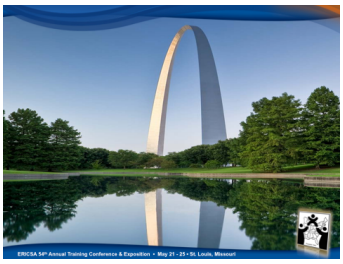
ERICSA

Eastern Regional Interstate Child Support Association



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Intergovernmental Case Law Update

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8:30 – 10:30 am
Breakout Session 7

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UIFSA expands personal jurisdiction beyond long-arm statutes

The father in ***Sullivan v. Smith*****,** 65 N.E.3d 1221 (Mass. App. 2016) previously participated in a Massachusetts paternity action that resulted in a support order against him. As the child approached majority and was planning for college, his guardians filed an equity action for post-minority support in the probate division. The court rejected Father's claim that it lacked personal jurisdiction over him, as he participated in the original paternity case. While the Massachusetts long-arm statute could not grant personal jurisdiction to adjudicate a claim to post-minority support, the court found that the UIFSA does. Based on the definition of "child" in Massachusetts's UIFSA, the court found that the provisions extend to children who have reached majority but who are in need of support from a parent.

Note: "UIFSA applies not only to minors, but also to children who have reached the age of majority but who are in need of support from a parent. ... Here, the Probate and Family Court had continuing, exclusive jurisdiction over the equity complaint seeking support, as it had issued an order of support and was the State of residence of the child and the former guardian."

The court explained that the trial court had personal jurisdiction over father under § 2–201(7) and (8) of the UIFSA.

§ 2-201. Bases for jurisdiction over nonresident

(a) In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of the commonwealth may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(1) the individual is personally served with a notice within the commonwealth;

(2) the individual submits to the jurisdiction of the commonwealth by consent in a record, by entering a general appearance or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(3) the individual resided with the child in the commonwealth;

(4) the individual resided in the commonwealth and provided prenatal expenses or support for the child;

(5) the child resides in the commonwealth as a result of the acts or directives of the individual;

(6) the individual engaged in sexual intercourse in the commonwealth and the child may have been conceived by that act of intercourse;

(7) the individual asserted parentage of a child under chapter 46 or chapter 209C; or

(8) there is any other basis consistent with the constitutions of the commonwealth and the United States for the exercise of personal jurisdiction.

(b) The bases of personal jurisdiction set forth in subsection (a) or in any other law of the commonwealth may not be used to acquire personal jurisdiction for a tribunal of the commonwealth to modify a child support order of another state unless the requirements of Section 6-611 are met or, in the case of a foreign support order, unless the requirements of Section 6-615 are met.

Service of process by mail

The model UIFSA allows the exercise of personal jurisdiction through personal service, different types of residence and activity within the state, and a constitutional catchall provision. It does not mention service by mail; although many states feature this provision. UIFSA Section 201 (2008). For example, Ohio's civil rules allow service by certified or express mail, evidenced by return receipt "signed by any person." The rules further envision an unclaimed certified piece of mail:

> If a United States certified or express mail envelope attempting service within or outside the state is returned with an endorsement stating that the envelope was unclaimed, the clerk shall forthwith notify the attorney of record ... and enter the fact and method of notification on the appearance docket. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by United States ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the

> address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. ... Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery. If the ordinary mail envelope is returned undelivered, the clerk shall forthwith notify the attorney, or serving party.

Under the Ohio rule, compliance creates a presumption of proper service. However, that presumption may be rebutted with evidence showing that service was in fact not made. A paternity judgment was upheld in ***In re J.K.M.,*** 2016-Ohio-7799, 2016 WL 6835709 (Ohio App. 2nd D. 2016), where a certified envelope was returned unclaimed. There was nothing in the record that the subsequent delivery by regular mail was returned, thus under the rule service was presumed. The court noted that the defendant never claimed he did not reside at a different address. There was also evidence of another personal service evasion.

Cause and Effect: Triggering personal jurisdiction

IV-D counsel dealing with interstate matters may fondly recall their law school days and *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978), which held that a nonresident who consents to a child living in another state, contrary to the parents' separation agreement, has not by this act alone purposefully availed himself of the benefits and protections of that state's laws. The Supreme Court noted that because this was a domestic action, the nonresident did not derive any commercial or financial benefit from the child's presence in the other state. "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws."

The Supreme Court in *Kulko* cited the Restatement (Second) of Conflict of Laws Section 31 (1971) which provides:

"A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

The Supreme Court ruled that this section was "intended to reach wrongful activity outside the State causing injury within the State." The court further explained: "[Father] has at all times resided in New York State, and, until the separation and [Mother's] move to California, his entire family resided there as well. [Father] did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of

litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being 'haled before a [California] court,' *Shaffer v. Heitner* ... To make jurisdiction in a case such as this turn on whether appellant bought his daughter her ticket or instead unsuccessfully sought to prevent her departure would impose an unreasonable burden on family relations, and one wholly unjustified by the 'quality and nature' of appellant's activities in or relating to the State of California. *International Shoe Co. v. Washington* ...

Kulko remains good law, although our nation's increasing mobility has perhaps lulled practitioners (and a few judges) to believe its precedent has been diluted after thousands of interstate cases.

In ***William B. v. Rachel H.,*** 68 N.E.3d 977 (Ill.App.2nd 2016), Mother resided with her two-year-old child in North Carolina. She underwent emergency surgery due to internal bleeding. The child's paternal grandparents, who reside in Illinois, cared for the child in Illinois while Mother recovered after surgery. They all agreed that Mother would recover the child about two months later. Father visited his parents over Christmas while on leave from the military, so everyone agreed to extend the visit by a month to allow Father to enjoy his son with his parents over the Christmas holiday. Mother then made arrangements to pick up the child in February, but the grandparents would not respond to her communications.

Father filed in Illinois for paternity in March, and after receiving service, Mother drove to Illinois and retrieved the child. Two weeks later, Father filed an emergency motion for temporary injunction and an order to return the child to Illinois. The trial court granted the motion, citing Section 201 of the Illinois UIFSA:

750 ILCS 22/201 Bases for jurisdiction over nonresident.

(a) In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of this State may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

…

(5) the child resides in this State as a result of the acts or directives of the individual;

…

The trial court found sub-section (a)(5) applicable. The Illinois appellate court affirmed. The court briefly discussed *Kulko*, and determined that Mother's actions "amounted to more than mere acquiescence." Mother thus exceeded the *Kulko* threshold by reaching out to the grandparents; and failing to retrieve the child until she was served with process. "Given these facts, it was reasonable for the trial court to infer that by [Mother's] acts or directives she intended the minor to reside in Illinois."

Note: The court remarks that "UIFSA was developed after *Kulko*, and case law notes that the UIFSA allows for long-arm jurisdiction as broad as is constitutionally permitted." The court further explained: "Additionally, where respondent sent the minor to Illinois and, for 5½ months, never visited him and never made any effort to retrieve him, and where there is no evidence that she supported him in any way during that time, it was foreseeable that at some point either petitioner or his mother would seek some form of child support."

Note: The court referenced a few other facts. First, Mother was off from work for only three days following surgery. Is this relevant for the constitutional analysis? Second, "[Mother] further testified that, although her fiancé lived with her after her surgery, she chose to have the grandparents care for the minor." Is this relevant for the constitutional analysis?

Note: There is a clear indication reading this case that both the trial and appellate courts were critical of Mother's inaction while the child remained in Illinois. Both courts noted the "5-1/2 months" the child remained in Illinois. Once served with process, in addition to driving to Illinois, should Mother have filed her own action in North Carolina? Under the UCCJEA, which could would have jurisdiction?

Note: Consider the UCCJEA. Although the court believed it proper to assume jurisdiction under *Kulko*, was the court wrong to find authority to adjudicate custody in a cause that originated as a *paternity* case authorized by the UIFSA?

Note: Father filed a parentage action. Presumably then, there was no existing presumption of paternity. If there was not, under what authority could the trial court order the child returned to Illinois? If there was (*e.g.,* birth certificate; genetic test; acknowledgement), under what authority would the court adjudicate (or ratify) a paternity presumption?

Uniform Parentage Act (2002)

SECTION 310. RATIFICATION BARRED.

> A court or administrative agency conducting a judicial or administrative proceeding is not required or permitted to ratify an unchallenged acknowledgment of paternity.

This is required by 42 U.S.C. Sec. 666(a)(5)(E). Illinois counsel should review *In re Paternity of an Unknown Minor,* 2011 IL App (1st) 102445, 951 N.E.2d 1220, 351 Ill. Dec. 556 (Ill.App.1st Div. 2011).

No bootstrapping jurisdiction for unrelated matters

For a litigant who otherwise would not be subject to personal jurisdiction, the UIFSA directs that participation solely in a UIFSA proceeding does not confer jurisdiction for another proceeding:

SECTION 314. LIMITED IMMUNITY OF [PETITIONER].

(a) Participation by a petitioner in a proceeding under this act before a responding tribunal, whether in person, by private attorney, or through services provided by the support enforcement agency, does not confer personal jurisdiction over the petitioner in another proceeding.

(b) A petitioner is not amenable to service of civil process while physically present in this State to participate in a proceeding under this act.

(c) The immunity granted by this section does not extend to civil litigation based on acts unrelated to a proceeding under this act committed by a party while physically present in this state to participate in the proceeding.

The Comment to Section 314 explains that this prohibition precludes joining disputes over child custody and visitation with establishment, enforcement or modification of support. "Only enforcement or modification of the support portion of such decrees or orders are relevant. Other issues, such as custody and visitation, or matters relating to other aspect of the divorce decree, are collateral and have no place in a UIFSA proceeding." The UCCJEA contains an equivalent provision.

Thus, the court in ***Wilson v. King***, 160 Idaho 344, 372 P.3d 399 (2016) declined to enforce a property settlement for an out-of-state support obligor. The parties were divorced in Colorado, and wife was awarded a portion of husband's military pension. They subsequently engaged in some custody and support disputes in Idaho, and wife sought to enforce the pension provision there. The husband argued that Idaho lacked personal jurisdiction to enforce the pension provision, despite his participation in the support proceedings. The court rejected the wife's argument that husband availed himself of the Idaho courts not only for support, but also to address some additional issues such as payment for counseling and transportation. The court ruled that these expenses were related to child custody proceedings, covered by the UCCJEA jurisdictional immunity. The court rejected similar arguments that husband's motion for contempt to enforce visitation and a motion for a TRO to restrict further travel were sufficient to confer personal jurisdiction beyond the UIFSA and UCCJEA matters.

Note: More often, the personal jurisdiction immunity found in the UIFSA is applied in cases where the UCCJEA is not involved. Such immunity envisions participation without being subject to personal jurisdiction for matters unrelated to the proceeding encompassed by the act. In this case, the dispute was litigated pursuant to both acts.

Note: What other options does the wife have to enforce her ex-husband's military pension? In what jurisdiction may she proceed?

UIFSA and the UCCJEA: Friends or Foes?

In re Salminen, 492 S.W.3d 31 (Tex. App. 2016) reminds that the UIFSA and the UCCJEA evaluate jurisdiction independently. "Each act is based on a completely independent uniform law." A court's jurisdiction to hear a child support issues doe not confer jurisdiction to determine custody or visitation. "The United States Supreme Court has established that the bases of jurisdiction in interstate child support cases are different from the interstate child custody cases. ... (Comparing *Kulko* ... (jurisdiction in child support claim is based on minimum contacts of obligor with forum state), with *May v. Anderson*, 345 U.S. 528 ... (1953) (jurisdiction in child custody claim is based on domicile of child))."

In this case two Finnish orders granted custody of a 12-year-old girl to Mother, a Finnish citizen. The Finnish courts granted Father some visitation rights. In 2012, Mother filed a UIFSA petition in New York. The New York court dismissed the petition for lack of jurisdiction, citing the Finnish child support agreement. Later, Mother and child temporarily moved to South Texas in 2014. She thereafter filed for support under the UIFSA, stating that she and the child both resided in Texas. Mother alleged that the Texas court had personal jurisdiction over Father because the child was possibly conceived when the parents were in Texas in 2002.

In response, Father unsuccessfully challenged personal jurisdiction under the UIFSA, but alternatively requested the trial court take temporary emergency jurisdiction under the UCCJEA. Father claimed that he had been denied visitation rights in Finland under the prior Finnish custody orders. The UCCJEA only allows emergency jurisdiction if a child is present in the state and has been abandoned or it is necessary to protect the child from abuse. The Father claimed Mother "has a continuous history of absconding with the child the subject of this suit, worldwide forum-shopping, and defying the Finnish court's possession and access orders again and again," and that that behavior "is nothing less than mistreatment and abuse of the child." At a temporary orders hearing, the trial court awarded Father "sole managing conservatorship," and ordered the immediate surrender of the child to Father. Mother sought mandamus, which was granted.

Clearly, Texas was not the "home state" of the child. Nor was temporary emergency jurisdiction appropriate "where no evidence indicates that the child needs emergency protection."

Note: Most appellate cases addressing custody jurisdiction issues discuss the UCCJEA. Citations to *May v. Anderson* are comparatively few, although the case remains good law. In *May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953), the parents separated by agreement, with mother and the children moving from Wisconsin to Ohio. Father later obtained a

Wisconsin decree awarding him custody of the children. He sought enforcement through a *habeas corpus* action in Ohio. An Ohio probate court determined that it must afford the Wisconsin judgment full faith and credit. After rejection by the Ohio appellate court, the Supreme Court granted certiorari and ruled that because the Wisconsin custody order was void, Ohio was not required to give it full faith and credit. The Supreme Court in *May* ruled that custody determinations can only be made through the exercise of *in personam* jurisdiction. In *May*, the mother had been personally served in Ohio. She was just not properly domiciled in or before the Wisconsin court. The Supreme Court explained: "...[W]e have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*." Id. at 345 U.S. 533. (emphasis added) The Court answered no: "In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony." *Id*. at 345 U.S. 534. The Court concluded: "We find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession." *Id.* (emphasis added)

May isn't cited as often as one may think. The reason is obvious: Most of these cases involve a party with actual custody before the court, seeking a formal custody order against an absent parent. The absent parent has no desire to have a parent/child relationship, let alone to appeal a custody determination. For example, termination of parental rights sometimes involves biological parents who may not even be aware of their parentage. *May* has also been criticized as unworkable, and even ignored at times. Homer Clark, Domestic Relations: Cases & Problems 1036-40 (3rd ed 1980). Yet *May* remains good law. *See* Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction, 58 La. L. Rev. 449, 506-509 (1998).

Building that Wall: No custody order = no support?

Nora Nieto and her two children, David and Jukari, live in Mexico. Nora's husband, Alfredo Arevalo, lives in Illinois with another woman and their two children. The Illinois Department of Healthcare and Family services filed a petition to establish support pursuant UIFSA.

In ***Department of Healthcare & Family Services v. Arevalo*****,** 68 N.E.3d 552 (Ill. App. 2nd, 2016), the court ruled that because the UIFSA requires a support order be established under the law of the forum state, and since Illinois required a custody determination in conjunction

with a support order, the court lacked authority to order support because there was no custody order. Because the court of appeals was simply wrong, there was a robust dissent.

The trouble began when the trial court commented *sua sponte* that a support order might result in a *de facto* custody order. In a subsequent hearing, the court wondered aloud that it might have to make a paternity determination as a prerequisite to ordering support. The IV-D agency replied that because the parties were married, paternity was presumed. The trial court continued its stream of consciousness by noting that the presumption from marriage was "only a presumption" and that the court "would still be required to determinate paternity" because support could be ordered. The trial court ruled that a support order would result in a *de facto* custody determination, which under UIFSA the trial court could not make.

Not to be outdone, the court of appeals began their erroneous journey by citing this portion of Illinois' UIFSA:

> Except as otherwise provided in this Act, a responding tribunal of this State shall:
>
> **(1)** apply the procedural and substantive law generally applicable to similar proceedings originating in this State and may exercise all powers and provide all remedies available in those proceedings; and
>
> **(2)** determine the duty of support and the amount payable in accordance with the law and support guidelines of this State.

The court first ruled that the UIFSA does not affect substantive rights. The court rejected the IV-D agency's argument that the UIFSA itself creates a duty of support. The court then ruled that the Illinois statutory scheme displaced the previous common law duty of support. ("While there may be no statute that affirmatively states that the common-law duty of support has been abolished, our legislature has abolished common-law marriage.") The court opined that when the Illinois Supreme Court recognized a common law duty of support, it restricted it to limited, specific situations, such as artificial insemination. Perhaps sensing the gathering clouds of faulty logic, the court explained:

> Moreover, to recognize a common-law cause of action for child support risks opening the floodgates to multitudinous lawsuits between married spouses. What of the husband who gambles or drinks? Can his wife sue him for increased support? What of the miserly husband or wife? Can the offended spouse sue his or her mate to loosen the purse strings? What if a couple cannot agree on budget priorities? Is public school a deprivation where the family can afford private school? We can envision countless scenarios leading to frivolous lawsuits. Consequently, if there is a duty of support in this case, it must be found in one or more statutes.

Because the parties are married, the court applied the Illinois marriage act to find that support cannot be ordered because there was no pending dissolution. The court rejected the (correct) argument that Illinois' IV-D provisions allowed a support order for one who has actual but not necessarily legal custody of a child.

The court then considered the Illinois Uniform Parentage Act.

> **(a)** The court shall issue an order adjudicating whether a person alleged or claiming to be the parent is the parent of the child. ...
>
> **(c)** In the absence of an explicit order or judgment for the allocation of parental responsibilities, the establishment of a child support obligation or the allocation of parenting time to one parent shall be construed as an order or judgment allocating all parental responsibilities to the other parent.

The court tried to explain that sub-section (a) requires a finding of parentage before ordering support, and then sub-section (c) automatically renders a custody judgment. But, since the UIFSA does not allow a court to make a custody determination, the Illinois UPA "did not furnish a duty of support." The court rejected the argument that because custody could not be adjudicated in Illinois under the UCCJEA, the effect of sub-section (c) of the Illinois UPA was inapplicable and thus allowed a support order. The court ruled that because the agency raised this argument for the first time in a petition for rehearing, the argument was forfeited. Perhaps mindful that the UCCJEA argument might have been raised initially in a petition for rehearing because rehearings typically call into question error in the appellate decision, the court obliged by noting that sub-section (c) simply cannot be read as an exception. The court in the next sentence criticized the dissent for trying to harmonize the UIFSA with the UPA.

Still not done, the court of appeals held that the presumption from marriage was insufficient to authorize a support order. Offending hundreds of years of what has been termed "the strongest presumption in the law," the court wrote: "A parent-child relationship can exist as a natural fact, but this is insufficient to establish a legal relationship."

The court concluded that once Nora establishes a custody order in Mexico, she can obtain a support order against Alfredo in Illinois.

Note: Had the mother in ***Arevalo*** had an acknowledgement or genetic test instead of a marriage certificate, she would have obtained a support order.

Note: While ***Arevalo*** is flawed in several respects, it illustrates an ironic consequence of some IV-D proceedings. In the United States, marriage has *always* in and of itself been sufficient grounds to establish a support order. Without the "benefit" of marriage, support cannot be established without a sufficient presumption, such as an acknowledgment or genetic test. Once a UPA presumption attaches, support can be ordered straight away. But, for married parents, well established custody provisions are frequently employed early to alter direct IV-D administrative establishment efforts.

Note: The dissent correctly states the law on these issues. Additionally, the dissent mentions the modern approach to "custody" determinations:

> Finally, I would note that, under the 2015 rewriting of the Marriage and Parentage Acts, the term "custody" has almost vanished from those statutes. See P. André Katz & Erin B. Bodendorfer, *The New and Improved Illinois Marriage and Dissolution of Marriage Act*, 103 Ill. B.J. 30, 34 (2015) (under the Marriage Act of 2015, "[c]ourts will no longer award 'custody' or 'visitation' .... Rather, courts will allocate 'parental responsibilities' (formerly custody) and 'parenting time' (formerly visitation)."); Pub. Act 99-85 (eff. Jan. 1, 2016) (adding 750 ILCS 46/802(a)) (when issuing a judgment relating to custody in a parentage proceeding, the court must apply the standards of the Marriage Act of 2015). Thus, under our new laws, the designation of one or both parents as "custodial" parents is largely a thing of the past. For all of these reasons, I believe that the majority wrongly adopts the position that the Department cannot pursue child support without a formal court order awarding Nora custody.

No CEJ if support not ordered in original judgment

In 2013, a Florida court approved a paternity settlement agreement for the children to reside in Texas with mother. No child support was entered. In 2014, Mother filed a motion to modify in Texas. Father sought to dismiss, based on the UCCJEA. Father filed to reopen in Florida, and the Texas court sought to communicate with the Florida court. For over six months, the Florida court failed to respond. The Texas court eventually held a hearing at which both parties participated, and modified the Florida judgment, adding a support order.

In ***In the Interest of T.B.***, 497 S.W.3d 640 (Tex. App. 2nd D. 2016), the court first held that while Florida was the home state for the initial custody determination under the UCCJEA, Texas could modify custody as a more convenient forum. The court noted that Father did not seek to compel the Florida court to proceed with his motion there.

The court then explained that "The UIFSA is a completely different and independent uniform law from the UCCJEA." The UCCJEA and UIFSA have different jurisdictional requirements. Once a court possessing UIFSA jurisdiction enters a support order, that court becomes the only tribunal authorized to modify the decree as long as it retains jurisdiction. But, if a court originally adjudicating custody "fails to include a child support order," that court "does not acquire continuing, exclusive jurisdiction ... under the UIFSA." Thus, mother could obtain a support order provided Texas had "jurisdiction" over father.

The court addressed its "jurisdiction" over father by describing the Florida agreement regarding child support:

> [i]n light of the parties' incomes, the interstate residences of the parties, the Father's sole obligation is to pay travel expenses for himself and the children for transport between Florida and

> Texas. Neither party will pay child support to the other party. It is the parties' intent and agreement that there will be no retroactive child support due.

The court ruled that this provision did not constitute a "child support order" under UIFSA. "The provision is not a support order because it does not order monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support."

Note: As with many states, Florida has a fairly robust custody relocation statute. In this case, the allowance of mother's relocation to Texas was clearly bargained with no support order, considering the incomes of the parties. There is specific reference to "Father's *sole obligation"* ... to pay travel expenses for himself *and the children* for transport between Florida and Texas." Inasmuch as the parties envisioned the father's liability for *all* travel expenses for the children, could this be viewed as "reimbursement for financial assistance provided to an individual obligee" under UIFSA?

The parties used this sentence in their Florida agreement: "Neither party will pay child support to the other party." What if they would have used this sentence: "Neither party will pay *periodic* child support to the other party." Or this: "Father's child support obligation shall be discharged by paying all transpiration expenses for the children for travel between Florida and Texas, and these payments are deemed to be reimbursement to Mother." Or this: "Father's obligation to pay for all travel expenses for the children shall be deemed the payment of child support pursuant to all applicable law, including but not limited to any state's version of the UIFSA."

Put another way: Can the parties bargain out of some UIFSA provisions? UCCJEA provisions?

Regardless of whether they can bargain out of them, can they inadvertently waive some of them?

Note: The court discussed the Texas court's "jurisdiction" to adjudicate a child support order, but then analyzed that issue not on jurisdictional grounds, but rather on basic authority to act under the UIFSA. In this case, Father appeared for the Texas hearing, and did not contest personal jurisdiction. If he had contested personal jurisdiction for a Texas court to order child support, would he have prevailed?

But CEJ if support provided in some form

Compare *In the Interest of T.B*. with ***In re Sanders*****,** 2016 Tex.App. LEXIS 7637 (Texas App. 5th D. 2016). In this case, the original Colorado order did not include a periodic support

amount, but rather required both parties to split all expenses for the child equally, including medical expenses, health insurance costs, and reimbursement for extracurricular activities.

UIFSA enforcement without foreign finality

In ***Henderson v. Henderson***, 241 Ariz. 580, 390 P.3d 1226, 2017 WL 785589 (Ct. App. 2017), a 2009 Canadian court awarded Mother $360,000 CAD in arrears and monthly support of $9744 CAD. Because the court had incomplete information on Father's income, the court designed its order as "subject to ... variation." (Canadian law allows retroactive modification.) The Canadian Family Responsibility Office attempted to register the order in Hong Kong, where Father's employer was headquartered, but was ultimately unsuccessful. The order was then registered in California in 2011, but Father left there before enforcement. He remarried in 2011 and in 2012 put a $500,000 down payment on a home is Tucson. Mother then registered the Canadian order in Arizona.

Mother eventually sought contempt in Arizona, and Father defended on grounds that the order could not be registered and enforced because it was still subject to "variance" in Canada. The court ruled that under the UIFSA, foreign support orders, even temporary or subject to modification, can be enforced.

"Support order" means a judgment, decree, order, decision or directive, whether temporary, final or subject to modification, issued in a state or foreign country for the benefit of a child, a spouse or a former spouse, that provides for monetary support, health care, arrearages, retroactive support or reimbursement for financial assistance provided to an individual obligee in place of child support. Support order may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorney fees and other relief." Ariz. Rev. Stat. § 25-1202.

The court also noted that under the Restatement (Third) of Foreign Relations Law of the United States, Sec. 486 comment (b), support orders that are not final, and that are subject to modification, should still be enforceable.

Limitations defined by effect within UIFSA choice of law

The State of Washington has this familiar UIFSA provision:

> **(1)** Except as otherwise provided in subsection (4) of this section, the law of the issuing state or foreign country governs:

(a) The nature, extent, amount, and duration of current payments under a registered support order;

(b) The computation and payment of arrearages and accrual of interest on the arrearages under the support order; and

(c) The existence and satisfaction of other obligations under the support order.

(2) In a proceeding for arrears under a registered support order, the statute of limitation of this state or of the issuing state or foreign country, whichever is longer, applies.

(3) A responding tribunal of this state shall apply the **procedures and remedies** of this state to enforce current support and collect arrears and interest due on a support order of another state or foreign country registered in this state.

(4) After a tribunal of this or another state determines which is the controlling order and issues an order consolidating arrears, if any, a tribunal of this state shall prospectively apply the law of the state or foreign country issuing the controlling order, including its law on interest on arrears, on current and future support, and on consolidated arrears.

(emphasis added)

In ***In re Paternity of M.H. V. Heflin***, 187 Wash.2d 1, 383 P.3d 1031 (2016), an Indiana court entered a paternity and support judgment against father in 1994. In 2010, the Indiana judgment was registered in Washington. The parties subsequently settled upon a repayment agreement for $120,000 in $2000 monthly payments. When the obligor defaulted, a wage withholding was entered.

The court of appeals reversed the withholding order, finding that Washington's 10-year presumption of payment statute extinguished the obligation. The appeals court found that the 10-year presumption fell under UIFSA's "procedures and remedies" choice of law. The Washington Supreme Court, however, rejected that conclusion and affirmed the withholding order. The court determined that the 10-year bar "does not fit well within the remedy section" of UIFSA. The court acknowledged that the comments to the model act refer to mechanisms such as license suspensions or revocations as examples of remedies, and that wage withholdings would seem to fall into the same category. However, the court explained that the 10-year presumption rule does not provide a "procedural mechanism to enforce a child support order." Rather, it sets a "durational limit on the general enforcement of an underlying judgment for child support."

Although the 10-year presumption was not a classic "statute of limitations" under Washington law -- meaning, a bar to a cause of action -- the court instead framed the issue as whether such "non claim statutes are statutes of limitation for purposes of the UIFSA choice of law provision." The court found that it was. The court explained that the effect **upon a UIFSA action** of a time bar to enforcement is equivalent to a time bar to a cause of action (a classic statute of limitations). Because Washington's 10-year presumption was less than Indiana's 20-year presumption, the withholding order remained effective.

Note: The decision cites helpful authority on this issue from Kansas, Texas, Colorado and Indiana.

Note:

> The policy behind UIFSA supports our holding. UIFSA sought to avoid allowing parents to forum-shop based on which states could limit their liability under existing support orders. The comment to the model act explains the rationale behind the statute of limitation provision is that "the obligor should not gain an undue benefit from his or her choice of residence if the forum state ... has a shorter statute of limitations for arrearages." Unif. Interstate Family Support Act (2008), 9 pt. 1B U.L.A. § 604(b) cmt. at 197 (Supp. 2016). Amicus persuasively argues that holding that a statute that limits the time for recovery of arrearages, like RCW 4.56.210(2), is not a "statute of limitation" for UIFSA choice of law purposes would prevent courts from applying RCW 26.21A.515 as it was intended to be applied. If the directive to apply the longer limitation period does not apply to the enforcement period under RCW 4.56.210(2), the directive is meaningless. Foreign support orders registered in Washington would be unenforceable under RCW 4.56.210(2) even if the statute of limitation for such enforcement had not yet expired in the issuing state. By mandating the application of the longer statute of limitation period, UIFSA suggests an intent to keep judgments for arrearages enforceable as long as possible to give children the most support possible. Holding that RCW 4.56.210(2) is a statute of limitation for UIFSA choice of law purposes is most consistent with that intent.

Note: After the six-figure arrearage was registered in Washington, the parties settled upon a repayment plan for the total amount. Would it have been advisable to include language in the settlement agreement designed to preclude a time bar defense? What kind of language could have been used?

Issuing order controls interest and emancipation

1981: Mother and Father meet as freshmen at Regis College in Denver.

1982: Mother filed for paternity and support; Father served in Colorado

1982: Mother moves to her parents' home in Alaska; Father moves to Florida; Child born in Alaska

1983: Mother receives AFDC in Alaska and notifies IV-D agency of Colorado paternity case

1983: Colorado enters default decree to $3400 birthing costs and $450 monthly support order

1984: Alaska registers the Colorado judgment in Florida under URESA

1984: Florida court finds $7650 arrearage under Colorado order and modifies support to $246 monthly (Mother did not learn of this 1984 modification until 2013)

1985: Father pays $45.55 to Alaska Child Support Enforcement Division; notice sent reminding of next $246 payment + $8831 appears and interest

1985: Father marries and moves to Texas, remaining there

1987: Mother and child move from Alaska to Colorado and remain there

Late 1980s - early 1990s: Alaska seeks to enforce assigned arrears against Father in Texas

1996: Father settles Alaska debt of $5429 for $2500 and receives "paid in full" letter

2000: Child turns 18

2012: Child finds Father through and internet search and informs her mother

2013: Mother registers 30-year-old Colorado order in Texas and seeks withholding, alleging over $1.5M in child support arrears ($71,241 was principal; the remaining million was interest)

2013: After learning of the Florida order (that modified the Colorado order), Mother registered that judgment in Texas

2014: As the child was 31 years old and about to graduate from medical school, the Texas court held a hearing to address Mother's claim that Father now owed about $1M, of which $49,744.18 was principal and the rest statutory interest

Colorado compounds 12% interest monthly on arrears.

Florida sets 10% simple interest on arrears.

In ***In the Interest of R.R.***, No. 02-15-00032-CV, 2017 WL 632897, 2017 Tex.App. LEXIS 1371 (Tex. App. Feb. 16, 2017), the court held:

1. It was not necessary to determine which order was controlling under UIFSA, because there is no prospective child support at issue, as the child is emancipated.
2. The trial court did not abuse its discretion by refusing to register the Colorado order, because it had been modified by the Florida judgment.
3. Failing to register the Colorado order did not run afoul of the UIFSA or the FFCCSOA because the Colorado judgment of $3400 was for pregnancy costs and attorney fees, and not child support. (The Texas court cited The Texas Family Code Section 159.102(2) briefly describing child support; but neglected to cite Sub-section (28) of the same section, which defines a "support order" to include "health care" and "reimbursement for financial assistance.")

4. The Colorado order, because it is from the issuing state, controlled both the age of emancipation, which was 19; as well as the interest assessment on arrears (12% compounded monthly). That interest rate would be applied to the Florida URESA arrearage determination of $7650 of Colorado arrears prior to modification.
5. Although Florida allows a laches defense, it is inapplicable to the Colorado judgment.
6. As between Colorado and Texas, the longer limitations period applies. Aware that the Texas limitations period would apply if Mother sought a Texas judicial determination of arrears, she instead sought a "judicial writ of withholding," which has no limitations period in Texas. Thus, the court did not have to study the Colorado limitations period.
7. The Alaska settlement for $2500 was for AFDC reimbursement only, and did not extinguish the debt owed to Mother.

Creditor's failure to object to registration does not void arrearage

In ***State ex rel. Des v. Pandora***, 382 P.3d 101 (Ariz. App. 1st Div. 2016), the *obligor* registered an Illinois order in Arizona, including an affidavit of zero arrears. The obligee failed to file a timely objection to registration. The model act, as well as Arizona's UIFSA, states in part: "If the non-registering party fails to contest the validity or enforcement of the registered support order in a timely manner, the order is confirmed by operation of law." UIFSA Section 606(b). In a split decision, the Arizona court of appeals ruled that while the obligee's failure to timely object to the notice waived her right to contest confirmation of the *support order*, the ability to contest arrears was not waived. "What is subject to confirmation under the statutes is the order, not the filing party's calculation of arrearages that may be due under that order. Once the foreign order is registered and confirmed, the Arizona court acquires jurisdiction to enforce the order by determining arrearages that may be due and enforcing payment of those arrearages."

A.R.S. § 25-1305 (B)(3) states in part: [The] failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted." (The model UIFSA is equivalent in Section 608, but adds this comment: "Confirmation of a support order, whether by action or as the result of inaction, validates both the terms of the order *and the asserted arrearages*.") The court found that "the statute does not say that a failure to object likewise results in confirmation of any arrearage amount posited by the filer or preclusion of the nonfiling party's right to object to that amount." The court explained further:

> Under the circumstances, we construe the reference in § 25-1305.B.3 to "alleged arrearages" to mean that a failure to object to registration of an order may result in enforcement proceedings to

> collect any arrearages specifically referenced in that order. Father's argument that a failure to object results in "confirmation of . . . the alleged arrearages" averred by the filing party reads a consequence into the statute that is not plainly stated, and we are reluctant to construe the statute to require such an onerous result when the statute plainly states that a failure to object will result in "confirmation of the order" and "preclu[sion of] further contest of that order," but does not plainly state the same result with respect to the filing party's separate avowal of arrears.

The court added that the UIFSA is a "streamlined process by which an Arizona court acquires jurisdiction over a foreign support order is aimed simply at determining the validity of the foreign order, because once it is determined to be valid and current, it is subject to enforcement as if it were issued by an Arizona court." When a foreign support order "does not establish an arrearage amount due and owing, the order does not represent the foreign court's determination of arrearages as a finding of fact to which we must give similar full faith and credit."

Administrative recitations do not reduce foreign order

It is not unusual for a IV-D agency to enter administrative orders changing arrears. These systems are by their nature dynamic. This can be "confusing" to obligors; and tempting to counsel aware of the quasi-judicial nature of administrative orders. The Missouri IV-D agency [Family Support Division, or "FSD"] has in the past corrected erroneous docketed orders by filing amended, corrected orders. For example, FSD utilizes a two-step administrative process to first confirm an arrearage, and then collect that arrearage. In the first step, FSD enters an administrative order "in accordance with the court order." Section 454.476.1, RSMo 2000. This first step is sometimes referred to as an AOEO (Administrative Order on an Existing Order). If an AOEO incorrectly declared an arrearage, the Missouri Supreme Court in *State ex rel. Hilburn v. Staeden*, 91 S.W.3d 607 (Mo. 2002) seemed to allow an administrative correction without the need to resort to the full battery of Rule 74.06 motions or an independent action to obtain relief from an erroneous judgment. But this practice was put into question by the decision in *State ex rel. Ryan v. Ryan* 124 S.W.3d 512 (Mo. App. S.D. 2004). In this case, FSD utilized § 454.476 to docket a November 1994 AOEO stating a child support arrearage of $4,001. In 2001, FSD filed an amended AOEO, declaring a child support arrearage of more than $18,000. The court of appeals held that the 2001 amended AOEO was "null and void" because §454.500.5 forbade the 1994 AOEO from being modified other than to conform to any circuit court modifications. In a footnote that may prove disquieting to counsel trying to correct an erroneous AOEO, the court stated:

...[T]he Director attempted to render an order, having all the force and effect of a judgment when docketed with the circuit court, that was to supersede his own prior determination. Since a circuit court could not do so, then it follows that the Director cannot do so. See § 454.501.

The decision in *Ryan* was troubling in several respects. First, the statutes cited by the court that forbid "modification" of AOEOs were federally mandated to forbid a court from retroactively modifying an administrative order for current child support. Such a retroactive modification would automatically alter an arrearage; but neither statute cited by the court was intended to prevent the correction of an erroneous arrearage for other reasons. The court in *Ryan* interpreted the proscription on "modification" from §§ 454.500.5 and 454.501 to forbid amendment or correction of an *arrearage* declaration. Second, the *Ryan* decision suggests the court believed the first AOEO was the result of an administrative hearing: "The State appears to admit that the 1994 AOEO *adjudicated* all of Father's child support arrearage under the [original court order]." To be sure, the vast majority of Division AOEOs are not adjudicated, and are docketed without objection. Nearly all of them are prepared by non-lawyer technicians who stamp them with a facsimile of the FSD director's signature, virtually none of them are seriously reviewed by more experienced supervisors, and some of them are simply wrong. The rationale in *Ryan* casts doubt on the ability to fix one of these incorrect orders, because the statutes supporting the court's reasoning are not dependent on the existence of an adjudicated administrative hearing. (Ironically, the decision in *Ryan* affords an erroneous docketed administrative order a more impenetrable shield than an erroneous circuit court judgment.)

In ***FSD v. Covert***, 2017 WL 765921 (Mo.App.E.D. 2017), Missouri docketed an administrative order in 2002 reciting more than $12,000 arrears from a California divorce decree. In the years following, the Missouri IV-D agency collected about $16,000 through three separate income withholding orders. Father then sought a declaratory judgment against FSD, claiming overpayment. During the course of these proceedings, California reviewed Father's support payments under the original judgment, and issued a modified judgment of almost $40,000 in child support arrears and over $250,000 in maintenance arrears and interest.

Father relied on *State ex rel. Ryan v. Ryan*, 124 S.W.3d 512 (Mo.App.S.D. 2004), arguing that Missouri was bound to the original arrearage determination. Rejecting that argument, the court noted that California retains CEJ over the support orders. Missouri "merely performs enforcement for California, as it must, under UIFSA." Clearly, as arrears continued to accrue under the California order, Missouri must enforce them. "In fact, Missouri is bound by UIFSA, Section 454.476(d), to continue to collect under the 1989 California Judgment: '[a] tribunal of this state shall recognize the continuing, exclusive jurisdiction of a tribunal of another state which has issued a child support order pursuant to [UIFSA].'"

"Simply, if Father believes that he has always owed only $12,356.81 in arrears, Missouri courts are not the forum in which to bring this claim: he has an adequate remedy at law elsewhere: in California."

Note: The court also ruled that an obligor "may not use the auspices of the declaratory judgment act to attack an otherwise valid administrative procedure. ... 'If administrative remedies are adequate, they must be exhausted before declaratory relief may be granted.'"

Note: "Therefore, under the auspices of UIFSA, we are prohibited from narrowly interpreting the 2002 Administrative Order, as Father suggests, so as to preclude FSD from collecting under the sole controlling order: the 1989 California Judgment. ...(Citations omitted) ('**An order of an administrative agency must be construed in conformity with the authority under which it was issued.**'); ... FSD has presented evidence from the California court demonstrating Father owes substantially more than $12,356.81 in arrears. Missouri has not collected anything that Father has not owed to Mother pursuant to the 1989 California judgment." (Emphasis added)

Procedure: strict compliance not necessary

Prior to ***Ex parte Reynolds***, 209 So. 3d 1122, 2016 WL 2943424 (Ala. Civ. App. 2016), Alabama was the only state requiring "strict compliance" with the UIFSA registering provisions as a condition precedent to enforcement. The decision reviews decisions of other states, all of which held that only "substantial compliance" is necessary. The court overruled previous Alabama cases to the contrary.

Note: Most IV-D offices utilize checklists for UIFSA registrations to minimize omission of required documents and procedures. Complaints of minor procedural violations should fail provided prejudice cannot be shown.

Note: "Public policy supports our determination that substantial compliance is the appropriate standard where there is no prejudice to the obligor. UIFSA encourages parties to register valid child support orders, and the procedural safeguards are designed to minimize the risk of prejudice to the obligor. UIFSA does not support a policy that punishes support recipients for minor, harmless procedural errors in registration." (Citations omitted)

Note: Alabama utilizes the UIFSA for intra-state enforcement was well, which was the situation in this case.

Note: The comments to Section 602, of the model act, Procedure to Register Order of Enforcement, state in part: "Substantial compliance with the requirements is expected."

Note: The term "subject matter jurisdiction" was used by this court when discussing whether the trial court had authority to proceed without strict compliance. Courts have historically used the word "jurisdiction" when addressing *authority* to proceed with various matters, instead of true *jurisdictional* power. In the past several years, however, courts have been cleaning up their jurisprudence by explaining that the term "subject matter jurisdiction" is not accurate when discussing whether a court simply has *authority* to proceed or not. Former Missouri Supreme Court Judge Michael Wolff, who has since returned to academia, wrote:

> Introduction: Concepts of Jurisdiction
>
> In deciding this case, the task at hand is to bring down to earth and clarify the meaning of the magical word "jurisdiction." The word has magic because it can make judgments disappear, as in: "The judgment is a nullity because the court lacked jurisdiction." The word has magic because it makes judges fearful of entering the Land of No Jurisdiction. A lawyer, accordingly, employs the magic word in hopes of curbing the judicial beast from entering the Land of No Jurisdiction, where the defense of the case might be devoured on its merits. In other cases, perhaps, judges likewise may use the magical word to display the admirable trait of judicial self-restraint in order to avoid deciding the merits. (This admirable trait can be exercised, one hastens to add, without getting all jurisdictional about it.) A word with such magic would seem, of course, to be irresistible to those who would seek legislation to block the courthouse door to litigants of unpopular character and claims of disfavored origin.
>
> To call a concept "jurisdictional" is to elevate its importance. The problem with a word with such magic is, sadly, that it will be over used, as it is in cases such as the present case.
>
> ...
>
> Personal jurisdiction often is referred to by its Latin name "in personam" jurisdiction, a handy way of implying that the concept has ancient roots and, thus, longstanding legitimacy. In modern terms, personal jurisdiction refers quite simply to the power of a court to require a person to respond to a legal proceeding that may affect the person's rights or interests. *State v. Fassero*, 256 S.W.3d 109, 117 (Mo. banc 2008). Since *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877), the power of a state's courts over persons within and without the territory of the state has been a matter of due process of law under the Fourteenth Amendment to the United States Constitution. Id. at 734.
>
> ...
>
> Subject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case. In the federal courts, unlike Missouri, subject matter jurisdiction is set forth in statutes passed within the authority granted to Congress by article III of the United States Constitution. Thus, pursuant to this constitutional authority, Congress has the power to increase or decrease the kinds and categories of cases heard in the federal courts. In contrast to the federal system, the subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution.
>
> ******

Thus, in Missouri, UCCJEA issues are no longer jurisdictional. Rather, the issues is simply whether the court has authority to act. *Hightower v. Myers,* 304 S.W.3d 727 (Mo. Banc 2010). The same is now true for UIFSA issues. *Ware v. Ware*, 337 S.W.3d 723 (Mo.App.E.D. 2011)

Procedure: Lack of notice voids registration

Despite court directive to do so, the obligee in ***Medeiros v. Medeiros***, 2017 Ark. App. 122 (Ark.App. 4th Div. 2017) failed to file a proper notice of her UIFSA registration of a California judgment in Arkansas. This was fatal to her UIFSA registration, although it was clear that the obligor had actual notice.

Note: The court also affirmed the obligor's defense of laches. The court did not discuss this equitable defense under California law, but simply concluded that under *Arkansas* statute, the defense was appropriate. The court did not mention the UIFSA nor more importantly, the FFCCSOA. *Cf.* ***In re Paternity of M.H. V. Heflin***, 187 Wash.2d 1, 383 P.3d 1031 (2016), discussed *infra.* To be sure, the defense of laches may not at first glance appear unduly harsh in this case. The parties were divorced in California in 1991. Father was ordered to pay maintenance to Mother; but no support order was entered as the child apparently resided with Father. In 2014, Mother sought to register the California judgment in Arkansas for enforcement. In affirming the Arkansas defense of laches, the court noted that during the 25 years prior to registration, Father never sought any child support from Mother. Had he known Mother intended to assert her alimony claim, he could have brought his claim for child support. Additionally, the court noted that Father is close to retirement, and had he known Mother would assert her claim, he could have planned differently. "Twenty-five years is a long time, and until the claim was filed, there was no evidence that Virginia ever intended to assert her alimony claim, despite interaction between the parties." Of course, this overlooks the bargained for agreement of no child support and maintenance. Presumably the parties agreed that Father would actually *pay* the maintenance while Mother would not pay any child support. Only if both of those things happened would their bargain be realized. This fact would defeat a laches defense in many jurisdictions that even allow the defense in support enforcement cases.

Going straight to jail: Simultaneous registration and contempt

The court in ***J.M.S. V. State ex rel. Y.R.S.***, 2016 Ala. Civ. App. LEXIS 152 (Ala. App. 2016) found substantial compliance was enough under the UIFSA and allowed a California judgment to be registered simultaneously with a motion for contempt that eventually resulted in a 10-day jail sentence. The court noted that the UIFSA allows such simultaneous filings.

Note: The contempt citation was rendered by an Alabama juvenile court. How would the UIFSA affect a situation where the child was placed in foster care and both parents became liable for support?

UIFSA amendments and a jurisdictional gap

In 2014, Congress passed the Preventing Sex Trafficking and Strengthening Families Act, 113 P.L. 183, 128 Stat. 1919. These amendments "incorporate the provisions required by the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance . . . to which the United States is a signatory. The amendments to the Uniform Act were developed and approved by the Uniform Law Commission for adoption in all jurisdictions. [Senate Judiciary Committee, Statement to Senate, No. 995 (February 8, 2016).]" In response, New Jersey amended its version of the UIFSA, altering the "continuing exclusive jurisdiction." The court in ***Lall v. Shivani***, 448 N.J. Super. 38, 45, 150 A.3d 416, 420 (Super. Ct. App. Div. 2016) recognized a jurisdictional "gap" resulting from the amendment.

Under the previous New Jersey UIFSA, the issuing state retains CEJ as long as the obligor, obligee or children remains a resident. The 2016 amendment changed the procedure when all parties have left the state. In this case, New Jersey's UIFSA permits the state to exercise CEJ "even if this State is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this State may continue to exercise jurisdiction to modify its order." Thus, if everyone has left, the parties may decide that a New Jersey court should modify the order by consenting to jurisdiction. However, the amendment further provides that "A tribunal of this State that has issued a child support order consistent with the law of this State may not exercise continuing, exclusive jurisdiction to modify the order if: (1) all . . . parties who are individuals file consent in a record with the tribunal of this State that a tribunal of another state that has jurisdiction over at least one of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction . . . ." This differs from the earlier version, which directed that New Jersey retained CEJ "*until* all of the parties who are individuals have filed written consents with the tribunal of this State for a tribunal of another state to modify the order and assume continuing exclusive jurisdiction." The former act designated New Jersey as the tribunal to modify until all parties agree otherwise.

The court recognized the amendment created a gap between the separate jurisdictional provisions. If New Jersey issued the controlling order, but all parties no longer resided there, the amendment requires consent to allow New Jersey to modify. If one party declines, and all parties do not file consents in New Jersey for another tribunal to assume CEJ as required under the amendment, the proper tribunal with authority to grant relief remains unclear.

No modification of foreign order when obligor outside jurisdiction

In ***Matter of Ardell***, 140 A.D.3d 863, 34 N.Y.S.3d 106 (N.Y. App. Div. 2016), a U.S. citizen and a Swedish national married and had three children in New York. The family later moved to Sweden, where mother obtained Swedish citizenship. They later divorced, obtaining a Swedish order for custody, with support deferred. Mother later moved with the children back to New York. The father remained in Sweden for awhile, and then moved to Singapore for employment. Father retained his Swedish citizenship and remained registered at his home address in Stockholm. The parties later consented to a child support order from the Swedish court.

A couple years later, Mother sought a *de novo* child support order, or alternatively to modify the Swedish order. The court ruled that it lacked jurisdiction over Father. Although New York's UIFSA allowed original jurisdiction over Father; it also forbids that original jurisdiction to modify a foreign support order unless certain circumstances are met:

"(1) the obligee submits to the jurisdiction of a tribunal of this state, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or

(2) the foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order."

The Swedish court had not refused to act; and the court rejected Mother's argument that because Father was no longer a resident of the country where the order was issued, the restrictions do not apply. The court noted that Father remained a registered resident of Stockholm pursuant to the laws of Sweden.

Note: from *2009 Revisions to the UIFSA*, by OCSE (2015)

Modification of Convention support order. For orders issued by a Convention country, section 711 contains an important limitation to modification jurisdiction. It provides that a state tribunal may not modify a Convention child support order if the obligee remains a resident of the issuing foreign country unless:

(1) The obligee submits to the jurisdiction of the state, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or

(2) The foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order.

Foreign support agreement. In the United States, a purely private agreement such as a separation agreement is treated as a type of contract, rather than a support order. As such, it is not enforceable under UIFSA. Outside of the United States, many countries recognize and

enforce certain types of agreements that are called "maintenance arrangements." The 2007 Family Maintenance Convention standardizes a process for recognition and enforcement of maintenance arrangements. In order to use a term "more readily understandable for U.S. bench and bar," UIFSA 2008 calls such an arrangement a "foreign support agreement." According to section 701, **foreign support agreement**:

> **(A)** means an agreement for support in a record that:
>
> (i) is enforceable as a support order in the country of origin;
>
> (ii) has been:
>
> (I) formally drawn up or registered as an authentic instrument by a foreign tribunal; or
>
> (II) authenticated by, or concluded, registered, or filed with a foreign tribunal; and
>
> (iii) may be reviewed and modified by a foreign tribunal; and
>
> **(B)** Includes a maintenance arrangement or authentic instrument under the Convention.

Section 710 addresses the recognition and enforcement of a registered foreign support agreement. Most importantly, UIFSA requires that the agreement must be accompanied by a document stating that the foreign support agreement is as enforceable as a support order would be in the country of origin. According to the official comment, if the agreement is enforceable only as a contract, it will not fall within the scope of this section. Another key provision is that under subsection (e), a proceeding for recognition and enforcement of a foreign support agreement must be suspended during the pendency of a challenge or appeal of the agreement before a tribunal of another state or a foreign country.

Bankruptcy applies UIFSA and FFCCSOA

In re Kimball, 561 B.R. 861 (Okla.W.D. Bkr. 2016) sets forth some basic rules regarding applicable law in federal courts. When a federal court sits in diversity, it looks to the forum state's choice of law rules to determine controlling substantive law. When dealing with procedural law, the forum state is usually determinative. In this case, the debtor sought discharge in an Oklahoma bankruptcy court of a child support arrearage accumulated from a Utah court order, claiming it was time barred. The court noted that statute of limitations are generally regarded as procedural, and thus the forum state limitations applies. However, in this case the bankruptcy court was exercising federal question jurisdiction under the bankruptcy code. The court noted the split in the federal circuits on this issue, and concluded that if the *Restatement* were to be used, Utah has the most "significant relationship to the parties and the occurrence."

But, none of this matters because under both the UIFSA and the FFCCSOA, the longer statute of limitations applies. The court noted that the FFCCSOA is not restricted to orders under the UIFSA, but applies to all child support orders. Because Oklahoma has no statute of limitations for child support arrears, the claim was not time barred.

No collateral attack on original judgment

In ***In the Interest of M.C.M.***, No. 04-15-00565-CV, 2016 WL 3181574, 2016 Tex. App. LEXIS 6026 (Tex. App. June 8, 2016), Texas registered a Massachusetts order and sought enforcement using a Massachusetts payment record. The court noted that the "introduction of a properly authenticated foreign judgment rendered by a court of general jurisdiction establishes a prima facie case in favor of the judgment's enforcement." Once authenticated and admitted into evidence, the obligor had the burden of proving the judgment was not enticed to full fait and credit. In this case, the obligor instead attacked the mother's testimony in the Massachusetts proceeding as "self-serving." Such a defense asserted in the enforcing court against a foreign judgment is a collateral attack, which is not permitted. No defense that goes to the merits of the original controversy may be raised.