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IN RE CALDERON-GARZA:  
THE TEXAS UCCJEA'S REACH  
TO UNBORN CHILDREN

Sandra E. Salas*

I. INTRODUCTION

In utero custody determinations and proceedings are not directly addressed in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). In Texas, the UCCJEA is the exclusive means by which a Texas court has jurisdiction over an initial child custody determination.1 Home state jurisdiction is determined by the child's domicile post-birth, regardless of where the mother spent the majority of her pregnancy.2 Under the Texas Family Code, “home state” is defined as the state where the child has lived for at least six months immediately prior to the commencement of the custody proceeding.3 A foreign country is treated as if it is a state of the United States when determining home state jurisdiction under the UCCJEA.4 On matters outside of paternity, the UCCJEA and related case law are silent regarding pre-birth custody proceedings. In the case In re Calderon-Garza, the court made a post-birth decision regarding jurisdiction. In the absence of statutes and case law, questions regarding in utero suits affecting the parent-child relationship remain unanswered.

II. THE CASE

In a paternity suit brought under the UCCJEA by a father, the El Paso Court of Appeals found Texas to be the child’s home state.5 The child was conceived while his American father, Medhi Farshad Derambakhsh, and mother, Maria Calderon-Garza, were medical students in Guadalajara, Mexico, during April 2000.6 A Mexican citizen, Calderon-Garza remained there and received all of her pre-natal care.7 She went to El Paso,

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1. In re McCoy, 52 S.W.3d 297, 303 (Tex. App.—Corpus Christi 2001, no pet.).
3. Id.
5. Calderon-Garza, 81 S.W.3d at 903.
6. Id. at 901.
7. Id.
Texas, on or about January 18, 2001, and remained there until the child was born on January 27, 2001.8 Calderon-Garza's parents reside in El Paso, and she relied on them for financial assistance during her pregnancy.9 Calderon-Garza informed Derambakhsh of the birth, and he immediately flew to Texas with his mother to see his new son.10 Despite the fact that Calderon-Garza refused to sign Derambakhsh's voluntary paternity affidavit, she asked him for financial assistance with her medical bills.11 Derambakhsh gave her post-dated checks to help her with the expenses. On or about March 25, 2001, Calderon-Garza returned to Mexico with the child, and on March 26, 2001, Derambakhsh filed his original petition for voluntary paternity in the trial court.12 He was unsuccessful at his attempts to serve Calderon-Garza, given that she was no longer in the United States.13 Derambakhsh secured an order for substituted service, to which Calderon-Garza responded via special appearance, maintaining that she was not subject to the jurisdiction of the Texas court.14 The associate judge in the matter sustained the special appearance, ordering that Derambakhsh's original petition be dismissed with prejudice.15 On appeal by Derambakhsh, the trial court found the following:

- Calderon's legal domicile [was] in Guadalajara, Jalisco, Mexico.
- Grounds for personal jurisdiction provided in Section 102.011(b) of the Texas Family Code... [were] established.
- The court had status and subject matter jurisdiction over the suit.
- Texas [wa]s the child's home state.16

In response to the court's findings, Calderon-Garza filed a motion seeking mandamus relief in order to compel the court to "vacate its order, sustain her special appearance, decline jurisdiction of this case, and dismiss the suit."17 The Court of Appeals denied Calderon-Garza's request.

III. DISCUSSION

Under the UCCJEA provisions in the Texas Family Code, Mexico is treated as if it were a U.S. state.18 Furthermore, in initial child custody matters, Texas may assert jurisdiction only if Texas is the home state of the child "on the date of the commencement of the proceeding."19 In the definitions section of the Texas Family Code, home state jurisdiction
means “immediately before commencement” of the suit.\(^{20}\) Thus, in Calderon-Garza, jurisdiction was not determined by the location of the mother, but rather by the location of the child. The appellate court found that though the child was in Mexico on the exact date the suit affecting the parent/child relationship was filed, the child’s home state was Texas because he had resided in Texas from birth until immediately before – one day before, to be exact – his father filed suit.\(^{21}\)

The court addressed two arguments in favor of Mexico as the child’s home state, and determined that neither argument would survive statutory examination.\(^{22}\) First, the court found that the child was never physically present in Mexico, despite the mother’s pre-natal presence there.\(^{23}\) Second, the court found that since the child was never physically present in Mexico, neither was he temporarily absent from Mexico.\(^{24}\)

\section*{A. Physical Presence Under the UCCJEA}

The UCCJEA is not altogether clear on what constitutes physical presence. What if a purported parent were to file for a custody determination pre-birth? Would Texas law support a finding granting custody, whether sole or joint, to a parent before the child was even born? What if in the Calderon-Garza case the father had known earlier about the mother’s pregnancy and attempted to file for custody while the mother was still residing in Mexico? The policy implications are startling. If Texas law does support paternity suits pre-birth, a court could order a mother to submit to DNA testing post-birth even before the mother has decided whether or not to carry her child to term. An analysis of the UCCJEA language is crucial, particularly in light of its sister statute, the Uniform Parentage Act.

Although the Texas Family Code contains definitions for both “child” and “fetus,” the language of the UCCJEA as it appears within the Texas Family Code addresses only custody determinations pertaining to a child. Case law has established that when construing a statute, a reviewing court must consider the statute as a whole rather than by its individual provisions.\(^{25}\) “One provision should not be given meaning out of harmony or inconsistent with other provisions.”\(^{26}\) The rules of statutory construction require courts to presume that the whole statute is meant to be effective.\(^{27}\) As a result, the UCCJEA should be construed not to apply to unborn children.

The language of the entire UCCJEA text contains references to “child” and does not make any reference to “fetuses.” The implication is that the

\(^{20}\) Id. § 152.102(7).
\(^{21}\) Calderon-Garza, 81 S.W.3d at 902-03.
\(^{22}\) Id. at 903-04.
\(^{23}\) Id. at 903.
\(^{24}\) Id.
\(^{25}\) Id. (citing Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001)).
\(^{26}\) Id.
\(^{27}\) TEX. GOV’T CODE ANN. § 311.021(2) (Vernon 2003).
Texas legislature did not intend for the UCCJEA to contemplate custody orders pre-birth.

"Child" is defined more than once in the Texas Family Code, depending on the particular topic addressed. For example, in terms of the parent/child relationship, "child" is defined in section 101.003 as "a person under [eighteen] years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes."28 In section 162.301, for adoption purposes, "child" means a minor "who cannot be placed for adoption with appropriate adoptive parents without the provision of adoption assistance because of factors including ethnic background, age, membership in a minority or sibling group, the presence of a medical condition, or a physical, mental, or emotional disability."29 The intent of the legislature must have been to clarify "child" specifically in the context of adoption assistance agreements, and to avoid other definitions of "child" used elsewhere in the code.

The UCCJEA does not apply to unborn children because it does not address the initial custody determinations of fetuses. The Texas Family Code defines a "fetus," separately from a "child," as "an individual human organism from fertilization until birth."30 In a subsequent section, "fetus" is used without redefinition.31 Notably, "fetus" is not used in the UCCJEA section of the Texas Family Code in reference to custody or jurisdictional issues. It is reasonable to infer that the legislature did not intend for the UCCJEA to apply to unborn children.32

B. Jurisdiction Under the UCCJEA

The Texas UCCJEA sets forth a four-tier jurisdictional determination structure for initial child custody actions:

1. home state jurisdiction;
2. significant connection jurisdiction;
3. jurisdiction due to declination of jurisdiction; and
4. default jurisdiction.33

Once Texas has jurisdiction, it is exclusive and continuing until either a Texas court determines that "neither the child, nor the child and one parent, nor the child and a person acting as a parent, have a significant connection with. . . [Texas] and that substantial evidence is no longer available in. . . [Texas] concerning the child's care, protection, training, and personal relationships," or when a court determines that "the child, the child's parents, and any person acting as a parent" no longer reside in Texas.34

29. Id. § 162.301.
30. Id. § 33.001(2).
31. Id. § 161.006.
33. TEX. FAM. CODE ANN. § 152.201.
34. Id. § 152.202
1. Home State Jurisdiction

Texas has home state jurisdiction if it was the home state of the child on the date the first pleading in the proceeding was filed, or was the child's home state within six months prior to the initiation of the action.\(^{35}\) Texas is also the child's home state if the child is under six months old and has lived in the state from birth.\(^{36}\) Under the UCCJEA, the temporary absence provision of the Texas Family Code cannot be construed to include periods before the child was first present in the claimed home state.\(^{37}\)

Determination of home state jurisdiction is limited to residency after birth.\(^{38}\) In the Calderon-Garza case, Derambakhsh had sued the mother for joint managing conservatorship of their Texas-born infant son, and the court did not allow the mother's claim that the child's presence in Texas was only temporary.\(^{39}\) Calderon-Garza, a Mexican national, argued that pre-natal care occurred in Mexico and that she was not in Texas for the majority of her pregnancy.\(^{40}\) She wanted the court to consider the child's in utero presence in Mexico as the child's actual residency, with the period in Texas as a temporary absence.\(^{41}\) Calderon-Garza claimed that she only came to Texas to bear her child and receive financial assistance from her parents.\(^{42}\) However, the court did not consider the child's existence in utero as a legal presence in Mexico.\(^{43}\) The child's presence was not determined until after he was born. As a result, Texas had home state jurisdiction over the initial custody decree because the child was born in Texas and lived in Texas until the day before the biological father filed the first pleading.\(^{44}\) Therefore, the appellate court denied Calderon-Garza relief, and she was not allowed to transfer the proceedings to a Mexican court.\(^{45}\)

2. Significant Connection Jurisdiction

While home state jurisdiction is given priority, Texas may still have jurisdiction over the initial proceeding under the second tier of the UCCJEA jurisdictional criteria. If the child and at least one parent have significant connections to Texas and substantial evidence in Texas exists "concerning the child's care, protection, training and personal relationships," Texas has jurisdiction over the initial custody determination.\(^{46}\)

\(^{35}\) Id. § 152.201(a)(1).
\(^{36}\) Id. § 152.102(7).
\(^{37}\) Id.; In re Calderon-Garza, 81 S.W.3d 899, 903 (Tex. App. – El Paso 2002, no pet.).
\(^{38}\) See Calderon-Garza, 81 S.W.3d at 903.
\(^{39}\) Id.
\(^{40}\) Id. at 901, 903.
\(^{41}\) Id. at 903.
\(^{42}\) Id.
\(^{43}\) Id.
\(^{44}\) Id.
\(^{45}\) Id. at 904.
\(^{46}\) TEX. FAM. CODE ANN. § 152.201(a)(2)(A)-(B) (Vernon 2003).
order for it to be appropriate for Texas to assert significant connection jurisdiction, the claiming party must show that:

1. the child has no home state or the home state has declined to exercise jurisdiction;
2. it is in the best interest of the child because the child and at least one of its parents have a significant connection with Texas beyond mere physical presence; and
3. there is available in Texas substantial evidence concerning the child's present or future care, protection, training, and personal relationships.47

Jurisdiction in Texas is based on the circumstances that exist when the suit is filed in Texas.48 Significant connection jurisdiction is measured by occurrences within the forum state, such as:

1. school attendance;
2. close familial relationships;
3. regular interaction with a parent, grandparent, stepparent or stepsiblings; and
4. medical, dental and mental health visits.49

In In re Brilliant, the El Paso Court of Appeals determined that the child did not have a home state, although the Texas court allowed significant connection jurisdiction.50 The child was conceived and born in Massachusetts, but she and her mother soon moved to Texas to be with the child's father.51 Forty-five days after moving to Texas, the mother became despondent and moved with the child back to Massachusetts. The mother did so notwithstanding a court order secured by the father in Texas that forbade the mother from removing the child to another state.52 During the forty-five day period that the child was in Texas, the child saw her extended family on a frequent basis and she played with her relatives.53 The mother and father had plans to raise their family in Texas, and the child's paternal grandfather helped the mother with caring for the child.54 He taught the mother such things as how to mix formula and sterilize bottles properly.55 Finally, the child's medical records were transferred to Texas.56 The Texas court found this evidence sufficient enough to constitute significant connections within the State of Texas.57

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49. Id.; In re Bellamy, 67 S.W.3d 482, 485 (Tex. App.—Texarkana 2002, no pet.).
50. 86 S.W.3d at 692.
51. Id. at 682.
52. Id. at 683.
53. Id. at 691.
54. Id.
55. Id.
56. Id.
3. Declination Jurisdiction

If all courts of another state or states that have home state or significant connection jurisdiction have declined to assert jurisdiction because the more appropriate forum is Texas, then Texas may assert declination jurisdiction. The person seeking to claim such jurisdiction must base his assertion on forum non-conveniens or unjustifiable conduct.

In Wood v. Redwine, an Oklahoma court found that none of the parties had sought the jurisdiction of another state, and thus, no other state declined to exercise jurisdiction. The parties’ failure to seek outside jurisdiction was not dispositive, so the forum state did not have jurisdiction under the declination jurisdiction criteria of the UCCJEA. The black letter of declination jurisdiction requires that another state’s courts decline to exercise jurisdiction.

4. Default Jurisdiction

If no other state court has jurisdiction under the first three criteria – home state, significant connection, or declination – then Texas may assert jurisdiction by default.

In Redwine, the court ultimately granted jurisdiction by default because none of the first three jurisdictional criteria were met. The child did not have a home state, nor did it have significant connections to the forum state. In addition, the parties had not sought, and thus were not declined, jurisdiction in another state’s courts. As a result, the court must have granted jurisdiction by default.

C. Inconvenient Forum

The Texas Family Code provides that a court with proper jurisdiction under the UCCJEA may decline jurisdiction if it determines that another state is the more convenient forum. Before determining whether the Texas court is an inconvenient forum, the court must decide whether the court of another state could exercise jurisdiction. To reach this determination, the court is allowed to receive information for consideration.

Relevant information includes:

1. proof of past or potential domestic violence;
2. how long the child has resided outside of Texas;
3. the distance between Texas and the state that would assume jurisdiction;

59. Id.
60. 2001 OK CIV APP 115, ¶ 12, 33 P.3d 53, 56.
61. Id.
63. Wood, 33 P.3d at 57.
64. Tex. Fam. Code Ann. § 152.207(a); In re McCoy, 52 S.W.3d 297, 305-06 (Tex. App. – Corpus Christi 2001, no pet.).
66. Id.
(4) the parties' financial status and the nature and location of the evidence relevant to the pending litigation;
(5) the ability of the respective courts to decide the matters expeditiously; and
(6) the familiarity of the courts with the facts and issues in the litigation.\(^6\) If the Texas court determines that a court of another state is the more appropriate forum, the proceedings are stayed upon the condition that proceedings promptly commence in the more convenient forum state.\(^6\)

In *Shanoski v. Miller*, a Maine court declined to exercise jurisdiction after finding that the Maine court was an inconvenient forum.\(^6\) The court based its decision on the following information:

(1) the child currently lived in North Carolina, and had lived there for eighty percent of her life;
(2) the father had not raised travel expenses to North Carolina on appeal;
(3) appellant did not claim that financial circumstances would dictate retaining the proceedings in Maine;
(4) the jurisdictional agreement between the parties did not cover future disputes, and thus, was inapplicable;
(5) more evidence pertaining to the current and future care of the children existed in North Carolina, including the child's teachers, and testimony from Maine witnesses could be by deposition or telephone; and
(6) because the witnesses were in North Carolina, it would be more expeditious for the North Carolina court to conduct the proceedings.\(^7\)

Maine was the less convenient forum even though the Maine court had been presented with more information than the court in North Carolina.

### D. Termination of Exclusive Continuing Jurisdiction

Texas allows its courts to terminate exclusive continuing jurisdiction upon a finding that the child, the child and one parent, or the child and a person acting as a parent no longer have a significant connection with Texas and substantial evidence regarding the child's protection, care, training, and personal relationships is no longer available in Texas.\(^7\) The child's connection with the forum state must be more than *de minimis* contact and must constitute a significant connection.\(^7\) Texas had continuing exclusive jurisdiction in *In re Bellamy*, a Texarkana Court of Appeals case, because it granted the original custody decree and the child maintained a significant connection with Texas.\(^7\) The child's home state

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\(^6\) *Id.* § 152.207(b)(1)-(4), (6)-(8).
\(^6\) *Id.* § 152.207(c).
\(^6\) 2001 ME 139, ¶ 27, 780 A.2d 275, 280.
\(^7\) *Id.* at 279-80.
\(^7\) *In re Marriage of Medill*, 40 P.3d 1087, 1093 (Or. Ct. App. 2002).
\(^7\) 67 S.W.3d 482, 485 (Tex. App. – Texarkana 2002, no pet.).
was Louisiana and the child's mother and the mother's current boyfriend had criminal records in Louisiana. However, the child attended school in Texas and lived only a few miles from her maternal grandparents in Texas. There was daily interaction between the family in Texas and the child, and the child had strong personal relationships with her maternal grandparents, father, stepmother, and stepbrothers, all of whom lived in Texas. Substantial evidence in Texas thus existed regarding the child's care, protection, training, and personal relationships.

In *In re Marriage of Medill*, Oregon did not have continuing exclusive jurisdiction in a case wherein the children had lived in Germany the majority of their lives and had only been present in Oregon for four months. The father of the children had secured an initial custody determination under the UCCJEA, but when he sought to modify custody, the UCCJEA permitted Oregon to terminate exclusive continuing jurisdiction and find that Germany was the more appropriate forum. Even though the father, the father's wife, and his parents resided in Oregon, and the children had been psychologically evaluated in Oregon, the Oregon court ruled that the connections constituted limited contacts and not the significant connections and evidence required under the UCCJEA.

E. Genetic Testing Outside of Texas

Had the baby in *Calderon-Garza* been born outside of Texas, such as in Mexico or another U.S. state, and had Derambakhsh questioned or denied parentage of Calderon-Garza's child, any parentage action by the mother or father would have come under the Texas Uniform Parentage Act (UPA). The UPA sets forth specific requirements for genetic testing to determine parentage. Testing must be of a type "reasonably relied on by experts in the field of genetic testing" and "performed by a laboratory accredited by:

1. the American Association of Blood Banks,
2. the American Society for Histocompatibility and Immunogenetics,
3. an accrediting body designated by the federal secretary of health and human services."

The reported results of genetic testing made under the requirements set forth in Subchapter F of the Texas Family Code are self-authenticating.
The statute does not indicate that the testing must occur within Texas, only that testing must comport with the statute in order to meet chain of custody requirements for admissibility.84 The documentation must include:

1. the name and photograph of each individual whose specimens have been taken;
2. the name of each individual who collected specimens;
3. the places in which the specimens were collected and the date of each collection;
4. the name of each individual who received the specimens in the testing laboratory; and
5. the dates the specimens were received.85

Costs of testing must be advanced by the person requesting the test or as ordered by the court.86

Case law establishes that adherence to the traditional rules for admitting evidence, along with compliance with the state’s genetic testing reporting requirements is sufficient for admissibility in parentage proceedings.87 Great weight has been given to the national accreditation of the facilities and their compliance with statutory requirements, regardless of the facility’s location in relation to the state exercising jurisdiction.88

Under the hypothesized change in facts, if Calderon-Garza were adamant about not submitting her child to the Texas courts, she could have rationally argued that Texas does not have personal jurisdiction over the child and, therefore, cannot order the baby to submit to testing in Texas or elsewhere.89 To establish personal jurisdiction over Calderon-Garza’s child, due process mandates that the party must have certain minimum contacts with the forum state in order to keep from offending “traditional notions of fair play and substantial justice.”90

IV. CONCLUSION

Because the UCCJEA applies to foreign states as if the foreign state were one of the United States, analysis of its potential effect on foreign parties is relevant. Mexican and Canadian citizens should thus consider the potential effect of the UCCJEA on a party’s right to file an in utero custody or parenage action. Texas case law has been silent regarding pre-birth custody determinations, though statutory law contemplates fetuses with regard to pregnancy termination. While the Texas Family

84. Id. § 160.504(b).
85. Id.
86. Id. § 160.506(a).
88. Id.
89. See Prine v. Prine, 28935 (La. App. 2 Cir. 1/22/97), no writ, 687 So. 2d 637, 638.
Code does not explicitly deny the right of a parent for an \textit{in utero} custody determination, it remains to be seen how the legislature or the courts will resolve this neglected question. In \textit{In re Calderon-Garza}, a Texas appeals court did not acknowledge the \textit{in utero} presence of a child. If parentage determinations are allowed, is it possible that pre-birth custody determinations will be allowed as well?