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PARENT AND CHILD—INTERSTATE CUSTODY: THE NORTH DAKOTA SUPREME COURT DECLINES TO DECIDE WHETHER THE SIX-MONTH TEMPORARY PRESENCE OF A CHILD IN NORTH DAKOTA IS SUFFICIENT TO EXERCISE HOME STATE JURISDICTION

Wintz v. Crabtree, 1999 ND 85, 593 N.W.2d 355

I. FACTS

Sandra Jean Wintz (Sandra) and William Jim Crabtree (Bill) were married in Denmark[1] in 1984.[2] Two children were born to this marriage,[3] Nadia[4] and William.[5] The couple lived in Germany where Bill served in the military.[6] The couple eventually separated and signed an agreement stipulating how their assets would be divided and establishing custody of the children.[7]

Sandra retained sole care, custody, and control of the children after the separation.[8] Sandra and the children returned to the United States

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1. *See* Appellant's Brief, app. at 15, 27, Wintz v. Crabtree, 1999 ND 85, 593 N.W.2d 355 (No. 980244).

2. *See Wintz*, ¶ 2, 593 N.W.2d at 356.

3. *See id.*

4. *See id.* Nadia was born August 4, 1986. *See* Appellant's Brief, app. at 25, *Wintz* (No. 980244).

5. *See Wintz*, ¶ 2, 593 N.W.2d at 356. William, also known as "Ricky," was born May 3, 1989. *See* Appellant's Brief, app. at 25, *Wintz* (No. 980244).

6. *See Wintz*, ¶ 2, 593 N.W.2d at 356. Bill served in the Air Force and was stationed in Germany for a total of six and a half years. *See* Appellant's Brief, app. at 48, *Wintz* (No. 980244).

7. *See Wintz*, ¶ 2, 593 N.W.2d at 356. The Separation Agreement was entered on March 23, 1992, and was prepared by an Air Force Judge Advocate General (JAG) Officer. *See* Appellant's Brief, app. at 15, 65, *Wintz* (No. 980244).

8. *See Wintz*, ¶ 2, 593 N.W.2d at 356. The separation agreement also outlined Bill's and Sandra's agreement for the visitation of the children. *See* Appellant's Brief, app. at 16-17, *Wintz* (No. 980244). As agreed by the couple, Bill was entitled to have the children the first and third weekend of every month, alternating holidays, and four weeks during summer vacation every year. *See id.* The agreement further provided conditions for the exchange of the children and stated that Bill would be responsible for the expenses in the exercise of his visitation rights. *See id.* at 17.

Although never ordered by a court, *see id.*, app. at 42, the separation agreement stated that Bill would make a monthly $400 payment to Sandra as child support, *see id.*, app. at 17. The Agreement provided that "[s]hould an action for support or divorce be filed in a court of law, both parties agree that child support shall be set according to the child support guidelines effective in that particular jurisdiction." *Id.* The separation agreement further stated that Bill would send an additional monthly payment of $150 to Sandra as spousal support for a period of 12 months or until remarriage, divorce, or death. *See id.*

Also contained in the separation agreement was the following language pertaining to court ratification:

> In the event that an action for divorce or dissolution of marriage is instituted by either party against the other, the parties hereto agree that they shall be bound by all the terms of this Agreement and that this Agreement shall not be merged in any decree or judgment that may be granted in such action, but shall survive the same and shall be forever binding and conclusive on the parties, but nothing herein shall be construed to prevent the decree or judgment in any such action from incorporating in full or in substance the

following the separation.[9] In 1993, Sandra went to Mexico and obtained a divorce.[10] The divorce decree provided that Sandra would retain custody of the children.[11] Relying on the divorce decree, both Bill and Sandra remarried.[12] From 1993 to 1997, the children lived with Sandra in New York, California, and Arizona.[13]

Pursuant to an agreement between Sandra and Bill that provided that Bill would "[h]ave extended visitation/custody for the [19]97/98 school year," the children came to live with their father in Minot, North Dakota.[14] The agreement also stated, "If either child desires to stay beyond the school year, additional arrangements will be made by the maternal parents."[15] In May 1998, Sandra asked when the children

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terms of this Agreement.

Id., app. at 20.

9. *See Wintz*, ¶ 2, 593 N.W.2d at 356. Sandra returned to her home state of New York where she and the children resided for approximately three years before moving to California for a short time and then to their current home in Arizona. *See* Appellant's Brief at 1, app. at 26, *Wintz* (No. 980244).

10. *See Wintz*, ¶ 2, 593 N.W.2d at 356. The divorce decree was entered July 13, 1993, in Tlaxcala, Mexico; judgment was entered by default because Bill did not appear. *See* Appellant's Brief, app. at 11-12, *Wintz* (No. 980244). Neither Bill nor Sandra had ever lived in Mexico. *See id.* at 1.

11. *See Wintz*, ¶ 2, 593 N.W.2d at 356-57. The relevant portion of the divorce decree stated: "[T]he minor children NADIA CHERI and WILLIAM RICHARD shall remain with and under the custody of their mother: 'SANDRA JEAN CRABTREE.'" Appellant's Brief, app. at 13, *Wintz* (No. 980244).

12. *See Wintz*, ¶ 2, 593 N.W.2d at 357.

13. *See id.* ¶ 3. According to Bill, the children visited him in Germany for approximately two months in 1995. *See* Appellant's Brief, app. at 25, *Wintz* (No. 980244). Sandra, however, testified that the duration of the summer visit was six weeks, rather than two months. *See id.*, app. at 81. Other than this visit, the children lived exclusively with their mother prior to coming to North Dakota to live with Bill and his wife for the 1997-1998 school year. *See* Appellee's Brief at 2, *Wintz* (No. 980244).

14. *Wintz*, ¶ 3, 593 N.W.2d at 357 (quoting Extended Visitation/Custodial Agreement, Appellant's Brief, app. at 24, *Wintz* (No. 980244)). Bill was transferred from Germany to Minot Air Force Base in August of 1997. *See* Appellant's Brief, app. at 28, *Wintz* (No. 980244).

15. *Wintz*, ¶ 3, 593 N.W.2d at 357 (quoting Extended Visitation/Custodial Agreement, Appellant's Brief, app. at 24, *Wintz* (No. 980244)). Bill prepared the Extended Visitation/Custodial Agreement after approximately 12 months of negotiation with Sandra. *See* Appellant's Brief, app. at 90-91, *Wintz* (No. 980244); Appellee's Brief at 2, *Wintz* (No. 980244). Sandra testified that Bill wanted the agreement to include the statement about the children staying with him beyond the school year. *See* Appellant's Brief, app. at 91, *Wintz* (No. 980244). Her acquiescence to allow that statement in the Agreement was a way to "appease" Bill, but she had no intention of allowing either of her children to remain with Bill, even if they had expressed a desire to do so:

> Q And you had previously agreed to—isn't it true that if the children wanted to stay longer for another school year that this is something that could be considered as well. Is that right?
> A [Sandra] No, I would not really consider it.
> Q Well, didn't you write a letter to Bill on February 5th stating that it was for one year unless the children wanted to stay for another school year.
> A [Sandra] Unless the children—unless the children had a desire, but I still wouldn't do it. It was just a way to appease him, cause I knew that they would never have that desire.
> Q But you did appease him in that there was some confusion about exactly when the children would be returning to your custody. Isn't that correct?
> A [Sandra] Not really. I was absolutely certain I would get my kids at the end of May. I had no reason to think otherwise and we were counting the days. . . .

Id., app. at 91-92.

would be returned to her.[16] Bill asked if the children could stay with him for another year, but Sandra declined.[17]

Subsequently, Bill filed a motion in North Dakota district court to modify the custody order.[18] Sandra responded, alleging that the district court lacked jurisdiction.[19] Agreeing with Sandra, the district court dismissed Bill's motion.[20] The district court decided that it would not exercise jurisdiction to modify custody because Arizona was the "home state" of the children when the motion was filed.[21] Also, the district court declined jurisdiction because it considered North Dakota an inconvenient forum under North Dakota Uniform Child Custody Jurisdiction Act.[22]

Bill appealed to the North Dakota Supreme Court,[23] arguing that under the Uniform Child Custody Jurisdiction Act (UCCJA)[24] and the Parental Kidnapping Prevention Act (PKPA),[25] North Dakota was the children's "home state." Therefore, he argued, that the district court erred in determining that Arizona, rather than North Dakota, was the children's home state.[26] Bill also asserted that the district court abused its discretion in declining to exercise jurisdiction on the basis that North Dakota was an inconvenient forum.[27]

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16. *See Wintz*, ¶ 3, 593 N.W.2d at 357. As early as March or April of 1998, Bill had begun asking Sandra about letting the children stay with him beyond the end of the school year, but Sandra refused, repeatedly telling him that she wanted the children returned to her at the end of the school year. *See* Appellee's Brief at 3, *Wintz* (No. 980244).

17. *See Wintz*, ¶ 3, 593 N.W.2d at 357.

18. *See id.* ¶ 4. Bill filed a Rule 3.2 motion to Modify Divorce Judgment on April 29, 1998. *See* Appellant's Brief, app. at 3, *Wintz* (No. 980244). Prior to this, Bill sent legal documents to Sandra, including a proposed motion to modify divorce decree and a stipulation to change custody. *See* Appellee's Brief at 3, *Wintz* (No. 980244). Sandra refused to sign the stipulation. *See id.* After the Motion to Change Custody was filed, Bill informed Sandra that he would not be returning the children. *See id.*

19. *See Wintz*, ¶ 4, 593 N.W.2d at 357. Sandra responded by a limited appearance for the sole purpose of contesting jurisdiction. *See* Appellant's Brief, app. at 27, *Wintz* (No. 980244). Neither party was ever a legal resident of North Dakota. *See* Appellee's Brief at 5, *Wintz* (No. 980244). Bill's legal residence is the state of Texas. *See* Appellant's Brief, app. at 60, *Wintz* (No. 980244).

20. *See Wintz*, ¶ 4, 593 N.W.2d at 357.

21. *See id.* (restating the findings of the district court).

22. *See id.* Recently, Chapter 14-14 of the North Dakota Century Code, Uniform Child Custody Jurisdiction Act (UCCJA), was repealed. *See* 1999 N.D. Laws ch. 147, § 3. It was replaced by Chapter 14-14.1 of the North Dakota Century Code, Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), which became effective August 1, 1999. *See id.* § 1. The most significant change is that the UCCJEA gave jurisdictional priority and exclusive continuing jurisdiction to the home state. *See* Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301, 305 (1999).

23. *See* Appellant's Brief, app. at 33, *Wintz* (No. 980244).

24. *See supra* note 22 and accompanying text.

25. Pub. L. No. 96-611, 94 Stat. 3568 (1980) (codified as amended at 28 U.S.C. § 1738A (1994 & Supp. IV 1998)).

26. *See* Appellant's Brief at 3-5, *Wintz* (No. 980244).

27. *See id.* at 6-11.

After briefly reflecting on the question of whether North Dakota had jurisdiction, the North Dakota Supreme Court announced that it need not decide whether the district court erred in holding that it did not have jurisdiction to modify custody.[28] Rather, because the district court declined to exercise jurisdiction based on its conclusion that North Dakota was an inconvenient forum,[29] the North Dakota Supreme Court focused its review on whether the district court abused its discretion on the inconvenient forum finding.[30] After reviewing the record, the court *held* that the district court did not abuse its discretion in finding that North Dakota was an inconvenient forum[31] and affirmed the dismissal of the motion to modify custody.[32]

II. LEGAL BACKGROUND

The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act were designed to promote judicial consistency in child custody determinations[33] and to ensure that such determinations would be honored in all states.[34] An important element of both of these provisions is the application of "home state" jurisdiction, which is one of the bases a court uses to decide if it has the jurisdictional authority to render a child custody determination.[35] Unfortunately, courts have reached conflicting results concerning what is required to establish home state jurisdiction.[36]

A. THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PARENTAL KIDNAPPING PREVENTION ACT

The Uniform Child Custody Jurisdiction Act was developed as a model act by a group of scholars as a solution to jurisdictional issues surrounding interstate child custody disputes.[37] The primary goals of

28. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 7, 593 N.W.2d 355, 358.

29. *See id.* ¶¶ 7-8. "Even assuming North Dakota arguably is the children's home state, the [district] court nevertheless concluded North Dakota should decline jurisdiction because it is an inconvenient forum." *Id.* ¶ 7.

30. The decision to decline to exercise jurisdiction on inconvenient forum grounds is within the trial court's discretion and will be overturned only it the court has abused its discretion. *See id.* ¶ 8.

31. *See id.* ¶ 11.

32. *See id.* ¶ 13.

33. *Compare* N.D. CENT. CODE § 14-14-01(1)(a)-(i) (1997) (repealed 1999) (listing the goals of the UCCJA), *and* UNIF. CHILD CUSTODY JURISDICTION ACT § 1, 9 U.L.A. 271 (1999), *with infra* text accompanying notes 50-51 (enumerating congressional findings and goals for the PKPA).

34. *See* Stoner, *supra* note 22, at 303 (discussing the historical origins of the UCCJA and its inadequacies which prompted the enactment of the PKPA).

35. *See* Stoner, *supra* note 22, at 304.

36. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 7, 593 N.W.2d 355, 357-58.

37. *See* Stoner, *supra* note 22, at 302.

the UCCJA were to avoid jurisdictional competition, promote cooperation between courts, assure that litigation concerning child custody occurs where the child and the family have the closest connection, discourage continuing custody controversies, deter parental abductions of children, avoid relitigation of issues already decided in other jurisdictions, facilitate the enforcement of other state's custody decrees, promote the exchange of information between courts, and create uniform child custody laws.[38] The UCCJA was meant to end the jurisdictional power struggles between states involved in interstate custody disputes.[39] The UCCJA was adopted by North Dakota in 1969[40] and was in effect until August 1, 1999.[41]

Of the purposes enumerated by the UCCJA, one primary concern was to prevent parental child snatching for the purpose of obtaining a more favorable forum following a divorce action.[42] The UCCJA also sought to thwart repeated custody disputes, which are extremely harmful to children.[43] The UCCJA attempted to achieve this purpose by establishing jurisdictional rules requiring custody litigation to take place in the forum with the most significant contacts or connections with the child.[44]

Even under the UCCJA, however, courts were not required to extend full faith and credit to custody decrees from other states.[45] The UCCJA also failed to address the problem of continuing jurisdiction and "the

38. *See* N.D. CENT. CODE § 14-14-01(1)(a)-(i) (1997) (repealed 1999); UNIF. CHILD CUSTODY JURISDICTION ACT § 1, 9 U.L.A. 271 (1999).

39. *See* Stoner, *supra* note 22, at 301.

40. *See* 1969 N.D. Laws, ch. 154. The UCCJA was also adopted by the other 49 states, the District of Columbia and the Virgin Islands. *See* Stoner, *supra* note 22, at 302.

41. *See supra* text accompanying note 22.

42. *See* Stoner, *supra* note 22, at 302. The policy behind the UCCJA is the same as that of the PKPA, which is "to deter, if not prevent, 'child snatching.'" State v. Rathjen, 455 N.W.2d 845, 848 (N.D. 1990) (quoting State *ex rel.* Valles v. Brown, 639 P.2d 1181, 1183 (N.M. 1981)).

43. *See* Stoner, *supra* note 22, at 302 (citing Henry H. Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 300 n.15 (1981)).

44. *See* Stoner, *supra* note 22, at 302-03.

45. *See* Stoner, *supra* note 22, at 303. This was initially in part because some states were slow to enact the UCCJA, which created "safe harbors" for parents seeking to move their children to another forum where they could attempt to modify existing custody decrees. *See* Greg Waller, Note, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Interstate Adoption Proceedings*, 33 HARV. J. ON LEGIS. 271, 279 (1996)). Where the UCCJA was adopted, states often enacted a modified version of the act, which undermined the act's uniform application. *See id.* Additionally, even where uniform versions of the UCCJA were enacted, courts often interpreted identical provisions differently than courts in other states. *See id.*

potential for concurrent jurisdiction between two states."[46] The purported gaps in the UCCJA, which allowed contestants to circumvent the Act's purposes, prompted Congress to enact the Parental Kidnapping Prevention Act[47] in 1980.[48] The PKPA mandates which custody orders will have the full faith and credit of sister states.[49] The historical and statutory notes to the PKPA provide congressional findings detailing the necessity for establishing national standards for determining which courts should exercise jurisdiction in interstate child custody matters.[50] The stated purposes of the PKPA are essentially the same as those of the

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46. Luna v. Luna, 1999 ND 79, ¶ 10, 592 N.W.2d 557, 561 (citing Roger M. Baron, *Child Custody Jurisdiction*, 38 S.D. L. REV. 479, 489 (1993) ("Congress closed the loopholes which had evolved under the UCCJA, strengthening the exclusive nature of continuing jurisdiction.")). Concurrent jurisdiction arises when more than one jurisdictional authority may have grounds to assert jurisdiction. *See* Stoner, *supra* note 22, at 312; *see also In re* Marriage of Schoeffel, 644 N.E.2d 827, 830 (Ill. App. Ct. 1994) (acknowledging that more than one state may have jurisdiction under the UCCJA). For example, under the UCCJA, jurisdiction may be assumed under four bases: (1) "home state," (2) "significant connection," (3) emergency, or (4) residual. *See infra* note 57. Therefore, a court in the child's home state has jurisdiction to modify a child custody decree. *See* N.D. CENT. CODE § 14-14-03(1)(a) (1997) (repealed 1999) (quoted *infra* note 57). However, a court in another state to which the child has a substantial connection may also assert jurisdiction. *See id.* § 14-14-03(1)(b) (quoted *infra* note 57). Aggressive litigants and receptive courts creatively exploited this loophole, which had evolved under the UCCJA. *See* Baron, *supra*, at 489.

47. *See Luna*, ¶ 10, 592 N.W.2d at 561 (citing Annotation, *Child Custody: When Does State That Issued Previous Custody Determination Have Continuing Jurisdiction Under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A*, 83 A.L.R. 4th 742, 748 (1991) (stating that the UCCJA was enacted to thwart a "national epidemic of parental kidnapping" and that the PKPA was later added in an attempt to solve still existing problems under the UCCJA)).

48. *See supra* note 25.

49. *See* Stoner, *supra* note 22, at 303.

50. *See* Pub. L. No. 96-611, § 7, 94 Stat. 3568 (1980) (codified as amended at § 1738A (1994 & Supp. IV 1998). Congress found: (1) there was a growing number of child custody disputes; (2) decisions rendered by courts were often inconsistent and conflicting; (3) parties involved in custody disputes frequently resorted to seizing and concealing their children; and (4) courts had not given full faith and credit to custody decisions made by sister states which caused burdens to commerce and harmed the welfare of involved children and their parents. *See id.* Therefore it was necessary to establish national standards for courts to use in determining their jurisdiction to decide such custody issues, and to ensure that such decisions were given their full effect by other states. *See id.*

UCCJA.[51] Custody orders are entitled to the full faith and credit of other states if they substantially comply with the PKPA.[52]

Against this statutory backdrop, the element of home state status is an important factor in determining if a state has jurisdiction.[53] Under the UCCJA, the determination of the child's home state is just one of four bases on which a court may establish jurisdiction.[54] Under the PKPA, however, the home state is given priority over the other bases, thus making the question of home state status central in determining whether a state has jurisdiction.[55] According to the PKPA, a state may not exercise jurisdiction under the other bases of jurisdiction if another state remains the child's home state.[56]

B. "HOME STATE" JURISDICTION

Under the UCCJA, jurisdiction may be assumed under four bases: (1) "home state," (2) "significant connection," (3) emergency, or (4) residual.[57] The bases for jurisdiction in the PKPA are essentially the

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51. *See id.* The stated purposes of the PKPA are to:

> (1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;
> (2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;
> (3) facilitate the enforcement of custody and visitation decrees of sister States;
> (4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
> (5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and
> (6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

Id.

52. *See* Stoner, *supra* note 22, at 303.

53. *See* N.D. CENT. CODE § 14-14-03(1)(a) (1997) (repealed 1999); *see also* 28 U.S.C. § 1738A(c)(2)(A) (1994).

54. *See* N.D. CENT. CODE § 14-14-03 (quoted *infra* note 57); UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 307-08 (1999).

55. *See* Stoner, *supra* note 22, at 304.

56. *See* 28 U.S.C. § 1738A(c)(2)(B) (1994).

57. *See* N.D. CENT. CODE § 14-14-03; UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 307-08 (1999); *see also In Re* Marriage of Arulpragasam and Eisele, 709 N.E.2d 725, 732 (Ill. App. Ct. 1999) (using brief descriptors for the four bases of assuming jurisdiction). The UCCJA provides that:

> 1. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial decree or modification decree if:
>
> a. This state (1) is the home state of the child at the time of commencement of the proceeding, or (2) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this state;

same.[58] The PKPA, however, unlike the UCCJA, gives preference to home state jurisdiction.[59] Under the PKPA, a state may exercise jurisdiction only if no other state has home state jurisdiction.[60] Both the UCCJA and the PKPA define "home state" in the same way:[61] A child's "home

b. It is in the best interest of the child that a court of this state assume jurisdiction because (1) the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and (2) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
c. The child is physically present in this state and (1) the child has been abandoned or (2) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected, dependent, or deprived; or
d. (1) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision a, b, or c, or another state has declined toexercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (2) it is in the best interest of the child that this court assume jurisdiction.

2. Except under subdivisions c and d of subsection 1, physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.
3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

N.D. CENT. CODE § 14-14-03 (codified UCCJA); UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 307-08 (1999).

58. *See* Stoner, *supra* note 22, at 304. The PKPA provides:

A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if–
(1) such court has jurisdiction under the law of such State; and
(2) one of the following conditions is met:
(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
(B) (i)it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;
(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or
(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

28 U.S.C. § 1738A(c) (1994).

59. *See* Stoner, *supra* note 22, at 304.

60. *See* 28 U.S.C. § 1738A(c)(2)(B) (1994).

61. The few differences between the definitions for "home state" in the UCCJA and the PKPA are in syntax and punctuation, with no resulting difference in meaning. *Compare* N.D. CENT. CODE § 14-14-02(5) (1997) (repealed 1999) (defining home state for the UCCJA), *with* 28 U.S.C. § 1738A(b)(4) (1994) (defining home state for the PKPA).

state" is where the child has lived for six consecutive months prior to the start of any custodial proceeding.[62]

The failure of the UCCJA to establish a priority of jurisdictional bases created a loophole allowing courts to utilize the jurisdictional bases as they saw fit.[63] The PKPA was enacted to remedy such loopholes by establishing a national standard that states could look to in resolving interstate custody disputes[64] and by mandating that custody orders receive the full faith and credit of sister states.[65] The home state preference of the PKPA also extends to modifying existing custody decrees.[66] The PKPA authorizes continuing exclusive jurisdiction in the state where the original decree was given, as long as one parent or the child still resides in the state and the state has continuing jurisdiction under its own laws.[67]

A feature of home state jurisdiction as defined in the UCCJA and the PKPA is that periods of temporary absence of a child, parent, or person acting as a parent, are counted as part of the six-month period required to establish home state status.[68] For example, in *Anderson v. Anderson*,[69] the North Dakota Supreme Court held that New York did not lose its status as the home state of the child in question even though the child spent a portion of the six-month period, required to make New York the home state, visiting his mother in North Dakota.[70] While the North Dakota Supreme Court seemed to have little difficulty finding that a four-week visit was a temporary absence, the court has not clearly stated how it defines or applies temporary absence to an extended period of visitation.[71]

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62. *See* 28 U.S.C. § 1738A(b)(4).

> "[H]ome State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period . . . .

Id.

63. *See* Stoner, *supra* note 22, at 305.

64. *See* Luna v. Luna, 1999 ND 79, ¶ 10, 592 N.W.2d 557, 561-62.

65. *See* Stoner, *supra* note 22 at 303; *see also* 28 U.S.C. § 1738A(a) (Supp. IV 1998).

66. *See* Stoner, *supra* note 22, at 304 (citing Robert G. Spector, *Uniform Child Custody Jurisdiction and Enforcement Act*, 32 FAM. L.Q. 301, 305 (1998)).

67. *See* 28 U.S.C. § 1738A(d) (Supp. IV 1998).

68. *See id.* § 1738A(b)(4) (quoted *supra* note 62); N.D. CENT. CODE § 14-14-02(5) (1997) (repealed 1999).

69. 449 N.W.2d 799 (N.D. 1989).

70. *See* Anderson v. Anderson, 449 N.W.2d 799, 802 (N.D. 1989) (finding that a four-week visit to North Dakota was a temporary absence and that the period of the visit counted toward the six-month period required to make New York the child's home state).

71. *See id.* The court had the opportunity to decide this issue, but it declined to do so. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 7, 593 N.W.2d 355, 358.

C. TEMPORARY PRESENCE AND JURISDICTION—CONFLICTING RESULTS

Although courts disagree about its precise definition, a temporary presence[72] is simply a child's interstate visit to a non-custodial parent or a person acting as a parent.[73] The specific question faced by the courts is whether a child's temporary presence in a state for more than six months, with the permission of the other party, is sufficient to establish jurisdiction in that state.[74] While it is agreed that home state jurisdiction results from the child's physical presence in the state,[75] the North Dakota Supreme Court has not decided whether a child's permissive presence in the state "starts the clock" for establishing the six consecutive months required by the UCCJA for home state jurisdiction.[76]

The North Dakota Supreme Court in *Wintz v. Crabtree*[77] has recognized that courts facing this question have reached opposite results and has referred to four Illinois cases,[78] two of which held that the temporary presence of a child for more than six months was sufficient to establish home state jurisdiction.[79] The two other Illinois cases held that

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72. Neither the UCCJA nor the PKPA actually contain the phrase "temporary presence" and instead refer to the "temporary absence" of the child from the home state. *See* N.D. CENT. CODE § 14-14-02(5); *cf.* 28 U.S.C. § 1738A(b)(4) (quoted *supra* note 62). Some courts have applied the dictionary definition of the terms. *See In re* Marriage of Richardson, 625 N.E.2d 1122, 1124 (Ill. App. Ct. 1993) (quoting BLACK'S LAW DICTIONARY 8, 1312 (5th ed. 1979) (stating that "temporary" means limited in time as opposed to indefinite or perpetual, and that "absence" means being absent or away from one's domicile or usual place of residence)). The *Richardson* court also noted that "'[t]emporary absence' does not connote a particular length of time. Under appropriate circumstances, the term can apply to a period of many months." *Id.* Other courts have explicitly rejected this approach. *See In re* Marriage of Arulpragasam and Eisele, 709 N.E.2d 725, 732 (Ill. App. Ct. 1999) ("[T]he 'temporary absence' provision is designed merely to prevent lapses in the six-month period caused by brief interstate visits by the child.").

73. *See Wintz*, ¶ 7, 593 N.W.2d at 357 (noting that a temporary presence may result from a visitation order or by the consent of the parties).

74. *See id.*

75. *See* Hangsleben v. Oliver, 502 N.W.2d 838, 843 (N.D. 1993) (holding that a child's physical presence has priority over her legal residence in determining home state jurisdiction). In *Hangsleben*, at the request of the custodial parent, a child lived with her grandparents in North Dakota for more than six months. *See id.* Without addressing whether this stay was temporary or permanent, the North Dakota Supreme Court held that North Dakota had become the child's home state. *See id.* The court found that the grandparents were clearly "persons acting as parents" under section 14-14-02(5) of the North Dakota Century Code. *Id.*

76. *See Wintz*, ¶ 7, 593 N.W.2d at 358 (declining to determine if North Dakota is the home state on the basis of a six-month permissive visit). In *Wintz*, the North Dakota Supreme Court avoided deciding whether a permissive, temporary six-month presence by a child in the state would confer home state jurisdiction by basing its judgment on an inconvenient forum analysis. *See id.*

77. 1999 ND 85, 593 N.W.2d 355.

78. *See Wintz*, 593 N.W.2d at 357-58.

79. *See id.* (citing *In re* Marriage of Arulpragasam and Eisele, 709 N.E.2d 725, 732 (Ill. App. Ct. 1999) (holding that a simple home state test should be applied: "Where has the child lived with a person acting as a parent for the last six months?")); *see also In re* Marriage of Schoeffel, 644 N.E.2d 827, 830 (Ill. App. Ct. 1994) (finding that a nine month stay in another state was not a temporary absence and applying the home state test later adopted by *Arulpragasam*).

such a presence was deemed inadequate for establishing home state jurisdiction.[80]

This split can be traced to *In re Marriage of Richardson*.[81] In *Richardson*, the majority found that Illinois did not obtain jurisdiction to modify custody by the child's eleven-month presence in the state for the purpose of attending school.[82] One justice, in a special concurrence, agreed with the result, but disagreed with the rationale of the majority.[83] The justice writing the special concurrence argued that Illinois became the child's home state because the child had resided in the state for more than six consecutive months.[84] Nevertheless, according to the special concurrence, the court was correct in declining to exercise jurisdiction, but should have done so on the grounds that Illinois was an inconvenient forum.[85]

Subsequent cases in Illinois have adopted the reasoning of either the *Richardson* majority[86] or its special concurrence.[87] The decisions hinge on the application of the phrase "temporary absence" from the UCCJA's definition of home state.[88] On one hand, the phrase is not precisely defined, nor does it connote a particular period of time.[89] Rather, "[u]nder appropriate circumstances, the term can be applied to a period of many months."[90] From the other perspective, the temporary

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80. *See Wintz*, 593 N.W.2d at 357-58 (citing *In re* Frost, 681 N.E.2d 1030, 1036 (Ill. App. Ct. 1997) (holding that a court may consider the intent of the parents in determining whether a child's out-of-state visit of more than six months is sufficient to establish home state jurisdiction in that state)); *see also In re* Marriage of Richardson, 625 N.E.2d 1122, 1126 (Ill. App. Ct. 1993) (finding that a child's 11 month visit to another state did not establish home state jurisdiction there).

81. 625 N.E.2d 1122 (Ill. App. Ct. 1993).

82. *See Richardson*, 625 N.E.2d at 1123. In *Richardson*, the parties divorced in California and were awarded joint custody of their daughter, provided that her primary residence would be with her father. *See id.* The mother moved to Illinois while the daughter continued to live with her father in California. *See id.* Pursuant to a written agreement between the parents, the father permitted the daughter to live in Illinois with her mother for the purpose of attending school for the year. *See id.* At the end of the school year the child was returned to her father, who had since moved to Arizona to obtain employment, but the mother subsequently filed a petition in Illinois seeking to modify custody. *See id.*

83. *See id.* at 1127 (Barry, J., specially concurring).

84. *See id.*

85. *See id.* at 1129.

86. *See supra* text accompanying note 80.

87. *See supra* text accompanying note 79.

88. *See* N.D. CENT. CODE § 14-14-02(5) (1997) (repealed 1999). The statute states that "[p]eriods of temporary absence of any of the named persons are counted as part of the six-month or other period." *Id.*

89. *See In re* Marriage of Richardson, 625 N.E.2d 1122, 1124 (Ill. App. Ct. 1993); *see also In re* Frost, 681 N.E.2d 1030, 1035 (Ill. App. Ct. 1997).

90. *Frost*, 681 N.E.2d at 1035. For example, under the *Richardson* approach, applied by the court in *Frost*, an extended permissive visit for the purpose of attending school should be considered a "temporary absence" because such a view encourages extended visitation agreements without one party having to worry about losing a jurisdictional forum because of the duration of the permissive visit. *See id.* at 1035-36.

absence provision "is designed merely to prevent lapses in the six-month period caused by brief interstate visits by the child."[91] The *Richardson* special concurrence acknowledged that temporary absence is not defined in the statute, but it emphasized that the home state provision required six consecutive months of presence.[92] Hence, it would be illogical that the legislature intended that an absence greater than six months would be considered temporary.[93]

Another area of divergence between the two views concerns the intent of the contesting parties.[94] The *Richardson* majority urged that in determining a child's home state a court should not only examine the child's physical presence, but also the circumstances surrounding his or her stay in the state.[95] Under this standard, a court may consider "the parents' agreement and their intent regarding the temporary or permanent status of the child's out-of-state absence."[96]

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91. *In re* Marriage of Arulpragasam and Eisele, 709 N.E.2d 725, 732 (Ill. App. Ct. 1999) (citing *In re* Marriage of Schoeffel, 644 N.E.2d 827, 830 (Ill. App. Ct. 1994)).

92. *See Richardson*, 625 N.E.2d at 1127 (Barry, J., specially concurring). "This leads me to believe that the legislature meant that only 'absences' *less* [than] six months within the relevant 6-month period may be 'temporary.'" *Id.*

93. *See id.*

94. *See Frost*, 681 N.E.2d at 1035-36. The court in *Frost* adopted the *Richardson* analysis and stated that under such an analysis, a court could consider the parent's agreement and their intent regarding whether a child's out of state absence should be considered permanent or temporary. *See id.* However, the court noted that the *Schoeffel* court refused to consider the intent of the parties when it rejected a father's argument that time spent by his wife and children outside of Illinois was a temporary absence. *See id.* In *Schoeffel*, a New York couple with two children moved to Illinois and lived there together for exactly six months. *See* 644 N.E.2d at 828. The wife then took the children and moved back to New York. *See id.* Six months after moving back to New York, the wife and children returned to Illinois for two weeks in hopes of a reconciliation. *See id.* The attempt failed, and the wife and the children returned to New York and had no further contact with Illinois. *See id.* One month later, which was seven months after their initial return to New York, the father filed a petition for dissolution of marriage in Illinois. *See id.* A default judgment was entered against the wife. *See id.* The wife appeared specially to challenge Illinois jurisdiction, and the trial court decided in her favor ordering that custody issues be resolved in New York. *See id.* The father advanced an argument that his wife and children did not permanently leave Illinois until after the failed reconciliation attempt; hence, their presence in New York prior to the failed reconciliation attempt was a temporary absence. *See id.* at 830. The court rejected this argument, holding that it would not attribute time spent in New York to the state of Illinois based on the alleged intent of the parties. *See id.*

95. *See Richardson*, 625 N.E.2d at 1124.

96. *Frost*, 681 N.E.2d at 1036. In *Frost*, a purported father commenced an action to establish paternity, custody, visitation, and child support. *See id.* at 1032. The mother and child lived with him in Chicago for several years before traveling to California to spend the summer with relatives. *See id.* The purported father alleged that the mother became undecided about whether to return to Chicago while she and the child were in California. *See id.* The mother enrolled the child in school in California and the purported father later learned that the mother did not intend to return with the child. *See id.* The mother argued that Illinois did not have jurisdiction to decide the matter because California had become the child's home state. *See id.* The mother also alleged that she had already filed a parentage action in California. *See id.* The purported father responded that he did not take legal measures to stop the child's relocation because the mother had previously indicated that her stay in California was temporary. *See id.* at 1032-33. The court reasoned that the *Richardson* approach, which allows a court to take into consideration the intent of the parties in determining whether an absence is permanent or temporary, should be applied. *See id.* at 1035-36. Because of the lack of a written agreement defining the nature of the child's absence from Illinois and because accounts by the

Courts adhering to the contrary view assert that the intent of the parties does not control the jurisdictional outcome.[97] These courts believe that by considering the intent of the parties, courts can confuse a person's domicile, which is primarily a question of intent, with that of presence for home state purposes.[98] The latter is not dependent on intent, according to these courts, but is primarily a question of the amount of time a contestant or child has been in the state.[99] Courts holding this view reject the need to consider circumstantial facts in favor of applying a simple home state rule: "Where has the child lived with a person acting as a parent for the last six months?"[100]

Both sides of the issue are supported by public policy rationale.[101] The perspective set forth by *Richardson* and later adopted by *In re Frost v. Frost*,[102] that a child's permissive interstate visit of more than six months does not automatically confer home state jurisdiction to the visited state, asserts that parents who live in separate states should be encouraged to negotiate extended interstate visits for their children.[103] The perspective contends that the application of the "simple 'home state' test"[104] would discourage such agreements "because of the potential legal consequences to the custodial parent."[105] A parent

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parties as to whether there was a mutual agreement conflicted, the court remanded the case for an evidentiary hearing to determine if the child's absence was, indeed, temporary. *See id.* at 1036. *Richardson* also provides a good example of a court considering the intent of the parties, as the court weighed heavily the fact that it was the clear understanding of both parties that the child would return to her father at the conclusion of the school year. *See Richardson*, 625 N.E.2d at 1125; *see also supra* text accompanying note 81.

97. *See Schoeffel*, 644 N.E.2d at 829 (finding that a two-week out of state attempt at a reconciliation between the parties did not have the effect of voiding the home state status of New York when the children had lived in New York for seven consecutive months).

98. *See id.* "It is a mistake to incorporate all the nuances of domicile into the Act's definition of 'home State.' It is also a mistake to allow parties to make agreements which control the operation of the Act." *Id.* at 830.

99. *See id.* at 829.

100. *In re* Marriage of Arulpragasam and Eisele, 709 N.E.2d 725, 732 (Ill. App. Ct. 1999) (applying the home state test as articulated in *Schoeffel*). The *Schoeffel* court said that the *Richardson* majority unnecessarily complicated what was meant to be a simple "home state" test when it held that the 11 months the child spent in Illinois were only a "temporary absence." *See Schoeffel*, 644 N.E.2d at 830.

101. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 7, 593 N.W.2d 355, 358. At least one Illinois court noted that the difference in analysis may be driven as a matter of policy preference, rather than strict statutory construction. *See Frost*, 681 N.E.2d at 1035 (noting that the *Richardson* special concurrence conceded that "temporary absence" was not statutorily defined). Thus, courts may choose their analyses based on a preference for the mathematical certainty achieved by a strict application of the six-month stay required to establish home state jurisdiction. *See id.* Courts may also be opposed to the possibility that the application of statute's six-month requirement could be controlled by means of an agreement between the parents. *See Schoeffel*, 644 N.E.2d at 830.

102. 681 N.E.2d 1030 (Ill. App. Ct. 1997).

103. *See Frost*, 681 N.E.2d at 1035-36; *In re* Marriage of Richardson, 625 N.E.2d 1122, 1125 (Ill. App. Ct. 1993).

104. *Arulpragasam*, 709 N.E.2d at 732 ("[W]here has the child lived with a person acting as a parent for the last six months?").

105. *Richardson*, 625 N.E.2d at 1125. "The freedom to reach such agreements should not be hampered by fear that jurisdiction would vest in another state if the out-of-state absence extends

unaware of the other parent's breach of promise to return the child would lose the right to start a proceeding in his or her state after six months, even if the parent believed the child would be returned at the end of the permitted visit.[106] The result would be a "chilling effect" on extended visitation agreements and family relationships would suffer.[107]

While applying the simple home state test provides mathematical certainty, it may bring about unfair results.[108] The *Frost* court decided that the *Richardson* analysis was more flexible and fair.[109] Further, applying it would discourage the premature filing of custody proceedings by the local parent for the sole purpose of preserving jurisdiction.[110]

The position espoused by the *Richardson* special concurrence also arguably furthers valid policy concerns.[111] The *Richardson* special concurrence argued that applying the more flexible approach, as the *Richardson* majority did, essentially renders the UCCJA's six-month consecutive residency requirement meaningless.[112] Under the majority's analysis, an out-of-state parent could always argue that the child's presence in the state was only temporary in order to defeat home state jurisdiction.[113] The special concurrence also disagreed that application of its view would discourage extended interstate visitation agreements between divorced parents.[114] Since determination of jurisdiction under the UCCJA "is predicated on the best interests of the child,"[115] courts will use their discretion and decide whether a forum is appropriate based on inconvenient forum grounds.[116] Therefore, even if a new home state is established in the course of an extended visit, the custodial parent has not necessarily lost his or her opportunity for an action to be decided in that parent's state.[117] This is in accord with one of the general purposes

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beyond six months." *Frost*, 681 N.E.2d at 1035.

106. *See id.*

107. *See id.*

108. *See id.* The *Frost* court noted that inequitable results were especially likely to occur in fact situations in which there is no written agreement providing for the extended interstate visit of a child. *See id.* In that case, the court reversed the trial court, which had dismissed a petition to establish custody on the basis of lack of jurisdiction. *See id.* at 1032, 1036-37. The case was remanded to determine whether the child's absence was "temporary" based on the verbal agreements of the parents. *See id.*

109. *See id.* at 1036.

110. *See id.*

111. *See In re* Marriage of Richardson, 625 N.E.2d 1122, 1127 (Ill. App. Ct. 1993) (Barry, J., specially concurring).

112. *See id.*

113. *See id.*

114. *See id.* at 1128.

115. *Id.*

116. *See id.*

117. *See id.* Courts using the *Richardson* special concurrence analysis note that more than one state may have jurisdiction under the UCCJA. *See In re* Marriage of Schoeffel, 644 N.E.2d 827, 830 (Ill. App. Ct. 1994); *see also In re* Marriage of Arulpragasam and Eisele, 709 N.E.2d 725, 730 (Ill. App. Ct. 1999). Therefore, vesting a state with home state jurisdiction after a six-month continued presence of a child does not necessarily divest jurisdiction from the previous home state. *See In re*

of the UCCJA, which is to assure that custodial proceedings take place in the forum with the closest connection to the child.[118]

The way the definition of temporary absence or temporary presence will be applied to permissive interstate visits of more than six months remains unsettled in North Dakota.[119] This is, in part, because the North Dakota Supreme Court has decided that the question of home state jurisdiction need not be determined in cases in which jurisdiction has already been declined on inconvenient forum grounds.[120]

D. INCONVENIENT FORUM

The UCCJA provides direction on inconvenient forum issues.[121] A court that has jurisdiction under the UCCJA may decline to exercise jurisdiction if it determines that a court of another state is a more appropriate forum.[122] Thus, North Dakota courts apply a two-pronged inquiry in resolving inconvenient forum issues in child custody cases.[123] The first prong is designed to determine if the court actually has jurisdiction.[124] The second prong is designed to determine whether exercising that jurisdiction is appropriate within the framework of the UCCJA and the PKPA.[125]

The overarching goal in this regard, both for the UCCJA and the PKPA, is that the court act in the best interests of the child.[126] In making this determination, courts deciding whether a forum is inconvenient may consider the guidelines provided in the UCCJA.[127] These guidelines include determining: (1) whether another state is or recently was the child's home state; (2) whether there is a closer connection between another state and the child or the child's family; (3) whether there is substantial information about the child's present or future care, training,

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Marriage of Richardson, 625 N.W.2d 1122, 1127 (Ill. App. Ct. 1993) (Barry, J., specially concurring). Courts with such concurrent jurisdiction are urged under the UCCJA to cooperate and defer to one another to resolve custodial issues in the best interests of the child. *See id.* (quoting parenthetically Wilcox v. Wilcox, 862 S.W.2d 533, 540 (Tenn. Ct. App. 1993)). *But cf. Schoeffel*, 644 N.E.2d at 830 (stating where two or more states have jurisdiction, the first state to exercise jurisdiction has the exclusive right to proceed).

118. *See Arulpragasam*, 709 N.E.2d at 733.

119. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 7, 593 N.W.2d 355, 358.

120. *See id.*

121. *See* N.D. CENT. CODE § 14-14-07 (1997) (repealed 1999); UNIF. CHILD CUSTODY JURISDICTION ACT § 7, 9 U.L.A. 497-99 (1999).

122. *See* N.D. CENT. CODE § 14-14-07 (1); UNIF. CHILD CUSTODY JURISDICTION ACT § 7(c), 9 U.L.A. 498 (1999).

123. *See* Smith v. Smith, 534 N.W.2d 6, 9 (N.D. 1995) (discussing the two-pronged approach described in Dennis v. Dennis, 387 N.W.2d 234, 235 (N.D. 1986)).

124. *See* Zimmerman v. Newton, 1997 ND 197, ¶ 8, 569 N.W.2d 700, 703.

125. *See id.*

126. *See* 28 U.S.C. § 1738A(c)(2)(D) (Supp. IV 1998) (quoted *supra* note 58). "In determining whether a forum is inconvenient, the court is to give paramount consideration to the court most able to act in the best interests of the children." Hangsleben v. Oliver, 502 N.W.2d 838, 845 (N.D. 1993).

127. *See Hangsleben*, 502 N.W.2d at 845.

and relationships in another state; (4) whether the parties have agreed on another appropriate forum; and (5) whether the purposes of the UCCJA would be contravened by the exercise of jurisdiction in another state.[128]

North Dakota courts have long recognized that inconvenient forum decisions fall within the court's discretion.[129] The standard of review for these decisions is that they will not be overturned unless the trial court has abused its discretion.[130] An abuse of discretion occurs when a court has been unreasonable, arbitrary or unconscionable in its actions or "when its decision is not the product of a rational mental process leading to a reasoned determination."[131] An abuse of discretion is never assumed, and an appellant must affirmatively establish that the trial court abused its discretion.[132] Nevertheless, a court's reasons for exercising its discretion should be adequately explained to allow for meaningful appellate review.[133]

Under the UCCJA, a court should proceed to an inconvenient forum analysis only after determining that it, in fact, has jurisdiction.[134]

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128. *See* N.D. CENT. CODE § 14-14-07(3); UNIF. CHILD CUSTODY JURISDICTION ACT § 7(c), 9 U.L.A. 498 (1999).

129. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 8, 593 N.W.2d 355, 358 (quoting Smith v. Smith, 534 N.W.2d 6, 10 (N.D. 1995) (holding that the trial court had jurisdiction in a custody proceeding because North Dakota was the children's home state within six months before the beginning of the proceedings, the children had significant connections to North Dakota, and California had declined jurisdiction and had deferred the case to North Dakota as a more appropriate forum)). For a general overview of how the North Dakota Supreme Court has addressed the issue of inconvenient forum within a child custody context, see *Luna v. Luna*, 1999 ND 79, ¶ 23, 592 N.W.2d 557, 564 (holding that the district court did not abuse its discretion in finding North Dakota was not an inconvenient forum because the original divorce decree was rendered in North Dakota, the mother still lived in North Dakota, there was a substantial amount of litigation involving the parties in North Dakota, and the daughter had spent time in North Dakota); *Hangsleben*, 502 N.W.2d at 845 (finding North Dakota to be an inconvenient forum because Hawaii was the child's home state prior to her presence in North Dakota, the child was present in North Dakota only to avoid her abusive father, the child had a closer connection with Hawaii and lived there for four years as opposed to only one year in North Dakota, neither parent lived in North Dakota, more substantial evidence relating to the child's future care and development was available in Hawaii, and exercise of jurisdiction in North Dakota would contravene the purpose of the UCCJA to avoid relitigation of custody decisions in other states); and *Dennis v. Dennis*, 387 N.W.2d 234, 236 (N.D. 1986) (holding that the district court did not abuse its discretion in finding North Dakota an inconvenient forum because Iowa was the home state of the children, substantial evidence concerning the care, protection, training, and personal relationships of the child was more readily available in Iowa, and Iowa had a closer connection with the children).

130. *See Wintz*, ¶ 8, 593 N.W.3d at 358.

131. *Id.*

132. *See Dennis*, 387 N.W.2d at 235-36 (concluding that the district court did not abuse its discretion in a custody modification proceeding in finding North Dakota an inconvenient forum when North Dakota was not the home state and another state had a closer connection with the children).

133. *See id.* at 238 (Meschke, J., concurring).

134. *See* N.D. CENT. CODE § 14-14-07(1) (1997) (repealed 1999); UNIF. CHILD CUSTODY JURISDICTION ACT § 7, 9 U.L.A. 497-98 (1999) ("A court *which has jurisdiction* under this chapter . . . may decline to exercise its jurisdiction . . . if it finds that it is an inconvenient forum." (emphasis added)); *see also* Zimmerman v. Newton, 1997 ND 197, ¶ 8, 569 N.W.2d 700, 703 ("[P]rocedurally, a court must first consider whether it has jurisdiction to decide custody and, if it does, the court must then decide . . . whether to exercise its jurisdiction"); *In re* Marriage of Schoeffel, 644 N.E.2d 827, 831 (Ill. App. Ct. 1994) (holding that since the trial court did not have jurisdiction, the appellate court need not

Nevertheless, the North Dakota Supreme Court addressed the inconvenient forum issue in *Wintz v. Crabtree*[135] without determining if North Dakota was the home state and had jurisdiction under the UCCJA.[136] With this approach, the North Dakota Supreme Court found it unnecessary to render a clear decision on whether North Dakota was the home state of the children in spite of the fact that their visit to this state exceeded six months.[137]

III. ANALYSIS

After explaining the facts of the case,[138] the North Dakota Supreme Court set out the applicable law and the method of analysis to determine if North Dakota had jurisdiction to decide an interstate custody dispute.[139] The court noted that North Dakota has jurisdiction if it is the child's home state[140] but also pointed out that courts have reached conflicting results when forced to decide whether a six-month permissive visit to a state is sufficient to make that state the child's new home state.[141] Rather than make this determination for North Dakota, the court focused on the trial court's decision to decline jurisdiction after finding North Dakota to be an inconvenient forum.[142] The court stressed that such inconvenient forum decisions lie within the trial court's discretion and will be overturned only where the trial court has abused its discretion.[143] The North Dakota Supreme Court found no abuse of discretion in this case, and agreed with the trial court that North Dakota was an inconvenient forum.[144] The court added that exercising jurisdiction in this case would contravene the UCCJA's purpose to prevent the wrongful retention of children.[145] Finally, the court indicated that it viewed the wrongful retention of children after visitation as an act equivalent to an abduction.[146]

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discuss whether the trial court could have properly declined jurisdiction on inconvenient forum grounds).

135. 1999 ND 85, 593 N.W.2d 355.

136. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 7-8, 593 N.W.2d 355, 358. This is not the first occasion where the North Dakota Supreme Court has discussed the inconvenient forum issue even when it need not have been raised. *See* Hangsleben v. Oliver, 502 N.W.2d 838, 844-45 (N.D. 1993) (finding North Dakota to be an inconvenient forum after assuming *arguendo*, that two other states did not have continuing jurisdiction to modify custody).

137. *See Wintz*, ¶ 7, 593 N.W.2d at 358.

138. *See id.* ¶¶ 2-3, 593 N.W.2d at 356-57.

139. *See id.* ¶ 5, 593 N.W.2d at 357.

140. *See id.* ¶ 6.

141. *See id.* ¶ 7, 593 N.W.2d at 357-58.

142. *See id.* ¶¶ 7-8, 593 N.W.2d at 358.

143. *See id.* ¶ 8.

144. *See id.* ¶¶ 11-12, 593 N.W.2d at 358-59.

145. *See id.* ¶ 12, 593 N.W.2d at 359.

146. *See id.*

Before addressing the merits of jurisdictional arguments presented by the parties, the North Dakota Supreme Court reiterated what has become a well-established analysis for determining jurisdiction in interstate custody disputes.[147] In essence, a trial court must go through a multi-step process to determine first if it has jurisdiction, and then it must consider whether such jurisdiction is appropriate to exercise.[148] The court stated that North Dakota has jurisdiction in child custody determinations where North Dakota "is the home state of the child at the time of commencement of the proceeding."[149] The court said that home state is defined in the statute to mean "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months."[150]

Although the North Dakota Supreme Court only made reference to the home state basis for obtaining jurisdiction, the trial court acknowledged the other three bases of "significant connection," emergency, and residual jurisdiction as means of establishing jurisdiction under chapter 14-14-03 of the North Dakota Century Code.[151] The trial court concluded that none of the bases for jurisdiction were adequate for establishing jurisdiction in this case.[152]

In reviewing the district court's decision, the North Dakota Supreme Court posed the specific question of "whether or not [the] temporary presence in the state for more than six months under a visitation order or by consent of the parties is sufficient to confer jurisdiction upon that

147. *See id.* ¶ 5, 593 N.W.2d at 357.

148. *See id.*

149. *Id.* ¶ 6 (quoting N.D. CENT. CODE § 14-14-03(1)(a) (1997) (repealed 1999)).

150. *Id.* (quoting N.D. CENT. CODE § 14-14-02(5) (1997) (repealed 1999)).

151. Under the UCCJA, jurisdiction may be assumed under (1) "home state," (2) "significant connection," (3) emergency, or (4) residual bases. *See supra* text accompanying note 57.

152. *See* Appellant's Brief, app. at 28, Wintz v. Crabtree, 1999 ND 85, 593 N.W.2d 355 (No. 980244). As to home state jurisdiction, the trial court had reasoned that Sandra, and not Bill, had custody of the children. *See id.* Stating that "Arizona was the home state of the mother and the children within 6 months prior to commencement of the proceeding," the trial court concluded that North Dakota was not the home state of the children. *Id.* The trial court also briefly addressed the other bases of significant connection, emergency and residual jurisdiction. *See id.* app. at 28-29, no. 8 (b)-(d). The trial court concluded that, although both Arizona and North Dakota presently have a "significant connection" with the children and one of the parents, evidence of such a connection was greater in Arizona. *See id.* The court also found "emergency" jurisdiction to be inapplicable, because it found that the children were present in North Dakota only because Bill refused to return them to their mother. *See id.* app. at 29, no. 8(c). Finally, the court concluded that Arizona would likely have jurisdiction under the preceding bases and that Arizona had not declined to exercise its jurisdiction. *See id.* at no. 8(d).

Turning to the inconvenient forum issue, the trial court determined that, under chapter 14-14-07 of the North Dakota Century Code, Arizona was the children's home state. *See id.* The trial court determined that Arizona had a closer connection to the children and their mother, and that information about the children's care was more available in Arizona. *See id.* Finally, the trial court added that under North Dakota Century Code chapter 14-14-07, Bill had improperly retained the children after their temporary stay with him. *See id.* at no. 9. Thus, the court also declined to exercise jurisdiction on this basis. *See id.*

state."[153] The court noted that other jurisdictions that have faced the question have reached conflicting results.[154] Without analysis, the court gave a brief overview of the two positions adopted by the courts that have had to answer the question.[155]

The court acknowledged that both approaches to deciding the jurisdictional issue are supported by policy reasons.[156] After briefly setting out the two jurisdictional views and reviewing the cases, the court said that it need not decide the issue for itself.[157] Rather, the court posited that even if North Dakota did have jurisdiction, the end result in this case was the appropriate response because North Dakota is an inconvenient forum.[158]

Turning to the inconvenient forum issue, the North Dakota Supreme Court reaffirmed the discretionary role of courts in inconvenient forum decisions.[159] Such discretionary decisions are "reversed on appeal only for an abuse of discretion."[160] The court quoted the forum non conveniens provision of the UCCJA, codified in section 14-14-07(3) of the North Dakota Century Code, which gives a deciding court the discretion to decline jurisdiction if it finds another forum more appropriate.[161] A key feature of this provision is the requirement that the interests of the child be considered.[162]

The court reviewed the record to determine if the trial court had adequately considered the forum non conveniens factors from North

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153. *Wintz*, ¶ 7, 593 N.W.2d at 357.

154. *See id.* All of the courts cited are from Illinois. *See id.*, 593 N.W.2d at 357-58.

155. *See id.* One position adopts a simple home state test that asks, "Where has the child lived with a person acting as a parent for the last six months?" *In Re* Marriage of Arulpragasam and Eisele, 709 N.E.2d 725, 732 (Ill. App. Ct. 1999) (finding that Illinois was the home state of the children because they had been in the state for more than six months even though their presence was permitted under a temporary order of a court in another state); *accord In re* Marriage of Schoeffel, 644 N.E.2d 827, 829-30 (Ill. App. Ct. 1994) (holding that Illinois was not the home state because the children moved to New York more than seven months before the commencement of the proceedings, hence, New York had become the children's home state).

The other position applies a more flexible approach and takes into consideration the parent's agreement and their intent as to whether the child's out-of-state absence of more than six months will confer jurisdiction to the visited state. *See In re* Marriage of Richardson, 625 N.E.2d 1122, 1124-25 (Ill. App. Ct. 1993) (stating that courts must consider not only the child's presence in the state, but also the circumstances under which their presence occurred and holding that an 11-month consensual visit to Illinois was a temporary absence from the child's home state); *see also In re* Marriage of Frost, 681 N.E.2d 1030, 1035-36 (Ill. App. Ct. 1997) (adopting the *Richardson* analysis and remanding the case to determine the intent of the parents as to whether the child's absence from Illinois was temporary).

156. *See Wintz*, ¶ 7, 593 N.W.2d at 358.

157. *See id.*

158. *See id.*

159. *See id.* ¶ 8.

160. *Id.* An abuse of discretion is characterized by arbitrary, unreasonable or unconscionable behavior or when a decision has been reached in an irrational and unreasoned manner. *See id.*

161. *See id.* ¶ 9.

162. *See id.* ¶ 10.

Dakota Century Code chapter 14-14-07(3).[163] Although the district court's conclusions are limited in its explanation,[164] the Memorandum Opinion was sufficiently expressed to allow for "meaningful appellate review."[165] The court concluded that the district court did not abuse its discretion because it considered and applied the statutory factors of North Dakota Century Code section 14-14-07(3).[166]

The court independently analyzed the inconvenient forum factors: (1) whether another state is or recently was the child's home state, (2) whether there was a closer connection between the child and another state, (3) whether substantial evidence of the child's present and future care was more readily available in another state, and (4) whether the exercise of jurisdiction in this state would contravene any of the purposes of the UCCJA.[167] The court reached the conclusion that the facts in the present case weighed in favor of jurisdiction in Arizona.[168] Important to the court was the fact that Arizona was a recent home state of the children.[169] The court determined that the children and their mother, with whom the children had lived exclusively except for the school year in North Dakota, had a closer connection with Arizona.[170] Also, Bill's connection with the state had only recently come about, as he had moved to North Dakota a short time before the children came to live with him.[171]

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163. *See id.* ¶ 11.

164. *See id.* The North Dakota Supreme Court quoted the following portion of the trial court's opinion:

> I determine that North Dakota is an inconvenient forum under [North Dakota Century Code section] 14-14-07.
>
> a. Arizona is the present home state of the children
> b. Arizona has a closer connection with the children and their mother
> c. Substantial evidence concerning the children's present or future care, protection, training and personal relationships is more readily available in Arizona[.]

Id. In his appeal to the North Dakota Supreme Court, Bill asserted that the district court gave no sound rationale for its finding. *See* Appellant's Brief at 11, *Wintz* (No. 980244). Bill argued that because the children had not lived in Arizona for more than six months preceding his motion to change custody, Arizona was not recently the children's home state. *See id.* at 7-8. Bill also argued that the district court's "sparse explanation for its finding prevents meaningful appellate review," and, as such, the district court's finding was "arbitrary and an abuse of discretion." *Id.* at 11.

165. Dennis v. Dennis, 387 N.W.2d 234, 238 (N.D. 1986) (Meschke, J., concurring) ("Judicial discretion is not judicial license. Judicial discretion can only be exercised for sound reasons, not spurious ones. And, the reasons for exercise of discretion should be sufficiently expressed, if not readily apparent, to enable meaningful appellate review.").

166. *See Wintz*, ¶ 11, 593 N.W.2d at 358.

167. *See id.* ¶ 12, 593 N.W.2d at 358-59. The statute includes another factor—whether the parties have agreed on another forum which is no less appropriate, *see* N.D. CENT. CODE § 14-14-07(3)(d) (1997) (repealed 1999),—but for reasons unexplained, the supreme court did not mention or address this factor in its opinion.

168. *See id.*

169. *See id.*, 593 N.W.2d at 358.

170. *See id.*

171. *See id.*, 593 N.W.2d at 358-59.

Regarding evidence about the children's well-being, the court found that both states could be sources for this information.[172] However, based on the written agreement between the parties, additional evidence about the children's well-being would develop in Arizona.[173]

Finally, the court considered the main purpose for the UCCJA and PKPA and concluded that exercising jurisdiction in North Dakota would contravene the intent of the Act to "[d]eter abductions and other unilateral removals of children undertaken to obtain custody awards."[174] Significantly, the court viewed Bill's retention of the children beyond what his written agreement had stipulated as the equivalent to an abduction or other unilateral removal.[175] Bill's initial custody of the children was lawful but in the court's view, "his retention of the children beyond the period of time agreed upon by the parties equates with child snatching."[176]

The court went on to say that "[b]ut for Crabtree's wrongful retention of the children, they would have returned to Arizona following the school term."[177] Without explicitly mentioning the conduct provision, this comment appears to address chapter 14-14-08 of the North Dakota Century Code, under which a court may decline to exercise jurisdiction based on the "reprehensible conduct" of a party.[178] The provision refers to one who has wrongfully removed a child from another state, but is applied equally, as in this case, where a child was wrongfully kept within the state.[179]

Although the jurisdictional question raised by *Wintz* was not answered, the North Dakota Supreme Court asserted that the trial court's decision to decline to exercise jurisdiction was well within its discretion and held that the discretion of the trial court was not abused.[180] The court added its own analysis of the statutory factors governing incon-

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172. *See id.*, 593 N.W.2d at 359 (noting that while the most recent information about the children's care was in North Dakota, evidence of the future care of the children would develop in Arizona).

173. *See id.*

174. *Id.* (quoting N.D. CENT. CODE § 14-14-01(e) (1997) (repealed 1999)).

175. *See id.*

176. *Id.*

177. *Id.*

178. This chapter is commonly referred to as the "unclean hands" provision of the UCCJA. *See* Hangsleben v. Oliver, 502 N.W.2d 838, 844 (N.D. 1993). The relevant portion of North Dakota Century Code section 14-14-08(2) states:

> Unless required in the interest of the child, the court may not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, . . . has improperly retained the child after a visit or other temporary relinquishment of physical custody.

179. *See id.*

180. *See* Wintz v. Crabtree, 1999 ND 85, ¶¶ 8, 11, 593 N.W.2d 355, 358.

venient forum decisions to show that the decision to decline to exercise jurisdiction was based on sound principles that furthered the goals of the UCCJA.[181]

IV. IMPACT

The impact of *Wintz* on future interstate custody disputes in North Dakota may be affected by a subsequent change in the North Dakota law. In 1999, North Dakota replaced the UCCJA with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[182] which brings state law into greater conformity with the PKPA.[183] If *Wintz* had been decided under the UCCJEA, the outcome may have been the same.[184] Perhaps the greatest potential for significant impact comes from the court's decision not to address the jurisdictional question.[185] One can argue that by proceeding to an inconvenient forum analysis, the court implied that it had the jurisdiction to decline.[186] Such implied jurisdiction occurs in *Wintz* because the children were present in North Dakota for more than six months, even though their stay was temporary.[187] It remains to be seen whether parental perceptions of this decision will result in a reluctance by custodial parents to allow their children extended permissive visits to a non-custodial parent in North Dakota.

A. THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

The law under which *Wintz* was decided was repealed and replaced when North Dakota enacted the Uniform Child Custody Jurisdiction and Enforcement Act in 1999.[188] The UCCJEA was drafted to provide clearer standards for states exercising jurisdiction over child-custody determinations[189] and to bring state laws into conformity with the PKPA.[190]

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181. *See id.* ¶ 12, 593 N.W.2d at 358-59.

182. *See supra* text accompanying note 22.

183. *See* Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act*, 32 FAM. L.Q. 267, 279 (1998).

184. The UCCJEA does not substantively change the definition of home state, neither does it clarify what is meant by a temporary absence. *See* N.D. CENT. CODE § 14-14.1-12(1) (1999); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201, 9 U.L.A. 671 (1999).

185. Interview with Kelly Gaines-Stoner, Clinical Instructor, Native American Law Project, Legal Aid Clinic, University of North Dakota School of Law, in Grand Forks, N.D. (Oct. 8, 1999).

186. *See id.*

187. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 3, 593 N.W.2d 355, 357 (noting that the children had stayed with their father in North Dakota for the entire school year).

188. *See supra* text accompanying note 22.

189. *See* Stoner, *supra* note 22, at 301-02. The UCCJEA defines a child-custody determination as follows:

"Child-custody determination" means a judgment, decree, or other order of a court

The UCCJEA was also designed to bring about uniform procedures for the enforcement of interstate child custody determinations.[191] The most significant change made by the UCCJEA is that it gives jurisdictional priority and exclusive continuing jurisdiction to the home state.[192] Under the UCCJEA, a state has jurisdiction to make an initial child custody determination only if it is the home state.[193] A state may gain jurisdiction under the other bases only if no other state qualifies as a home state or if the true home state has declined to exercise jurisdiction.[194] Also, once a state has made a child custody determination in conformity with the requirements for either an initial[195] or modified

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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.

N.D. CENT. CODE § 14-14.1-01(2) (Supp. 1999); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 102(3), 9 U.L.A. 658 (1999).

190. *See* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT prefatory note, 9 U.L.A. 649-50 (1999). The prefatory notes explain that the 30 years following the drafting of the UCCJA were marked by inconsistent interpretation by state courts. *See id.* This "inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity among the States." *Id.* at 650. This made the goals of the UCCJA unobtainable in many cases. *See id.*

191. *See id.*

192. *See* Stoner, *supra* note 22, at 305. "Home state" jurisdiction has now been prioritized over the other jurisdictional bases in the same manner as it is in the PKPA. *See* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201 cmt., 9 U.L.A. 671-72 (1999). This eliminates the potential conflict between the UCCJEA and the PKPA. *See id.*

193. *See* N.D. CENT. CODE § 14-14.1-12(1); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201, 9 U.L.A. 671 (1999). The definition of "home state" in the UCCJEA is slightly reworded, but no substantive change was intended. *See* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 102 cmt., 9 U.L.A. 659 (1999); *see also* N.D. CENT. CODE § 14-14.1-01(6) (Supp. 1999).

194. *See* N.D. CENT. CODE § 14-14.1-12 (Supp. 1999). The UCCJEA enumerates the jurisdictional bases as follows:

> Except as otherwise provided in section 14-14.1-15, 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 subdivision a, 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 section 14-14.1-18 or 14-14.1-19, and:
> (1) 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
> (2) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
> c. All courts having jurisdiction under subdivision a or b 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 section 14-14.1-18 or 14-14.1-19; or
> d. No court of any other state would have jurisdiction under the criteria specified in subdivision a, b, or c.

N.D. CENT. CODE § 14-14.1-12(1); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201, 9 U.L.A. 671 (1999).

195. *See id.*

child custody determination,[196] that state has exclusive continuing jurisdiction until none of the interested parties live in the state or have a significant connection to the state.[197] Other relevant changes made by the UCCJEA are found in its inconvenient forum provision.[198] The list of factors that a court may consider in determining whether another state is a more appropriate forum was expanded.[199] Also, under the UCCJEA, a state, after determining that it is an inconvenient forum, may no longer simply dismiss the action,[200] but must stay the proceeding and direct the parties to file in the more appropriate forum.[201]

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196. *See* N.D. CENT. CODE § 14-14.1-14 (Supp. 1999); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 203, 9 U.L.A. 676 (1999).

197. *See* N.D. CENT. CODE § 14-14.1-13 (Supp. 1999); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 202, 9 U.L.A. 673-74 (1999).

198. *See* N.D. CENT. CODE § 14-14.1-18 (Supp. 1999); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 207, 9 U.L.A. 682-83 (1999).

199. *See* N.D. CENT. CODE § 14-14.1-18(2) (Supp. 1999); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 207(b), 9 U.L.A. 682 (1999). The UCCJEA's expanded list of factors for determining whether a forum is inconvenient states:

> 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.

UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 207 (b), 9 U.L.A. 682 (1999). "The list is not meant to be exclusive." *Id.*

200. *See* Hoff, *supra* note 183, at 285. "To do so would leave the case in limbo." UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 207 cmt., 9 U.L.A. 683 (1999).

201. *See* N.D. CENT. CODE § 14-14.1-18(3) (Supp. 1999); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 207(c), 9 U.L.A. 682-83 (1999). Certainly, other modifications were effected by the UCCJEA but are beyond the scope of this comment. For more detailed coverage of substantive changes brought about by the UCCJEA, see UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT prefatory notes, 9 U.L.A. 649-53 (1999); Stoner, *supra* note 22; and Hoff, *supra* note 183.

B. *WINTZ V. CRABTREE* REVISITED

The North Dakota Supreme Court left unanswered the question of whether or not a child's permissive temporary presence of more than six months in the state is sufficient to confer jurisdiction upon the state;[202] the question remains unanswered. This raises the question whether the *Wintz* outcome would be significantly different under the new law. The UCCJEA gives priority to home state jurisdiction, necessitating a determination of which state holds that position.[203] The definition of home state has not substantially changed and the drafters have not further defined the scope of a "temporary absence."[204] Therefore, had *Wintz* been decided under the UCCJEA, the court may still have chosen to leave the jurisdictional question unanswered.

C. POSSIBLE UNINTENDED RESULTS OF DECLINING TO ANSWER THE JURISDICTIONAL QUESTION

The court's decision to not answer this jurisdictional question may have unintended results. On other occasions, the North Dakota Supreme Court has chosen not to decide similar questions.[205] In *Zimmerman v. Newton*,[206] rather than addressing the question of whether jurisdiction existed, the trial court assumed that jurisdiction existed and declined to exercise that jurisdiction because a custody proceeding was pending in another state.[207] On appeal, the North Dakota Supreme Court also assumed, without deciding, that the state had jurisdiction under section 14-14-03 of the North Dakota Century Code[208] and considered only whether the court incorrectly declined to exercise jurisdiction under the "simultaneous proceedings" provision of the UCCJA.[209] In *Wintz*, the

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202. *See* Wintz v. Crabtree, 1999 ND 85, ¶ 7, 593 N.W.2d 355, 358.

203. This change merely brings the UCCJA in conformity with the priority already established under the PKPA. Arguably, where state law conflicts with federal law, the federal law will supersede. *See* Hangsleben v. Oliver, 502 N.W.2d 838, 844 (N.D. 1993) (stating that North Dakota was preempted by the PKPA from exercising its home state jurisdiction where other states could validly exercise continuing jurisdiction under PKPA and had not declined to do so). Hence, firmly establishing which state is the "home state" is not a new requirement.

204. *See* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 102 cmt., 9 U.L.A. 659 (1999); *see also* N.D. CENT. CODE § 14-14.1-01(6) (Supp. 1999).

205. *See* Zimmerman v. Newton, 1999 ND 197, ¶ 9, 569 N.W.2d 700, 704 (stating that the court would assume that North Dakota had jurisdiction without actually deciding the issue). In *Hangsleben* the court said that it need not determine a continuing jurisdiction question. *See Hangsleben*, 502 N.W.2d at 844.

206. 1999 ND 197, 569 N.W.2d 700.

207. *See Zimmerman*, ¶ 9, 569 N.W.2d at 704.

208. *See id.*

209. *See* N.D. CENT. CODE § 14-14-06 (1997) (repealed 1999); *see also Zimmerman*, ¶ 9, 569 N.W.2d at 704. The court rejected the plaintiff's argument that a home state or significant connection

court declined to decide whether a six-month permissive temporary presence in North Dakota was sufficient to confer home state jurisdiction.[210] However, it could be argued that by proceeding to the inconvenient forum question, the court assumed that the jurisdiction was there to decline.[211]

The implications resulting from this assumption in *Wintz* are further reaching than they were in *Zimmerman*.[212] By assuming that North Dakota had jurisdiction in *Wintz*, the court implied its assent to the position furthered by the *Richardson* special concurrence—that a permissive six-month presence of a child in the state is sufficient to establish home state jurisdiction.[213] Therefore, the related policy concerns raised by the *Richardson* majority, in opposition to the "simple 'home state' test,"[214] must be considered. For example, the *Wintz* decision may have a chilling effect on the creation of extended visitation agreements if the custodial parent realizes that a new home state for the child may be established if the visit exceeds six months.[215] If jurisdiction is, in fact, established on this basis, the court may exercise its discretion to ensure that the proceeding takes place in the more appropriate forum.[216] However, courts are often reluctant to relinquish control over the custodial determinations of a child who is physically before the court and where, by this time, substantial information about the child's care and well being has been developed.[217]

Another possible implication of the court's refusal to decide the jurisdictional issue in *Wintz*, is that it expands the trial court's discretionary role. If trial courts assume they have jurisdiction in order to decide the issue on inconvenient forum grounds, which is a discretionary

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determination needed to be made, because "an affirmative answer to either question would not affect [the] appeal." *Id.*

210. *See* Wintz v. Crabtree, 1999 ND 85, 593 N.W.2d 355, 357-58.

211. *See In re* Marriage of Richardson, 625 N.E.2d 1122, 1129 (Ill. App. Ct. 1993) (Barry, J., specially concurring) (citing *In re* McDonald, 253 N.W.2d 678, 681 n.7 (Mich. Ct. App. 1977)). "The trial court failed to rule expressly on whether Michigan has jurisdiction. By declining to exercise jurisdiction, however, the circuit court implicitly held that it had jurisdiction to resolve the dispute." *McDonald*, 253 N.W.2d at 681 n.7.

212. The assumption of jurisdiction by the *Zimmerman* court did not effect the outcome of that case. *See Zimmerman*, ¶ 9, 569 N.W.2d at 704. By the same token, an assumption of jurisdiction in the *Wintz* case does not change the outcome of the case, but it raises the inference that a simple, six-month presence in the state is all that is needed to establish "home state" jurisdiction.

213. *See Richardson*, 625 N.E.2d at 1127-28 (Barry, J., specially concurring).

214. *See id.* at 1124-25 (stating that applying a strict physical presence analysis would create new "home state" jurisdiction for any extended visit over six months and would discourage extended visitation agreements by divorced parents living in different states).

215. *See id.*; *see also In re* Marriage of Frost, 681 N.E.2d 1030, 1035 (Ill. App. Ct. 1997).

216. *See Richardson*, 625 N.E.2d at 1128 (Barry, J., specially concurring).

217. For example, although it ultimately decided that the children had a greater connection to Arizona, the trial court in *Wintz* admitted that, "there is available substantial evidence concerning the children's present or future care, protection, training, and personal relationships in *either* State." Appellant's Brief, app. at 28, Wintz v. Crabtree, 1999 ND 85, 593 N.W.2d 355 (No. 980244) (emphasis added).

determination, a degree of the uniformity sought by the enactment of uniform acts is lost.[218] While this increase of the trial court's discretion may seem to foster more just decisions on a case-by-case basis, one can argue that it undermines the goal of uniformity sought by the enactment of the UCCJA, the UCCJEA and the PKPA.[219]

Because we are an increasingly mobile society, and particularly because North Dakota is home to two United States Air Force bases, it is likely that interstate custody disputes arising out of six-month or longer visitations will again surface. For the benefit of interstate families separated by divorce, the scope of "temporary absence," and whether it includes a six-month permissive visit, should be determined.

Warren J. Roehl[*]

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218. *See Wintz*, ¶ 8, 593 N.W.2d at 358.

219. Interview with Marcia O'Kelly, Professor, University of North Dakota School of Law, in Grand Forks, N.D. (Oct. 7, 1999).

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