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July 2008 New Mexico Bar Exam

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7/08 MPT1

1)

To: Charles Petrilla, Managing Partner and Pro Bono Manager
From: Applicant
Date: July 29, 2008
Re: Jessica Bohmer/Interstate Custody Case

I. Franklin had home-state jurisdiction under the Franklin Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) at the time of the filing of the current custody case in Franklin

The UCCJEA provides the proper forum for custody in child custody proceedings where the parties live in different states. Under the act, the court of the "home-state" of the child has proper jurisdiction to make custody determinations. Home-state is the state where the child has lived with a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. Periods of temporary absence are counted toward the time period. *s. 16-102(7)*. The Franklin Court of Appeals has ruled in *In re Marriage of Mills* that if the child and parent leave the state for an extended visit with the intent to return, and formulate the intention not to return while on the visit, the date the time period is set to run from is the date they left the jurisdiction.

In this case, Jessica and Carrie left the state at different times. Carrie left Franklin and arrived in Columbia on December 1, 2007. Jessica left Franklin on February 2, 2008 and formed the intent to stay in Columbia sometime between Feb 2, 2008 and March 1, 2008. On March 1, 2008 she told Alex of her intention to remain in Columbia. Custody proceedings were filed in Franklin on June 30, 2008. This is seven months from the date that Carrie left Franklin and five months from the date Jessica left Franklin. The issue is whether or not both the parent and the child have to reside in the new state for six months, or whether the child can reside in the state for six months while her parent resides there for slightly less than that.

The language of the UCCJEA specifically states that the Home State is where the "child lived with a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." As stated in *In re Marriage of Mills*, the determinative date is the date

the parties entered the jurisdiction, not the intention of the parties while they were there. For two of the relative six months Carrie lived with her grandparents and not her parent. This fact could be in Jessica's favor, as we can argue that she was residing with family and was therefore living there and not on vacation.

However, Carrie did not become intergrated into the community until after Jessica arrived. Carrie was not enrolled in first-grade until the middle of February, 2008. At the age of six, a child should be enrolled in school, and would most likely be enrolled if she had permanently moved to where she was staying. Carrie's full integration into the state of Columbia did not begin until her mother arrived in February 2008.

It is likely the court would rule that Columbia did not have proper home-state jurisdiction because Carrie and Jessica do not meet the plain language of the statute and no special circumstances exist which suggest the court would be inclined to read more into the plain language than is there.

II. If the Franklin Court decides that Franklin is the home-state jurisdiction, a Motion to Decline Jurisdiction under the Inconvenient Forum provision of the Franklin UCCJEA is likely to be successful.

Under the Franklin UCCJEA, a Franklin Court can decline jurisdiction under the act if it "determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." *s. 16-207(a)*. The court will look to six factors, none dispositive, to determine if the forum is inconvenient. These six factors have been reviewed by the Franklin Supreme Court, in *In re Marriage of Brickman and Young*, as a case of first impression. The six factors are: (1) whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child, (2) the length of time the child has resided outside this state, (3) the distance between the court in this state and the court in teh State that would assume jurisdiction, (4) the relative financial circumstances of the parties (5) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child; and (6) the familiarity of the court of each State with the facts and issues in the pending litigation. *s. 16-207(c)*.

As to the first factor, domestic violence has occurred between the Alex and Jessica. As far back as 2006 Jessica filed for a civil protection order against Alex when he tried to choke her. There have been incidents both before and after that. He has also pushed her down, grabbed her, pulled her by the hair, and slapped her in the face. There has also been emotional abuse, where Alex restricted her access to money, her friends and family. The Court in *In re Marriage of Brickman and Young* indicated that while no factor was dispositive, the presence of domestic violence was to be given the greatest weight. Jessica fled Franklin because of the domestic violence, just as the plaintiff did in the precedent. Alex owns a rifle and Jessica is afraid he will use it on her. Just as in *Marriage of Brickman*, Columbia provides greater protection for the wife and children because of the distance from the abuser. Therefore this factor very heavily weighs in favor of Franklin being an inconvenient forum.

The second factor is the length of time the child has resided outside of the state. As discussed in part one, Carrie has resided outside of Franklin for seven months. However, Carrie spends the majority of her life in Franklin, having lived there from 2004 to 2008. The Court in *Marriage of Brickman* found that five years was a sufficient period of time for this factor to weigh in favor of the inconvenient forum. Therefore this factor will be balanced equally between the forums or weigh toward Franklin being the proper forum.

The third factor is the distance between the courts. The distance is about an hour and a half each way. This is a considerable amount of time for Jessica to travel. The Court in *Marriage of Brickman* found four hours to be a significant amount of time to travel and stated that the non-custodial parent should be the one to have to travel. Jessica's travel is much shorter than in *Brickman*, and she has her parents to watch Carrie, which eases the child care burden. Jessica also will be attending school while working. This gives her even less time to travel. While the balance is not as heavy as in *Brickman*, it is likely the courts will find this factor to tip in Jessica's favor as well.

The fourth factor is the relative financial circumstances. Alex makes \$55,000 a year while

Jessica makes \$10,000 a year. The Court held that the wealthier party can better afford the travel and should be the one burdened by it. Therefore this factor weighs in favor of Jessica.

The fifth factor is general concerns over venue and the location of evidence. The evidence in this case is split evenly. Carrie and Jessica's parents are located in Columbia. They are best able to testify to the threatening letters, phone calls and domestic violence. Carrie's school, teachers and records are located in Columbia. They show the integration of Carrie into Columbia and the fitness of Jessica as a parent. They can also show the lack of nightmares or fear in her currently living situation. However, the bulk of the events that will go to the decision of whether Alex is a fit parent took place in Franklin. Carrie was not enrolled in school in Franklin and there are likely not parties outside of the family who can testify as to her integration into the community there. In *Marriage of Brickman*, the court indicated that the key distinction is the location of witnesses. Because Jessica was estranged from friends in Franklin, it appears that those witnesses are in Columbia. Therefore, this factor tilts in favor of Franklin as an inconvenient forum as well.

The sixth and final factor is the familiarity of the court with the facts and issues in the case. The Franklin courts have much more familiarity with the case than do the Columbia courts. All the legal proceedings between the two parties took place in Franklin, including the current child custody case and the civil protection order. This factor will weigh in favor of Franklin being the proper forum.

While each factor is a close call, all but one factor will likely fall in favor of the Columbia Courts being better suited for jurisdiction. Of most importance is the Domestic Violence and the fact that Jessica fled the state to protect herself from the domestic violence. As this factor is to be weighted more heavily than the others, the Franklin court is likely to rule that it is an inconvenient forum for purposes of this case.

It is important that the Columbia Legal Services promptly file the case in the Columbia Courts. A ruling of inconvenient forum stays the proceeding in Franklin courts on the condition

that a child custody proceeding be promptly commenced in another designated state. *s. 16-207(c)*.
If the case is not promptly filed in Columbia, the Franklin court can resume jurisdiction over the case.

END OF EXAM