THE UCCJEA: QUESTIONS, ANSWERS, AND SUGGESTIONS

Presented By:
Renny W. Deese
Reid, Lewis, Dees, Nance & Person, L.L.P.
330 Dick Street, Heritage Square
Fayetteville, NC 28301

Summary

North Carolina is one of the first states to enact the UCCJEA.[1] Among other things, the UCCJEA sets forth very specific rules regarding which court can exercise jurisdiction in a custody action, provides remedies to enforce custody determinations, and creates mechanisms for courts to "communicate and cooperate" with each other. The UCCJEA is applicable in North Carolina to causes of action arising on or after October 1, 1999. The major topics to be addressed in this manuscript are (1) initial jurisdiction and the mandate for exclusive, continuing jurisdiction; (2) modification jurisdiction; (3) emergency jurisdiction; (4) declining jurisdiction; (5) registration and enforcement; and (6) communication and cooperation between courts.

Preliminary Warning About The Turbo Habeas[2] Created by the UCCJEA

The UCCJEA provides for expedited relief whenever there is a question of jurisdiction in a custody case. Either party can request expedited relief regardless of whether there is an emergency. Therefore, counsel should be thoroughly prepared with witnesses, evidence, and law on any

[1] As of the date of this presentation, the following states have enacted some version of the UCCJEA: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington and West Virginia.

[2] Turbo habeas is a term coined by Professor Spector, one of the drafters of the UCCJEA, referring specifically to the expedited enforcement available under §50A-308. I have applied the same term to the manner in which the question of jurisdiction is expeditiously handled so that counsel will not be caught off-guard.

The presenter wishes to acknowledge Mary Craven, at Womble Carlyle Sandridge & Rice, PLLC, for her consent in allowing the reproduction and usage of her manuscript from her presentation at the North Carolina Bar Foundation's seminar entitled "Family Law Practice in the New Millenium" in September 2000.

jurisdictional issue prior to filing an action or requesting any relief. Specifically, the statute provides that, "Upon request of a party, [the question of jurisdiction] must be given priority on the calendar and handled expeditiously." § 50A-107. (Emphasis added).

I. Initial Jurisdiction

A. PRIORITY – HOME STATE

Under the UCCJEA, if the minor child has a home state, jurisdiction is only proper in the home state unless a court in the home state declines to exercise jurisdiction. If a court is making a custody determination, order should contain sufficient findings on which jurisdiction is based. (Foley v. Foley, ____ N.C. App. _____, 576 S.E.2d 383 (March 4, 2003).

· Where Is the Home State of the Child?

The definition of home state has not substantively changed from the UCCJA definition; it is still:

> The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period. §50A-102(7).

In an ideal world, the identification of a home state would be a no-brainer. However, there are factual situations which can create difficulty in ascertaining the home state. Although a child's legal residence is generally that of the parents, the determination of home state is different than the determination of the child or parents legal residence. Cransford v. Cransford, 2000 WL893293, (N.Y.A.D. 3d Dept.).

Examples for discussion:

1. Mother and father residing in separate states with the children traveling between households.

2. Military Service.

3. A child under six months who has lived in multiple states.

One could argue that if the court is struggling to find a home state, there may not be one—hence the reason there are other (although not as desirable) bases for jurisdiction.

· Assuming You Have Identified a Home State, What Next?

If there is a home state, the custody proceeding must proceed in the home state unless the court declines jurisdiction under §50A- 207 or 208. The home state is the only state that can decide the issue of whether the home state should decline jurisdiction. Declining Jurisdiction is discussed infra, on page 9.

· What If There Is No Home State, or the Home State Has Declined to Exercise Jurisdiction?

There are three additional bases which can be used to exercise jurisdiction, but ONLY if there is no home state, or the home state has declined to exercise jurisdiction. These three bases (referred to in this manuscript as "second choice," "third choice," and "last resort") are discussed b elow.

B. SECOND CHOICE: SIGNIFICANT CONNECTION JURISDICTION

If there is no home state, a court can exercise jurisdiction if:

· There is a significant connection by at least one of the individuals[3]; (more than physical presence).

AND

Substantial evidence is available in the state concerning the child's care, protection, training and personal relationship. §50A-201(a)(2).

The UCCJA "best interest" language of the significant connection basis for jurisdiction has been deleted. The Comment notes that the language was deleted because it created confusion by shifting the focus to a substantive custody determination.

[3]Either the child and the child's parents, or the child and at least one parent or a person acting as parent.

· And What Constitutes Substantial Evidence?

In Holland v. Holland, 56 N.C. App. 96, 286 S.E.2d 895 (1982), the court of appeals held the quality of evidence goes beyond the standard of "more than a scintilla" or "any competent evidence." Specifically, the court stated that:

> To be able to enter a well-founded custody order, the trial court must look beyond the declarations of competing parents, seeking to find the real circumstances of the child's welfare. The "substantial evidence" required by the statute, therefore, must be such as would enable the trial court to look to sources within the state that could address each of the statutory aspects of the child's interest, care, protection, training and personal relationships.

Id. at 100, 898.

Given the mandate of Holland, it is hard to imagine that substantial evidence will exist in a state where the child has only lived briefly.

Note the "substantial evidence" does not have to be "fresh" to be meaningful. The UCCJEA used to state that the substantial evidence must relate to the child's "present or future" care. Confusion existed as to whether older evidence could be used to satisfy the "present or future" standard language regarding the "present or future care" of the child has been deleted. The Comment acknowledges that evidence related to the child's past care, protection, housing and personal relationships may be useful. The focus should be on "whether there is sufficient evidence in the state for the court to make an informed custody determination." See §50A-201 and its Comment.

C. THIRD CHOICE: HOME STATE AND SIGNIFICANT CONNECTION HAVE DECLINED

If there is not jurisdiction under the first or second choices, a state has jurisdiction to exercise custody if:

> All courts having [home state] or [significant connection jurisdiction] 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 [the provisions of the UCCJEA for declining jurisdiction]. §50A-201.

D. LAST RESORT: CATCH ALL JURISDICTION

As a last base of jurisdiction, North Carolina may exercise jurisdiction if there is no other state which can exercise jurisdiction under the criteria of any of the previous bases.

- If a State Does Not Have Jurisdiction under Any of the above Bases, but the Parties Have Agreed That the Case Will Be Heard in a Particular State, Will The Consent Confer Jurisdiction?

No. This is subject matter jurisdiction. See Comment to §50A-201. ("[A]n agreement of the parties to confer jurisdiction in a court that would not otherwise have jurisdiction under this Act is ineffective.") (Foley v. Foley, ____ N.C. App. ____, 576 S.E.2d 383 (March 4, 2003))
However, if the parties are in agreement as to where the case should be heard, they may be able to persuade the court with proper jurisdiction to decline jurisdiction under §50A-207 based on the statutory factors, one of which is whether there is any agreement of the parties as to which state should assume jurisdiction.

II. Continuing, Exclusive Jurisdiction

- After North Carolina Has Issued an Order, How Long Will it Retain Jurisdiction over the Matter?

The concept of "exclusive continuing jurisdiction" is central to the UCCJEA. Once North Carolina has made a child custody determination, it will have exclusive continuing jurisdiction until one of two things occurs. It continues until "a court of this state determines that neither the child, the child's parents, or 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 "a court of this state or a court of another state determines that the child, the child's parents, or any person acting as a parent do not presently reside in this state." §50A-202.

As restated in the Comment, exclusive continuing jurisdiction is lost, "[i]f the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence" or when "the child, the child's parents, or any person acting as a parent no longer reside in the original decree state."

· What Does "Reside in the State" Mean?

Under the Comment to §50A-202, even if an individual is domiciled in the state, if they actually live elsewhere, jurisdiction is lost. Specifically, the Comment states that "if all of the [named persons] physically leave the state to live elsewhere, the exclusive, continuing jurisdiction ceases." Read literally, the exclusive continuing jurisdiction is lost the day the last named individual leaves the state. Because the statute focuses on physical presence rather than domicile, it is unclear whether even a temporary job assignment could result in a loss of jurisdiction; the Comment does not provide any time requirement. Note also that once a state loses exclusive, continuing jurisdiction, it cannot be "revived" by a return of a named individual to the state. For example, if the custodial parent moves from North Carolina to state "X", and the non-custodial parent leaves North Carolina to physically live in state "X" but then returns to North Carolina, the exclusive, continuing jurisdiction has been lost. See Comment to §50-A-202.

III. Modification Jurisdiction

· Where Do You File an Action for Modification If There Is a Prior Order?

First, you need to examine the initial custody order carefully and determine whether the initial order was in substantial conformity with the UCCJEA. There are limited circumstances wherein North Carolina may modify another state's order if the other state exercised jurisdiction in substantial conformity with the UCCJEA. Therefore, the first determination is whether the other state's order meets the "substantial conformity" requirement.

If North Carolina decides that another court did not exercise jurisdiction initially in substantial conformity with the UCCJEA, North Carolina is not bound to recognize the order, and may proceed as if the order did not exist. For example, in Brewington v. Serratto, 77 N.C.App. 726(1985), the North Carolina court of appeals held that a Texas order granting the mother custody of the minor child was void, as the court had not exercised jurisdiction in substantial conformity with the UCCJA. In Brewington, the Texas order did not state it was the home state of the minor child, or that it had been the home state within six months prior to commencement of the action, or that Texas had significant connection jurisdiction. Neither was there a finding of factual circumstances existing at the time of the order meeting the jurisdictional requirements. As such, the North Carolina courts did not recognize the Texas judgment, and went on to use a best interests standard in awarding custody to the father as if it were an initial proceeding. Because the Brewington court looked behind the order at the facts existing at the time of the Texas order, it would make sense that a prior order where the facts indicate substantial conformity with the UCCJEA should be entitled to recognition even if it is not apparent from the face of the order.

· Assuming the Initial Order Was in Substantial Conformity with the UCCJEA, When Can a North Carolina Court Modify Another State's Order?

*To modify an order, North Carolina must have jurisdiction under either home state or significant connection AND

*the other state decides: it no longer has exclusive continuing jurisdiction or that another state would be a more appropriate forum under 207; OR

* either state decides that neither the child nor the child's parents, nor anyone acting as parent, "presently reside" in the other state.

To recap, only the other state can decide that North Carolina would be a more appropriate forum if one of the named individuals presently reside in the other state. However, either state may decide that none of the individuals listed above reside in the other state. Note that because of the preference for the continuing jurisdiction of the other state, if a fact situation presents itself where there is any room for advocacy as to whether an individual "presently resides" in the other state, counsel may want to request that the decision be made by the other state, although the statute does not require it.

· What If There Are Two Simultaneous Proceedings?

Unless the court is able to exercise temporary emergency jurisdiction, North Carolina may not exercise jurisdiction if, at the time the North Carolina proceeding was commenced (i.e. filed), a proceeding in a court of another state having jurisdiction in substantial conformity with the UCCJEA had been commenced. The only exception is if the other state proceeding has been terminated or stayed to allow North Carolina to proceed. §50A-206(a). After determining another proceeding has been commenced in another state, the North Carolina court must stay its action and communicate with the other court. Unless the other court declines to act, the North Carolina proceeding is dismissed.

IV. Emergency Jurisdiction

· When Can a North Carolina Court Exercise Emergency Jurisdiction?

A North Carolina court can exercise emergency jurisdiction if the child is present 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 mistreatment or abuse. The comment states this is "extraordinary jurisdiction reserved for extraordinary circumstances." In

filing a request that the court exercise a temporary emergency jurisdiction order, keep in mind there is a mechanism which allows the present address of a party to be sealed if it is alleged under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of the information. See §50A-209.

· How Long Will the Temporary Emergency Order Last?

The term of the temporary emergency order will depend upon whether another proceeding has been filed or whether there has been an adjudication in another state. If so, the UCCJEA requires the court exercising temporary jurisdiction to communicate with the state which has jurisdiction. §50A-204(d).

If there is no prior custody determination and no other proceeding has been commenced, the "temporary order" will remain in effect until an order is obtained from a court having jurisdiction on grounds of initial, modification, or exclusive continuing jurisdiction. The statute provides that if no other proceeding is commenced, the temporary order becomes a final determination after this state becomes the home state, if the order so provides. §50A-204(b) (Emphasis added.)

The statute does not provide the procedure, if any, to have the temporary order designated as a final order. Once the order is a "final order," there are significant consequences in terms of whether there must be a substantial change of circumstance to modify the order and the attachment of continuing exclusive jurisdiction. The wording of the statute suggests that the court can include language to the effect that if no action is commenced in another state, the temporary emergency order simply "becomes a final determination if it so provides, and this state becomes the home state of the child." Id. Because the court would seemingly need some "proof" that it did become the home state of the child, it seems the prudent course would be to file a verified motion at the time North Carolina becomes the home state of the child, alleging the existence of home state jurisdiction and requesting the court enter the order as final, such that the order can affirmatively recite the existence of home state jurisdiction.

If there is a previous determination, or custody proceeding has been commenced in another state, there is not a possibility that the North Carolina order will become a final order. As stated previously, the court must "immediate ly communicate" with the other court. The emergency order must specify a period considered adequate to obtain an order from a state with jurisdiction. The order will only remain in effect until an order is obtained from the other state or the period expires. (For example of treatment by court of another state issuing emergency order when North Carolina courts had continuing exclusive jurisdiction see Ruth v. Ruth, ____ N.C. App. ____, 579 S.E.2d 909 (May 20, 2003))

V. Declining Jurisdiction

· When Can a Court Decline Jurisdiction?

Under the UCCJEA, a court can decline jurisdiction on two grounds: "Inconvenient Forum" or based upon a party's "Unjustifiable conduct."

· What Is the Procedure for Raising the Issue of Inconvenient Forum?

Any party, and either court, can raise the issue of inconvenient forum. §50A-207(a). There does not have to be a hearing to decide this issue; the statute merely provides that the court "shall allow the parties to submit information." §50A-207(b). The court will consider factors set forth below. The Old UCCJA factors are set forth for comparison.

UCCJEA FACTORS

1. Whether domestic violence has occurred and is likely to continue in the future and which state could protect the parties and the child.
2. Length of time child has resided outside the state.
3. Distance between the 2 courts.
4. Relative financial circumstances of the parties.
5. Any agreement of parties regarding the state which will assume jurisdiction.
6. Nature and location of the evidence required to resolve the pending litigation.
7. Ability of the respective courts to decide the issue expeditiously and procedures necessary to present evidence.
8. Familiarity of respective courts with facts and issues in the pending litigation.

OLD UCCJA FACTORS[4]

1. If another state is or recently was the home state.
2. If another state has a closer connection.
3. Substantial evidence is more reasonably available.
4. If the parties have agreed on another forum.
5. If exercising jurisdiction would contravene any purposes of UCCJA.

[4] "The court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose, it may take into account the following factors, among others...."

The list is not meant to be exclusive. The Comment provides specific directives to consider the communication and cooperation provisions in considering subparagraph 3, and to consider different procedural and evidentiary laws, and the flexibility of the dockets in considering subparagraph 7. If a North Carolina court declines jurisdiction, then it simultaneously issues a conditional stay of the North Carolina proceedings rather than dismissing the proceedings. In declining jurisdiction and issuing a conditional stay, the court may impose any other conditions just and proper. Also, note there is no longer an ability to request fees and costs if the court declining jurisdiction is a clearly inappropriate court; the rationale being that if the court has jurisdiction it cannot be clearly inappropriate court.

A state exercising temporary emergency jurisdiction may use this provision to request that the other court with jurisdiction decline to act. As such, if the facts justify an exercise of emergency jurisdiction, counsel may want to consider the desirability of retaining local counsel in the state with jurisdiction to assist in the decision of where the matter should be heard.

If the court with jurisdiction has not adopted the UCCJEA, the other court may be looking at different factors than the North Carolina court. Counsel needs to look at the statute and case law in the other state if there will be a request that a court outside this state decline jurisdiction. However, because both the UCCJA and UCCJEA set forth non-exclusive factors, it should not be inappropriate to request a non-UCCJEA court to examine the additional factors set forth in the UCCJEA.

There should be specific findings on all factors set forth in the UCCJEA to be prudent. See, Watkins v. Watkins, 120 N.C. App. 475, 462 S.E.2d 687 (1995) (in this UCCJA case, the trial court's findings did not support its decision to relinquish jurisdiction where, although the child and a parent had resided in Texas for over 2 ½ years, the court ignored evidence that mother was unable to take full advantage of her visitation provision because of her financial situation, there was no evidence regarding where the extended family resided, and the trial court failed to inquire about relevant information or witnesses in North Carolina. Also, because the factors in the UCCJA were intended to provide guidance and were not intended to be exhaustive, where there is evidence the parties are uncooperative, the court should look behind such facts as the child's home state.) See also Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985) (the trial court did not abuse its discretion in refusing to decline jurisdiction under the UCCJA where parties lived primarily in Florida and only lived in North Carolina for 13 months.)

- What Showing Must Be Made for a North Carolina Court to Decline Jurisdiction Due to a Party's Conduct?

The standard is "unjustifiable conduct." If a court has jurisdiction because a person seeking to invoke has engaged in unjustifiable conduct, the court shall decline to exercise jurisdiction unless (1) the parties have acquiesced in the exercise of jurisdiction; (2) all other states with jurisdiction have declined to exercise it; or (3) no other state has jurisdiction. § 50A-208.

- What Are the Financial Consequences of Court Declining Jurisdiction Due to "Unjustifiable Conduct?

The financial consequences can be severe. If a court dismisses a petition or stays a proceeding because it declined to exercise its jurisdiction, it "shall assess against the party 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." §50A-208(c). Note that the statute does not provide for financial consequences to the party acting unjustifiably if there was no other state with jurisdiction, or if the states that would otherwise have jurisdiction decline to exercise it.

The attorneys fees provision in §50A-208 is derived from the International Child Custody Abduction Remedies Act, (ICARA), 42 USC§11607(b)(3). The UCCJEA has a slightly different laundry list of costs which may be covered than the ICARA. For cases decided under the ICARA, see Rydder v. Rydder, 49 F.3d 369(Iowa 1995)(award of $18,487.00 attorney fees and expenses of $9,667.40 to father in successful suit for return of children to him in Poland were so excessive as to constitute abuse of discretion); Freier v. Freier, 985 F.Supp. 710 (Mich 1997) (Interpreter's costs were not recoverable by prevailing party where interpreter was not appointed by the court); Seagenweit v. Seagenweit, 63 F.3d. 719(Iowa 1995) (father was entitled to award of costs as prevailing party where father won in district court but case was mooted while on appeal due to the minor child's tragic death).

VI. Registering A Child Custody Order from Another State or Country in North Carolina

You can register an order in North Carolina with or without a request for enforcement. Once again, note that the UCCJEA only applies to determinations where there has been notice and an opportunity to be heard. §50A-205. As such, although some states, like North Carolina, provide the court may issue an enforceable custody order without notice and opportunity to be heard, an order is entitled to interstate enforcement and non-modification under the UCCJEA only if there has been notice and an opportunity to be heard. §50A-205 and its Comment.

- What Do You Need to Register an Order?

1. A letter requesting registration.

2. Two copies of the Order (1 Certified).

3. A verified statement that to the best of the knowledge and belief of the person seeking registration that the order has not been modified.

4. The name and address of the person seeking registration[5] and any person or parent acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

· What Happens After You Provide the Above Documents to the Clerk?

1. The registering county will file it as a foreign judgment.

2. You will need to serve notice on the persons listed above, which includes notice of their opportunity to contest the registration. Specifically, the notice must state three things: (1) that a registered determination is enforceable as of the date of registration in the same manner as a determination issued by North Carolina; (2) that a hearing must be requested within 20 days after service of the notice to contest the validity of the registered determination; and (3) that failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted. §50A-305(c).

· How Long Does a Person Have to Contest Registration?

A person seeking to contest the validity of a registered order only has 20 days after service to request a hearing on its validity.

· How Can You Contest Registration?

Only on very limited grounds. The three grounds listed below are the only defenses to registration. The statute places the burden on the person contesting the registration to establish that one of the three defenses to the order is applicable. Specifically, the defenses are:

1. The issuing court did not have jurisdiction; (or)

2. The determination sought to be registered has been vacated, stayed or modified by a court having jurisdiction to do so; (or)

3. The person contesting registration was entitled to notice but was not given notice in accordance with the standards of 50A-108 in the proceedings before the court that issued the order sought to be registered. (See the Comment for limitations on the lack of notice defense under local law if due to the acts of the party raising the defense.)

[5]The information may be sealed by following the procedures of §50A-209.

The statute does not provide any leeway to argue at the registration hearing that the order was obtained by fraud or wrongful conduct; presumably if the person had notice of the proceedings, the order in such a case should have been appealed or those objections should have been made at the time that the order was issued. Moreover, the confirmation of the registered order will preclude contest of the order with respect to any matter which could have been asserted at registration. §50A-305(f).

VII. Communication Between Courts

· When is Communication Required?

Communication between courts is required if a North Carolina court (1) is exercising temporary emergency jurisdiction and a proceeding has been commenced or a determination has been made in another state; (2) if there are simultaneous proceedings; and (3) if in a proceeding for enforcement, the court becomes aware of a proceeding to modify in another state. Pursuant to the Comment, communication is not required but is "strongly suggested," on the issue of declining jurisdiction based on an inconvenient forum. Indeed, it is hard to imagine how the court could properly consider the factors in §50A-207 regarding issues such as the respective abilities of the courts to decide the matter expeditiously, and the familiarity of the courts with the issues and facts, without communication.

· What Type of Record Must Be Made of the Communication?

The statute does not mandate the type of communication or the type of record to be made. The two courts could communicate by facsimile, telephone, e-mail, letter, video conference, or in person. Because §50A-110(d) requires a record if the communication is substantive, the trial court may want to consider choosing the most thorough record practical for the parties. Both a court reporter transcribing the telephone conversation, or an electronic recording will give the courts and the parties complete records. If there is no verbatim transcript or record, this author would suggest a request be made to the court that the following, at minimum, be apparent from the record: (1) the date, time and length of the communication; (2) the parties to the communication; (3) the topics discussed in the communication; (4) each court's position on each of topics discussed; (5) any resolution of any of the topics; and (6) the respective evidence and records available (and considered) by each court as of the communication.

The court is given the option of allowing the parties to participate in the communication. If the participation in the communication does not rise to the level of a hearing where the parties can present facts or evidence, the parties must be given the opportunity to present facts and legal arguments prior to a decision. §50A-110(b). Although this may be done by affidavit or memorandum, the Comment stresses that the parties must be given the opportunity to 'fairly and fully" present facts and arguments.

Given the above, if you know the courts are going to communicate, consider a motion to request how it will occur. You can also attempt to arrange for a transcript, and may want to consider whether you need local counsel presenting evidence/argument on the other end.

VIII. Cooperation Between the Courts

The UCCJEA recognizes the cost attendant to litigating interstate matters. The statute envisions that if evidence is located outside of North Carolina, the court should consider the most efficient method of getting the evidence. For example, if a North Carolina court needs evidence located in Hawaii, it may request that a Hawaiian court conduct an evidentiary hearing. Also, if North Carolina has exclusive continuing jurisdiction and the child is now living elsewhere, the court could request a child custody evaluation be ordered in another state.

It is not clear the procedures which will make this cooperation happen. Presumably, there will need to be local counsel in the other state who will issue subpoenas, examine witnesses, present evidence, etc. However, the statute reads as if one court could simply request that another court order an individual to produce evidence, etc. As the Comment provides this provision is at the "very" heart of the UCCJEA," it is hoped that the sta tute will be read broadly to minimize the expense to the parties.

The statute states that "a court of this state" may request assistance from another court; however, the parties will probably need to request the North Carolina court to make the request. Although the court is authorized to make the request *sua sponte,* the court will not know the location of the evidence and the limitations on certain witnesses, unless the matters are brought to its attention. The following actions may be performed by court of another state under §50A-112:

- Another state can hold an evidentiary hearing and forward a certified copy of the transcript.
- Another state can order a person to give evidence.
- Another state can order an evaluation.
- Another state can order a party to appear with the child.

IX. Enforcement

Enforcing out of state child custody orders has gotten much speedier. Prior to attempting to enforce an out of state order, you need to make sure the order sought to be enforced was entered in substantial conformity with the UCCJEA. A North Carolina court shall not enforce the order of the

other state unless the substantial conformity requirement has been met. The enforcement provisions provide for authority to enter orders for temporary visitation, expedited enforcement, and "pick up" orders.

Temporary Visitation

Even if a North Carolina court does not have jurisdiction to modify another state's order, it can still enforce an order by setting a specific visitation schedule when the prior order has failed to do so or providing for make-up or substitute time when a party has been deprived of visitation or custody of the child. §50A-304 and Comment.

· How Long Will a Temporary Visitation Order Remain in Effect?

When a court sets a visitation schedule, the court is to provide for a period which it considers adequate to allow an order from a state having jurisdiction under initial or modification jurisdiction. The temporary visitation order will last until there is an order from the other court, (which has jurisdiction) or until the period expires. After obtaining a temporary visitation order, you may want to request that the North Carolina court request the other court to issue the same order, thus allowing a simultaneous order in both proceedings.

Expedited Enforcement (a.k.a. Turbo Habeas)

· How Can You Get Expedited Relief?

File a verified Petition. The petition must attach certified copies (or copies of certified copies) of all orders sought to be enforced and of any order confirming registration. Pursuant to §50A-308, the Petition must state:

(1) Whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(2) whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this Article and, if so, identify the court, the case number, and the nature of the proceeding;

(3) whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding;

(4) the present physical address of a child and the respondent, if known;

(5) whether relief in addition to the immediate physical custody of the child and attorneys' fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(6) if the child-custody determination has been registered and confirmed under G.S. 50A-305, the date and place of registration.

· What Happens After the Petition Is Filed?

The court shall issue an order directing the respondent to appear at a hearing (with or without the child). The court may also enter "any order necessary to ensure the safety of the parties and the child." §50A-308(c).

· What Are the Requirements of the Order Directing the Respondent to Appear?

The order must state the time and place of the hearing. This will require some thinking given that at the time the order is signed, it may not be clear when the order will be served on the respondent. The enforcement hearing will take place within 24 hours after service of the petition and order unless that date is impossible. §50A-308(c). The petitioner can request the date of the hearing be extended under 50A-308; however, if a petition for a warrant is filed as well, the petitioner may not request additional time. Also, the order must advise that the petitioner may take immediate physical custody of the child and may order the payment of fees, cost and expenses under §50A-312 unless the respondent appears at the hearing and establishes that: the custody determination has not been registered and confirmed and the court did not have jurisdiction, the determination has been vacated, etc., did not get notice, or the order was registered, but has been vacated, etc. §50A-308.

· What Defenses Are Available at an Enforcement Hearing?

Only three defenses are available if the order is not registered; namely the same defenses that are available at a confirmation of registration hearing, and that are set forth in the order requiring the respondent to appear. §50A-310. There is only one defense available if the order is registered; to-wit, that the order sought to be enforced was vacated, stayed, or modified by a court with jurisdiction. §50A-308. If the respondent fails to establish, one of the defenses exists, upon a finding that a petitioner is entitled to physical custody, the court shall order that the petitioner may take custody. §50A-319(a).

· What about Fees at an Enforcement Hearing?

The court shall award fees, costs and expenses to the "prevailing party" and may grant additional relief. The requirement that the court award fees and costs to the prevailing party unless the other party establishes the award is clearly inappropriate is set forth in §50-A-312. This provision, similar to the "unjustifiable conduct" attorneys fees provision, is derived from the ICARA, discussed *infra*.

· What if there is a concern that upon receiving notice of the enforcement hearing, a party will flee?

If there is concern about the child's safety, or that a party will flee with the child, one can file a verified application for a warrant to take physical custody of the child when filing the petition. §50A-311. The standard is whether the child is "immediately likely to suffer serious physical harm or be removed from the state." Id.

In order to issue a "pick up" warrant, the court must hear testimony of the petitioner or other witness and find the child is imminently likely to suffer serious physical harm or be removed from the state. The testimony may be heard in person, via telephone, or any other means acceptable under North Carolina law. §50A-311 and its Comment.

The application for the warrant must include the information provided in the petition. §50A-311(b). The warrant must recite the facts supporting the emergency, direct law enforcement officers to take custody of the child, and provide placement for the child. §50A-311(c). Note that the court can authorize officers to enter private property if there is a finding that a less intrusive remedy is not effective.

In issuing the "pick up" warrant, the court can also impose conditions upon the petitioner to insure the petitioner does not leave the jurisdiction with the child pending the hearing. In certain circumstances, it may not be appropriate for placement to be with the petitioner due to the same concerns of flight. The statute does not require that any findings be made justifying the conditions placed upon the petitioner. Examples of conditions cited in the Comment to §50A-311 include cash bonds and passport surrender.

· What Happens after the Warrant Is Executed?

After the warrant is executed upon, the respondent must immediately be served with the petition, warrant and order. §50A-311(d). The enforcement hearing must be held the day after the pick up order is executed upon unless it is impossible. §50A-311(b).