

POINT SHEET

Bohmer v. Bohmer

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DRAFTERS' POINT SHEET

This performance test requires applicants, as associates of a Franklin law firm, to analyze the provisions of the Franklin Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and to predict whether the UCCJEA, and the Franklin cases interpreting it, will permit the firm to persuade a Franklin court that a state of Columbia court is the preferable venue to address a child custody dispute. The child's mother, Jessica Bohmer, is the firm's client. Jessica is still married to six-year-old Carrie's father, Alex Bohmer. Jessica has recently relocated from Franklin to Columbia with Carrie because of her concerns about Alex's violence.

The File contains an instructional memo from the managing partner, a transcript of a telephone call between the partner and a Columbia legal services attorney representing Jessica there, a Columbia Legal Services intake form, a Civil Protection Order, and a copy of an e-mail from Alex to Jessica. The Library includes excerpts from the UCCJEA and two Franklin cases.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the user jurisdictions.

I. Format and Overview

Applicants' work product should resemble a legal memorandum that an associate would write to a partner. Applicants should thoroughly discuss the two issues raised in the instructional memo, identifying the specific UCCJEA provisions and case law supporting their analyses and conclusions and incorporating all relevant facts. Applicants are told to address and analyze potential weaknesses as well as strengths of Jessica's case. Those addressing only strengths should be downgraded. The issues that should be addressed are the following:

A. Whether Franklin or Columbia was the home-state jurisdiction under the Franklin UCCJEA at the time of the filing of the custody case in Franklin

Applicants should conclude that Franklin was the home-state jurisdiction at the time Alex filed his custody suit in Franklin. They should conclude this after reading § 16-102, which defines the key concept of home-state jurisdiction; § 16-201, which prioritizes home-state jurisdiction; and *In re Marriage of Mills* (Franklin Ct. App. 2002).

Mills sets forth a test for determining whether a stay is a temporary absence or a permanent relocation to another state. The *Mills* court ruled that it is best to look at the intent of the absent parent to determine whether the move is a permanent relocation. Further, a move can begin as a temporary absence and can change to a permanent relocation because of a change in the parent's intentions. Home-state jurisdiction remains in the left-behind jurisdiction for six months from the time of the absent parent's intention to make the move permanent.

B. Assuming that Franklin is the home-state jurisdiction, whether the Franklin court is likely to grant a motion to decline jurisdiction under the UCCJEA’s inconvenient forum provision, thus allowing a Columbia court to decide the Bohmer custody action

Applicants should analyze the UCCJEA inconvenient forum provision (§§ 16-207, 16-201(a)(2) (a court with home-state jurisdiction may decline in favor of another jurisdiction)) and *In re Marriage of Brickman and Young* (Franklin Sup. Ct. 2003). Applicants should discuss each of the six factors in § 16-207(b) in light of the facts and apply the appropriate standard as set forth in *Brickman*. They should conclude that the firm can make a strong argument that the Franklin court should decline jurisdiction to allow the Bohmer custody action to be heard in Columbia. However, they should also recognize that Jessica’s case is not as compelling as that of the mother in *Brickman*, and thus the outcome of such a motion cannot be predicted with certainty.

II. Detailed Analysis

A. Whether Franklin or Columbia was the home-state jurisdiction under the UCCJEA when Alex filed the custody action in Franklin

Under the UCCJEA, the “home state” is the state in which a child lived with a parent for at least six consecutive months immediately before the commencement of the custody proceeding. § 16-102(3). A temporary absence is considered part of the home-state period. *Id.*

Under § 16-201, to proceed with an initial custody case, the court must either be (1) the “home-state” jurisdiction (if a home-state jurisdiction exists) or (2) the court in whose favor the “home-state” court declined jurisdiction under the UCCJEA inconvenient forum provision, § 16-207. The home-state jurisdiction has priority over all other jurisdictions except under very limited circumstances, namely, if the home-state jurisdiction declines jurisdiction in favor of another, more appropriate state. The jurisdiction must have been the child’s home state on the date of the commencement of the custody action, or must have been the child’s home state within six months of the commencement of the action. § 16-201. If the latter situation applies, § 16-201 further requires that a parent must continue to live in the left-behind state.

A key determination is the date of a child’s permanent relocation to another state. This is the date from which the six-month period begins to run resulting in establishing another state as the new home state.

1. Establishment of new home state: determination if absence from state is temporary absence or a permanent relocation

- The *Mills* court discusses the factors used to determine if a parent and child have relocated permanently. In *Mills*, the children’s absence was originally intended to be temporary, but it became a permanent relocation when the mother moved to

Columbia and engaged in activities that made it clear she intended to relocate there permanently: she rented a house, enrolled the children in school, and took a new job. She did not expressly tell the father of her intent to relocate until months later. The father filed for custody in the left-behind state within six months of the date the mother notified him that her move was permanent, but more than six months from the date she first moved to Columbia. The court concluded that Franklin was no longer the home state at the time the father filed for custody and therefore the Franklin court lacked custody jurisdiction under the UCCJEA.

- The intent of the parent who has left is a significant factor in deciding whether there is a temporary absence or a permanent relocation. The court looks to the party's actions to determine intent.
- If the parent is found not to have the requisite intent to relocate, then the absence is treated as if it did not exist in determining the period of home-state jurisdiction. *See Mills*; § 16-102(7).
- Thus, the first two months that Carrie was visiting her grandparents in Columbia (December 2007 and January 2008) are most appropriately treated as a temporary absence, that is, as if Carrie were still living in Franklin for purposes of determining the home state.
- However, a stay that begins as a “temporary absence” can change and become a permanent relocation. *See Mills*. The nature of Carrie's stay with her grandparents changed, but only after February 2, 2008, when Jessica joined Carrie in Columbia and decided to relocate there.
- Franklin would continue to be the home state for six months from the time that Jessica formed the intent to relocate to Columbia and began to take steps to do so.
- Note that under *Mills*, the date that the absent parent expressly informs the other parent of the permanent nature of the move is relevant, but not controlling in deciding the date on which the absence transformed from a temporary to a permanent move. In *Mills*, the left-behind father in Franklin claimed that the key date was the date on which his wife *expressly* told him that her earlier move to Columbia was permanent, which he claimed was less than six months before his custody filing in Franklin. The *Mills* court rejected this argument, concluding that under the facts of the case it should have been clear to the father at an earlier date that the mother's move was permanent—the mother and children had been living in Columbia for months, the kids were enrolled in Columbia schools, etc.
- The period for calculating if Columbia is the home state begins to run from one of the following: February 2 (when Jessica went to Columbia), late February (when

Jessica decided not to return to Franklin, began looking for a job, and enrolled Carrie in school), or March 1 (when Jessica told Alex of her decision to stay).

- Under *Mills*, the most relevant time would be late February when Jessica made a decision to stay in Columbia and began to act upon it. However, under any one of these dates, Franklin would still remain Carrie's home-state jurisdiction on the date Alex filed for custody (June 30) because fewer than six months had passed.
 - An argument that December 1, 2007 (when Carrie left to visit her grandparents), was the relevant date for determining whether Columbia would be the home state on June 30, 2008, would not be meritorious.
- In short, the requisite events to start the "home-state" clock ticking in Columbia did not occur until sometime after February 2, the day that Jessica left Franklin for Columbia. Thus, Columbia could not have become the new "home-state" jurisdiction for six months from that date—sometime after August 2, at the earliest. This means that the Franklin court had the right to proceed under "home-state jurisdiction" authority in Alex's June 30 custody case because at most only five months had passed, not the six months needed to establish a new home state in Columbia.
- Jessica sent Carrie to stay in Columbia with her parents on December 1, 2007; Jessica and Alex remained in Franklin; after Alex tore up the family photos, Jessica went to Columbia on February 2, 2008, telling Alex she would stay with her parents for a short visit but would return to Franklin in a few weeks.
- Jessica did not return as promised, but decided sometime later in February to separate from Alex and stay in Columbia. She enrolled Carrie in school in Columbia, found a job, and made plans to enroll in a community college. On March 1 Jessica told Alex that she did not intend to return to Franklin.
- On June 30, 2008, Alex filed for custody in Franklin district court. This date is: seven months from December 1, 2007, when Carrie left Franklin for Columbia; five months from February 2, when Jessica left Franklin for Columbia; and four months after Jessica told Alex on March 1 that she intended to stay in Columbia.
- If the objective test of "physical presence of the child within the jurisdiction" were the rule, then Columbia would arguably be the home state because more than six months had passed since December 1, 2007, when Carrie went to stay with her grandparents in Columbia.
- Here, it is not absolutely certain if February 2, later in February, or March 1 is the relevant date for determining if Carrie's living status has changed. The best answer is that the date that Jessica decided not to return to Franklin is the relevant

date; but even assuming it is the earlier date of February 2, Franklin was still the home state on June 30, when Alex filed the custody petition. Columbia would not become the home state until sometime after July 1 at the earliest.

- Therefore, under the UCCJEA, Franklin has jurisdiction to the exclusion of any other state, unless it is an “inconvenient forum” under § 16-207.¹

B. Assuming that Franklin is the home state, whether a motion to decline jurisdiction under the UCCJEA’s inconvenient forum provision would be likely to succeed, thus allowing a Columbia court to decide the Bohmer custody case

UCCJEA § 16-207(a), as interpreted by *Brickman*, provides the criteria for analyzing whether the Franklin court should decline to exercise jurisdiction over the custody case despite the fact that Franklin is the home state. Applicants must discuss the strengths and weaknesses of Jessica’s case in light of the court’s analysis in *Brickman*.

Section 16-207(b) states: “A court of this State which has jurisdiction under this [Act] to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another State is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court’s own motion, or request of another court.”

Section 16-207 requires the home state court to determine whether a court of another state would be a more appropriate forum by considering six factors. Although the first factor carries more weight, no single factor is dispositive.

Factor One: Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child

In *Brickman*, the court of appeal reversed the trial court’s denial of the mother’s (Young’s) motion to decline jurisdiction. It found that the trial court failed to make findings regarding *Brickman*’s acts of domestic violence before concluding that Young had not shown that she and the children would be safer if the custody case were transferred to Columbia. The court then detailed the couple’s extensive history of domestic violence in Franklin.

A finding of past domestic violence can be the basis for a Franklin court to yield jurisdiction to another state, although first the court must consider evidence regarding all of the other jurisdictional factors enumerated by § 16-207(b). The *Brickman* court emphasized that the Franklin UCCJEA places domestic violence at the top of its list of factors—if it is present, the

1. Under sections of the UCCJEA that were not included in the Library, there is one other circumstance where it would be appropriate to depart from the home-state jurisdiction: if “emergency jurisdiction” were appropriate in another jurisdiction. This issue is not raised by this problem and the Library does not contain legal authority for discussion of this issue.

court may consider which of two competing states can better protect the victim from further abuse unless issues arise from consideration of other factors that outweigh the safety considerations.

Here, there is a credible history of Alex's abusive behavior toward Jessica. This is set out in the telephone transcript, the legal services intake form, the civil protection order, and Alex's e-mail. The parties had a 10-month separation followed by reconciliation, past physical violence in Carrie's presence, numerous incidents that Jessica shared with the legal services attorney at intake, and Alex's possession of a rifle. In addition, there were several recent incidents: Alex was increasingly unpredictable around Jessica, he had torn up family photos in anger, and he had sent a series of threatening e-mails after Jessica told him that she intended to stay in Columbia. Jessica says she fears for her safety and is afraid to return to Franklin.

However, these facts do not weigh as heavily in favor of Jessica as was the case in *Brickman*, where the evidence of domestic violence was more compelling than here. In *Brickman*, there was an escalating pattern of violence, including the husband severely beating his wife during pregnancy, resulting in four criminal convictions and incarceration. Here, there is an established pattern of violence that led to the issuance of the Franklin protection order in 2006 and to a temporary separation. Jessica's current fears are based on an incident in which Alex shook her and ripped up family photos, after which she moved to Columbia because she feared further violence. He sent her an e-mail message, saying "I mean business" and "I guarantee you that you'll be sorry," which sounds ominous but is not explicitly threatening. Parts of the message are conciliatory and express concern for Carrie; Alex says that he is "willing to meet you [Jessica] halfway" and that "Carrie is my daughter and she needs her daddy as well as her mommy." Moreover, the *Brickman* court relied in part on the fact that the offender "had not received any type of psychological counseling since his last incarceration" and had failed to show "that his potential for future violence has abated." If Alex can show that he attended the therapist appointment mentioned in his e-mail, he may be able to make the showing that *Brickman* failed to make.

In sum, although Jessica has some strong evidence of domestic violence, it is not as strong as that in *Brickman*.

FACTOR FAVORS JESSICA, BUT NOT TO THE EXTENT IN *BRICKMAN*

Factor Two: The length of time the child has resided outside this state

The *Brickman* children spent the most recent five years in Columbia; before that they had lived in Franklin. They had many connections in Columbia, but had lived in relative isolation in Franklin. The court found that this factor favored finding jurisdiction in Columbia.

Here, Carrie has spent seven consecutive months in Columbia, she was born in Columbia and lived there for her first year before she and her parents moved to Franklin, and many of Jessica's extended family members live in Columbia. Jessica can testify that these relationships give her a sense of security and well-being in contrast to the fear and anxiety she felt living in

Franklin where she was relatively isolated because Alex discouraged any relationships with friends or family in Franklin.

NEUTRAL—OR SLIGHTLY FAVORS JESSICA

Factor Three: The distance between the court in this state and the court in the state that would assume jurisdiction

In *Brickman*, Young’s Columbia home and the Franklin court were 400 miles apart. As the custodial parent, Young would have had to bring the children to court or arrange for their care. The court concluded that Brickman, the noncustodial parent, should bear any transportation inconvenience as he was “in the better position to undertake the necessary travel.”

Here, it is 100 miles or an hour-and-a-half drive between the Franklin and Columbia courts. Because Jessica has physical care of Carrie, under *Brickman*, it would be reasonable to require Alex to bear the burden of traveling to Columbia. However, the distance is not nearly as burdensome as it was in *Brickman*. Furthermore, Jessica and Carrie live with Jessica’s parents, who could presumably watch Carrie. Finally, Jessica is only working part-time, so she may be able to make the trip without missing work.

NEUTRAL

Factor Four: The relative financial circumstances of the parties

Brickman’s annual income was \$41,000 and Young’s only \$6,500. Presumably, the father’s greater income made travel easier for him, but the court did not discuss this in detail.

Here, Jessica has a relatively new part-time job at a doctor’s office earning \$10,000 per year. Because she is a new employee, her job status may be particularly vulnerable. Alex has a presumably stable job with Franklin Pharmaceutical Co. making \$55,000 per year.

FAVORS JESSICA

Factor Five: The nature and location of the evidence required to resolve the pending litigation, including testimony of the child

This factor examines the traditional bases for determining venue and inquires about the nature and location of the evidence required to resolve the pending litigation, including the testimony of the children. In *Brickman*, the court recognized that records can be transported to new courts easily, and that virtually all the witnesses lived in Columbia. Brickman did not refute Young’s assertions. Therefore, the court held that this factor favored Young.

Here, the relevant evidence and witnesses appear almost equally split between Franklin and Columbia: Carrie, Jessica, and Jessica’s parents and extended family are in Columbia; Carrie was born in Columbia and lived there until she was one year old; and Carrie has had extended visits with her grandparents there. On the other hand, Alex lives in Franklin; Carrie also lived there for four years; and her former preschool and friends are in Franklin. Jessica claims that they were isolated in Franklin because of Alex’s abusive behavior and therefore she could argue that there is minimal evidence in Franklin. At best, it is not a clear-cut factor in favor of either party.

NEUTRAL

Factor Six: Each state court's familiarity with the facts and issues in the pending litigation

In *Brickman*, there was extensive litigation concerning the marriage in the Franklin court—the case file filled five volumes. In contrast, there was only a civil protection order in Columbia. However, despite the extensive litigation history in Franklin, the Franklin Supreme Court was satisfied that Columbia was the appropriate forum under the circumstances.

Here, there is past litigation in Franklin in that a protection order was issued against Alex in 2006. But that order did not address custody of Carrie and there is no prior custody case in either jurisdiction. The parties lived longer in Franklin as a couple than in Columbia, but got married and initially lived in Columbia. There appear to be more witnesses and possible evidence of Carrie's welfare in Columbia. Current threats might be better addressed in Columbia. A certified copy of the Franklin protection order could be obtained easily and introduced in Columbia.

NEUTRAL—OR SLIGHTLY FAVORS JESSICA

III. Conclusion

Even though Franklin is the UCCJEA home state, applicants should conclude that the Franklin court is likely to decline jurisdiction in favor of Columbia based on the overarching factor of safety and security for Jessica and Carrie in light of Alex's abusive behavior and the threat that it may continue. Although the evidence of domestic violence is not as extensive as in *Brickman*, the totality of circumstances favors Jessica and there is no other factor that outweighs the issue of her sense of safety for herself and Carrie. Therefore, it would be reasonable for the Franklin court to follow *Brickman* and rule in Jessica's favor on the firm's motion to decline jurisdiction. This initial custody case is more appropriately addressed in Columbia.

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Williams v. A-1 Automotive Center