

**MODIFYING A CHILD CUSTODY DECREE  
ORIGINALLY ENTERED IN ANOTHER STATE:  
THE SUPREME COURT OF NEBRASKA  
EXPLAINS THE NEBRASKA CHILD CUSTODY  
JURISDICTION ACT IN *HAMILTON v. FOSTER***

Only about 55 percent of American children live with both biological parents.<sup>1</sup>

INTRODUCTION

The best interest of the child is the court system's paramount consideration in deciding over one million custody disputes each year.<sup>2</sup> The best interest of the child test seeks to meet the child's interests in acquiring a protective and stable home and future for the child.<sup>3</sup> Generally, parents have the responsibility of caring for and protecting their children.<sup>4</sup> However, when parents ask the court to make a custody determination, the judge is allowed great discretion in granting custody under the best interest standard.<sup>5</sup> The court's interest in the custody of a child does not end upon the custody determination.<sup>6</sup> Custody disputes are devastating to children, and such disputes create even more problems when the contesting parties cross state lines.<sup>7</sup> These additional problems appearing in multistate custody battles include parental child snatching, forum shopping, and repeated custody litigation.<sup>8</sup>

One other problem that arises with multistate custody disputes relates to personal jurisdiction.<sup>9</sup> Because child custody orders are not deemed "final" judgments, they are subject to modification until the time the child reaches the age of maturity.<sup>10</sup> When families move

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1. Russell M. Coombs, *The Federalization of Family Law: Child Custody and Visitation by Non-Parents Under the New Uniform Child Custody Jurisdiction Act: A Rerun of Seize-and-Run*, 16 J. AM. ACAD. MATRIMONIAL LAW 1, 3 (1999).

2. Jerry A. Behnke, Note and Comment, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 699 (1995).

3. Behnke, 28 LOY. L.A. L. REV. at 699.

4. NANCY E. WALKER, CATHERINE M. BROOKS & LAWRENCE S. WRIGHTSMAN, *CHILDREN'S RIGHTS IN THE UNITED STATES: IN SEARCH OF A NATIONAL POLICY* 72 (1st ed. 1999).

5. WALKER, *supra* note 4, at 85.

6. Behnke, 28 LOY. L.A. L. REV. at 706.

7. Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N. DAK. L. REV. 301, 301 (1999).

8. Stoner, 75 N. DAK. L. REV. at 302.

9. See *infra* notes 10-13 and accompanying text.

10. Behnke, 28 LOY. L.A. L. REV. at 706.

from state to state, the state that entered the original decree (the "issuing state") may no longer have personal jurisdiction over the parties.<sup>11</sup> However, child custody proceedings are considered "status" determinations,<sup>12</sup> which do not usually require a court to have personal jurisdiction over the parties.<sup>13</sup>

When more than one state is involved in a custody dispute, each state claims a genuine interest in reaching a solution to the dispute.<sup>14</sup> Courts of various states must then engage in jurisdictional struggles to determine which state is the most appropriate state to make the custody decision.<sup>15</sup> In the interim, the children, who are already facing the difficulties of custody battles, must wait.<sup>16</sup> In some situations, the child must repeatedly face extremely harmful custody litigation.<sup>17</sup> In response to the issues that arise with interstate custody disputes, the National Conference of Commissioners on Uniform State Laws joined the American Bar Association to approve the Uniform Child Custody Jurisdiction Act ("UCCJA")<sup>18</sup> in 1968.<sup>19</sup> All fifty states and the District of Columbia have since adopted the UCCJA.<sup>20</sup>

Recently, in *Hamilton v. Foster*,<sup>21</sup> the Supreme Court of Nebraska examined Nebraska's jurisdiction to modify a custody decree originally entered in Colorado.<sup>22</sup> The Denver County District Court in Denver, Colorado placed permanent custody of Elizabeth A. Hamilton, Ariel M. Rettig, and Meagan K. Rettig (collectively "the Children") with their maternal grandfather, Thomas E. Hamilton, and his girlfriend, Sharon M. Foster.<sup>23</sup> Hamilton, Foster, and the three Children moved to Omaha, Nebraska in 1997.<sup>24</sup> Hamilton and Foster later separated in July 1999.<sup>25</sup> Following the separation, Hamilton filed a pe-

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11. Stoner, 75 N. DAK. L. REV. at 306.

12. Status determinations involve relationships between two people when the relationship is neither temporary in nature nor terminable at the will of either party and when the state has a concern with such a relationship. *Id.* at 306 (citation omitted).

13. Stoner, 75 N. DAK. L. REV. at 306.

14. *Id.* at 301.

15. *Id.*

16. *Id.* (stating multistate custody struggles usually lead to heartwrenching outcomes); Behnke, 28 LOY. L.A. L. REV. at 705, 707 (stating prior interstate custody law usually led to states entering conflicting custody decrees and the state that is most able to decide the custody matter in the child's interests should assume jurisdiction).

17. Stoner, 75 N. DAK. L. REV. at 302.

18. Unif. Child Custody Jurisdiction Act §§ 1-28, 9 U.L.A. pt. IA (1999).

19. Behnke, 28 LOY. L.A. L. REV. at 705.

20. *Id.*

21. 260 Neb. 887, 620 N.W.2d 103 (2000).

22. *Hamilton v. Foster*, 260 Neb. 887, 887, 892-93, 620 N.W.2d 103, 103, 110 (2000).

23. Brief for Appellant at 6, *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000) (No. A-99-1349).

24. *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109.

25. *Id.*

tion for sole custody of the Children, which the Douglas County District Court dismissed for failure to state a cause of action.<sup>26</sup> The Supreme Court of Nebraska reversed the district court decision, finding that the Nebraska Child Custody Jurisdiction Act (“NCCJA”)<sup>27</sup> allowed Nebraska to modify the original decree.<sup>28</sup> Specifically, the court found that Colorado had lost jurisdiction over the custody of the three Children and Nebraska met the jurisdictional requirements to modify custody.<sup>29</sup>

This Note will first examine the facts and holding of *Hamilton*.<sup>30</sup> This Note will then detail the relevant provisions of the NCCJA (the statute courts must follow when determining if the State of Nebraska has authority to decide or modify custody proceedings).<sup>31</sup> Next, this Note will review prior caselaw illustrating when an issuing state has retained or lost continuing exclusive jurisdiction<sup>32</sup> over custody proceedings.<sup>33</sup> This Note will then analyze the holding in *Hamilton*.<sup>34</sup> Specifically, this Note will show how the Supreme Court of Nebraska properly applied the NCCJA to the Hamilton custody dispute by making a two-step determination: (1) that the issuing state lost jurisdiction over the custody decree, and (2) that Nebraska had obtained jurisdiction to modify the decree.<sup>35</sup> This Note will conclude by commending the Supreme Court of Nebraska, because the court provided a specific framework for analyzing the NCCJA and also provided guidance for practitioners involved in future custody cases involving custody decrees originally entered by another state.<sup>36</sup>

## FACTS AND HOLDING

On May 21, 1993, the Denver County District Court in Denver, Colorado entered an order regarding the custody of Elizabeth A. Hamilton, Ariel M. Rettig, and Meagan K. Rettig (collectively “the Children”).<sup>37</sup> The district court awarded permanent custody of the Children to their maternal grandfather, Thomas E. Hamilton (“Hamil-

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26. *Id.*

27. NEB. REV. STAT. §§ 43-1201 to -1225 (1999).

28. *Hamilton*, 260 Neb. at 887, 899, 905, 620 N.W.2d at 103, 113, 117.

29. *Id.* at 898, 620 N.W.2d at 113.

30. See *infra* notes 37-84 and accompanying text.

31. See *infra* notes 95-119 and accompanying text.

32. See *infra* notes 66-71 and accompanying text (explaining the term “continuing exclusive jurisdiction” under the NCCJA).

33. See *infra* notes 127-276 and accompanying text.

34. See *infra* notes 286-90, 300-408 and accompanying text.

35. See *infra* notes 300-408 and accompanying text.

36. See *infra* notes 409-416 and accompanying text.

37. *Hamilton v. Foster*, 260 Neb. 887, 890, 620 N.W.2d 103, 108 (2000) (stating the district court awarded permanent custody of the Children to Hamilton and Foster); Brief for Appellant at 6, *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000) (No.

ton”), and his girlfriend, Sharon M. Foster (“Foster”).<sup>38</sup> Stephen and Wendy Rettig, the parents of the Children, were denied visitation but ordered to pay monthly child support of one hundred dollars and twenty-five dollars respectively.<sup>39</sup>

For more than fourteen years, Hamilton resided with Foster.<sup>40</sup> Although they were never married, the couple held themselves out to be husband and wife while residing in the States of Colorado, North Carolina, and Nebraska.<sup>41</sup> The Children resided with Hamilton and Foster for approximately ten of the fourteen years that Hamilton and Foster were together.<sup>42</sup> During this period, Hamilton and Foster provided a home, the necessities of life, support, and sustenance to the Children.<sup>43</sup> The Children referred to Hamilton as “grandpa” and to Foster as “grandma.”<sup>44</sup>

In July 1999, after living in Omaha, Nebraska for over one year, Hamilton and Foster discontinued their relationship.<sup>45</sup> Hamilton moved with the Children out of the family home and into another residence in Omaha.<sup>46</sup> Foster also remained in Omaha.<sup>47</sup> Foster continued to visit the Children on a regular basis, but discontinued all financial support for the Children.<sup>48</sup>

On October 8, 1999, Hamilton filed a petition under the Nebraska Child Custody Jurisdiction Act (“NCCJA”)<sup>49</sup> and the Uniform Interstate Family Support Act (“UIFSA”)<sup>50</sup> in Douglas County District Court.<sup>51</sup> Hamilton sought an order of the district court awarding him sole custody of the Children.<sup>52</sup> In discussing the children’s biological parents, Hamilton alleged that the Children had not had contact with their parents since 1994; furthermore, the court determined the parents had also not paid any child support.<sup>53</sup> The district court did not

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A-99-1349) (stating the three minor children are Elizabeth A. Hamilton, Ariel M. Rettig, and Meagan K. Rettig).

38. *Hamilton*, 260 Neb. at 890, 620 N.W.2d at 108.

39. *Id.* at 890, 620 N.W.2d at 109.

40. Brief for Appellant at 6, *Hamilton* (No. A-99-1349).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 6-7.

45. *Id.* at 7-8 (stating the appellant and the appellee parted ways in the summer of 1999 after living together for more than one year in the State of Nebraska); *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109 (stating Hamilton and Foster separated in July 1999).

46. *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109.

47. *Id.*

48. Brief for Appellant at 6, 8, *Hamilton* (No. A-99-1349).

49. NEB. REV. STAT. §§ 43-1201 to -1225 (1999).

50. NEB. REV. STAT. §§ 42-701 to -7,105 (1999).

51. *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109.

52. Brief for Appellant at 6, 8, *Hamilton* (No. A-99-1349).

53. *Id.* at 891, 620 N.W.2d at 109.

know the location of either of the Children's biological parents; however, the court stated that Stephen Rettig resided in Denver, Colorado, and Wendy Rettig possibly resided in Las Vegas, Nevada.<sup>54</sup>

In addition to requesting sole custody, Hamilton requested that Foster help support the Children financially and be awarded reasonable visitation.<sup>55</sup> Foster demurred to Hamilton's petition, claiming that he failed to allege sufficient facts to support a claim against Foster.<sup>56</sup> The district court entered an order sustaining the demurrer on November 24, 1999, finding that the claim failed to state a cause of action.<sup>57</sup> The court further maintained that Hamilton could not amend his petition to state a cause of action, because no statutory authority obligated Foster to provide child support.<sup>58</sup> The court dismissed Hamilton's custody request for failure to state a cause of action under the NCCJA.<sup>59</sup>

Subsequently, Hamilton appealed the Douglas County District Court's decision and the Supreme Court of Nebraska accepted Hamilton's appeal using its power to control the docket of the appellate courts.<sup>60</sup> Hamilton argued on appeal that the lower court erred when it determined Hamilton had failed to state a cause of action pursuant to the NCCJA.<sup>61</sup> Therefore, Hamilton alleged the lower court erred in sustaining Foster's demurrer relating to that claim.<sup>62</sup>

Chief Justice John Hendry, writing for the Nebraska Supreme Court, affirmed the Douglas County District Court's order dismissing the child support portion of the case and reversed the district court's order dismissing the child custody portion of the case.<sup>63</sup> The court determined that the trial court had failed to address the issue of whether

54. *Id.*

55. *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109.

56. Brief for Appellee at 5, *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000) (No. A-99-1349). Foster claimed no legal duty existed requiring her to provide support for the children under UIFSA or any other statute. *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109.

57. *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109.

58. *Id.*

59. *Id.*

60. *Hamilton*, 260 Neb. at 887, 890, 620 N.W.2d at 103, 108.

61. *Id.* at 891, 620 N.W.2d at 109. Hamilton appealed the Douglas County District Court's decision on three additional grounds. *Id.* at 889, 891-92, 620 N.W.2d at 103, 109. Hamilton's second argument alleged the court erred in finding that his petition, pursuant to UIFSA, did not state a cause of action. *Id.* at 891-92, 620 N.W.2d at 109. Third, Hamilton alleged the lower court should have found Foster had a duty to provide support to the three children commensurate with UIFSA based on the fact that the Colorado custody order named her joint custodian of the children. *Id.* Finally, Hamilton argued the lower court erred by not allowing him to revise his petition to include facts demonstrating Foster's legal duty to provide support for the children in compliance with the doctrine of *in loco parentis*. *Id.*

62. *Hamilton*, 260 Neb. at 891-92, 620 N.W.2d at 109.

63. *Id.* at 887, 890-91, 905, 620 N.W.2d at 108-09, 117.

the Nebraska court had jurisdiction to modify the Colorado custody decree.<sup>64</sup> The court determined Hamilton had alleged sufficient facts to establish a cause of action to modify the custody order under the NCCJA.<sup>65</sup>

Pursuant to the NCCJA, the court established that the first question to decide before a custody order issued in another jurisdiction can be modified is whether the issuing state appears to have continuing exclusive jurisdiction.<sup>66</sup> The court determined that if the state that entered the initial custody decree (the "issuing state") lost all or almost all connection with the child, that state could lose continuing exclusive jurisdiction to modify the custody decree.<sup>67</sup> However, the court recognized that when one parent remained a resident of the issuing state, the courts of Nebraska were without jurisdiction to modify the child's custody unless the issuing state affirmatively declined to exercise jurisdiction.<sup>68</sup> However, the court also recognized that if one parent continued to live in the issuing state, that fact alone could not establish that such state would retain continuing exclusive jurisdiction.<sup>69</sup> The court stated that the requirements to retain continuing exclusive jurisdiction are that a parent or contestant continue to reside in the issuing state and the child retain a significant connection with that state.<sup>70</sup> The court further determined that if all parties moved away from the issuing state or only one parent remained in the state but failed to maintain a connection with the child, the issuing state would no longer have the required significant contact with the child.<sup>71</sup>

The Supreme Court of Nebraska explained that although Mr. Rettig continued to reside in Colorado, he no longer had any connection with any of his Children.<sup>72</sup> Mr. Rettig did not have custody, did not have visitation rights, and had not had any contact with his Children since early 1994.<sup>73</sup> In addition, the court determined the Children, Hamilton, and Foster had all moved away from Colorado.<sup>74</sup> The court explained Mr. Rettig had a connection with Colorado, but the Children had no connection with Mr. Rettig or Colorado.<sup>75</sup> The court accepted

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64. *Id.* at 898-99, 620 N.W.2d at 113.

65. *Id.* at 899, 620 N.W.2d at 113.

66. *Id.* at 893-94, 620 N.W.2d at 110-11 (citations omitted).

67. *Id.* at 894, 620 N.W.2d at 111.

68. *Id.* at 895, 620 N.W.2d at 112.

69. *Id.* at 895-96, 620 N.W.2d at 112.

70. *Id.* at 896, 620 N.W.2d at 112.

71. *Id.* at 897, 620 N.W.2d at 113.

72. *Id.* at 887, 890, 897-98, 620 N.W.2d at 103, 109, 113.

73. *Id.* at 890, 897-98, 620 N.W.2d at 109, 113.

74. *Id.* at 898, 620 N.W.2d at 113.

75. *Id.*

the facts pleaded as true, and ascertained that Hamilton had alleged sufficient facts to show the State of Colorado had lost significant connection with the Children pursuant to section 43-1214 of the NCCJA.<sup>76</sup> Therefore, the Nebraska Supreme Court determined Colorado no longer had continuing exclusive jurisdiction.<sup>77</sup>

The Nebraska Supreme Court then analyzed the case to determine if Hamilton had sufficiently alleged that the State of Nebraska had obtained jurisdiction over the custody decree pursuant to the NCCJA.<sup>78</sup> The court noted that one of the circumstances giving Nebraska the ability to acquire jurisdiction to modify a custody decree from another state occurred when Nebraska became the child's home state.<sup>79</sup> The court used the definition enumerated in the NCCJA to determine that a child's home state is one where such child has resided with her parent or person acting as her parent for not less than six consecutive months prior to the commencement of the custody proceedings.<sup>80</sup> Hamilton alleged in his petition that he, Foster, and the Children had resided in the State of Nebraska for more than one year at the time he filed his petition.<sup>81</sup> The court relied on the NCCJA definition of "home state" and Hamilton's petition to determine Nebraska was indeed the Children's home state at the time of the modification proceedings.<sup>82</sup> Thus, the Supreme Court of Nebraska declared that the lower court could appropriately exercise jurisdiction to modify the custody order of the Children.<sup>83</sup> Ultimately, the Nebraska Supreme Court reversed the trial court's order dismissing Hamilton's custody claim.<sup>84</sup>

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76. *Id.*

77. *Id.* at 887, 898, 620 N.W.2d at 103, 113.

78. *Id.*

79. *Id.* at 898, 620 N.W.2d at 113.

80. *Id.* Nebraska Revised Statutes section 43-1202(5) provides that:

Home state shall mean the state in which the child immediately preceding the time involved lived with his or her 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 the persons mentioned. Periods of temporary absence of any of the named persons shall be counted as part of the six-month or other period.

NEB. REV. STAT. § 43-1202(5).

81. *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113.

82. *Id.*

83. *Id.* at 887, 899, 905, 620 N.W.2d at 103, 113, 117.

84. *Id.* at 887, 905, 620 N.W.2d at 103, 117. The Supreme Court of Nebraska reasoned Foster had no legal duty to support the Children. *Id.* The court stated the Uniform Interstate Family Support Act did not create an independent duty to provide support. *Id.* at 900, 620 N.W.2d at 114.

## BACKGROUND

Each year, in excess of one million children must face the hardships of custody disputes.<sup>85</sup> In making these numerous custody decisions, courts recognize the best interests of the child as the primary consideration.<sup>86</sup> This "best interests test" focuses the court's attention on the child rather than the competing parties.<sup>87</sup> When the custody determination involves parties living in more than one state, problems in addition to the underlying custody battle begin to arise.<sup>88</sup> These additional problems appearing in multistate custody battles include parental child snatching, forum shopping, and repeated custody litigation.<sup>89</sup> The National Conference of Commissioners on Uniform State Laws joined the American Bar Association in 1968 to approve the Uniform Child Custody Jurisdiction Act ("UCCJA")<sup>90</sup> in response to the issues that arise with multistate custody disputes.<sup>91</sup> Since the introduction of the UCCJA, all fifty states and the District of Columbia have adopted some form of the Act.<sup>92</sup> Nebraska's version, the Nebraska Child Custody Jurisdiction Act ("NCCJA"),<sup>93</sup> provides the State of Nebraska with jurisdiction to decide child custody matters originally determined in another state (the "issuing state") if: (1) the issuing state has lost jurisdiction; and (2) Nebraska has jurisdiction in the form of "home state jurisdiction," "significant connection jurisdiction," "emergency jurisdiction," or "default jurisdiction."<sup>94</sup>

## A. THE NEBRASKA CHILD CUSTODY JURISDICTION ACT

The UCCJA, adopted as the NCCJA in the State of Nebraska, serves several purposes in relation to child custody decrees.<sup>95</sup> The

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85. Jerry A. Behnke, Note and Comment, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 699 (1995).

86. Behnke, 28 LOY. L.A. L. REV. at 699.

87. *Id.*

88. Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N. DAK. L. REV. 301, 301 (1999).

89. Stoner, 75 N. DAK. L. REV. at 302.

90. Unif. Child Custody Jurisdiction Act §§ 1-28, 9 U.L.A. pt. IA (1999).

91. Behnke, 28 LOY. L.A. L. REV. at 705.

92. *Id.*

93. NEB. REV. STAT. §§ 43-1201 to -1225 (1999).

94. NEB. REV. STAT. § 43-1203. See Stoner, 75 N. DAK. L. REV. at 312, 315 (stating four alternative jurisdictional grounds exist pursuant to the UCCJA to enter a custody determination: (1) home state jurisdiction; (2) significant connection jurisdiction; (3) emergency jurisdiction; and (4) default or vacuum jurisdiction).

95. Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 298 (1986) (providing the Act incorporates several purposes); NEB. REV. STAT. § 43-1201(1) (stating the nine general purposes of the NCCJA). The text of section 43-1201(1) reads in full:

(1) The general purposes of sections 43-1201 to 43-1225 are to:



main purpose of the UCCJA is to avoid the competition between jurisdictions, as well as the conflicts with courts in various states that arose before the enactment of the UCCJA.<sup>96</sup> Another significant purpose of the UCCJA is to promote cooperation between states so that custody decrees are rendered in the state most suitable to enter a decree in the child's best interest.<sup>97</sup>

Before entering an initial custody decree, the State of Nebraska must comply with specific statutory requirements to obtain subject matter jurisdiction.<sup>98</sup> Nebraska has subject matter jurisdiction over a child custody determination if: (1) Nebraska is the child's home state; (2) Nebraska has a significant connection with the child or one of the parties to the action; (3) the child is present in the state and an emergency exists; or (4) no other state has jurisdiction or another state has refused to exercise jurisdiction.<sup>99</sup> If another state entered the initial decree, and a party seeks to have the decree modified in Nebraska, modification jurisdiction must exist in Nebraska.<sup>100</sup> Modification jurisdiction exists when it appears that the issuing state no longer has jurisdiction or had declined to exercise jurisdiction and the State of Nebraska meets the requirements for initial jurisdiction.<sup>101</sup>

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- (a) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
  - (b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
  - (c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
  - (d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
  - (e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;
  - (f) Avoid relitigation of custody decisions of other states in this state when feasible;
  - (g) Facilitate the enforcement of custody decrees of other states;
  - (h) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
  - (i) Make uniform the law of those states which enact it.

NEB. REV. STAT. § 43-1201(1).

96. Blakesley, 35 EMORY L.J. at 298.

97. NEB. REV. STAT. § 43-1201(1)(b).

98. NEB. REV. STAT. § 43-1203(1).

99. *Id.*

100. NEB. REV. STAT. § 43-1214(1).

101. *Id.*

1. *NCCJA Section 43-1214—Subject Matter Jurisdiction to Modify a Decree of Another State*

Before a court in Nebraska may enter a modification decree regarding a custody order originally entered by another state, Nebraska must have modification jurisdiction.<sup>102</sup> The modification provision of the NCCJA provides in part:

(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.<sup>103</sup>

Thus, modification jurisdiction has two requirements.<sup>104</sup> First, the Nebraska court must determine that the court that entered the initial custody decree no longer has jurisdiction under prerequisites substantially similar to those outlined in the NCCJA or that such state has declined to exercise jurisdiction to modify the order.<sup>105</sup> Second, the Nebraska court must meet the initial jurisdiction requirements.<sup>106</sup>

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102. NEB. REV. STAT. § 43-1214(1). See Stoner, 75 N. DAK. L. REV. at 315-17 (explaining modification jurisdiction exists when the court that entered the decree no longer has jurisdiction and the new court has jurisdiction). See also NEB. REV. STAT. § 43-1202(7) (defining "modification decree" as "a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court . . .").

103. NEB. REV. STAT. § 43-1214(1).

104. *Id.*

105. NEB. REV. STAT. § 43-1214(1)(a). The text of section 43-1214 reads in full:

- (1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.
- (2) If a court of this state is authorized under subsection (1) of this section and section 43-1208 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 43-1222.

NEB. REV. STAT. § 43-1214.

106. NEB. REV. STAT. § 43-1214(1)(b).

2. *NCCJA Section 43-1203—Prerequisites for Initial Subject Matter Jurisdiction*

There are four circumstances in which Nebraska would have the requisite jurisdiction to enter an initial child custody decree.<sup>107</sup> The jurisdictional provision of the NCCJA provides in part:

- (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
  - (a) This state (i) is the home state of the child at the time of commencement of the proceedings, or (ii) had been the child's home state within six months before commencement of the proceedings and the child is absent from this state because of his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state;
  - (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) 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 (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; [or]
  - (d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (a), (b), or (c) of this section, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.<sup>108</sup>

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107. NEB. REV. STAT. § 43-1203(1). See NEB. REV. STAT. § 43-1202(6) (defining "initial decree" as "the first custody decree concerning a particular child . . .").

108. NEB. REV. STAT. § 43-1203(1)(a)-(d). The text of section 43-1203 reads in full:

- (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
  - (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) 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 his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state;

The first circumstance where Nebraska has jurisdiction over an initial decree is when Nebraska is the child's home state.<sup>109</sup> Home state jurisdiction exists if Nebraska is the child's home state when the party seeking custody commences proceedings within this state.<sup>110</sup> Furthermore, if the child in question is absent from Nebraska only because another party claiming custody removed the child to another state, home state jurisdiction will still exist when a parent or a party acting as the child's parent still resides within Nebraska.<sup>111</sup>

Courts generally classify custody arrangements as status determinations where special jurisdictional rules apply.<sup>112</sup> Specifically, when a state does not have personal jurisdiction over a child, that state may still have jurisdiction to enter a custody decree.<sup>113</sup> The second circumstance where Nebraska has initial jurisdiction is where Nebraska has significant connection jurisdiction, which occurs when maximum contacts exist and when the state is not the child's home

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- (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) 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 (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected;
  - (d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (a), (b), or (c) of this section, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction; or
  - (e) The child is not an Indian child over which jurisdiction is otherwise provided under the Nebraska Indian Child Welfare Act.
- (2) Except under subdivisions (c) and (d) of subsection (1) of this section, 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 or her custody.

NEB. REV. STAT. § 43-1203.

109. NEB. REV. STAT. § 43-1203(1)(a)(i).

110. *Id.* See NEB. REV. STAT. § 43-1203(5) (defining "home state" as "the state in which the child immediately preceding the time involved lived with his or her 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 the persons mentioned. Periods of temporary absence of any of the named persons shall be counted as part of the six-month or other period").

111. NEB. REV. STAT. § 43-1203(1)(a)(ii). See NEB. REV. STAT. § 43-1202(9) (defining "person acting as parent" as "a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody . . .").

112. Stoner, 75 N. DAK. L. REV. at 306

113. *Id.*

state.<sup>114</sup> Significant connection jurisdiction exists in Nebraska when the child's best interests are served by a Nebraska court assuming jurisdiction, Nebraska has a significant connection with the child and a parent or a contestant, and substantial evidence is available concerning the child's well-being.<sup>115</sup>

The third circumstance in which Nebraska has initial jurisdiction is when the state has emergency jurisdiction.<sup>116</sup> Emergency jurisdiction exists when the child is physically located in Nebraska and either a party with custody of the child abandoned the child or the child has been threatened with or subjected to abuse, mistreatment, or neglect.<sup>117</sup> Finally, default or "vacuum" jurisdiction exists in Nebraska when it seems that no state would have home state, significant connection, or emergency jurisdiction.<sup>118</sup> Default jurisdiction also exists if another state declines to exercise jurisdiction because that state determines Nebraska is a more appropriate forum for entering a custody decree.<sup>119</sup>

#### B. APPLICATION OF THE MODIFICATION PROVISIONS OF THE UCCJA/ NCCJA

Because custody orders are subject to modification until the time the child reaches the age of maturity, child custody determinations are not deemed "final" judgments.<sup>120</sup> When a state enters an original custody determination, that state may retain jurisdiction over the custody of the child involved and if so, another state may modify the decree only under limited exceptions.<sup>121</sup> Thus, continuing jurisdiction of the issuing state is considered "exclusive."<sup>122</sup> If one contestant remains a resident of the issuing state and the child continues to have minimal contacts with that party, such as visitation, continuing exclusive jurisdiction exists.<sup>123</sup> However, it is possible for the issuing state

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114. Christopher L. Blakesley, *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, 476 (1998).

115. NEB. REV. STAT. § 43-1202(1)(b). See NEB. REV. STAT. § 43-1202(1) (defining "contestant" as "a person, including a parent, who claims a right to custody or visitation rights with respect to a child . . .").

116. NEB. REV. STAT. § 43-1203(1)(c).

117. *Id.*

118. NEB. REV. STAT. § 43-1203(1)(d)(i) (providing Nebraska has jurisdiction when no other state has jurisdiction pursuant to the home state, significant connection, or emergency jurisdiction provisions); Stoner, 75 N. DAK. L. REV. at 312-15 (explaining default or vacuum jurisdiction exists when no other state has jurisdiction pursuant to the act or another state declines to exercise jurisdiction).

119. NEB. REV. STAT. § 43-1203(1)(d)(i).

120. Behnke, 28 LOY. L.A. L. REV. at 706.

121. Blakesley, 58 LA. L. REV. at 486.

122. Stoner, 75 N. DAK. L. REV. at 315-16.

123. Blakesley, 58 LA. L. REV. at 486.

to lose jurisdiction.<sup>124</sup> Continuing exclusive jurisdiction is lost when no party continues to have a significant connection with the issuing state and no evidence exists concerning the child's protection, training, care, and personal relationships within that state.<sup>125</sup> The issuing state also loses continuing exclusive jurisdiction when none of the parties continue to reside within the issuing state.<sup>126</sup>

### 1. *The Issuing State Retained Continuing Exclusive Jurisdiction*

A state may exercise jurisdiction over a custody matter when that state has a significant connection with the child and the child's parents or the child and at least one contestant, and when substantial evidence exists within that state concerning the child's protection, training, care, and personal relationships.<sup>127</sup> In *Range v. Range*,<sup>128</sup> the Supreme Court of Nebraska exercised jurisdiction to modify a custody decree, even though the child did not reside in Nebraska because a significant connection still existed between the child and the State of Nebraska.<sup>129</sup> In *Range*, a father asked the Sarpy County District Court to modify an initial custody order and transfer custody of his daughter, Nicole, from the child's mother to him.<sup>130</sup> The couple's marriage was dissolved on May 10, 1985 in the State of Nebraska and the district court awarded Martin and Nancy Range joint custody of their four minor children.<sup>131</sup> The court modified the custody order on June 18, 1986, granting sole custody of the eldest child, Kristi, to Martin.<sup>132</sup> In the same modification order, the court awarded sole custody of Nicole, Jaymi, and Karri to Nancy.<sup>133</sup>

Nancy was allowed to remove the three youngest daughters from Nebraska.<sup>134</sup> Nancy moved to Georgia and later remarried.<sup>135</sup> The court stated that Nicole had encountered difficulty with her mother's new husband, and additional friction existed between Nicole, her two

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124. *Id.* at 486-87.

125. *Stoner*, 75 N. DAK. L. REV. at 316.

126. *Id.* The parties in custody proceedings include the child and either the child's parents or parent substitutes. *Id.*

127. NEB. REV. STAT. § 43-1203(1)(b).

128. 232 Neb. 410, 440 N.W.2d 691 (1989).

129. *Range v. Range*, 232 Neb. 410, 416-17, 440 N.W.2d 691, 695-96 (1989).

130. *Range*, 232 Neb. at 410-11, 440 N.W.2d at 692-93. The mother was awarded possession of the four minor children. *Id.* at 410, 440 N.W.2d at 692.

131. *Range*, 232 Neb. at 410, 440 N.W.2d at 692.

132. *Id.* at 410-11, 440 N.W.2d at 692. Kristi M. Range was born on September 7, 1972; Nicole D. Range was born on April 30, 1974; Jaymi L. Range was born on March 24, 1977; and Karri N. Range was born on January 23, 1980. *Id.* at 410, 440 N.W.2d at 692.

133. *Range*, 232 Neb. at 410-11, 440 N.W.2d at 692.

134. *Id.* at 411, 440 N.W.2d at 692-93.

135. *Id.* at 417, 440 N.W.2d at 696.

younger sisters, and her mother.<sup>136</sup> The court found it would be in Nicole's best interests to remove her from Nancy's care, and to place sole custody with Martin.<sup>137</sup> On November 9, 1987, the Sarpy County District Court awarded Martin temporary custody of Nicole because of the substantial change in circumstances.<sup>138</sup>

Nancy appealed the district court's decision, alleging that the lower court had erred in determining it had subject matter jurisdiction to modify Nicole's custody arrangement.<sup>139</sup> Nancy argued that Georgia was now Nicole's home state.<sup>140</sup> The Supreme Court of Nebraska affirmed the lower court decision, finding that the district court did have subject matter jurisdiction over the custody matter; therefore, the lower court's decision was not an abuse of discretion.<sup>141</sup> Justice Leslie Boslaugh delivered the opinion of the court, reasoning that Nicole had significant and substantial connections to the State of Nebraska.<sup>142</sup> The court analyzed the provisions of the NCCJA pertaining to significant connection jurisdiction.<sup>143</sup> Pursuant to the NCCJA, a court may assume jurisdiction over a child custody matter when the child and her parents, or the child and at least one of the contestants have a significant connection with Nebraska and when substantial evidence exists in Nebraska regarding the child's protection, training, care, and personal relationships.<sup>144</sup>

In discussing the significant connection between Nicole and the State of Nebraska, the court noted that Nicole was born and had lived the majority of her life in Nebraska.<sup>145</sup> Further, the court observed that Nicole had many relatives in Nebraska, including grandparents, aunts, and uncles, in addition to her father and older sister.<sup>146</sup> Nicole's only relatives in Georgia were her sisters and mother.<sup>147</sup> The

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136. *Id.*

137. *Id.* at 410-11, 440 N.W.2d at 692-93.

138. *Id.* at 410-11, 440 N.W.2d at 691, 693.

139. *Id.*

140. *Id.* at 412, 440 N.W.2d at 693. The petitioner also alleged the lower court erred in determining it had personal jurisdiction in the respondent's application for modification. *Id.* at 411, 440 N.W.2d at 693. The Supreme Court of Nebraska responded to this allegation by stating that each of petitioner's special appearances in the case below conferred jurisdiction over petitioner because each constituted a general appearance. *Id.* at 411-12, 440 N.W.2d at 693 (citation omitted).

141. *Range*, 232 Neb. at 410, 417, 440 N.W.2d at 691, 696.

142. *Id.* at 410, 416, 440 N.W.2d at 692, 695. *See also* *Nebraska ex rel. Grape v. Zach*, 247 Neb. 29, 43, 47, 524 N.W.2d 788, 800, 802 (1994) (finding significant connection jurisdiction existed in Nebraska because substantial evidence about the child's protection, training, care, and personal relationships existed in Nebraska even though Nebraska clearly was not the child's home state as defined under the NCCJA).

143. *Range*, 232 Neb. at 412, 416-17, 440 N.W.2d at 693, 695-96.

144. *Id.* at 412, 440 N.W.2d at 693.

145. *Id.* at 416, 440 N.W.2d at 695.

146. *Id.*

147. *Id.*

court further explained that Nicole expressed a strong desire to live in Nebraska with her older sister and her father.<sup>148</sup> Another contact recognized by the court was the fact that Judge Thompson of the Sarpy County District Court had been involved with this custody case since May 1985.<sup>149</sup> Considering all of the significant connections to the State of Nebraska, the Supreme Court of Nebraska determined the district court had significant connection jurisdiction under the NCCJA to make a custody determination concerning Nicole.<sup>150</sup>

In *State ex rel. Grape v. Zach*,<sup>151</sup> the Supreme Court of Nebraska determined Nebraska had jurisdiction to modify a custody order, because even though Nebraska was clearly not the child's home state under the NCCJA, Nebraska had retained a significant connection with the child.<sup>152</sup> In *Grape*, Roy Zach asked the Platte County District Court to modify an initial custody decree and place custody of his child with him rather than with Penny Grape.<sup>153</sup> In 1989, Grape sought a court determination of paternity against Zach.<sup>154</sup> Zach admitted paternity, and the district court ordered him to pay child support.<sup>155</sup> With Zach's consent, Grape and the child moved to New York in June 1990.<sup>156</sup> The two parties subsequently returned to Columbus, Nebraska in early 1992.<sup>157</sup> In March 1992, Grape filed a motion with the Platte County District Court to determine she was the child's natural custodial parent.<sup>158</sup> The court awarded full custody of the boy to Grape.<sup>159</sup> Zach subsequently filed a motion for temporary custody with the district court.<sup>160</sup> Grape failed to appear at the hearing, and the district court awarded temporary custody to Zach.<sup>161</sup> At a subsequent hearing for permanent custody, the district court found sub-

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148. *Id.* at 416, 440 N.W.2d at 695-96.

149. *Id.* at 416, 440 N.W.2d at 696. The parties had appeared before the Sarpy County District Court and Judge Thompson three times since the original divorce decree in May 1985. *Id.* at 416-17, 440 N.W.2d at 696.

150. *Id.* at 410, 416-17, 440 N.W.2d at 691, 695-96. The court also relied on testimony of the guardian ad litem, urging the trial court to accept Nicole's request to return to the State of Nebraska to live with her older sister and her father. *Id.* at 417, 440 N.W.2d at 696.

151. 247 Neb. 29, 524 N.W.2d 788 (1994).

152. *State ex rel. Grape v. Zach*, 247 Neb. 29, 29, 43, 46-47, 524 N.W.2d 788, 788, 800, 802 (1994).

153. *Grape*, 247 Neb. at 31, 33-34, 524 N.W.2d at 788-89, 795.

154. *Id.* at 32, 524 N.W.2d at 794.

155. *Id.*

156. *Id.* at 33, 524 N.W.2d at 795.

157. *Id.* at 32-33, 524 N.W.2d at 794-95. Grape and the boy returned to Nebraska one and one-half months before Grape filed her motion. *Id.* at 33, 524 N.W.2d at 795.

158. *Grape*, 247 Neb. at 32-33, 524 N.W.2d at 795.

159. *Id.* at 33, 524 N.W.2d at 795.

160. *Id.* Zach filed a document entitled "Motion to Set Aside Order, for Temporary Custody, and for Order Prohibiting [Grape] from Removing Child from State." *Id.*

161. *Grape*, 247 Neb. at 33, 524 N.W.2d at 795.



stantial evidence concerning the young child's protection, training, care, and personal relationships existed within Nebraska; therefore, the court determined Nebraska had jurisdiction to decide the child's custody and awarded permanent custody to Zach.<sup>162</sup> Grape appealed the matter to the Nebraska Court of Appeals, alleging that Nebraska was not the boy's home state within the NCCJA; therefore, Nebraska did not have jurisdiction over the proceedings.<sup>163</sup>

The Nebraska Court of Appeals dismissed the case, determining that the NCCJA deprived the Nebraska courts of subject matter jurisdiction.<sup>164</sup> The court of appeals reasoned that Nebraska was not the child's home state and there were no significant connections with the State of Nebraska.<sup>165</sup> Zach appealed to the Supreme Court of Nebraska.<sup>166</sup> The Supreme Court of Nebraska reversed the court of appeals and remanded the case with orders to reinstate the district court judgment.<sup>167</sup> Justice D. Nick Caporale, writing for the court, explained that Nebraska was not the child's home state as defined within the NCCJA.<sup>168</sup> Justice Caporale noted that the child had not been residing in Nebraska with a parent for six months prior to Grape's custody petition, nor had the child been removed from Nebraska within the six months before Grape filed her petition.<sup>169</sup> Therefore, Nebraska did not have home state jurisdiction pursuant to the NCCJA.<sup>170</sup>

However, Justice Caporale explained that even though home state jurisdiction did not exist in *Grape*, the State of Nebraska had significant connection jurisdiction pursuant to the NCCJA.<sup>171</sup> Significant connection jurisdiction exists under the NCCJA when (1) substantial evidence exists showing the child's best interests; and (2) when the parties have significant contacts within Nebraska.<sup>172</sup> Justice Caporale noted the child was born in the State of Nebraska and

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162. *Id.* at 34, 524 N.W.2d at 795. The district court awarded supervised visitation rights to Grape. *Id.*

163. *Grape*, 247 Neb. at 32, 34, 524 N.W.2d at 794-95.

164. *Id.*

165. *Id.* at 38, 524 N.W.2d at 798.

166. *Id.* at 29, 32, 524 N.W.2d at 788, 794.

167. *Id.*

168. *Id.* at 32, 35-36, 43, 524 N.W.2d at 794, 796, 800.

169. *Id.* at 32, 43, 524 N.W.2d at 794, 800.

170. *Id.* at 35-36, 43, 524 N.W.2d at 796, 800.

171. *Id.* at 32, 43, 46, 524 N.W.2d at 794, 800, 802

172. *Id.* at 46, 524 N.W.2d at 802. The court provided

under § 43-1203(1)(b), a state which is not the home state and which does not have continuing jurisdiction by virtue of having originally determined custody may nonetheless have jurisdiction if the relevant parties have significant contacts with the state and there is available in the state substantial evidence concerning the statutorily designated issues.

*Id.*

lived within the state for more than three years before his mother removed him to New York.<sup>173</sup> Also, Grape had returned to Nebraska after living in New York and sought help from the Nebraska court system by seeking a custody determination from the district court.<sup>174</sup> The court also recognized that the child's maternal grandparents were Nebraska residents.<sup>175</sup> By analyzing these facts, the court determined that not only the boy, but Grape and Zach as well, had a significant connection to Nebraska at the time Zach filed his custody determination.<sup>176</sup> The Supreme Court of Nebraska thus determined Nebraska had subject matter jurisdiction under the significant connection provision of the NCCJA to make a custody determination for the boy.<sup>177</sup>

In *In re Interest of L.W.*,<sup>178</sup> the Supreme Court of Nebraska deferred a permanent decision on custody to the State of Iowa because Iowa retained continuing exclusive jurisdiction.<sup>179</sup> In *In re Interest of L.W.*, the county attorney sought to have the County Court for Custer County, Nebraska enter an order for the State to care for and protect the minor child, L.W., according to law.<sup>180</sup> In 1976, the child's parents had obtained a divorce in Iowa, and the Iowa court granted custody of L.W. to the child's mother.<sup>181</sup> Subsequently, the mother remarried and the child, mother, and stepfather moved to Nebraska.<sup>182</sup> The child's biological father remained in Iowa.<sup>183</sup> The county attorney alleged that L.W.'s stepfather had sexually assaulted her sometime during the period between January 1, 1989 and April 5, 1989, while the child lived with her mother and stepfather in Custer County, Nebraska.<sup>184</sup>

L.W. was temporarily placed within the custody of the Nebraska Department of Social Services.<sup>185</sup> The county court based its decision on the fact that both the child and the mother had admitted the allegations of sexual abuse.<sup>186</sup> The court then determined that a factual

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173. *Grape*, 247 Neb. at 32, 46-47, 524 N.W.2d at 794, 802.

174. *Id.* at 46-47, 524 N.W.2d at 802.

175. *Id.*

176. *Id.*

177. *Id.* at 32, 46-47, 524 N.W.2d at 794, 802-03.

178. 241 Neb. 84, 486 N.W.2d 486 (1992).

179. *In re Interest of L.W.*, 241 Neb. 84, 103, 486 N.W.2d 486, 499 (1992).

180. *In re Interest of L.W.*, 241 Neb. at 86-87, 486 N.W.2d at 490.

181. *Id.* at 90, 486 N.W.2d at 492.

182. *Id.*

183. *Id.* at 88-89, 486 N.W.2d at 491-92. The court explained the DSS prepared to place the child with her biological father and the Iowa Department of Social Services would investigate the father's safety, stability, and situation via a home study. *Id.* at 90, 486 N.W.2d at 492.

184. *In re Interest of L.W.*, 241 Neb. at 86-87, 486 N.W.2d at 490.

185. *Id.* at 87, 486 N.W.2d at 490-91.

186. *Id.*

basis existed for the admissions and entered an adjudication accordingly.<sup>187</sup> After several subsequent review hearings, the mother eventually filed a motion to dismiss, claiming that the county court lacked subject matter jurisdiction because Iowa had retained continuing exclusive jurisdiction over L.W.<sup>188</sup> The court denied the mother's motion to dismiss the action which placed the child within the State's care.<sup>189</sup>

The child's mother appealed the county court's decision to the Custer County District Court, arguing that the lower court erred in determining it had subject matter jurisdiction to enter a custody order.<sup>190</sup> The district court affirmed the county court's judgment in all respects.<sup>191</sup> The court found the mother had been, and continued to be, a resident of Nebraska for more than six months prior to the time the county attorney commenced proceedings.<sup>192</sup> The court further found L.W. had been a Nebraska resident for more than six months prior to the proceedings.<sup>193</sup> According to the home state provisions of the NCCJA, which provide that Nebraska has jurisdiction if the child lived in Nebraska for more than six months prior to the custody proceedings, the district court found the juvenile court could take jurisdiction over the matter.<sup>194</sup> The mother appealed the district court decision, alleging the NCCJA did not grant Nebraska subject matter jurisdiction.<sup>195</sup>

The Supreme Court of Nebraska reversed the district court and determined Iowa had retained continuing exclusive jurisdiction over L.W.'s custody and therefore Nebraska could only enter a temporary custody decree.<sup>196</sup> Chief Justice William C. Hastings delivered the opinion of the court, reasoning that even though section 43-1203 of the NCCJA granted Nebraska initial jurisdiction, Nebraska may be pro-

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187. *Id.* at 87, 486 N.W.2d at 491.

188. *Id.* at 87-88, 486 N.W.2d at 491.

189. *Id.* at 87-88, 486 N.W.2d at 490-91.

190. *Id.* at 86, 88, 486 N.W.2d at 486, 491.

191. *Id.* at 89, 486 N.W.2d at 492.

192. *Id.* at 88, 486 N.W.2d at 491-92.

193. *Id.* at 86, 88-89, 486 N.W.2d at 490-92. The court also found L.W.'s biological father was a resident of Iowa during the period of the action and L.W.'s mother had not objected to the county court's jurisdiction during all proceedings between April 5, 1989 and March 5, 1991. *Id.*

194. *In re Interest of L.W.*, 241 Neb. at 88-89, 486 N.W.2d at 491-92 (finding the juvenile court could properly assert jurisdiction over the child pursuant to the NCCJA because the mother and the child were residents of Nebraska for at least six months before the proceedings); NEB. REV. STAT. §§ 43-1202(5), 43-1203(1)(a) (defining home state as the state where the child lived in the six months prior to the proceedings and explaining a court of Nebraska may assert jurisdiction when Nebraska is the child's home state).

195. *In re Interest of L.W.*, 241 Neb. at 84, 89, 486 N.W.2d at 486, 492.

196. *Id.* at 84, 103, 486 N.W.2d at 486, 499.

hibited from modifying the custody order.<sup>197</sup> The court stated that Nebraska must abide by section 43-1214 of the NCCJA and first inquire whether Iowa had retained jurisdiction under jurisdictional requirements equivalent to the NCCJA.<sup>198</sup> Given that the biological father had remained an Iowa resident since the 1976 divorce and significant contact existed between the child and her father, the court determined that Iowa had significant connection jurisdiction, and thus continuing exclusive jurisdiction.<sup>199</sup> The court stated that Iowa's continuing exclusive jurisdiction indicated that the Nebraska court must defer jurisdiction to Iowa.<sup>200</sup> However, even though Nebraska did not have modification jurisdiction, the court explained that because Nebraska had emergency jurisdiction under the NCCJA, the ju-

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197. *Id.* at 86, 99, 486 N.W.2d at 486, 497. The court concluded the juvenile court had home state jurisdiction since the child had resided within Nebraska for more than six months. *Id.* at 98-99, 486 N.W.2d at 496-97. The court also found the juvenile court could assume jurisdiction under Nebraska Revised Statute § 43-1203(1)(b) since there existed substantial evidence in Nebraska concerning the child's future protection, training, care, and personal relationships. *Id.* at 98-99, 486 N.W.2d at 496-97. Further, the court concluded emergency jurisdiction existed because the child was physically present in Nebraska and her stepfather had sexually abused her. *Id.* at 98-99, 486 N.W.2d at 497.

198. *In re Interest of L.W.*, 241 Neb. at 99-100, 486 N.W.2d at 497.

199. *Id.* at 101, 486 N.W.2d at 498. The text of Iowa Code section 598B.202 states in full:

1. Except as otherwise provided in section 598B.204, a court of this state which has made a child-custody determination consistent with section 598B.201 or 598B.203 has exclusive, continuing jurisdiction over the determination until any of the following occurs:
  - a. A court of this state determines that the child does not have, the child and one parent do not have, or the child and a person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.
  - b. A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.
2. A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under section 598B.201.

IOWA CODE § 598B.202 (2001).

200. *In re Interest of L.W.*, 241 Neb. at 101, 486 N.W.2d at 498. The court stated "[w]hen another state has entered a child custody decree and one of the parents remains a resident of that state, generally the courts of this state are without jurisdiction to make a permanent change of custody unless the first state affirmatively declines jurisdiction or fails to take appropriate action." *Id.* at 103, 486 N.W.2d at 499. *See also* Kumar v. Superior Court of Santa Clara County, 652 P.2d 1003, 1007 (Cal. 1982) (quoting Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203, 214-15 (1981)) (stating "continuing jurisdiction of the prior court is exclusive . . . [o]nly when the child and all the parties have moved away is deference to another state's continuing jurisdiction no longer required").

venile court could enter a temporary order for the child.<sup>201</sup> Thus, Nebraska could enter a temporary custody decree until the case could be heard by the Iowa courts, which the Nebraska court found had retained continuing exclusive jurisdiction over L.W.'s custody case.<sup>202</sup>

In *Jensby v. Jensby*,<sup>203</sup> Nebraska retained continuing exclusive jurisdiction over the custody of two minor children even though the children no longer resided within Nebraska's borders.<sup>204</sup> In *Jensby*, Julie Jensby requested the Fillmore County District Court to modify an earlier custody decree and place custody of her children with her, rather than their father, Kent Jensby.<sup>205</sup> In February 1993, Kent and Julie Jensby had obtained a divorce decree, and the court awarded custody of the couple's children, Leisha and Chaz, to Kent, with visitation rights awarded to Julie.<sup>206</sup> In October 1993, Kent, his girlfriend Mary, and the two children moved to Kansas.<sup>207</sup> Kent later separated from Mary in 1996.<sup>208</sup>

On April 14, 1998, the Fillmore County District Court modified the original custody decree and placed Leisha and Chaz in Julie's custody.<sup>209</sup> The court listened to testimony from Julie, Kent, and Mary.<sup>210</sup> Julie testified that her work schedule could accommodate the children's school and summer schedules if the court awarded her custody.<sup>211</sup> She further testified that she enrolled her daughter in summer school during Leisha's visit in 1997 to improve Leisha's math skills.<sup>212</sup> Julie also told the court that she lived in a house in the Omaha area, and the children's grandparents, aunts, uncles, and cousins lived in surrounding communities.<sup>213</sup> Following Julie's testimony, Kent testified that he did not return from work until 7 or 8 p.m., and even later some nights, to avoid fighting with Mary.<sup>214</sup> He testified that Mary had played a larger role in Leisha and Chaz's up-

201. *In re Interest of L.W.*, 241 Neb. at 101, 486 N.W.2d at 498.

202. *Id.* at 86, 103, 486 N.W.2d at 490, 499.

203. No. A-98-410, 1999 Neb. App. LEXIS 84, at \*1 (Neb. Ct. App. Mar. 9, 1999).

204. *Jensby v. Jensby*, No. A-98-410, 1999 Neb. App. LEXIS 84, at \*1, \*15-\*16 (Neb. Ct. App. Mar. 9, 1999).

205. *Jensby*, 1999 Neb. App. LEXIS 84, at \*3.

206. *Id.* at \*1.

207. *Id.* at \*2. Julie Jensby moved to Omaha, Nebraska prior to Kent and the children's move to Kansas. *Id.* Julie married Joseph Lecci on November 26, 1994 and worked as a night charge nurse in Plattsmouth, Nebraska. *Id.* at \*4. On January 29, 1994, Kent married his girlfriend, Mary Dubas. *Id.* at \*2.

208. *Jensby*, 1999 Neb. App. LEXIS 84, at \*3. Crystal Howard then moved in with Kent, and the two subsequently married in December 1997. *Id.*

209. *Jensby*, 1999 Neb. App. LEXIS 84, at \*8.

210. *Id.* at \*4-\*8.

211. *Id.* at \*5.

212. *Id.* at \*4-\*5.

213. *Id.* at \*5-\*6.

214. *Id.* at \*1, \*2, \*6.

bringing than did he.<sup>215</sup> Finally, Mary testified that Chaz had witnessed Kent assault her on one occasion, and that Kent would come home with a case of beer approximately three nights per week during the last months of their marriage.<sup>216</sup> After considering all the testimony, the court awarded custody of the two minor children to Julie.<sup>217</sup>

Kent appealed the district court's decision to the Nebraska Court of Appeals, alleging that although Nebraska had jurisdiction, Nebraska should have deferred to Kansas on the basis that Nebraska was an inconvenient forum.<sup>218</sup> The Nebraska Court of Appeals found no abuse of discretion in the lower court's decision, determining that the State of Nebraska could modify the original custody decree.<sup>219</sup> The appellate court explained that when a court is determining a custody proceeding with interstate implications, the court must first determine if it has jurisdiction under the NCCJA, and secondly determine if it is appropriate for that court to exercise jurisdiction.<sup>220</sup>

The NCCJA provides that Nebraska may exercise jurisdiction over a custody matter when Nebraska is the children's home state or when the State of Nebraska has a significant connection with the children.<sup>221</sup> Although the court determined Nebraska did not have home state jurisdiction over the Jensby custody proceedings, the court stated it was clear that Nebraska had significant connection jurisdiction over the matter.<sup>222</sup> The court ascertained significant connection jurisdiction existed because (1) Julie, the children's noncustodial parent, continued to reside in Nebraska; (2) the children had numerous relatives in Nebraska; and (3) the children continued to visit Nebraska on a regular basis.<sup>223</sup> The court further stated continuing exclusive jurisdiction was not disturbed by the children residing in another state for more than six months.<sup>224</sup> The court explained that caselaw interpreting the NCCJA provided that if one of the original contestants to the case continued to reside in the issuing state while maintaining a significant connection with the children, significant connection jurisdiction remained in the issuing state.<sup>225</sup> A Nebraska

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215. *Id.* at \*7-\*8.

216. *Id.* at \*6-\*7.

217. *Id.* at \*8.

218. *Id.* at \*1, \*8-\*9.

219. *Id.* at \*19, \*22.

220. *Id.* at \*9.

221. NEB. REV. STAT. § 43-1203(1)(b).

222. *Jensby*, 1999 Neb. App. LEXIS 84, at \*11, \*15. Leisha and Chaz Jensby lived in Kansas for about three years prior to the time Julie Lecci initiated modification proceedings in Nebraska. *Id.* at \*15-\*16.

223. *Jensby*, 1999 Neb. App. LEXIS 84, at \*15-\*16.

224. *Id.* at \*14 (quoting *Blanco v. Tonniges*, 2 Neb. App 520, 525-26, 511 N.W.2d 555, 558 (1994)).

225. *Id.*

court entered the original decree over Leisha and Chaz in February 1993.<sup>226</sup> Although the district court determined Kent and the children had moved to Kansas in October 1993, the court also determined Julie continued to reside in Nebraska.<sup>227</sup> Thus, the court maintained that Nebraska had continuing exclusive jurisdiction pursuant to the NCCJA.<sup>228</sup> The court then determined that Nebraska was not an inconvenient forum requiring the State to defer jurisdiction to Kansas.<sup>229</sup>

## 2. *The Issuing State Lost Continuing Exclusive Jurisdiction*

Continuing exclusive jurisdiction is lost when no party continues to have a significant connection with the issuing state and no evidence exists concerning the child's protection, training, care, and personal relationships within that state.<sup>230</sup> The issuing state also loses continuing exclusive jurisdiction when none of the parties continue to reside within the issuing state.<sup>231</sup> In *Jorgensen v. Vargas*,<sup>232</sup> the Supreme Court of Iowa concluded that New York did not have jurisdiction over the proceedings and Iowa had home state jurisdiction to enter an initial child custody decree.<sup>233</sup> In *Jorgensen*, Karna Jorgensen filed an action in the Iowa District Court for Polk County to modify a New York custody decree to allow joint custody of her son, Isaiah, with her ex-husband Maurice Vargas, and to allow her the primary physical care of Isaiah.<sup>234</sup> In 1989, Isaiah was born in New York.<sup>235</sup> Jorgen-

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226. *Id.* at \*1.

227. *Id.* at \*2.

228. *Id.* at \*11, \*16.

229. *Id.* at \*17-\*19. The court of appeals noted that the children spent considerable time in Nebraska and there was substantial evidence showing the children's future protection, training, care, and personal relationships in Nebraska. *Id.* at \*18. The text of section 43-1207(3) states in full:

- (3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:
- (a) If another state is or recently was the child's home state;
  - (b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;
  - (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
  - (d) If the parties have agreed on another forum which is no less appropriate; and
  - (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 43-1201.

NEB. REV. STAT. § 43-1207(3).

230. *Stoner*, 75 N. DAK. L. REV. at 316.

231. *Id.*

232. 627 N.W.2d 550 (Iowa 2001).

233. *Jorgensen v. Vargas*, 627 N.W.2d 550, 550, 556, 566-67 (Iowa 2001).

234. *Jorgensen*, 627 N.W.2d at 550, 554.

sen and Isaiah moved to Iowa in January 1993.<sup>236</sup> In September 1993, Vargas petitioned the Family Court of New York for custody of Isaiah.<sup>237</sup> Two months later, he petitioned the Supreme Court of New York for divorce from Jorgensen.<sup>238</sup> Subsequently, in May 1994, the New York Supreme Court entered the divorce decree with Jorgensen and Vargas' stipulation of joint legal custody.<sup>239</sup> Then, in June 1994, the Family Court of New York decided that Iowa was Isaiah's home state, and concluded it did not have subject matter jurisdiction over Vargas' separate custody petition.<sup>240</sup> Upon Jorgensen's petition, the Iowa District Court for Polk County modified the New York custody decree, deciding that primary custody of Isaiah should be granted to Jorgensen.<sup>241</sup> In reaching this conclusion, the Iowa court assumed that all aspects of the New York divorce decree were valid, including the fact that the New York court had jurisdiction to enter a decree of custody in the first place.<sup>242</sup>

Vargas appealed the district court's order to the Court of Appeals of Iowa, alleging Iowa lacked jurisdiction to hear the dispute under Iowa's version of the UCCJA.<sup>243</sup> The court dismissed the case after

235. *Id.* at 553.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* When reaching a settlement in the divorce action, Maurice and Karna entered a stipulation providing each with joint legal custody with a visitation schedule. *Id.*

240. *Jorgensen*, 627 N.W.2d at 553. The Family Court of New York specifically found "that (1) New York was not the child's home state at the time Maurice commenced the action in that court, and (2) Iowa was the child's home state." *Id.* See *Todd K. v. Sarah P.*, No. A-99-711, 2000 Neb. App. LEXIS 176, at \*11-\*12 (Neb. Ct. App. June 13, 2000) (concluding a child under the age of six months who was born in Nebraska and removed one week after birth has no home state for purposes of the NCCJA). See also *Todd K.*, 2000 Neb. App. LEXIS 176, at \*20 (Hannon, J., dissenting) (stating the state where a child is born is the child's home state when they have not lived elsewhere).

241. *Jorgensen*, 627 N.W.2d at 550, 554.

242. *Id.* at 554.

243. *Id.* The text of Iowa Code section 598B.201 reads in full:

1. Except as otherwise provided in section 598B.204, a court of this state has jurisdiction to make an initial child-custody determination only if any of the following applies:
  - 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 paragraph "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 598B.207 or 598B.208 and both of the following apply:
    - (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.



determining that continuing exclusive jurisdiction remained in New York.<sup>244</sup> The court of appeals agreed with the district court that original jurisdiction had existed in New York to enter the original custody order for Isaiah.<sup>245</sup> The court then looked at Iowa's jurisdiction to modify the New York decree.<sup>246</sup>

In looking at Iowa's modification jurisdiction, the court explained that even though Iowa is probably Isaiah's home state, the child's father continued to reside in New York.<sup>247</sup> The court explained that when one party continues to reside in the issuing state, a significant connection remains with that state.<sup>248</sup> The court looked to Iowa Code section 598A.14, a portion of the Iowa version of the UCCJA, which provides that an Iowa court cannot modify a decree of another state unless the issuing state no longer has jurisdiction and the State of Iowa has jurisdiction.<sup>249</sup> Applying the statute to the facts of the case, the court of appeals decided that Iowa did not have jurisdiction under the UCCJA to modify the New York custody decree because New York

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

- c. All courts having jurisdiction under paragraph "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 598B.207 or 598B.208.
  - d. No court of any other state would have jurisdiction under the criteria specified in paragraph "a", "b", or "c".
2. Subsection 1 is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.
  3. Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

IOWA CODE § 598B.201 (2001). The text of Iowa Code section 598B.203 reads in full:

Except as otherwise provided in section 598B.204, a court of this state shall not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under section 598B.201, subsection 1, paragraph "a" or "b", and either of the following applies:

1. The court of the other state determines it no longer has exclusive, continuing jurisdiction under section 598B.202 or that a court of this state would be a more convenient forum under section 598B.207.
2. A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

IOWA CODE § 598B.203 (2001).

244. *Jorgensen*, 627 N.W.2d at 554.

245. *Id.* Both parties had agreed to allow the Supreme Court of New York to enter an order for joint custody. *Id.* at 553-54.

246. *Id.* at 554.

247. *Jorgensen v. Vargas*, No. 98-1385, 2000 WL 1587631, at \*4 (Iowa App. Oct. 25, 2000), *vacated by* 627 N.W.2d 550 (Iowa 2001).

248. *Jorgensen*, 2000 WL 1587631, at \*4.

249. *Id.*

had retained jurisdiction.<sup>250</sup> The court of appeals dismissed the case.<sup>251</sup>

Jorgensen petitioned the Iowa Supreme Court for review, which granted further review to consider whether the district court of Iowa had jurisdiction to modify the custody order entered by the Family Court of New York.<sup>252</sup> The Iowa Supreme Court reversed the court of appeals and asserted that New York did not have initial jurisdiction to enter a custody decree in the first place.<sup>253</sup> Consequently, Iowa did not need to give full faith and credit to the New York order.<sup>254</sup>

After determining Iowa did not need to follow the New York custody order, the Iowa Supreme Court found the Iowa district court did have initial jurisdiction to enter a custody determination.<sup>255</sup> Chief Justice Charles S. Lavorato, writing for the court, reasoned that New York was not Isaiah's home state.<sup>256</sup> Isaiah had resided with his mother in Iowa for approximately ten months prior to the time Vargas submitted his petition for divorce in New York.<sup>257</sup> The court decided none of the other provisions for initial jurisdiction under the UCCJA provided New York with jurisdiction to enter a custody order.<sup>258</sup> Specifically, the court stated New York did not have either significant con-

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250. *Jorgensen*, 627 N.W.2d at 554.

251. *Id.*

252. *Id.* at 550, 554.

253. *Id.* at 550, 565.

254. *Id.*

255. *Id.* at 550, 565-66.

256. *Id.* at 553, 566.

257. *Id.* at 560. Iowa Code section 598A.3 provides Iowa is the child's home state if the child resided in Iowa for six months prior to the commencement of the custody proceedings. *Id.* at 565-66.

258. *Jorgensen*, 627 N.W.2d at 560-61. For a discussion of emergency jurisdiction under the UCCJA, see *In re Interest of L.W.*, 241 Neb. 84, 103, 486 N.W.2d 486, 499 (1992) (determining the juvenile court in Nebraska had emergency jurisdiction since the child was sexually assaulted in Custer County; however, Nebraska only had jurisdiction to enter a temporary order and Iowa retained continuing jurisdiction; if Iowa failed to take action or declined jurisdiction then the State of Nebraska have permanent jurisdiction). See also *In re Interest of J.L.H.*, 2 Neb. App. 40, 49, 507 N.W.2d 641, 647 (1993) (declaring "when the welfare of a child present in Nebraska is threatened by a grave emergency, a Nebraska court may enter orders for the protection of the child even if the orders contravene those of another state that still retains custodial jurisdiction of the child . . . the child's physical presence in Nebraska alone is sufficient to confer jurisdiction on a Nebraska court to make a custody determination under § 43-1203(1)(c)").

For a discussion of default jurisdiction under the UCCJA, see *Jensby v. Jensby*, No. A-98-410, 1999 Neb. App. LEXIS 84, at \*16-\*18 (Neb. Ct. App. Mar. 9, 1999) (stating whether a court declined to exercise jurisdiction on the belief a more convenient forum existed in another state is at the trial court's discretion; in determining if a court is an inconvenient forum, the court must consider the child's best interests; the court may also consider the factors enumerated in NEB. REV. STAT. § 43-1207(3)).

nection, emergency, or default jurisdiction under the UCCJA.<sup>259</sup> The court then found that Iowa met the jurisdictional requirements of the UCCJA to enter an initial decree because Iowa was Isaiah's home state and Isaiah had continued to reside in Iowa at the time Jorgensen commenced proceedings.<sup>260</sup> Therefore, the Iowa court had jurisdiction to make the child custody determination.<sup>261</sup>

In *In re the Marriage of Beier*,<sup>262</sup> Minnesota had jurisdiction to modify a custody decree originally entered in Texas because none of the parties continued to reside in Texas and significant connection jurisdiction existed in Minnesota.<sup>263</sup> In *In re the Marriage of Beier*, Scot and Sandra Beier had obtained a divorce in Texas in December 1983, and the court awarded custody of the couple's son, Jeremy, to Sandra.<sup>264</sup> In May 1984, Scot moved to Minnesota, following his military discharge.<sup>265</sup> In October 1984, Sandra moved to Illinois.<sup>266</sup> After moving to Minnesota, Scot asked the Hennepin County District Court of Minnesota to modify the custody decree and grant him custody of his minor son.<sup>267</sup> The district court dismissed Scot's request for modification of the original custody order concluding it did not have subject matter jurisdiction to hear the custody matter.<sup>268</sup> Scot appealed the district court dismissal to the Court of Appeals of Minnesota, alleging that Minnesota did have jurisdiction under the UCCJA to hear his motion for modification of custody.<sup>269</sup>

The Court of Appeals of Minnesota reversed the trial court's dismissal of Scot's request for child custody modification.<sup>270</sup> The court maintained that if Sandra had continued to reside in Texas, Minnesota would be forced to defer jurisdiction over the modification hearing

259. *Jorgensen*, 627 N.W.2d at 560-61. The court relied on the Family Court of New York's decision that New York did not have jurisdiction to decide Isaiah's custody. *Id.* at 564.

260. *Jorgensen*, 627 N.W.2d at 566. The Supreme Court of Iowa opined that since New York was unable to assume jurisdiction at the time Vargas commenced divorce proceedings, the essence of Jorgensen's request was for the court to determine an initial custody decree. *Id.* at 550, 566.

261. *Jorgensen*, 627 N.W.2d at 567.

262. 371 N.W.2d 52 (Minn. Ct. App. 1985).

263. *In re the Marriage of Beier*, 371 N.W.2d 52, 52, 54-56 (Minn. Ct. App. 1985).

264. *In re the Marriage of Beier*, 371 N.W.2d at 52, 54. The couple's son was born in 1977, and the family resided in Minnesota until 1981, when the family moved because the United States Army stationed Scot in Texas. *Id.*

265. *In re the Marriage of Beier*, 371 N.W.2d at 54. Scot found a job and purchased a house, and Sandra allowed Jeremy to visit Scot in Minnesota for summer vacation in 1984. *Id.*

266. *In re the Marriage of Beier*, 371 N.W.2d at 54-55.

267. *Id.* at 52, 54.

268. *Id.*

269. *Id.* at 52, 54-55.

270. *Id.* at 52, 56.

to Texas.<sup>271</sup> However, the court stated that when all the parties affected by the child custody decree move away from the issuing state, their connection with that state attenuates.<sup>272</sup> Since neither the father, the mother, nor the child continued to reside in Texas, the court declared Texas had lost jurisdiction over the custody of Jeremy.<sup>273</sup> The court then concluded that Minnesota had significant connection jurisdiction pursuant to the UCCJA because (1) the Beier family lived in Minnesota until Jeremy reached age four; (2) Jeremy attended school in Minnesota for a short time; and (3) several of the child's ex-

271. *Id.* at 55.

272. *Id.* (citation omitted).

273. *Id.* The text of Minnesota Statutes section 518A.03 states in full:

Subdivision 1. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial 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 removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
- (b) it is in the best interest of the child that a court of this state assume jurisdiction because (1) the child and the 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; or
- (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 the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
- (d) (1) it appears that no court in another state would have jurisdiction under prerequisites substantially in accordance with clause (a), (b), or (c), or a court of another state has 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, and (2) it is in the best interest of the child that a court of this state assume jurisdiction.

Subd. 2. Except under clauses (c) and (d) of subdivision 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.

Subd. 3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine custody.

MINN. STAT. § 518A.03 (1990) (repealed and renumbered at §§ 518D.101 to D.317). The text of Minnesota Statutes section 518A.14 states in full:

Subdivision 1. If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (1) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 518A.01 to 518A.25 or has declined to assume jurisdiction to modify the decree and (2) the court of this state has jurisdiction.

Subd. 2. If a court of this state is authorized under subdivision 1 and section 518A.08 to modify a custody decree of another state, it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 518A.22.

MINN. STAT. § 518A.14 (1990) (repealed and renumbered at §§ 518D.101 to D.317).

tended family members resided in Minnesota.<sup>274</sup> Consequently, substantial evidence existed in Minnesota concerning Jeremy's protection, training, care, and personal relationships, and the court stated exercising jurisdiction would be in the child's best interests.<sup>275</sup> The Court of Appeals of Minnesota reversed the trial court, explaining that Texas had lost jurisdiction to modify custody and subsequently Minnesota had met the jurisdictional requirements to modify Jeremy's custody order.<sup>276</sup>

## ANALYSIS

In *Hamilton v. Foster*,<sup>277</sup> the Supreme Court of Nebraska examined Nebraska's jurisdiction to modify a custody decree originally entered in Colorado.<sup>278</sup> The district court for Denver, Colorado placed permanent custody of Elizabeth A. Hamilton, Ariel M. Rettig, and Meagan K. Rettig (collectively "the Children") with their maternal grandfather, Thomas E. Hamilton ("Hamilton"), and his girlfriend, Sharon M. Foster ("Foster").<sup>279</sup> In 1997, Hamilton, Foster, and the Children moved to Omaha, Nebraska.<sup>280</sup> In July 1999, Hamilton and Foster separated.<sup>281</sup> Hamilton filed a petition for sole custody of the Children, which the Douglas County District Court dismissed for failure to state a cause of action.<sup>282</sup> The Supreme Court of Nebraska reversed this decision, finding that the Nebraska Child Custody Jurisdiction Act ("NCCJA")<sup>283</sup> allowed Nebraska to modify the original decree.<sup>284</sup> Specifically, the court applied a two-step process and determined first that Colorado no longer had jurisdiction over the custody of the three Children, and second, that Nebraska had met the jurisdictional requirements to modify custody.<sup>285</sup>

In *Hamilton*, the Supreme Court of Nebraska was correct in concluding that Colorado no longer had jurisdiction over custody of the

274. *In re the Marriage of Beier*, 371 N.W.2d at 56.

275. *Id.*

276. *In re the Marriage of Beier*, 371 N.W.2d at 52, 56. The court remanded the case to the trial court, noting the trial court had discretion to determine if it should exercise jurisdiction or defer jurisdiction to another state on the basis of convenience. *Id.* at 56.

277. 260 Neb. 887, 620 N.W.2d 103 (2000).

278. *Hamilton v. Foster*, 260 Neb. 887, 887, 892-93, 620 N.W.2d 103, 103, 110 (2000).

279. *Hamilton*, 260 Neb. at 890, 620 N.W.2d at 108 (stating the court awarded permanent custody of the Children to Hamilton and Foster); Brief for Appellant at 6, *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000) (No. A-99-1349) (stating the three minor children are Elizabeth A. Hamilton, Ariel M. Rettig, and Meagan K. Rettig).

280. *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109.

281. *Id.*

282. *Id.*

283. NEB. REV. STAT. §§ 43-1201 to -1225 (1999).

284. *Hamilton*, 260 Neb. at 887, 899, 905, 620 N.W.2d at 103, 113, 117.

285. *Id.* at 898, 620 N.W.2d at 113.

Children, and also in concluding that Nebraska had met the jurisdictional requirements under the NCCJA to modify the custody order regarding the Children.<sup>286</sup> Since neither the original contestants nor the Children continued to reside in Colorado, the court looked to prior caselaw to properly apply the NCCJA and find that Colorado had lost jurisdiction.<sup>287</sup> In further evaluating the NCCJA, the *Hamilton* court relied upon prior caselaw to properly find that the Children's home state was now Nebraska.<sup>288</sup> Furthermore, even if Nebraska had not had home state jurisdiction in this case, the court could have correctly concluded that Nebraska had jurisdiction over the custody of the Children because Nebraska had a significant connection with the Children pursuant to the NCCJA.<sup>289</sup> Due to the decision in *Hamilton*, Nebraska practitioners now have a clear model for determining when Nebraska has initial jurisdiction and modification jurisdiction over custody decrees pursuant to the NCCJA.<sup>290</sup>

In today's mobile society, families move from state to state quite frequently.<sup>291</sup> This change in residence often creates difficulty when the family seeks to modify custody arrangements.<sup>292</sup> The Uniform Child Custody Jurisdiction Act ("UCCJA"),<sup>293</sup> enacted as the NCCJA in Nebraska, requires the most closely connected state to decide custody disputes.<sup>294</sup> When a state enters an original custody determination, the continuing jurisdiction of that state is considered exclusive.<sup>295</sup> So long as one contestant remains a resident of the issuing state and the child continues to have minimal contacts with that party, continuing exclusive jurisdiction exists.<sup>296</sup> However, it is possible for the issuing state to lose jurisdiction over future custody determinations.<sup>297</sup> Continuing exclusive jurisdiction is lost when no party continues to reside within the issuing state.<sup>298</sup> Additionally, the issuing state loses continuing exclusive jurisdiction when none of the parties continue to have a significant connection with the issuing state

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286. See *infra* notes 305-42, 345-406 and accompanying text.

287. See *infra* notes 305-42 and accompanying text.

288. See *infra* notes 351-66 and accompanying text.

289. See *infra* notes 368-406 and accompanying text.

290. See *infra* notes 300-408 and accompanying text.

291. Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N. DAK. L. REV. 301, 301 (1999).

292. Stoner, 75 N. DAK. L. REV. at 301.

293. Unif. Child Custody Jurisdiction Act §§ 1-28, 9 U.L.A. pt. IA (1999).

294. Stoner, 75 N. DAK. L. REV. at 302-03.

295. *Id.* at 315-16.

296. Blakesley, 58 LA. L. REV. at 486.

297. *Id.* at 486-87.

298. Stoner, 75 N. DAK. L. REV. at 316.

and no evidence exists concerning the child's protection, training, care, and personal relationships within the issuing state.<sup>299</sup>

In *Hamilton*, the Supreme Court of Nebraska correctly applied the NCCJA to the facts of the case to determine that the issuing state, Colorado, had lost continuing exclusive jurisdiction over the custody of the Children.<sup>300</sup> The NCCJA provides that Nebraska shall not modify a custody decree entered by another state without conducting a two-step determination.<sup>301</sup> First, a court of Nebraska must determine that the issuing state no longer has jurisdiction pursuant to prerequisites that are substantially similar to those enumerated by the NCCJA or that the issuing state has declined to exercise jurisdiction.<sup>302</sup> Second, the Nebraska court must determine that Nebraska meets the initial jurisdictional requirements to enter a custody order.<sup>303</sup> Until the state makes these findings, jurisdiction to modify a custody decree remains with the issuing state.<sup>304</sup>

#### A. COLORADO NO LONGER HAD JURISDICTION OVER THE CUSTODY PROCEEDINGS

Before a court of Nebraska may modify a custody order originally entered in another state, the NCCJA requires that the court must determine the issuing state has lost continuing exclusive jurisdiction.<sup>305</sup> An issuing state loses continuing exclusive jurisdiction when it appears to Nebraska that the court that issued the original decree no longer has jurisdiction pursuant to jurisdictional requirements that are substantially similar to the NCCJA.<sup>306</sup> Specifically, in order for the issuing state to have continuing exclusive jurisdiction, the issuing state must still have either home state, significant connection, emergency, or default jurisdiction.<sup>307</sup>

299. *Id.* The parties in custody proceedings include the child and either the child's parents or parent substitutes. *Id.*

300. *See infra* notes 301-42 and accompanying text.

301. NEB. REV. STAT. § 43-1214(1).

302. NEB. REV. STAT. § 43-1214(1)(a).

303. NEB. REV. STAT. § 43-1214(1)(b). *See Stoner*, 75 N. DAK. L. REV. at 312, 315 (stating four alternative jurisdictional grounds exist pursuant to the UCCJA to enter a custody determination: (1) home state jurisdiction; (2) significant connection jurisdiction; (3) emergency jurisdiction; and, (4) default or vacuum jurisdiction).

304. Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 310 (1986).

305. *See infra* notes 306-07 and accompanying text.

306. NEB. REV. STAT. § 43-1214(1)(a).

307. NEB. REV. STAT. § 43-1203(1). For an explanation of when a state meets the initial jurisdictional requirements pursuant to the NCCJA *see infra* notes 346-408 and accompanying text.

In *In re Interest of L.W.*,<sup>308</sup> the Supreme Court of Nebraska analyzed the NCCJA and determined that the State of Iowa had retained continuing exclusive jurisdiction over the custody proceedings.<sup>309</sup> The *In re Interest of L.W.* court determined Iowa was no longer the child's home state because the child must have resided within the state for six months prior to the commencement of the proceedings for that state to be the child's home state.<sup>310</sup> L.W. had resided in Nebraska for more than six months, so Nebraska had become the child's home state.<sup>311</sup> However, the court also determined that the child's biological father continued to reside in Iowa and that significant contact still existed between the child and her father; therefore, Iowa retained continuing exclusive jurisdiction because Iowa had significant connection jurisdiction.<sup>312</sup> Although Nebraska had emergency jurisdiction pursuant to the NCCJA over the child based upon allegations of abuse, the court explained such jurisdiction is only temporary in nature.<sup>313</sup> Since an Iowa court had entered the initial custody decree, an original party continued to reside in Iowa, and the child had at least minimal contact with that party, the Supreme Court of Nebraska determined the NCCJA bound the Nebraska court to defer a permanent custody determination to the State of Iowa.<sup>314</sup>

Similarly, in *Jensby v. Jensby*,<sup>315</sup> the Nebraska Court of Appeals looked to the NCCJA to determine if the state that entered the initial custody decree had retained continuing exclusive jurisdiction.<sup>316</sup> The *Jensby* court determined the initial decree was entered in the State of Nebraska.<sup>317</sup> However, since that decree, the court explained that the father and the children had moved from Nebraska to Kansas.<sup>318</sup> When the children's mother, who continued to reside within Nebraska, sought to modify the custody arrangements, the court observed that the children often returned to Nebraska for visitation with their mother.<sup>319</sup> The father argued that although Nebraska had jurisdiction, Nebraska was an inconvenient forum, and therefore the court

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308. 241 Neb. 84, 486 N.W.2d 486 (1992).

309. *In re Interest of L.W.*, 241 Neb. 84, 103, 486 N.W.2d 486, 499 (1992).

310. *In re Interest of L.W.*, 241 Neb. at 98, 486 N.W.2d at 496.

311. *Id.*

312. *Id.* at 100-01, 486 N.W.2d at 498.

313. *Id.* at 101-02, 104, 486 N.W.2d at 498, 500 (citation omitted).

314. *Id.* at 101, 103, 486 N.W.2d at 498-99. Further, the Nebraska court found the Iowa court system did not decline to exercise jurisdiction; thus, continuing exclusive jurisdiction remained in Iowa. *Id.* at 103, 486 N.W.2d at 499.

315. No. A-98-410, 1999 Neb. App. LEXIS 84, at \*1 (Neb. Ct. App. Mar. 9, 1999).

316. *Jensby v. Jensby*, No. A-98-410, 1999 Neb. App. LEXIS 84, at \*1, \*16 (Neb. Ct. App. Mar. 9, 1999).

317. *Jensby*, 1999 Neb. App. LEXIS 84, at \*15.

318. *Id.* at \*2.

319. *Id.* at \*2-\*3, \*15-\*16.



should decline to exercise jurisdiction.<sup>320</sup> The factors the *Jensby* court used to determine that it was in the children's best interests for Nebraska to exercise jurisdiction included (1) the fact that the children had spent considerable time in Nebraska; (2) the children's mother and many other relatives resided in Nebraska; and (3) a Nebraska court entered the original decree.<sup>321</sup> Thus, the Nebraska Court of Appeals determined that Nebraska had a significant connection with the children, and thus Nebraska had retained continuing exclusive jurisdiction.<sup>322</sup> Because Nebraska had continuing exclusive jurisdiction, Nebraska did not need to defer to the court of Kansas.<sup>323</sup>

In *In re the Marriage of Beier*,<sup>324</sup> the Court of Appeals of Minnesota determined the State of Texas had lost jurisdiction over a custody decree and the State of Minnesota met the statutory requirements to assert jurisdiction by applying the Minnesota version of the NCCJA.<sup>325</sup> The *In re the Marriage of Beier* court determined that a court of Texas had awarded custody of the child to his mother upon dissolution of marriage.<sup>326</sup> However, since the original decree, all parties had moved from Texas to other states.<sup>327</sup> The father resided in Minnesota; the mother resided in Illinois.<sup>328</sup> The divorced couple's child had lived primarily in Illinois, but he also visited his father in Minnesota.<sup>329</sup> The UCCJA requires that at least one party remain in the issuing state for that state to retain jurisdiction.<sup>330</sup> Thus, based on the Minnesota version of the UCCJA, the court stated that the State of Texas had lost jurisdiction over the case.<sup>331</sup>

In *Hamilton*, the Supreme Court of Nebraska correctly applied the provisions of the NCCJA regarding modification jurisdiction to the facts of the case.<sup>332</sup> The *Hamilton* court determined that neither the Children nor the parties acting as the Children's parents continued to reside within Colorado.<sup>333</sup> In fact, the court determined the Children had lived in Nebraska since 1997.<sup>334</sup> Therefore, Colorado did not have home state jurisdiction because the Children had not lived in Colorado

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320. *Id.* at \*4-\*5, \*18-\*19.

321. *Id.*

322. *Id.* at \*1, \*10, \*22.

323. *Id.* at \*11, \*19.

324. 371 N.W.2d 52 (Minn. Ct. App. 1985).

325. *In re the Marriage of Beier*, 371 N.W.2d 52, 55-56 (Minn. Ct. App. 1985).

326. *In re the Marriage of Beier*, 371 N.W.2d at 54.

327. *Id.* at 55.

328. *Id.*

329. *Id.* at 54.

330. *Id.* at 55.

331. *Id.*

332. See *infra* notes 333-42 and accompanying text.

333. *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113.

334. *Id.*

for six months prior to the commencement of the proceedings.<sup>335</sup> Although the Children's father still resided somewhere in the State of Colorado, the Children had not had contact with him since 1994.<sup>336</sup> Therefore, Colorado did not have significant connection jurisdiction pursuant to jurisdictional requirements substantially similar to the NCCJA.<sup>337</sup> Because Colorado was no longer the Children's home state and Colorado no longer had a significant connection with the Children, the court determined Colorado had lost continuing exclusive jurisdiction over the custody of the Children.<sup>338</sup>

The *Hamilton* court's review of the circumstances when an issuing state loses continuing exclusive jurisdiction is governed by the NCCJA, and the court correctly applied this statute by examining the Children's connection with the State of Colorado.<sup>339</sup> Like *In re Interest of L.W.*, the *Hamilton* court analyzed the parties' residency, but the *Hamilton* court determined that although the children's biological father still resided in the issuing state, no significant contact existed between the Children and their father.<sup>340</sup> Unlike *Jensby*, the *Hamilton* court determined the Children's contact with their biological father had become not only minimal, but rather nonexistent.<sup>341</sup> Similar to *In re the Marriage of Beier*, the *Hamilton* court applied the modification provisions of the NCCJA and decided Colorado had lost contin-

335. *Id.* See NEB. REV. STAT. § 43-1202(5) (providing "home state shall mean the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months . . .").

336. *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113.

337. *Id.* at 897-98, 620 N.W.2d at 113.

338. *Id.* at 897-98, 620 N.W.2d at 112-13.

339. Compare NEB. REV. STAT. § 43-1214 (providing

[i]f a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree . . . .])

with *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113 (determining continuing jurisdiction no longer existed in Colorado).

340. Compare *In re Interest of L.W.*, 241 Neb. at 101, 486 N.W.2d at 498 (declaring the Nebraska court must defer jurisdiction to the court of Iowa because the biological father continued to reside in Iowa and the child retained significant contact with her father), with *Hamilton*, 260 Neb. at 898, 890, 620 N.W.2d at 109, 113 (stating the biological father continued to reside in the issuing state, Colorado, however the children had not had contact with him since 1994 and he did not have visitation or custody rights).

341. Compare *Jensby*, 1999 Neb. App. LEXIS 84, at \*11, \*15-\*16 (ascertaining the initial custody order was entered by a Nebraska court, the noncustodial parent continued to be a Nebraska resident, and significant connection jurisdiction still existed in Nebraska), with *Hamilton*, 260 Neb. at 890, 898, 620 N.W.2d at 109, 113 (stating the biological father continued to reside in the issuing state, Colorado, however the children had not had contact with him since 1994 and he did not have visitation or custody rights).

uing exclusive jurisdiction.<sup>342</sup> Thus, the *Hamilton* court determined that not only was Colorado not the Children's home state, but Colorado did not have significant connection jurisdiction, and therefore Colorado had no continuing exclusive jurisdiction.<sup>343</sup> Thus, in *Hamilton*, the Supreme Court of Nebraska correctly determined Colorado was no longer exclusively able to modify the custody order over the three Children.<sup>344</sup>

#### B. NEBRASKA HAD JURISDICTION TO MODIFY THE CUSTODY DECREE

Once a court determines the issuing state has lost continuing exclusive jurisdiction over a custody decree, the second step to modify a decree pursuant to the NCCJA requires a court to evaluate if it has jurisdiction under the NCCJA.<sup>345</sup> The NCCJA prescribes four bases for jurisdiction.<sup>346</sup> The first basis for jurisdiction is if Nebraska is the child's home state.<sup>347</sup> Second, jurisdiction exists when it is in the child's best interest that Nebraska assume jurisdiction because the child and at least one party to the custody proceedings have a significant connection to the state, and there exists substantial evidence within Nebraska about the child's present and future protection, training, care, and personal relationships.<sup>348</sup> Third, if the child is physically present in Nebraska and either an emergency exists or the child has been threatened with abandonment, abuse, or neglect, Nebraska has jurisdiction.<sup>349</sup> Finally, Nebraska has jurisdiction under the NCCJA if it appears that no other state has jurisdiction and Nebraska would be an appropriate forum.<sup>350</sup>

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342. Compare *In re the Marriage of Beier*, 371 N.W.2d at 56 (concluding the trial court erred when it decided Minnesota did not have subject matter jurisdiction because significant connection jurisdiction existed in Minnesota), with *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113 (determining the court of Nebraska could properly exercise subject matter jurisdiction over the custody decree because Nebraska is now the Children's home state).

343. See *supra* notes 333-42 and accompanying text.

344. See *supra* notes 301-43 and accompanying text.

345. *Stoner*, 75 N. DAK. L. REV. at 315 (explaining the UCCJA requires the modifying state to determine if the original state no longer has jurisdiction and then determine if the new state has jurisdiction pursuant to the UCCJA); NEB. REV. STAT. § 43-1225 (providing sections 43-1201 to 43-1225 are to be known as the "Nebraska Child Custody Jurisdiction Act").

346. NEB. REV. STAT. § 43-1203.

347. NEB. REV. STAT. § 43-1203(1)(a).

348. NEB. REV. STAT. § 43-1203(1)(b).

349. NEB. REV. STAT. § 43-1203(1)(c).

350. NEB. REV. STAT. § 43-1203(1)(d).

### 1. *Nebraska Had Home State Jurisdiction*

In *Hamilton*, the Supreme Court of Nebraska correctly decided that Nebraska had jurisdiction over the custody of the three Children because Nebraska had become the Children's home state.<sup>351</sup> The *Hamilton* court correctly applied the statutory requirements of the NCCJA to the facts of the case to determine the Children's home state was Nebraska.<sup>352</sup> A child's home state is the state in which the child lived with a parent or a person acting as the child's parent for at least six consecutive months immediately prior to the commencement of the proceedings.<sup>353</sup> The first circumstance where home state jurisdiction exists under the NCCJA is when Nebraska is the child's home state at the commencement of the custody proceedings.<sup>354</sup> According to the NCCJA, Nebraska also has home state jurisdiction if one parent resides in Nebraska and Nebraska would have been the home state of the child but for the removal of the child from the state by the other parent.<sup>355</sup>

In *Jorgensen v. Vargas*,<sup>356</sup> the Supreme Court of Iowa found that the State of Iowa had subject matter jurisdiction over a custody decree because Iowa was the child's home state under Iowa Code section 598A.3, the Iowa equivalent of the NCCJA.<sup>357</sup> This section requires that the child live in Iowa for six months immediately prior to the commencement of the custody proceedings for Iowa to have home state jurisdiction.<sup>358</sup> In analyzing the facts of the case, the *Jorgensen* court noted that the child had resided in Iowa for approximately eighteen months prior to the time his mother had filed proceedings to make a custody determination.<sup>359</sup> Moreover, the court determined the mother and child had continued to reside within the State of Iowa during the proceedings.<sup>360</sup> Therefore, the Iowa court properly asserted jurisdiction, because it fulfilled the requirements for home state jurisdiction under Iowa Code Section 598B.201—specifically it determined the

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351. See *infra* notes 353-66 and accompanying text.

352. See *infra* notes 353-55, 363-66 and accompanying text.

353. NEB. REV. STAT. § 43-1202(5).

354. NEB. REV. STAT. § 43-1203(1)(a)(i).

355. NEB. REV. STAT. § 43-1203(1)(a)(ii).

356. 627 N.W.2d 550 (Iowa 2001).

357. *Jorgensen v. Vargas*, 627 N.W.2d at 550, 565-66 (Iowa 2001) (finding the Iowa district court had home state jurisdiction to enter an initial custody determination); IOWA CODE § 598A.3 (1997) (repealed and renumbered at §598B.201) (providing a court of Iowa has jurisdiction to make a custody determination if this state is the child's home state).

358. IOWA CODE § 598B.102(7) (2001).

359. *Jorgensen*, 627 N.W.2d at 566.

360. *Id.*

child and the mother had lived in Iowa for more than six months prior to the custody proceedings.<sup>361</sup>

Similarly to *Jorgensen*, the *Hamilton* court decided Nebraska was the Children's home state by applying the provisions of the NCCJA to the facts of the case.<sup>362</sup> In *Hamilton*, all three Children and both of the contestants had resided in Nebraska for more than one year before Hamilton filed the custody petition with the court.<sup>363</sup> The *Hamilton* court also determined that all parties, including the Children, had continued to reside in Nebraska during the pendency of the proceedings.<sup>364</sup> The *Hamilton* court acknowledged that the NCCJA required the child to reside in the state for six months in order for the state to have home state jurisdiction over the proceedings.<sup>365</sup> Like *Jorgensen*, the *Hamilton* court looked to residency requirements.<sup>366</sup> Since the Children had resided in Nebraska for more than one year, the *Hamilton* court correctly determined Nebraska was the Children's home state as provided in the NCCJA.<sup>367</sup>

## 2. Nebraska Had Significant Connection Jurisdiction

Child custody proceedings are status determinations, thus, a court may still exercise jurisdiction even when a state does not have

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361. Compare IOWA CODE § 598B.201 (providing "a court of this state has jurisdiction to make an initial child-custody determination only if any of the following applies: (a) [t]his 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"), with *Jorgensen*, 627 N.W.2d at 566 (finding the Iowa district court had subject matter jurisdiction because the child lived in Iowa from June 16, 1996 to January 14, 1998 when the child's mother asked the court to make a custody determination).

362. See *infra* notes 363-66 and accompanying text.

363. *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113.

364. *Id.*

365. Compare NEB. REV. STAT. § 43-1203 (providing "[a] court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if [t]his state is the home state of the child at the time of commencement of the proceeding"), with *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113 (stating the Children resided in Nebraska for more than one year prior to Hamilton's petition; therefore, Nebraska is the Children's home state and Nebraska can properly exercise jurisdiction).

366. Compare *Jorgensen*, 627 N.W.2d at 566 (stating Iowa was Isaiah's home state because Isaiah lived in Iowa from June 16, 1996 until January 14, 1998 when his mother filed the custody petition, and both parties continue to reside in Iowa), with *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113 (stating Nebraska was the Children's home state because Hamilton, Foster, and the three children were Nebraska residents for more than one year when Hamilton filed his petition, and all parties continue to reside in Nebraska).

367. See *supra* notes 363-66 and accompanying text.

personal jurisdiction over a child in a custody proceeding.<sup>368</sup> Such jurisdiction can be exercised when the state has a significant connection with the child.<sup>369</sup> When the state is not the child's home state but maximum contacts exist between the state and the child, the state has significant connection jurisdiction.<sup>370</sup>

In *Hamilton*, a significant connection existed between Nebraska and the three Children; therefore, not only did the court correctly determine Nebraska was the Children's home state, but the Nebraska court could have also correctly determined Nebraska had significant connection jurisdiction pursuant to the provisions of the NCCJA.<sup>371</sup> Because Nebraska had significant connection jurisdiction, Nebraska would still have been able to modify the Colorado custody order even if Nebraska was not the children's home state.<sup>372</sup> Significant connection jurisdiction exists under the NCCJA if it is in the child's best interest for Nebraska to assume jurisdiction.<sup>373</sup> In addition to considering the child's best interest, courts must determine that the child and at least one contestant have a significant connection in Nebraska and that substantial evidence exists in Nebraska concerning the child's present and future protection, training, care, and personal relationships.<sup>374</sup>

In *Range v. Range*,<sup>375</sup> the Supreme Court of Nebraska decided Nebraska had jurisdiction under the NCCJA to modify a custody decree even though Nebraska was no longer the child's home state.<sup>376</sup> At the time of the proceedings, Nicole D. Range had not lived in Nebraska for the preceding year; rather, the child resided in Georgia during this time.<sup>377</sup> However, the record in *Range* supported the court's findings of a substantial and significant connection with the State of Nebraska pursuant to the NCCJA.<sup>378</sup> Nicole was born in Nebraska, resided most of her life in the state, and had grandparents, aunts, and uncles in Nebraska.<sup>379</sup> Nicole's only relatives in Georgia included her

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368. Anthony A. Dorland, *Civil Procedure—Orders for Child Protection and Nonresident Defendants: The UCCJA Applies and Minimum Contacts are Unnecessary*, 25 WM. MITCHELL L. REV. 965, 986 (1999).

369. NEB. REV. STAT. § 43-1203(1)(b).

370. Christopher L. Blakesley, *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, 476 (1998).

371. See *infra* notes 373-406 and accompanying text.

372. NEB. REV. STAT. § 43-1214(1).

373. NEB. REV. STAT. § 43-1203(1)(b).

374. *Id.*

375. 232 Neb. 410, 440 N.W.2d 691 (1989).

376. *Range v. Range*, 232 Neb. 410, 416-17, 440 N.W.2d 691, 695-96 (1989).

377. *Range*, 232 Neb. at 411, 417, 440 N.W.2d at 693, 696. Nicole spent the summer of 1987 visiting her father and the trial court entered its decision in September 1988. *Id.*

378. *Range*, 232 Neb. at 416, 440 N.W.2d at 695.

379. *Id.*

mother and two siblings.<sup>380</sup> Nicole's father had a significant connection with Nebraska, because he continued to reside within the state.<sup>381</sup> Nicole's father had also consistently exercised his visitation rights with his daughter.<sup>382</sup> The *Range* court thus found that Nebraska had a significant connection with the child and the father pursuant to the significant connection provisions of the NCCJA, and it would be in the best interests of the child for Nebraska to retain continuing exclusive jurisdiction, even though Nicole's home state was now Georgia.<sup>383</sup>

Similarly, in *State ex rel. Grape v. Zach*,<sup>384</sup> the Supreme Court of Nebraska applied the significant connection provisions of the NCCJA and concluded that Nebraska could exercise jurisdiction over a custody determination even though Nebraska was not the child's home state.<sup>385</sup> The *Grape* court determined Nebraska was not the child's home state, because the mother and child had resided in New York from 1990 until one and one-half months before filing a petition for a custody decision, when they returned to Columbus, Nebraska.<sup>386</sup> The NCCJA definition of a child's home state is the state where the child resided for more than six consecutive months prior to the commencement of the custody proceedings.<sup>387</sup> Therefore, Nebraska did not meet the statutory definition of the child's home state, because the boy lived in Nebraska for only one and one-half months prior to the proceedings.<sup>388</sup> However, the *Grape* court explained that substantial evidence of the child's present and future protection, training, care, and personal relationships existed in Nebraska.<sup>389</sup> The court determined the child was born and lived in Nebraska for his first three years of life, his father continued to reside in Nebraska, his mother had re-

380. *Id.*

381. *Id.* at 414, 417, 440 N.W.2d at 694, 696 (citing Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203, 214-15 (1981)).

382. *Range*, 232 Neb. at 417, 440 N.W.2d at 696.

383. *Id.* at 412, 416-17, 440 N.W.2d at 693, 695-96.

384. 247 Neb. 29, 524 N.W.2d 788 (1994).

385. *State ex rel. Grape v. Zach*, 247 Neb. 29, 34, 47, 524 N.W.2d 788, 795, 803 (1994). See NEB. REV. STAT. § 43-1203(1)(b) (providing Nebraska has initial or modification jurisdiction to enter a custody decree if it is in the child's best interest that Nebraska assume jurisdiction because "the child and his or her parents, or the child and at least one contestant, have a significant connection with the state" and "there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships").

386. *Grape*, 247 Neb. at 33, 43, 524 N.W.2d at 795, 800.

387. NEB. REV. STAT. § 43-1202(5).

388. *Grape*, 247 Neb. at 43, 524 N.W.2d at 800. See NEB. REV. STAT. § 43-1202(5) (providing "[h]ome state shall mean the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months").

389. *Grape*, 247 Neb. at 47, 524 N.W.2d at 802.

turned to live in Nebraska, and his maternal grandparents also resided in Nebraska.<sup>390</sup> The court stated Zach and the child had resided together from the time the lower court awarded Zach temporary custody through the pendency of the proceedings.<sup>391</sup> Consequently, the court determined it would be in the best interests of the child for Nebraska to assume jurisdiction, because the child, the father, and the mother had a significant connection with the state.<sup>392</sup> In addition to all of the parties residing in Nebraska, there existed substantial evidence about the boy's future in Nebraska.<sup>393</sup>

In *In re the Marriage of Beier*, the Court of Appeals of Minnesota first determined the State of Texas had lost jurisdiction over a custody decree and secondly determined the State of Minnesota met the statutory requirements to assert jurisdiction by applying the Minnesota version of the NCCJA.<sup>394</sup> The *In re the Marriage of Beier* court evaluated whether Minnesota had jurisdiction under the state statutory requirements after the court determined Texas no longer had continuing exclusive jurisdiction.<sup>395</sup> The court concluded that sufficient contacts existed in Minnesota, as required by the significant connection provisions of the UCCJA.<sup>396</sup> The Beier family had lived in Minnesota for the first four years of the child's life, the child had attended school in Minnesota, and extended family members resided within the state.<sup>397</sup> These contacts were sufficient for the court to determine that Minnesota had the significant contacts necessary to establish jurisdiction over the custody proceedings.<sup>398</sup> Using the modification provisions of the UCCJA, the court determined Minnesota had jurisdiction to modify the original custody decree issued in Texas.<sup>399</sup>

Like *Range*, *Grape*, and *In re the Marriage of Beier* the *Hamilton* court applied the significant connection provisions of the NCCJA by looking to evidence within the State of Nebraska concerning the connection the state had with the Children before the court.<sup>400</sup> The *Ham-*

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390. *Id.* at 46-47, 524 N.W.2d at 802.

391. *Id.* at 33-34, 524 N.W.2d at 795.

392. *Id.* at 32, 47, 524 N.W.2d at 794, 802, 803.

393. *Id.*

394. *In re the Marriage of Beier*, 371 N.W.2d at 55-56.

395. *Id.* at 55.

396. *Id.* at 56.

397. *Id.*

398. *Id.*

399. *Id.* at 54, 56.

400. *Compare Range*, 232 Neb. at 416-17, 440 N.W.2d at 695-96 (stating the child had grandparents, aunts, and uncles in Nebraska and it was in the best interests of the child for Nebraska to assume subject matter jurisdiction over the custody proceedings), and *Grape*, 247 Neb. at 46-47, 524 N.W.2d at 802 (stating the child's parents and grandparents resided in Nebraska and there was substantial evidence of the child's present and future protection, training, care, and personal relationships to grant the Nebraska court subject matter jurisdiction), and *In re the Marriage of Beier*, 371 N.W.2d at 56



*ilton* court determined the three Children moved to Omaha, Nebraska in 1997 with Hamilton and Foster.<sup>401</sup> The five individuals had lived together until July 1999, when Hamilton and the Children moved to another home in Omaha.<sup>402</sup> The court noted that all parties had continued to reside within Nebraska.<sup>403</sup> The court determined that the exact whereabouts of the Children's biological mother and father were unknown, and, in fact, they had not been in contact with the Children since January 1994.<sup>404</sup> Hamilton stated that the Children attended school in Nebraska, and all pertinent witnesses whom can testify regarding the Children's present and future care reside within the state's borders.<sup>405</sup> Like the provisions of the NCCJA section pertaining to significant connection jurisdiction require, the *Hamilton* court obtained evidence concerning the Children's present and future protection, training, care, and personal relationships within the State of Nebraska.<sup>406</sup> The Supreme Court of Nebraska properly followed the two-step process as provided in the statutory provisions of the NCCJA and prior caselaw applying similar provisions of the UCCJA in determining Nebraska had met the jurisdictional requirements to modify the custody order originally entered in Colorado.<sup>407</sup> The court in *Hamilton* properly concluded the State of Nebraska had jurisdiction pursuant to the NCCJA to modify the Colorado custody decree.<sup>408</sup>

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(concluding the trial court erred when it decided Minnesota did not have subject matter jurisdiction over the custody decree because significant connection jurisdiction existed in Minnesota), *with Hamilton*, 260 Neb. at 890-91, 620 N.W.2d at 108-09 (stating the children's grandfather resided in Nebraska and Sharon M. Foster resided in Nebraska), *and* Brief for Appellant at 11, *Hamilton* (No. A-99-1349) (stating the children attended school in Nebraska and all pertinent witnesses are present in Nebraska).

401. *Hamilton*, 260 Neb. at 891, 620 N.W.2d at 109.

402. *Id.*

403. *Id.*

404. *Id.* at 890-91, 620 N.W.2d at 109.

405. Brief for Appellant at 11, *Hamilton* (No. A-99-1349).

406. Compare NEB. REV. STAT. § 43-1203(1)(b) (providing

[a] court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if [i]t is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships[])

*with Hamilton*, 260 Neb. at 890-91, 620 N.W.2d at 108-09 (stating the children's grandfather resided in Nebraska and Sharon M. Foster resided in Nebraska), *and* Brief for Appellant at 11, *Hamilton* (No. A-99-1349) (stating the children attended school in Nebraska and all pertinent witnesses were present in Nebraska).

407. See *supra* notes 301-42, 345-406 and accompanying text.

408. See *supra* notes 301-407 and accompanying text.

## CONCLUSION

In *Hamilton v. Foster*,<sup>409</sup> the Supreme Court of Nebraska declared the State of Nebraska had jurisdiction to modify a custody decree originally entered by a Colorado court.<sup>410</sup> The court analyzed the jurisdictional requirements under the Nebraska Child Custody Jurisdiction Act ("NCCJA")<sup>411</sup> that a state must meet to modify a custody decree.<sup>412</sup> The Supreme Court of Nebraska explained that the NCCJA requires the court to first determine that the issuing state must no longer have jurisdiction, because either all of the parties have moved away from that state, or if a party remains a resident of the issuing state, that party must no longer have significant contact with the child.<sup>413</sup> The court further explained that in addition to the issuing state losing jurisdiction over the custody matter, the NCCJA requires the State of Nebraska to next determine that the state has either home state, significant connection, emergency, or default jurisdiction before it may modify the original decree.<sup>414</sup> The *Hamilton* court explained that the State of Colorado no longer had jurisdiction and that the State of Nebraska had home state jurisdiction over the Children pursuant to the NCCJA.<sup>415</sup> Thus, the court stated that Nebraska had jurisdiction to modify the custody decree originally entered in Colorado.<sup>416</sup>

Because the lives of innocent children are involved in custody proceedings, it is essential that a court take the time to determine when another state retains or has lost jurisdiction. If a court acts too swiftly, the child is the party that suffers; if a court incorrectly defers jurisdiction to another state, the proceedings are delayed. Further, if a court incorrectly asserts jurisdiction over the proceedings, the child's interests will be held up in appeals. The Supreme Court of Nebraska's examination of the NCCJA formed a framework regarding continuing exclusive jurisdiction and explained the specific steps a court must take when determining whether it has jurisdiction to modify an existing custody decree. This decision will serve to help many individu-

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409. 260 Neb. 887, 620 N.W.2d 103 (2000).

410. *Hamilton v. Foster*, 260 Neb. 887, 898, 620 N.W.2d 103, 113 (2000).

411. NEB. REV. STAT. §§ 43-1201 to -1225 (1999).

412. *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113.

413. *Id.* at 887, 895-96, 620 N.W.2d at 112.

414. *Id.* at 898, 620 N.W.2d at 113. See Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N. DAK. L. REV. 301, 312, 315 (1999) (stating four alternative jurisdictional grounds exist pursuant to the UCCJA to enter a custody determination: (1) home state jurisdiction; (2) significant connection jurisdiction; (3) emergency jurisdiction; and, (4) default or vacuum jurisdiction).

415. *Hamilton*, 260 Neb. at 898, 620 N.W.2d at 113.

416. *Id.* at 891, 899, 620 N.W.2d at 109, 113.

als who must already face the difficult prospect of placing their children in the hands of the court system when they decide to ask the courts of this state to modify an existing custody decree that may not have originated within the State of Nebraska.

*Lisa M. Kulhavy — '03*

