63-72,

[5] Because numerous judicial officers have entered orders in this matter, they are identified by name.

93-94. The court also entered temporary orders, addressing a variety of other matters, but reserved the residential schedule and the jurisdiction ("UCCJEA") issue for a later hearing. CP 63-72, 93-94. The court also ordered appointment of a guardian ad litem. CP 70.

On June 5, 2012, Justin filed a motion to dismiss the dissolution action on the grounds that the court either did not have jurisdiction over the party's child or it should decline jurisdiction. CP 57. He mentioned for the first time that he had filed for divorce in Kansas, but provided no proof. CP 58. He made no argument regarding why the court should not exercise jurisdiction over the marriage and property, but focused on jurisdiction to decide matters related to the child. CP 57-62. He conceded there was no home state. CP 60.

On June 6, 2012, Wendy moved for revision of the commissioner's ruling denying her a protection order. CP 148-153. In a memorandum, she reviewed the definition of domestic violence and the legal standards for protection orders. CP 142-147. On June 14, 2012, Judge Janice Ellis granted the motion for revision and granted Wendy a domestic violence protection order. CP 35-39, 117-118. Judge Ellis found Justin "committed domestic

violence as defined in RCW 26.50.010 and represents a credible threat to [Wendy's] physical safety..." CP 35. The court also found the child had no home state and the court had "temporary emergency jurisdiction." CP 37. The court ordered visitation to continue pursuant to the temporary orders. CP 38. Justin did not appeal the order of protection.

A week after Judge Ellis entered the order of protection and found temporary emergency jurisdiction, Commissioner Stewart heard Justin's motion to dismiss. CP 32-34. The commissioner found the child has no home state, but also found there "is no emergency jurisdiction." CP 31-32. The commissioner decided Washington should decline jurisdiction in favor of Kansas because the child had spent more time (5.5 months) in Kansas, as compared to Washington (2.5 months, by the date the petition for dissolution was filed), meaning "there are likely to be more witnesses to the child's upbringing in KS than in WA." CP 33. (The commissioner did not include in the calculation the 1.5 months the child spent with Wendy in Costa Rica.) The commissioner viewed the DVPO as relating "to the Mother" and as "deferring residential contact with the child to the family law portion of the divorce." CP

34. The court also found no "basis to restrict or supervise the Father's contact with the child." CP 34.

Wendy moved to revise Commissioner Stewart's orders. CP 24-31. On July 6, 2012, Justin filed copies of the Kansas pleadings. CP 95-111. On July 9, 2012, Judge Linda Krese revised the commissioner's orders and found Kansas to be the home state because the child's "absence from Kansas from his date of birth on June 15, 2011 was a temporary absence as to both H[.J.M.] and his parents." CP 10.

It appears from the clerk's minutes that neither Commissioner Stewart nor Judge Krese conferred with the court in Kansas. CP 112, 115-116, 164.

Wendy filed a timely notice of appeal. CP 1-8.

C. KANSAS PROCEEDINGS

On March 29, 2012, Justin petitioned for dissolution in Kansas. CP 96. (This is the same day Wendy filed in Washington.) He requested temporary orders, including temporary joint custody of H.J.M., such that the infant would spend 30 days in Kansas and 30 days in Washington. CP 99. In his petition, Justin declared Wendy to be a resident of Kansas and declared the child had lived only in Kansas and Washington. CP 96-97. He made no

mention of Costa Rica, nor did he assert any basis for the exercise of the court's jurisdiction over the child. CP 96-98.

On April 2, 2012, in the absence of Wendy, in person or by counsel, the Kansas court entered temporary orders, including a temporary order of joint custody granting the alternating 30-day schedule. CP 99-107. The petition and orders were served on Wendy three months later, on June 28, 2012. CP 114.

Meanwhile, on May 22, 2012, Justin filed his response to Wendy's petition in Washington. CP 73-76. He did not mention the Kansas proceeding in his response or declaration. Id.; see, also, CP 180-192. Instead, he agreed to Washington's jurisdiction over all matters. CP 190. He asked for affirmative relief, including by request that the court enter his parenting plan. CP 75-76, 190-191. He filed his motion to dismiss for lack of jurisdiction on June 5, 2012, informing the court for the first time that he had filed a petition for dissolution. CP 58. He did not tell the court about the temporary orders or otherwise provide proof of the Kansas proceeding.

On June 12, 2012, Wendy told the court she had not been served with notice of any legal action in Kansas, and told the court Justin claimed to have filed an action, but provided no proof. CP

41, 46. More than three weeks later, on June 28, 2012, Wendy was served with the Kansas petition and orders. CP 114. On July 6, 2012, Justin filed copies of the Kansas pleadings. CP 95-111. Three days later, Judge Krese revised Commissioner Stewart's order, from which Wendy appealed. CP 1-8, 9-11.

IV. ARGUMENT

A. THE STANDARD OF REVIEW

Whether Washington courts have subject matter jurisdiction is a question of law that this Court reviews de novo. *In re Parentage of Ruff,* 168 Wn. App. 109, 115, 275 P.3d 1175 (2012). The question of subject matter jurisdiction is governed by statute, specifically, by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which seeks, through national uniformity of laws and conformity with federal law, to eliminate the problems of forum-shopping and conflicting custodial orders that plagued interstate child custody determinations in the past. Both Washington and Kansas have adopted the UCCJEA. Title 36 RCW Chapter 27; Title 23 KSA Chapter 23.

The UCCJEA, formerly the UCCJA, was revised substantially in 1997 to give priority in jurisdiction to the child's "home state," otherwise address problems with the prior act, and

make the uniform act consistent with federal law, i.e., the Parental Kidnapping Prevention Act (PKPA).[6] *See* UCCJEA (1997), *Prefatory Note.*[7] The revision was so substantial as to render cases decided under the former act of dubious precedential value. *Staats v. McKinnon,* 206 S.W.3d 532, 547 (Tenn.Ct.App. 2006) ("It would be a mistake to rely heavily on prior case law interpreting the UCCJA and the PKPA in construing the provisions of the UCCJEA.").

B. THE ORDER ON APPEAL IS JUDGE KRESE'S ORDER.

When a superior court judge revises a commissioner's order, the judge's order supersedes the commissioner's. *Grieco v. Wilson,* 144 Wn. App. 865, 877, 184 P.3d 668 (2008) ("when the court makes independent findings and conclusions, the court's revision order then supersedes the commissioner's decision"); *aff'd in part and rev'd in part, on other grounds, In re Custody of E.A.T.W.,* 144 Wn. App. 865, 184 P.3d 668 (2010); *accord, In re Marriage of Dodd,* 120 Wn. App. 638, 644, 86 P.3d 801 (2004) (no need to assign findings to commissioner's order because judge's supersedes it); *State ex rel. J.V.G. v. Van Guilder,* 137 Wn. App.

[6] Federal law governs what custody orders are entitled to full faith and credit.

[7]http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf.

417, 423, 154 P.3d 243 (2007) ("Generally, we review the superior court's ruling, not the commissioner's"). Accordingly, this case must go back to the superior court for correction of the error of law made by Judge Krese and discussed below.

However, for two reasons, additional briefing is provided. First, Judge Krese included in her revision order the following statement: "The court denies the motion to revise in so far as it declined to exercise jurisdiction in favor of Kansas." CP 11.[8] This order does not make sense in light of Judge Krese's home state determination. Because Judge Krese determined Kansas was the home state, and because the home state has priority jurisdiction, Washington would have no power to exercise or decline jurisdiction. *In re Parentage, Parenting, & Support of A.R.K.-K.*, 142 Wn. App. 297, 307, 174 P.3d 160 (2007) ("The UCCJEA does not permit Washington unilaterally to declare itself a more convenient forum and wrest jurisdiction from the home state."). The home state determination settles the matter (unless the home state

[8] The court also ordered: "The court denies the motion to revise with regard to all other provisions ordered by the commissioner." CP 11. If this order somehow revives the commissioner's order in any respect (e.g., as to the commissioner's finding/concluding there was no "basis to restrict or supervise the Father's contact with the child" (CP 34)), then Wendy asks permission to file a supplemental brief challenging the commissioner's order. However, this challenge is also implicit in the analysis of Commissioner Stewart's order, which follows in § IV.E.

declines). For this reason, and because the judge revised the commissioner's order, it appears the only appealable order is that of Judge Krese.

However, because of the language in Judge Krese's order about not revising the commissioner's order on declining jurisdiction, and because the question of whether to decline jurisdiction should arise again on remand, appellant argues below that Commissioner Stewart properly determined there was no home state, but improperly declined jurisdiction. CP 34. However, first, appellant addresses an error clearly made by both judicial officers, then the home state question, then the commissioner's order declining jurisdiction.

C. THE UCCJEA REQUIRES A JUDICIAL CONFERENCE.

Judge Krese, if not Commissioner Stewart, failed a mandatory requirement of the statute, to confer with the Kansas court. Because of the DVPO, the Washington court was mandated to first confer with the Kansas court. RCW 26.27.231(4).[9]

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[9] The temporary emergency jurisdiction provision provides:

> (4) A court of this state that has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, <u>shall immediately communicate with the other court.</u>

Likewise, the simultaneous proceedings provision applies under "the rare circumstance 'when there is no home State, no State with exclusive, continuing jurisdiction and more than one significant connection State.'" *Koeplin v. Crandall,* 230 P.3d 797, 800 (Mont. 2010). This provision required the Washington court to "stay its proceeding and communicate with the court of the other state." RCW 26.27.251(2). The court's failure to do so violates the statute.

Here, this failure is particularly problematic since, although a proceeding had been commenced in Kansas, no order had been entered in compliance with the UCCJEA and the proceedings were essentially dormant, since Justin had acquiesced to litigating in Washington and had not even served Wendy with the Kansas pleadings. A judicial conference would have informed the Washington judicial officers that there was no active proceeding in Kansas. There was, in effect, nowhere to send this case.

D. THE CHILD HAS NO HOME STATE; THE TRIAL COURT'S RULING TO THE CONTRARY IS ERRONEOUS AS A MATTER OF LAW.

Judge Krese ruled Washington had no jurisdiction because Kansas is the home state. As discussed further in § IV.E, this is

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RCW 26.27.231 (emphasis added).

incorrect for the reason that Washington properly exercised temporary emergency jurisdiction and the court could not act further without conferring with Kansas. Also, Judge Krese's ruling is incorrect simply because Kansas is not the home state.

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 [or] [i]n 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." RCW 26.27.021(7). Alternatively, if these definitions do not apply, 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. The definition of home state further provides that "[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).

Here, the trial court ruled that H.J.M. "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[.J.M.] and his parents." CP 10. That is, Judge Krese included in the home state calculation the time the child spent from birth in Costa Rica until moving from Costa Rica to Kansas. This is an erroneous, strained and unworkable reading of the statute.

Most simply, Judge Krese's interpretation allows for a person to be temporarily absent from a state where he or she has never been present, an interpretation at odds with the plain language of the statute.

First, "absence" is defined as "[t]he state of being absent or away from a place, or from the company of a person or persons." *Oxford English Dictionary* (Electronic Version, 2012). Being absent implies having been present, otherwise, I am absent from everyplace but the place I am now sitting (including the moon, for example). As a matter of simple logic, there can be no absence without there having first been a presence.

The statute's use of the phrase, "temporary absence," enhances this connotation of return to a place where one formerly was present. "Temporary" means "[l]asting for a limited time; existing or valid for a time (only); not permanent; transient; made to supply a passing need." *Id.* I am not on the moon, but I certainly am not temporarily absent from the moon. In like fashion, because

H.J.M. was not present in Kansas until he was six weeks old, he was not temporarily absent from Kansas while he was in Costa Rica.

Judge Krese's interpretation to the contrary would permit, for example, a child to have a home state where he or she had never lived, provided one or both parents were temporarily absent from the state. For example, if a couple moved to Seattle so that one could complete a two-year medical residency, but maintained a permanent residence in Nebraska (i.e., owned a home, continued to vote in Nebraska, etc.) and where one of them continued to work, and returned periodically to Nebraska for that purpose, a child born in Washington and living in Washington for its entire life, could still have Nebraska as its home state. This is an absurd result of Judge Krese's interpretation.

Also, helpfully, the question of absence relates to the question of where the child "lived" during the six months preceding commencement of the action. The statute uses the term "lived," not "resided" or "domiciled, for a reason." It thereby contemplates a human being physically present in a place. As the Texas court put it, "[t]he first cogent issue in determining ... home state is a determination of whether the children were physically present in

Texas for six consecutive months preceding [the commencement of a proceeding]." *In re Marriage of Marsalis,* 338 S.W.3d 131, 135 (Tex. App. Texarkana 2011). In *Marsalis*, the court did not count as time lived in the state time the family spent preparing to move there. 338 S.W.3d at 135-136. As a consequence, there was no "home state" in *Marsalis*. *Id.,* at 136.

Similarly, the New Mexico court has observed that "the Legislature used the word 'lived,' rather than 'resided,' or 'was domiciled,' precisely to avoid complicating the determination of a child's home state 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). For example, a Florida court refused to defer to the orders of a French court finding them not in substantial conformity with the UCCJEA because "the French court focused on the location of the children's 'usual and permanent centre of interest,'" rather than on where the children had lived for the six months preceding commencement of the action. *Karam v. Karam,* 6 So. 3d 87, 91 (Fla. Dist. Ct. App. 3d Dist. 2009). Thus, even if a child changes states of "residence," the home state calculation remains determinative.

The court in New Jersey likewise emphasizes that use of the term "lived" focuses the inquiry on physical presence. "In this regard, determination of the child's legal residence or domicile is unnecessary as the statutory language 'lived,' included within the definition of home state, connotes physical presence within the state, rather than subjective intent to remain." *Sajjad v. Cheema,* 51 A.3d 146, 154 (App.Div. 2012). "By adopting a definition of home state that focuses on the historical fact of the child's physical presence in a jurisdiction, the Legislature intended to provide a definite and certain test." *Id.,* at 173, *citing Escobar,* 64 P.3d at 517 (internal quotation marks omitted).

The Texas court also noted the policy benefits of this kind of clarity: "The purposes behind the UCCJEA further suggest that a child's physical location is the central factor to be considered when determining a child's home state." *Powell v. Stover,* 165 S.W.3d 322, 326 (Tex. 2005). This focus makes "the determination of jurisdiction more straightforward." *Id.* Under a straightforward analysis, H.J.M. had not "lived" in any one place for six consecutive months preceding the commencement of the action. He was not temporarily absent from Kansas, a place he had never been.

Simply, under the statute, he had no home state. The trial court's ruling to the contrary should be vacated.

E. BECAUSE WASHINGTON HAS TEMPORARY EMERGENCY JURISDICTION, THE SUPERIOR COURT COULD DECLINE JURISDICTION ONLY IN THE MANNER PRESCRIBED BY THE UCCJEA.

On June 14, 2012, Washington exercised temporary emergency jurisdiction pursuant to Judge Ellis's finding of domestic violence and entry of a domestic violence protection order. CP 35-39; RCW 26.27.231. A DVPO is a "custody determination." RCW 26.27.021(3) ("child custody determination" includes temporary orders) & (4) ("child custody proceeding" includes domestic violence proceedings). No other state had made a child custody determination. The temporary orders entered in Kansas on April 2, 2012, pursuant to Justin's petition for dissolution, were not entered "substantially in conformity" with the UCCJEA, not least of all because Kansas was not the home state, but also because Wendy had received no notice. RCW 26.27.251(1) & (2).[10] *See In re Thorensen*, 46 Wn. App. 493, 730 P.2d 1380 (1987) (Washington

[10] Moreover, Justin had misinformed the Kansas court regarding jurisdictional bases by omitting the fact that the child was born in Costa Rica and lived there from birth to age six weeks, before coming to Kansas. CP 96-98. This deceptive omission violates the UCCJEA and obstructs its operation, constitutes unjustifiable conduct, and requires Kansas decline jurisdiction unless numerous conditions are met. RCW 26.27.231.

court may exercise jurisdiction over child custody case if other state proceedings not substantially in compliance with either the PKPA or UCCJEA); RCW 26.27.241(1) (requiring notice and opportunity to be heard before a court may make a child custody determination).[11] Moreover, it appears Judge Ellis was ignorant of the Kansas proceedings. CP 112.

Thus, under the statute, Judge Ellis's order "remains in effect until an order is obtained from a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221..." RCW 26.27.231(2). That is, absent an order from a state with priority jurisdiction and entered in compliance with federal law and the uniform act, the statute did not allow Commissioner Stewart or Judge Krese to dismiss the Washington action. The statute "does not permit a court simply to declare that it has decided to decline to exercise jurisdiction." *Prizzia v. Prizzia,* 707 S.E.2d 461, 468 (Va. Ct. App. 2011).

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[11] The PKPA also withholds the full faith and credit requirement where courts are not abiding by the statute:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

28 U.S.C. § 1738A(g) (emphasis added).

Here, Judge Krese ignored the statute and ignored Judge Ellis's ruling on jurisdiction, as if it had not happened. Judge Krese held, "Washington does not have jurisdiction unless Kansas declines ...." CP 10. In fact, Washington had temporary emergency jurisdiction, which exists regardless of home state jurisdiction, even if only temporarily. Consequently, Judge Krese's factual findings regarding the DVPO are imprecise and off-point. She found that Justin is not prohibited from contacting H.J.M., though she acknowledges he is restrained from entering upon certain places where H.J.M. might be. CP 10. This is something of a non sequitur. Likewise, it is true, as Judge Krese finds, that "[t]here was no finding that [Justin] represented a threat to H[J.M.]." CP 10. Setting aside for the moment whether or not domestic violence against the child's mother poses a threat to the child, temporary emergency jurisdiction does not depend on such a finding. Rather, the statute permits the exercise of jurisdiction "to protect the child because the child, or a sibling <u>or parent</u> of the child, is subjected to or threatened with abuse." RCW 26.27.231(1) (emphasis added). In light of Judge Ellis's order, Judge Krese had to confer with Kansas before she could enter any order, let alone one simply deferring to Kansas.

For different reasons, and in several ways, Commissioner Stewart's order also violates the statute. However, the broader principle is the same: the Washington court may decline jurisdiction only after complying with the UCCJEA, including, conducting the proper analysis.

Here, there is no state with priority jurisdiction. RCW 26.27.021. There is no home state (RCW 26.27.021(1)(a)), and, as of June, 2012, the only state that had exercised jurisdiction in compliance with the act (i.e., temporary emergency jurisdiction) was Washington. RCW 26.27.231.

Because there was no home state, Washington also could exercise jurisdiction based on "significant connection." RCW 26.27.201(1)(b). Under this provision, Washington could exercise jurisdiction to make an initial child custody determination because:

> A court of another state does not have jurisdiction under (a) of this subsection, ... 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)(b). Thus, Washington could exercise jurisdiction because: there was no home state; Wendy and H.J.M. lived in Washington; she was employed in Washington; some of her family lives here; friends and family members who had known the child since birth and known Justin during the marriage also live here. CP 50-55. Moreover, importantly, Washington had extended protection to Wendy and the child against Justin's domestic violence. CP 49.

Having significant connection jurisdiction, the Washington court still could decline jurisdiction in favor of a more convenient forum. RCW 26.27.261. However, before doing so, the court would have to "consider all relevant factors," including:

> (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (b) The length of time the child has resided outside this state;
>
> (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (d) The relative financial circumstances of the parties;
>
> (e) Any agreement of the parties as to which state should assume jurisdiction;
>
> (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

> (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

RCW 26.27.261(2). In other words, the court "must specifically determine two things: (1) 'that it is an inconvenient forum under the circumstances,' and (2) 'that a court of another state is a more appropriate forum.'" *Prizzia,* 707 S.E.2d at 469. Commissioner Stewart failed on both of these prongs and, more generally, with respect to the express statutory mandate.

Most obviously, Commissioner Stewart simply ignored the domestic violence finding made by Judge Ellis, flatly violating. RCW 26.27.261(2)(a). This provision was added to the revised uniform act and placed at the very top of the list so that a priority consideration of the court's will be "which State can best protect the victim from further violence or abuse." 9 U.L.A. 683. *See, also, In re Marriage of Stoneman,* 64 P.3d 997, 1002 (Mont. 2003) (urging courts "to give priority to the safety of victims of domestic violence when considering jurisdictional issues under the UCCJEA.").[12] Here, the superior court had entered a finding of domestic violence.

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[12] There are numerous *Stoneman* cases in Montana, and a prior *Stoneman* case, involving a property issue, has received negative treatment, unlike the case cited above. *See Nang Loi v. Feeley,* 277 P.3d 1195 (Mont. 2012).

Justin did not appeal the finding. For purposes of Justin's motion to dismiss, the issue was res judicata. That is, because the fact of domestic violence was settled by Judge Ellis, the statute mandated consideration of it by Commissioner Stewart.

Instead, confusingly, Commissioner Stewart declared "[t]here is no emergency jurisdiction" merely one week after a superior court judge declared there was. CP 33, 37. The commissioner also essentially ignored the finding of domestic violence, declaring there was "no basis to restrict or supervise the Father's contact with the child." CP 34. In fact, Washington law mandates that parenting restrictions be imposed where domestic violence is found, absent express findings that contact is not harmful to the child or that the parent's abusive conduct will not recur. RCW 26.09.191(2) and (2)(n). Certainly, the commissioner simply ignored what Washington law recognizes: that domestic violence harms children whether they are the direct or indirect victims of the violence. The commissioner's indifference to the domestic violence finding, which Judge Ellis based on the plentiful evidence of Justin's intimidating, violent, often drunken behavior, is contrary to the letter and spirit of the UCCJEA and other

Washington law.[13] Indeed, Washington has a strong policy of preventing domestic violence and protecting its victims. *Danny v. Laidlaw Transit Services,* 165 Wn.2d 200, 208-215, 193 P.3d 128 (2008). In respect of children, it is clear Washington provides greater protection than Kansas. *Compare* RCW 26.09.191 and 2011 Kan. ALS 26; 2011 Kan. Sess. Laws 26; 2011 Kan. SB 24 (Kansas does not require courts to restrict residential time based on domestic violence, but only requires courts to consider "evidence of spousal abuse" as a factor in determining a residential schedule). This protective approach to domestic violence is the law in Washington, including in the UCCJEA, which the commissioner erroneously ignored.

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[13] RCW 26.50.010(1) defines domestic violence as:

> (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

Kansas defines "domestic battery" differently:

> (1) Knowingly or recklessly causing bodily harm by a family or household member against a family or household member; or
> (2) knowingly causing physical contact with a family or household member by a family or household member when done in a rude, insulting or angry manner.

KSA § 21-5414.

Nor did the commissioner properly work through the rest of the list. The commissioner summarily concluded "Kansas has the equivalent ability of Washington to handle this case," though there was nothing in the record addressing itself to this question. CP 33. Indeed, it appears the Kansas court did not even know the child had lived the first six weeks of its life in Costa Rica. Further, the commissioner ignored the first 1.5 months of the child's life and, rather, calculated that "the mathematical difference of 5.5 months of joint-parenting in Kansas outweighs the 2.5 months of joint-parenting or lack of in Washington." CP 33. The difference between time in Kansas and time outside of Kansas is actually the difference between 4 months and 5.5 months, in other words, negligible. More importantly, the test is not mathematical. Rather, the statute mandates consideration of eight different factors, only one of which is the length of time the child has lived in a state.

The commissioner also noted "some of mother's witnesses to Kansas incidents now reside in Washington." CP 33. But declared that based on the three months more lived in Kansas (and not counting the 1.5 months lived in Costa Rica), "there are *likely* to be more witnesses to the child's upbringing in KS than in WA." CP 34 (emphasis added). By its own terms, this is sheer speculation.

Altogether, the commissioner's analysis is both faulty and incomplete.

Thus, although the commissioner's order was superseded, it was also incorrect, since jurisdiction over this child custody matter could only be declined in a manner that conforms to the UCCJEA. *See Prizzia,* 707 S.E.2d 468 (reversing where, "[a]lthough the trial court said it was "declin[ing] to exercise jurisdiction" over child custody matters in this case, the trial court did not decline to exercise its jurisdiction in a manner that conformed" to the UCCJEA). In short, this case awaits a proper jurisdictional analysis.

V. CONCLUSION

For the foregoing reasons, the order entered by Judge Krese should be vacated and this matter remanded for a proper analysis of jurisdiction.

Dated this 6th day of November 2012.

RESPECTFULLY SUBMITTED,

PATRICIA NOVOTNY
WSBA #13604
Attorney for Appellant

McDermott Chronology

06/15/11	H.J.M. born	1.5 months in CR
07/28/11	H.J.M. to KS	5.5 months in KA
01/15/12	H.M. to WA (with Wendy	
03/13/12	Justin to WA	
03/15/12	Justin to KS	
03/29/12	Wendy files petition for dissolution in WA	2.5 months in WA
03/29/12	Ex parte TROs entered in WA	
03/29/12	Justin files petition for dissolution in KS	
04/02/12	Ex parte TROs entered in KS	
04/17/12	Justin served with WA petition	
05/04/12	Wendy files petition for DVPO and motion for temporary orders in WA	
05/22/12	Justin files response to WA petition	
05/30/12	Comm. Stewart denies DVPO, etc. and defers re jurisdiction	
06/05/12	Justin files motion to dismiss for lack of jurisdiction	
06/06/12	Wendy files motion to revise Comm. Stewart's order	
06/14/12	Judge Ellis revises Comm. Stewart's order, grants DVPO, and declares WA has temporary emergency jurisdiction.	
06/21/12	Comm. Stewart grants motion to dismiss/declines jurisdiction; finds no emergency; finds no basis for parental restrictions	
06/22/12	Wendy moves to revise Comm. Stewart's order	
06/28/12	KS petition Served on Wendy	
07/06/12	Justin files copies of the KS pleadings	
07/09/12	Judge Krese revises Comm. Stewart's order and finds KS to be home state	
07/18/12	Wendy files notice of appeal	
09/06/12	Justin moves to dismiss WA dissolution proceeding	
09/27/12	WA court denies the motion to dismiss	

FILED
JUL 09 2012
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

In re the Marriage of: WENDY A. MCDERMOTT Petitioner, and JUSTIN J. MCDERMOTT, Respondent	Case No.: 12-3-01064-3 ORDER ON MOTION TO REVISE

This matter came on for hearing this 29th day of June, before the undersigned Judge of the above court on the motion of the petitioner, Wendy McDermott, for an order revising the June 21, 2012, order of Commissioner Stewart declining jurisdiction in Washington. The court considered the pleadings and materials originally submitted to the Commissioner and the additional pleadings submitted by both parties, as well as the arguments made in court. The court is prepared to rule as follows:

FINDINGS OF FACT

1. The child who is the subject of the parenting plan in this dissolution , Holden McDermott, was born on June 15, 2011 in Costa Rica.

2. At the time the child was born, both his mother and father were residents of the state of Kansas. Holden was born in Costa Rica because the parents agreed that they wanted him born there so that he could enjoy dual citizenship in Costa Rica and the United States and because the mother was (or had been) working there. There is no evidence that the mother established Costa Rica as her permanent residence.

3. On the date of Holden's birth and for the remainder of his time in Costa Rica, both parents were residents of Kansas and intended to return to Kansas with Holden.

4. Both parents were present in Costa Rica when Holden was born. Mr. McDermott returned to Kansas in early July and then came back to Costa Rica in July and the entire family returned to Kansas on or about July 28, 2011.

5. Holden remained in Kansas with his parents until January 15, 2012, when he moved to the State of Washington with his mother. There is some dispute about whether the parties agreed that Ms. McDermott should move to Washington with the expectation that Mr. McDermott would move there as well. Mr. McDermott did come to Washington on March 13, 2012 and stayed no more than two days.

6. On March 18, 2012, Ms. McDermott filed the current petition for dissolution of their marriage.

7. On June 14, 2012, a Domestic Violence Order for Protection was entered. The order does not prohibit contact with Holden. It does restrain Mr. McDermott from coming within 500 feet of or entering Holden's day care or school. There was no finding that Mr. McDermott represented a threat to Holden.

CONCLUSIONS OF LAW

1. Pursuant to RCW 26.27.021(7), Kansas is the home state of Holden 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 Holden and his parents. The parents did not intend to relocate to Costa Rica but to maintain and return to their residence in Kansas.

2. Pursuant to RCW 26.27.201, Washington does not have jurisdiction unless Kansas declines to exercise its jurisdiction on the ground that Washington is the more appropriate forum.

ORDER

Based on the above findings and conclusions, the court orders as follows:

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.

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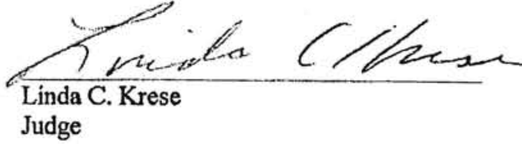
3. The court denies the motion to revise with regard to all other provisions ordered by the commissioner.

Dated this 9th day of July, 2012.



Linda C. Krese
Judge

FILED

JUN 21 2012

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

IN THE SNOHOMISH COUNTY SUPERIOR COURT

IN AND FOR THE STATE OF WASHINGTON

In re the Marriage of:	
WENDY A. MCDERMOTT, Petitioner,	No. 12-3-01064-3
and	~~[PROPOSED]~~
JUSTIN J. MCDERMOTT, Respondent.	ORDER ~~GRANTING MOTION TO DISMISS FOR LACK OF JURISDICTION~~ ON JURISDICTION

I. ORDER

THIS MATTER, having come on regularly before the above-entitled Court, the undersigned presiding, upon motion of the Respondent, Justin McDermott, and the Court being otherwise fully advised, NOW, THEREFORE, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED ~~that the Motion to Dismiss for lack of jurisdiction is hereby granted.~~ that:

The Court makes the additional findings, if any: Washington has in rem and in personum jurisdiction.

WASHINGTON HAS CURRENT JURISDICTION OVER THE CHILD. There IS NO QUESTION THAT THE CHILD ~~HAS~~ HAD NO HOME STATE AS CHILD ~~HAS~~ HAD NOT LIVED IN ANY STATE AT TIME OF FILING For 6 consecutive months ~~(1 week only in Kansas; 2½ months in, in WA)~~ (5½ months in WA; 2½ month in WA)

Engel Law Group, P.S.
600 University Street, Suite 1904
Seattle, WA 98101
Ph. 206-625-9800
Fax. 260-243-8177

ORIGINAL

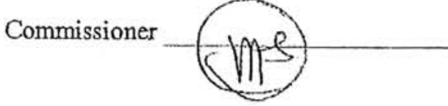
(LHS)

There is ~~probably~~ no emergency jurisdiction. The court is looking at significant contacts and substantial evidence. Kansas has the equivalent ability of Washington to handle this case.* Court is confident there would be no difference in outcome.* (LHS) *AS TO JURISDICTIONAL DETERMINATION OR ULTIMATE PARENTING PLAN.

Here, the mathematical difference of 5 1/2 months of joint-parenting in Kansas outweighs the 2 1/2 months of joint-parenting or lack of in WASHINGTON. The Court does consider the months after filing and that some of mother's witnesses to Kansas incidents now reside in Washington. The Court finds that Washington should decline jurisdiction to Kansas AND IN FACT HEREBY DOES (LHS). ~~Care of custody of~~

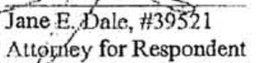
SEE ATTACHED PAGE 3

Date this _______ day of June, 2012.



Commissioner

Presented by:
Engel Law Group, P.S.



Jane E. Dale, #39521
Attorney for Respondent

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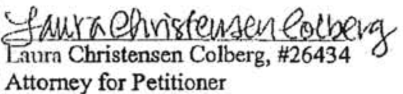

Laura Christensen Colberg, #26434
Attorney for Petitioner

pg 2 of 3

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600 University Street, Suite 1904
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Case Name McDermott Case No. 12-3-01064-3

The court FINDS:

There is no home state.

The child resided 5 1/2 months in Kansas.

The child resided 2 1/2 months in Washington before the action was filed by the Mother.

There is a DVPO in place in WA as to the Mother, but deferring residential contact with the child to the family law portion of the divorce.

WA has in rem and in personam jurisdiction over the child.

The court believes that due to the time differential (5 1/2 months in KS vs 2 1/2 months in WA), there are likely to be more witnesses to the child's upbringing in KS than in WA.

Therefore:

The court declines WA jurisdiction in favor of KS.

The care and custody of the child shall remain with the Mother until a KS order enters. Neither parent shall remove the child from WA. 3 Skype visits per week shall continue (up to 30 min ea) as arranged on Sunday nights.

The Father's contact with the child in WA shall be: from 1 PM to 5 PM June 21, 2012, with Father's mother to do pick-up/drop-off from mother's aunt's home.

The court does not find a basis to restrict or supervise the Father's contact with the child.

The issue of evaluations requested by the Mother is deferred to KS.

DONE IN OPEN COURT this date: June 21, 2012

Presented By:

Laura Christensen Colberg WSBA 26434
For Petitioner/Mother

3/3

JUDGE / COURT COMMISSIONER

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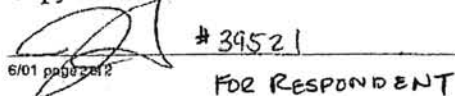

#39521
FOR RESPONDENT

6/01 page 2of2

1084-4

MARRIAGE OF MCDERMOTT
APPENDIX: STATUTORY PROVISIONS

WASHINGTON UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT: RCW TITLE 26, CH. 27

RCW 26.27.021 Definitions

The definitions in this section apply throughout this chapter, unless the context clearly requires otherwise.

(2) "Child" means an individual who has not attained eighteen years of age.

(3) "Child custody determination" means 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. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, a parenting plan, or visitation with respect to a child is an issue. The term includes a proceeding for dissolution, divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, emancipation proceedings under chapter 13.64 RCW, proceedings under chapter 13.32A RCW, or enforcement under Article 3.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(7) "Home state" means 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. A period of temporary absence of a child, parent, or person acting as a parent is part of the period.

(8) "Initial determination" means the first child custody determination concerning a particular child.

RCW 26.27.061. Effect of child custody determination
A child custody determination made by a court of this state that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this state or notified in accordance with RCW 26.27.081 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

RCW 26.27.071. Priority
If a question of existence or exercise of jurisdiction under this chapter is raised in a child custody proceeding, the question, upon proper motion, must be given priority on the calendar and handled expeditiously.

RCW 26.27.201. Initial child custody jurisdiction
(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

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

(c) All courts having jurisdiction under (a) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under RCW 26.27.261 or 26.27.271; or

(d) No court of any other state would have jurisdiction under the criteria specified in (a), (b), or (c) of this subsection.

(2) Subsection (1) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

RCW 26.27.211. Exclusive, continuing jurisdiction
(1) Except as otherwise provided in RCW 26.27.231, a court of this state that has made a child custody determination consistent with RCW 26.27.201 or 26.27.221 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) 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.

(2) A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under RCW 26.27.201.

RCW 26.27.221 Jurisdiction to modify determination.
Except as otherwise provided in RCW 26.27.231, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under RCW 26.27.201(1) (a) or (b) and:(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under RCW 26.27.211 or that a court of this state would be a more convenient forum under RCW 26.27.261; or(2) A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state .

RCW 26.27.231. Temporary emergency jurisdiction.
(1) A court of this state has 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.

(2) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(3) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, any order issued by a court of this state under this section 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 under RCW 26.27.201 through 26.27.221. The order issued in this state

remains in effect until an order is obtained from the other state within the period specified or the period expires.

(4) A court of this state that has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, shall immediately communicate with the other court. A court of this state that is exercising jurisdiction pursuant to RCW 26.27.201 through 26.27.221, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

RCW 26.27.241. Notice -- Opportunity to be heard – Joinder

(1) Before a child custody determination is made under this chapter, notice and an opportunity to be heard in accordance with the standards of RCW 26.27.081 must be given to: (a) All persons entitled to notice under the law of this state as in child custody proceedings between residents of this state; (b) any parent whose parental rights have not been previously terminated; and (c) any person having physical custody of the child.

(2) This chapter does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(3) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the law of this state as in child custody proceedings between residents of this state.

RCW 26.27.251. Simultaneous proceedings

(1) Except as otherwise provided in RCW 26.27.231, a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning

the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under RCW 26.27.261.

(2) Except as otherwise provided in RCW 26.27.231, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to RCW 26.27.281. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(a) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(b) Enjoin the parties from continuing with the proceeding for enforcement; or

(c) Proceed with the modification under conditions it considers appropriate.

RCW 26.27.261. Inconvenient forum

(1) A court of this state which has jurisdiction under this chapter to make a child custody determination 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 motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If 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.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for dissolution or another proceeding while still retaining jurisdiction over the dissolution or other proceeding.\

RCW 26.27.271. Jurisdiction declined by reason of conduct

(1) Except as otherwise provided in RCW 26.27.231 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) A court of the state otherwise having jurisdiction under RCW 26.27.201 through 26.27.221 determines that this state is a more appropriate forum under RCW 26.27.261; or

(c) No court of any other state would have jurisdiction under the criteria specified in RCW 26.27.201 through 26.27.221.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under RCW 26.27.201 through 26.27.221.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (1) of this section, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this chapter.

RCW 26.27.521. Recognition and enforcement
A court of this state shall accord full faith and credit to an order issued by another state and consistent with this chapter that enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under Article 2.

RCW 26.27.531. Appeals
An appeal may be taken from a final order in a proceeding under this article in accordance with expedited appellate procedures in other civil cases relating to minor children. Unless the court enters a temporary emergency order under RCW 26.27.231, the enforcing court may not stay an order enforcing a child custody determination pending appeal.

RCW 26.27.901. Application--Construction
In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.