Docket # V-9682/13

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

S A McK,

Petitioner-Appellant,

-against-

S B M,

Respondent-Appellee

Motion for Leave to Appeal from the Supreme Court, Appellate Division
First Department

AMICI CURIAE BRIEF OF National Advocates for Pregnant Women, New York Civil Liberties Union, MotherWoman, Inc., National Organization for Women in New York City, Choices in Childbirth, Service Women's Action Network, Planned Parenthood of New York City, NOW-New York State, Law Students for Reproductive Justice, Backline, Every Mother is a Working Mother, and the California Chapter of National Organization for Women

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INTRODUCTION AND INTEREST OF AMICI

Amici curiae, National Advocates for Pregnant Women, New York Civil Liberties Union, MotherWoman, Inc., National Organization for Women in New York City, Choices in Childbirth, Service Women's Action Network, Planned Parenthood of New York City, and the Reproductive Justice Clinic at New York University School of Law are non-profit health and advocacy organizations. Undersigned *amici* wish to bring to the Court's attention that the Referee in this case adopted an unwarranted departure from the plain meaning and purpose of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in a manner that would create dangerous and unconstitutional consequences for pregnant women if the decision were upheld.

On May 30, 2013, the Family Court, through Referee Fiordaliza Rodriguez, granted Mr. S. B. M.'s motion to dismiss Ms. McK.'s petition in New York State seeking custody of her child S. B. M. McK. The crux of this decision was the Referee's finding that Ms. McK, by virtue of relocating from California to New York while pregnant, committed an "appropriation of the child [*sic*] while in utero [that] was irresponsible, reprehensible." Order on Motion dated May 30, 2013 (Ord.) at 5. Based on that, and the credence given by the Referee to a California proceeding that was not permitted by the UCCJEA, the Referee declined to exercise

the home state jurisdiction that, the Referee conceded, clearly rested with the State of New York. Ord. 3.

The ruling below is deeply problematic. The plain language and clear intent of the UCCJEA make obvious that it may only be applied to live, birthed children. The Act grants no authority to courts to determine custody, or jurisdiction of custody cases, based on the location of embryos, fetuses, or by necessity, the associated pregnant women. The Referee's interpretation of the UCCJEA is thus wholly without legal foundation. If upheld, the Referee's Order would render the UCCJEA unconstitutional in violation of Equal Protection, Substantive Due Process, and the fundamental rights to travel and privacy. For these reasons, this Court must affirm the home state finding, take jurisdiction over the child custody matter, and reverse the remainder of the Referee's Order.

Amici are twelve organizations committed to securing the rights of women, in general, and the rights of pregnant women, in particular.

Amicus curiae National Advocates for Pregnant Women (NAPW) is a non-profit organization dedicated to ensuring that women retain their full human and civil rights, including the rights to equality, self-determination, and due process of law, during all stages of pregnancy. NAPW applies its legal and social science expertise in advocating for reproductive and family justice, including the right to carry a pregnancy to term and become a parent without punishment and without

unjustified state supervision and surveillance. NAPW seeks to join this case because the opinion of the Family Court below erroneously and dangerously subjects pregnant women's decisions – about where they will travel, what education and occupations they will pursue, and where they will establish a home – to state scrutiny and punishment in child custody proceedings.

Amicus curiae the New York Civil Liberties Union (NYCLU) is the New York State affiliate of the American Civil Liberties Union (ACLU). As such, the NYCLU is deeply devoted to the protection and enhancement of fundamental rights. The right to equal treatment under law, the right to privacy and autonomy, and the right to travel are fundamental rights to which the NYCLU is committed. Accordingly, the NYCLU joins in seeking to submit this brief.

Amicus curiae MotherWoman, Inc. is a non-profit organization committed to supporting and empowering mothers to create positive personal and social change by building community safety nets, impacting family policy, and promoting the leadership and resilience of mothers. MotherWoman advocates for family-friendly social policies that support mothers and their families as well as develops community networks, coalitions, and taskforces to address perinatal mental health as a public health and social justice issue.

Amicus curiae The National Organization for Women in NYC (NOW-NYC) works to promote reproductive rights, secure women's economic empowerment, and

end discrimination and violence against women. NOW-NYC gives women a powerful voice. As the largest NOW chapter in the country, NOW-NYC plays a key role in shaping both the local and national debate on the issues that impact women. NOW-NYC advocates for the right for reproductive justice, including the rights of pregnant women.

Amicus curiae Choices in Childbirth (CiC) is a non-profit organization that is a national leader in consumer advocacy and outreach for women and their families. CiC believes that every woman deserves a safe, respectful, and deeply fulfilling birth experience. CiC helps women make informed decisions about where, how and with whom to birth. CiC opposes unauthorized state action that undermines women's ability to make these decisions.

Amicus curiae Service Women's Action Network (SWAN) is a nonprofit, nonpartisan civil rights organization dedicated to transforming military culture by securing equal opportunity and freedom to serve without discrimination, harassment, or assault; and to reforming veterans' services to ensure high quality health care and benefits for women veterans and their families. SWAN challenges the institutions and cultural norms that deny equal opportunities, equal protections, and equal benefits to service members and veterans, and works on issues such as women in combat, military sexual violence, VA benefits and healthcare, reproductive

healthcare, and LGBT equality. SWAN assists service members and veterans without regard to sex, gender, sexual orientation, or gender identity.

Amicus curiae Planned Parenthood of New York City (PPNYC) has been an advocate for and provider of reproductive health services and education for New Yorkers for nearly 100 years. PPNYC's health care centers offer reproductive health services, including gynecological care, contraception, pregnancy testing, abortion, testing and treatment for sexually transmitted infections, and HIV testing and counseling. Through a threefold mission of clinical services, education, and advocacy, PPNYC is bringing better health and more fulfilling lives to each new generation of New Yorkers. As a voice for reproductive freedom, PPNYC supports legislation and policies to ensure that all New Yorkers will have access to the full range of reproductive health care services and information.

Amicus curiae NOW-New York State, Law Students for Reproductive Justice, Backline, Every Mother is a Working Mother, and The California Chapter of National Organization for Women have also joined this brief and their statements of interest are set forth in Appendix A.

PRELIMINARY STATEMENT

Petitioner Ms. S McK resides in New York and seeks custody through New York's courts for her six month old son. Ms. McK's New York residence reflects

major life decisions undertaken in the past year. Originally, Ms. McK resided in San Diego where she worked as a firefighter at the Camp Pendleton federal military facility. McK. Affidavit in Opposition filed February 25, 2013 (McK Aff. in Opp.) ¶ 2. After becoming pregnant in May 2012 by B M, Respondent in this matter, Ms. McK decided to leave her firefighting job for fear its inherent dangers might jeopardize her pregnancy or interfere with her subsequent parenting obligations. McK. Aff. ¶¶ 9-11.

In investigating her options for self-reliance as a prospective single mother, Ms. McK began to focus on completing her college education on the Post 9/11 G.I. Bill. McK. Aff. ¶¶ 5-8. On October 9, 2012, she attended a college fair and talked with university representatives. Although she looked into schools in California, Connecticut, and New York, she focused on Columbia University as early as October 9th as an outstanding school to which she might gain admission and which offered excellent support and benefits for veterans under the Yellow Ribbon Program. McK. Aff. ¶¶ 6-8, 10, 12, 15-19 & Exhs. C-J. She then applied for admission to Columbia, and on November 16, 2012, she sublet her house; owing more on the mortgage than it was worth, she had difficulty selling it. Ms. McK then made a temporary move to Northern California while awaiting confirmation that her hopes of attending Columbia University would be realized. McK. Aff. in Opp. ¶¶ 22-23.

Upon receiving confirmation of admission to Columbia for the spring semester, Ms. McK relocated to the State of New York on December 16, 2012. Ms. McK Reply Affirmation (McK. R. Aff.) at 6. Ms. McK believed that a college degree would increase her employability and earnings potential. Because she had served four years in the Marines and was honorably discharged, she was eligible for substantial aid under the G.I. Bill. In her choice of Columbia, Ms. McK was strongly influenced by the University's unique and beneficial support network for veterans, older students, and parents; its academic prestige; and the more favorable financial aid made available to veterans by Columbia and New York State. McK. Aff. ¶¶ 15-19. [1]

At the time of her December 2012 move to New York, Ms. McK was approximately seven months pregnant. In the fall of 2012, Ms. McK believed, based on B M's communications with her, that B M had no desire for involvement with Ms. McK or their putative offspring. McK. Aff. ¶¶ 20, 24 & 25. Ms. McK and B M had no relationship after conceiving around May 23-25, 2012, and B M had married

[1] The record also indicates that Ms. McK's resources consisted primarily of those available to a military veteran who had been employed as a firefighter at $3600 a month salary and that she would be relying on the supports available to a veteran seeking higher education under the GI Bill. These supports were approximately $3258 a month in New York, whereas California only offered a stipend of $2,139. McK. Aff. 10 & Exh.F. (Presumably to ensure that she qualified for the New York stipend, Ms.McK had changed her legal residence to New York by the beginning of the spring semester. *See* McK. Aff. ¶¶ 33 & 34.) Ms. McK owned a house in California valued at $195,000, on which she owed a mortgage of $250,000, and which she had listed for sale. McK. Aff. ¶ 32.

another woman in October 2012. McK. Aff. in Opp. ¶¶5, 20. B M declined invitations to meet his son after the time of birth. McK. R. Affirm. at 8-9.

This action began on February 25, 2013, when Ms. McK petitioned New York Family Court for child custody. McK Petition for Custody, filed February 25, 2013 (McK. Pet). Her child had been born in the State of New York on February 23, 2013, and had lived with his mother in New York since birth. *Id.* Under New York Domestic Relations law Section 76, based on the UCCJEA, a New York court "has jurisdiction to make an initial child custody determination only if this state is the home state of the child on the date of the commencement of the proceeding." Under Section 75-a, the State of New York is the child's home state and should have taken initial and continuing jurisdiction over custody matters.

B M, residing in California, received notice of this New York custody proceeding by service effectuated on or about the date of Ms. McK's February 25th, 2013 filing.[2] The materials served on B M gave him Ms. McK's New York residence and identified the name, address and telephone number of her New York attorney. McK. Pet.

[2] The record contains a petition dated February 25, 2013, together with a summons issued by the court clerk dated February 26th, 2013. B M's counsel subsequently argued that personal service was not properly obtained because the summons had not been served together with the petition. The Referee found formal service and that actual notice cured any defect. Ord. 3. Initial appearances were made on April 16th, 2013, during which the Referee heard arguments and examined documents concerning proof of service on B M, not appended as Exhibits to the transcript of that proceeding. Transcript of Hearing, April 16, 2013 (April 16 Tr.) at 6 *passim*. *See also* May 10 Tr. 9 (McK counsel referencing having signed receipt from address of M).

B M had filed a Petition to Establish Parental Relationship in California on November 15th, 2012.[3] That Petition was initiated by B M's completion of a court form labeled "PETITION TO ESTABLISH PARENTAL RELATIONSHIP." Confusingly, this form allowed B M to check a series of boxes to initiate both a paternity filing for "a child who is not yet born" and a custody proceeding for "[a] child [that] resides or is found in this county." B M CA Pet.

After B M received notice of McK's petition for child custody in New York State, B M's counsel did not initially respond in that State, but instead began substantial activity in California. On March 1, 2013, B M's counsel filed a motion for default judgment asking the California court to take jurisdiction.[4] Acting *ex parte*, the California Court signed the default order on March 6, 2013. Immediately thereafter, on March 7, 2013, B M filed a Request for Order and Supporting Declaration seeking a series of orders.[5] In the supporting declaration, B M's attorney alleged that Ms. McK had engaged in behavior "tantamount" to parental kidnapping by relocating to New York while pregnant.[6] On March 13, 2013, B M's

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[3] California Materials: B M Petition to Establish Parental Relationship (B M CA. Pet.). Papers concerning the California proceeding were submitted as an "Addendum" to the Motion for Order to Show Cause filed by B M's New York counsel. References here to the California proceedings are based on the papers in the record below that appear in that "Addendum" and are referenced first as "California Materials:"

[4] California Materials: B M Request to Enter Default Judgment (B M CA Def. Req).

[5] California Materials: B M March 7 Request for Order and Supporting Declaration (B M CA Ord. Req. Mar. 7).

[6] California Materials: B M CA Ord. Req. Mar. 7 Mandell Supporting Declaration (B M CA Ord. Req. Man. Dec.), at 2.

counsel filed papers in the California Court seeking a custody determination by that court, laying out a further array of substantive claims.[7] Ms. McK's New York Counsel, having finally received notice of the California default, then filed papers seeking reversal of the default judgment on grounds that New York was the child's home state,[8] and B M's attorneys filed opposing papers arguing as they subsequently argued below.[9] The foregoing sets forth the extent of the "California proceedings" that had taken place by the time, on April 16th, that the New York Referee became fully involved in this matter.

Eventually, B M's counsel entered a limited appearance on April 4, 2013 in New York, by motion for order to show cause why the petition should not be dismissed. The critical claim in that motion, for present purposes, was B M's argument that California, not New York, was the proper forum because B M had already filed on November 15th, 2012, in California – while Ms. McK was still pregnant – and that proceeding was ongoing. B M's lawyers alleged that, by moving to New York State, Ms. McK had "absconded" with the fetus in utero specifically to avoid the California proceeding and therefore, that her relocation, childbirth, and subsequent custody filing in New York were impermissible forum shopping. B M

[7] California Materials: B M March 13 Request for Order and Supporting Declaration (B M CA. Ord. Req. Mar. 13).
[8] California Materials: Ms. McK March 25 Request for Order and Supporting Declaration (Ms. McK CA Ord. Req. Mar. 25).
[9] California Materials: B M April 8 Response to Ms. McK CA Ord. Req. Mar. 25 (B M CA Resp. Apr. 8).

argued that this "absconding" and "forum shopping" by Ms. McK should prevent New York from exercising "home state" subject matter jurisdiction on grounds of "unjustifiable conduct" and inconvenient forum. Transcript of Hearing, May 10, 2013 (May 10 Tr.) at 18.[10]

In response, Ms. McK argued simply that New York was clearly the child's "home state," and that under the UCCJEA, this was dispositive of subject matter jurisdiction. May 10 Tr. at 10, 14. *See also* April 16 Tr. 15. As to Ms. McK's relocation while pregnant, her counsel further argued that any inquiry into a pregnant woman's reasons for moving were both irrelevant and prohibited as infringing on constitutionally protected activity. May 10 Tr. 23-25. At the close of the May 10th hearing, the Referee ordered counsel for the parties to provide briefing on the arguments in time for the next scheduled hearing on May 30th. May 10 Tr. 30-33. On May 30, 2013, Referee Fiordaliza Rodriguez granted B M's motion and dismissed Ms. McK's custody petition. Ord. The Court recognized that New York is in fact the child's "home state," Ord. 3, but nonetheless declined jurisdiction. The Referee based this outcome on findings that Ms. McK had effectively "absconded" with the fetus in utero, Ord. 3, 4-5, moved to New York State in furtherance of an

[10] *See also* California Materials: Memorandum in Support of B M CA Resp. Apr. 8 (B M CA Resp. Memo. Apr. 8), at 2, 5.

unspecified "forum shopping" scheme,[11] Ord. 3-4, and that the first-filed California proceeding was the more "convenient forum,"[12] § 76(f), Ord. 5-6. The court characterized Ms. McK's relocation as a classic scenario in which "parents, or their surrogates, act in a reprehensible manner, such as [by] removing, secreting, retaining, or restraining the child." Ord. 5. More specifically, Referee Rodriguez wrote, "[w]hile Petitioner did not 'abduct' the child, her appropriation of the child [*sic*] while in utero was irresponsible, reprehensible...." *Id.* As for Ms. McK's stated reasons for relocating, the Referee found them "unavailing, lack[ing] merit," Ord. 3, and even reprimanded Ms. McK for supposedly manufacturing evidence, Ord. 5.[13]

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[11] The Referee cited disparities in custody and support laws between New York and California, noting, "New York, unlike California, does not promote joint custody," Ord. 3, and New York affords child support until age 21, *id.* at 5. *Amici* could find no evidence that Ms. McK was aware of any discrepancies between New York and California custody and support laws, nor is there evidence that such discrepancies formed the basis of Ms. McK's decision to relocate.

[12] The Referee supported the "more convenient forum" by noting that the California court would hear paternity and custody before one judge whereas New York, would require a paternity determination by the Magistrate. Ord. 6. The Referee also weighed favorably evidence that might be available in California, *id.,* at 5-6, and refused to consider evidence weighing in New York's favor based on her finding that Ms. McK's move to New York while she was pregnant was "unjustifiable conduct," *id.* at 6.

[13] In general, the Referee's handling of the evidence submitted by Ms. McK appears to minimize contrary evidence after an outcome decision had already been made. This conclusion is supported by the fact that Ms. McK had not had an opportunity to submit evidence until a few days before the Referee issued her May 30th Order and long after the Referee had heard from the California judge, who obviously had already accepted, ex parte, B M's view of the case. This is a special case of the general problem of status quo effect and sequentiality biases. Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U CHI. L. SCH. ROUNDTABLE 139 (1995) (empirical research demonstrating once a family court judge has made a custodial decision, status quo effect and sequentiality bias significantly preclude fair deliberation on the evidence at later stages). In light of these very risks, the courts should honor the UCCJEA's simple and straightforward "home state" jurisdiction rule and reserve consideration of complex, contested evidence until such time as the parties, both properly before the court, have the opportunity for a fair and orderly hearing on substantive issues.

Furthermore, because the Referee determined Ms. McK's relocation to be "unjustifiable conduct," the Court also made Ms. McK subject to the fee-shifting penalty for invoking the New York Family Court's jurisdiction.

N.Y. DOM. REL. LAW § 76-g(3) (McKinney 2002).

The Referee's Order conducted no statutory construction of the UCCJEA, nor did it contemplate the constitutional concerns raised by Ms. McK's counsel.

Ms. McK timely appealed the May 30th Order. In the meantime, the California court is proceeding apace with its deliberations.[14]

ARGUMENT

I. This Court should affirm that New York is the "home state" which has sole and continuous jurisdiction over the child's custody under the UCCJEA and should reverse the remainder of the Referee's Order. The UCCJEA does not define pregnant women as "persons" who may be found to have engaged in "unjustifiable conduct" by "removing" or "absconding" with the fertilized eggs, embryos or fetuses they carry, nurture, and sustain.

Subject matter jurisdiction under the UCCJEA as adopted in New York is determined according to a simple calculus: first and foremost, the reviewing court must determine the existence of a home state. N.Y. DOM. REL. LAW § 76 (McKinney 2002). The Referee's Order correctly began here and properly found

[14] Attorneys for *amici* are informed and believe that mother and infant were ordered to travel to and remain in California for one week in July once the New York court declined jurisdiction, and that Ms. McK complied with that order.

that New York is the child's "home state." Ord. 3. That conclusion should be affirmed.

In cases such as this, where the undisputed home state is the State of the court in question, the subject matter jurisdiction inquiry is at an end. This is because the UCCJEA prioritizes home state jurisdiction by design, making a child's home state the presumptive forum for initial custody determinations. *See Michael McC. v. Manuela A.*, 848 N.Y.S.2d 147, 151 (N.Y. App. Div. 2007); *Hector G. v. Josefina P.*, 771 N.Y.S.2d 316, 323 (N.Y. Sup. Ct. 2003); Merril Sobie, *Practice Commentaries*, N.Y. DOM. REL. LAW § 76 (McKinney) (2007).

Once a court determines that it is the child's home state, the court may decline jurisdiction only upon a finding of any of three conditions: (1) a simultaneous proceeding was properly filed first in a foreign jurisdiction in substantial conformity with the UCCJEA, N.Y. DOM. REL. LAW § 76-e (McKinney 2002); (2) forum inconvenience, *id.* at § 76-f; or (3) unjustifiable conduct by the party seeking to gain home state jurisdiction, *id.* at § 76-g. Denial of subject matter jurisdiction for any other reason is improper and in violation of the UCCJEA.

The Referee's decision adhered to this analytical framework in name only. While embracing the relevant concepts (home state, simultaneous proceedings having jurisdiction substantially conforming under the UCCJEA, forum non conveniens, and unjustifiable conduct), the Referee failed to apply them in

accordance with their proper meaning under law. Instead, the Referee substituted her own beliefs and speculations to decline jurisdiction. This was error. As discussed in what follows, proper statutory construction leaves no doubt that New York must assert jurisdiction.

A. New York is the child's home state, creating subject matter jurisdiction and making New York the presumptive forum.

New York's codification of the UCCJEA provides that the threshold issue when determining subject matter jurisdiction in a child custody proceeding is identification of the child's "home state." Subject matter jurisdiction is automatic in the home state, whereas other bases of jurisdiction are permitted only where there is no home state, or where home state jurisdiction is improper for one of three statutorily defined reasons: prior legitimate proceeding; forum non conveniens; or "unjustifiable conduct". N.Y. DOM. REL. LAW § 76 (McKinney 2002). "Home state" is defined as:

> [T]he state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Id. at §75-a.

Ms. McK gave birth on February 23, 2013, in New York State. Her child lived in New York continuously until the time of Ms. McK's custody filing, two days later, on February 25, 2013. As the Referee found below, "[o]n the literal construction of the statute, New York is the home state of the subject child." Ord. 3. This finding afforded New York with subject matter jurisdiction, making it the presumptive forum for a custody determination of the child in accordance with the well documented history and purpose of the UCCJEA. A brief synopsis of that history is relevant here.

The UCCJEA was developed by the National Conference of Commissioners of Uniform State Law (NCCUSL) as a necessary revision of its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA, drafted in 1967, was intended to provide uniformity across states in child custody proceedings and to facilitate the full faith and credit due to custody decisions in other state courts. The UCCJA solution was to make subject matter jurisdiction in initial custody proceedings a matter of judicial balancing of multiple factors, including the child's home state, the best interests of the child, conveniences and conduct of the parties, and so forth. Inevitably, this highly discretionary standard led to inconsistent views of the same evidence in different courts, producing the very inter-state competition over jurisdiction that the act was intended to foreclose. *See* David Carl Minneman,

Annotation, Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act, 100 A.L.R.5th 1 (2002).

Moreover, in the years following the UCCJA's proliferation through state legislatures, Congress passed two acts which directly conflicted with the UCCJA – the Parental Kidnapping and Prevention Act (PKPA), and the Violence Against Women Act (VAWA). *See* Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child Custody Practice under the New Act*, 32 FAM. L. Q. 267, 268 (1998). The PKPA's conflict was particularly acute because that statute assigned priority to home state jurisdiction in a field closely related to that regulated by the UCCJA; the result was a number of cases in which the UCCJA was rendered obsolete by federal preemption. *See, e.g., Reis v. Zimmer*, 700 N.Y.S.2d 609, 615 (N.Y. App. Div. 1999).

The NCCUSL responded with the UCCJEA. The most salient change in that statute from the previous one lay in the prioritization of home state jurisdiction. *See* Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction and Enforcement Act – A Metamorphoses of the Uniform Child Custody Jurisdiction Act*, 75 N.D. L. REV. 301, 305 (1999). This is evident from the drafters' comments accompanying the relevant language:

> The jurisdiction of the home State has been prioritized over other jurisdictional bases. Section 3 of the UCCJA provided four independent and concurrent bases of jurisdiction. The PKPA provides that full faith and credit can only be given to an initial custody determination of a 'significant

> connection' State when there is no home State. This Act prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.

UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201 comment (1997).

Additionally, the UCCJEA deliberately eliminated any "best interests" language from the jurisdictional criteria of initial custody determinations. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 101 prefatory note (1997) ("The UCCJEA eliminates the term 'best interests' in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children"). The significance of these changes was that the NCCUSL recommended a bright line rule for jurisdiction, one that would not invite parties and courts into competing evidentiary deliberations at the jurisdictional threshold.

The solution, in sum, was to place priority for interstate jurisdiction on the "home state" of the child – an objective determination based on relatively straightforward evidence *See Landrum-Spitia v. Spitia*, 2007 WL 1470728, at *1 (Conn. Super. Ct. May 9, 2007); *Stephens v. Fourth Judicial Dist. Court*, 128 P.3d 1026, 1028 (Mont. 2006); *Powell v. Stover*, 165 S.W.3d 322, 326 (Texas 2005); *Welch-Doden v. Roberts*, 42 P.3d 1166, 1173 (Ariz. Ct. App. 2002). Both New York and California endorsed this solution by enacting the UCCJEA as part of their child

custody statutory regimes. As a result, the Referee's proper determination of New York as the home state in this matter made New York the presumptive forum for the initial custody proceeding in accordance with the purposes behind the UCCJEA.

B. There is no simultaneous proceeding having "jurisdiction substantially in conformity" sufficient to strip jurisdiction from the courts of New York.

There are only three circumstances under which the UCCJEA permits a court of the home state to decline jurisdiction. The first set of circumstances[15] identified in the statute is codified in New York at Section 76-e, which states, in pertinent part:

> [A] court of this state may not exercise its jurisdiction under this title if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state *having jurisdiction substantially in conformity with this article.*

N.Y. DOM. REL. LAW § 76-e (McKinney 2002) (emphasis added).

The Referee below incorrectly assumed that the California Court handling the proceeding "to establish parental relationship" initiated by Respondent B M on November 15, 2012 had jurisdiction substantially in conformity with the UCCJEA

[15] *Amici* discuss the grounds for denial of jurisdiction in the order in which they appear in the statute for purposes of clarity. This was not the structure of the Referee's Order, nor does it represent the weight applied by the Referee to each ground for dismissal. To the contrary, the Referee placed the greatest emphasis on Ms. McK's alleged 'misconduct' – her relocating while pregnant -- treating the § 76-e basis for dismissal as an afterthought. *See* Ord. 4.

because it was a previously-filed, simultaneous proceeding. This is wrong as a matter of fact and law. As a purely factual matter, the Referee's decision was in error. California's form petition invites confusion by permitting simultaneous filing of paternity and custody petitions; this feature of the form was most likely designed to promote administrative efficiency, but as evidenced by this case, it may produce the opposite effect. The singular nature of the form suggests both proceedings begin apace, but the paternity proceeding explicitly countenances a "child not yet born," whereas the custody filing requires information concerning the location of the child, presumably applicable only after the time of birth.

Furthermore all the subsequent activity in the California court, including the default judgment, took place in March 2013 after B M had been served regarding the New York proceeding. The California filings thus have all the hallmarks of an effort to create the appearance of meaningful activity precisely to interrupt New York jurisdiction. The Referee should have scrutinized the procedural facts; had she done so, she would have discovered that the proceedings consisted of preemptive activity generated by B M and designed to serve his preference in forum, despite the UCCJEA home state priority.

Yet more troubling still, the Referee's decision simply assumes that California's jurisdiction was in conformity with the UCCJEA. B M filed for custody in November, 2012, over three months before Ms. McK gave birth and the child

came into existence on February 23, 2012. Ord. 1. The Referee thus implicitly read the UCCJEA as permitting subject matter jurisdiction in custody proceedings over beings not yet born. No such interpretation of the statute is fairly plausible.

A court's primary consideration when presented with an issue of statutory interpretation or application is to "ascertain and give effect to the intention of the Legislature." McKinney's Cons. Laws of NY, Book 1, Statutes § 92 [a], at 177. The clearest indicator of legislative intent is the statutory text, and thus courts are charged to first give effect to the plain meaning of statutory language. *Majewski v. Broadalbin-Perth Central School District*, 696 N.E.2d 978, 980 (N.Y. 1998).

The UCCJEA concerns jurisdiction over child custody, with "child" defined as "an individual who has not attained eighteen years of age." N.Y. Dom. Rel. Law § 75-a(2) (McKinney 2002). The plain meaning of "child" does not include fertilized eggs, embryos, or fetuses being sustained in a woman's body. Moreover, the UCCJEA's use of the word "birth" in its definition of "home state" addresses children less than six months of age – "In the case of a child less than six months of age, the term [home state] means the state in which the child lived from birth …." N.Y. Dom. Rel. Law § 75-a(7) (McKinney 2002). This makes plain that eggs, embryos, and fetuses cannot be considered as distinct entities for purposes of child custody, nor, it should be obvious, can the decisions about their custody be used as a mechanism for judging and controlling a pregnant woman.

Other statutes of this State universally use the term "child" only to denote beings after the time of birth.[16] Additionally, when the state seeks to reach or address pregnancy or pregnant women in particular, it uses appropriately specific terms. *See Wilner v. Prowda*, 601 N.Y.S.2d 518, 520 (N.Y. Sup. Ct. 1993) ("When our Legislature enacts laws concerning unborn children, it says so explicitly.") (internal citation omitted). Furthermore, of the total number of state decisions to address whether the UCCJEA enables custody determinations before a child is born, the great majority have determined that the statutory term "child" could *not* reference any pre-birth entity. *See Gray v. Gray*, 2013 WL 3967672 (Ala. Civ. App. Aug. 2, 2013); *B.B. v. A.B.*, 916 N.Y.S.2d 920 (N.Y. Sup. Ct. 2011); *Waltenburg v. Waltenburg*, 270 S.W.3d 308 (Tex. App. 2008); *Arkansas Dept. of Human Services v. Cox*, 349 Ark. 205 (2002); *In re Unborn Child of Starks*, 18 P.3d 342 (Okla. 2001); *In re Marriage of Tonnesson*, 189 Ariz. 225 (Ct. App. 1997); *In re Marriage of Tonnesson*, 937 P.2d 863 (Colo. Ct. App. 1996); *In re Steven S.*, 126 Cal. App. 3d. 23 (1981). In the few decisions reaching a contrary result, significantly, the specific courts conducted no statutory analysis whatsoever; instead those courts apparently

[16] *People v. Morabito*, 580 N.Y.S.2d 843 (N.Y. City Ct. 1992). When the New York Legislature has intended a law to apply to fetuses, it has stated so explicitly. *See, e.g.,* N.Y. REAL PROP. ACTS. LAW §§ 928, 967, 1531, 1753, 1764 (McKinney 1981) (employing the terms "person not in being" and "infant not in being"); N.Y. DOM. REL. LAW § 81 (McKinney 2002) (employing the terms "unborn child" and "child likely to be born," respectively); N.Y. SURR. CT. PROC. ACT LAW § 1408 (McKinney 1967) (employing the term "persons not in being"); N.Y. INS. LAW § 5102 (McKinney 2006) (defining "serious injury" for motor vehicle insurance reparations to include "personal injury which results in . . . loss of a fetus"); N.Y. PUB. HEALTH LAW § 4300 (McKinney 1970) (defining decedent for anatomical gifts statute to include "a stillborn infant or fetus").

presumed without questioning that the UCCJEA applied prior to birth. *See Stewart v. Vulliet*, 888 N.E.2d 761 (Ind. 2008); *In re P.D.M.*, 2001 WL 1503276 (Iowa App. 2001); *Gullet v. Gullet*, 992 S.W.2d 866 (Ky. Ct. App. 1999). Accordingly, there can be no serious question that the plain text of the UCCJEA prohibits subject matter jurisdiction until after the point of birth when a child, for purposes of a child custody proceeding, exists.

The Referee's view of the California proceeding as "having jurisdiction substantially conforming" also runs afoul of the UCCJEA's *purpose*. As noted above, the UCCJEA deliberately gives preference for initial and continuing custody determinations to a child's "home state." *See* IA *supra.*[17] Yet the definition of "home state," as the Referee noted, Ord. 3, plainly contemplates only live, birthed children. *Id.*; N.Y. DOM. REL. LAW § 75-a (McKinney 2002); *cf. Wilner v. Prowda*, 601 N.Y.S.2d 518, 521 (N.Y. Sup. Ct. 1993) (interpreting "home state" under UCCJA).

It follows from the Referee's opinion, then, that home state jurisdiction may be subverted wherever a custody or other parental status filing was previously made in another state under any of the alternative provisions of § 76(1)(b)-(d). The Referee's opinion thus prioritizes not home state jurisdiction, but rather the 'first-

[17] Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301, 313 (1999); *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 312 (Tex. App. 2008).

filed' forum. Indeed, where the parties have as long as nine months to file before home state may be established, the Referee's interpretation would presumably make home state jurisdiction the rare exception. This reading of the statute would turn it upside down. *See Waltenburg v. Waltenburg*, 270 S.W.3d 308, 318 (Tex.App. 2008) (finding that subject matter jurisdiction before a child is born "would defeat the clear purpose underlying the legislature's enactment of the UCCJEA – to prioritize home-state jurisdiction").

Finally, the United States Supreme Court has recognized that controversies are not justiciable until they are "ripe" for adjudication and that "unripe" claims will not satisfy the "case or controversy" requirement. *See Poe v. Ullman*, 367 U.S.497 (1960); *Boyle v. Landry,* 401 U.S. 77 (1971). B M's child custody petition, filed prior to the birth of the child, was not "ripe" for adjudication when filed and should have been dismissed as nonjusticiable.

C. The Referee incorrectly considered forum non conveniens as a reason to refuse New York home state jurisdiction.

The second means by which a court may decline home state jurisdiction under the UCCJEA is defined by § 76-f, "inconvenient forum." Under this section, a court has discretion to decline jurisdiction if another state is the more appropriate forum upon consideration of the following eight factors:

(a) whether domestic violence or mistreatment or abuse of a child or sibling has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) the length of time the child has resided outside this state;

(c) the distance between the court in this state and the court in the state that would assume jurisdiction;

(d) the relative financial circumstances of the parties;

(e) any agreement of the parties as to which state should assume jurisdiction;

(f) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) the familiarity of the court of each state with the facts and issues in the pending litigation.

N.Y. DOM. REL. LAW § 76-f(2) (McKinney 2002). A decision to decline jurisdiction on grounds of forum non conveniens is discretionary with the child's home state court, but it is imperative that in reaching such a decision, the court expressly consider all eight factors on the record. *Id.* ("[T]he court . . . *shall* consider all relevant factors . . . .") (emphasis added). *Frank MM. v. Lorain NN.*, 960 N.Y.S.2d 232, 234 (N.Y. App. Div. 2013); *Berg v. Nandis*, 882 N.Y.S.2d 615, 616 (N.Y. App. Div. 2009). This requirement assures that courts will give serious, balanced consideration to the convenience question, and prevents mere 'punting' that would upset the jurisdictional hierarchy under the UCCJEA. Accordingly, a court's

dismissal under § 76-f(2) absent consideration of all eight factors requires reversal. *Berg*, 882 N.Y.S.2d at 616; *Greenridge v. Greenridge*, 792 N.Y.S.2d 165, 166 (N.Y. App. Div. 2005); *Rey v. Spinetta*, 777 N.Y.S.2d 746, 747 (N.Y. App. Div. 2004) (characterizing dismissal without consideration of all eight factors as "improvident exercise of [] discretion.").

In the present case, the Referee found New York to be less convenient than California and dismissed, in part, for this reason. To support this exercise of discretion, the Referee cited: (1) Ms. McK's "reprehensible conduct;" (2) Respondent, B M's residence in California; (3) California's ability to investigate concerns regarding B M's parental fitness; (4) Ms. McK's sufficient finances, as evidenced by payment in full for a New York apartment lease and an attorney in this matter; and (5) that the case would be assigned to only one judge in California, whereas it was assigned to a Magistrate and a Referee in New York. Ord. 5-6.

Of this list, only three represent factors enumerated at §76-f(2); the location and conduct of the parties (let alone analysis of these with respect to one party only) are not enumerated. Additionally, the Referee's analysis of the "the relative financial circumstances of the parties" was erroneous. § 76-f(2). The question is not whether either party is destitute, as the Referee seemed to think, but where the finances of the parties stand in relation to one another. There can be no real issue in this case that B M, a well-endorsed athlete and public figure, possesses *far* greater

wealth than Ms. M, a veteran of the Marines and former firefighter who left her employment, in part, because of potential risk to her pregnancy and expected new parenting obligations. *See* TAN at 13 n.12 *supra*. As a result, the Referee only considered two of the enumerated statutory factors – location of evidence, and relative efficiency of proceedings.

By law, this is insufficient and requires reversal.[18] *Blerim M. v. Racquel M.*, 839 N.Y.S.2d 57, 61 (N.Y. App. Div. 2007) (finding that where court dismissed petition upon consideration of only two factors, "the court made its jurisdictional decision without properly applying the statutory scheme for such determinations"). While it is true that the §76-f(2) list is not comprehensive, the Referee apparently believed that reliance on unenumerated factors could substitute for those within the statute. *See* Ord. 5 ("[The mother's conduct] weighs heavily in the more discretionary inconvenient forum analysis."); Ord. 6 ("The Petitioner's conduct must be considered a relevant factor in determining whether New York is the most convenient forum.").

Indeed, the Referee's extreme reliance on Petitioner's alleged "misconduct" improperly curtailed the requisite statutory analysis. The Referee outright refused to

[18] This is true even supposing that the analysis under two factors was complete. It was not. The Referee failed to consider much information of relevance, particularly regarding the location of evidence. Ord. 5-6.

consider any factors suggestive of the relative convenience of New York in an arrestingly candid attempt to punish Ms. McK:

> Here, the Petitioner brought the child [*sic*] to a state which she had no connection to, without prior arrangement with the child's [*sic*] putative father. Any convenience of New York as a forum is dependent upon the child's [*sic]* presence in New York, which is the direct result of the Petitioner unilaterally removing [*sic*] the child [*sic*] from California to New York in December 2012. Therefore, for this court to accept jurisdiction, would reward the Petitioner's highhanded conduct.

Ord. 6. In this manner, the Referee openly rejected the duty to balance the appropriate statutory factors out of unguarded disdain for Ms. McK's decision to relocate to New York while pregnant. Completely apart from the outrageous nature of the Referee's characterization of Ms. McK's protected conduct as "highhanded," the UCCJEA does not permit substitution of unenumerated factors for those required by law. Tellingly, the Referee cited to no authority in support of her questionable analysis. For this reason, the decision below declining jurisdiction on grounds of forum non conveniens must be reversed for failure to properly apply the § 76-f(2) statutory factors.

D. Ms. McK's relocation to New York while she was pregnant cannot be classified as unjustifiable conduct.

The third and final ground on which a court of the home state must nonetheless decline jurisdiction is "jurisdiction declined by reason of conduct," or

"unjustifiable conduct." N.Y. DOM. REL. LAW § 76-g (McKinney 2002). In substance, the statute holds:

> 1. Except as otherwise provided in section seventy-six-c of this title or by other law of this state, if a court of this state has jurisdiction under this article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction...[.][19]

Id. The core of this provision – the term "unjustifiable conduct" – is itself not defined by statute, but as recognized by the Referee below, a clear standard has emerged. As the Referee noted, "unjustifiable conduct" is typically reserved for cases in which one parent removes a child across state lines for the express purpose of obtaining jurisdiction *and* either (a) there was an existing custody order in the state of departure, (b) the removal of the child was an unlawful abduction, or (c) both (a) and (b). Ord. 4. This reading comports with that of contemporary commentators. *See, e.g.*, Merril Sobie, *Practice Commentaries,* N.Y. DOM. REL. LAW § 76-g (McKinney) (2011) ("Section 76-g is not meant as a catchall to permit dismissal whenever a parent's conduct might not be justifiable. Consistent with its

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[19] That provision goes on to say:

> unless: (a) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction; (b) a court of the state otherwise having jurisdiction under sections seventy-six through seventy-six-b of this title determines that this state is a more appropriate forum under section seventy-six-f of this title; or (c) no court of any other state would have jurisdiction under the criteria specified in sections seventy-six through seventy-six-b of this title. 2. If a court of this state declines to exercise its jurisdiction pursuant to subdivision one of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under sections seventy-six through seventy-six-b of this title.

Id.

intent, the section should be invoked only rarely in situations involving a parent who has abducted the child, or has engaged in similar unconscionable acts; even then, the provision should not be used to short circuit initial home state jurisdiction [§ 76] or exclusive, continuing modification jurisdiction [§ 76-a].").

The Referee began with an appropriate assessment of the relevant facts under this section. The Referee's opinion rightfully stated that there was not a custody order from another jurisdiction and that Ms. McK's move to New York "was not in itself illegal." Ord. 4. This should have ended the inquiry. However, despite apparently grasping both the pertinent law and facts, the Referee went on to state, "[w]hile Petitioner did not 'abduct' the child, her appropriation of the child [*sic*] while in utero was irresponsible, reprehensible..." Ord. 5. The Referee went on to chastise Ms. McK for her "highhanded conduct" in "unilaterally removing [*sic*] the child [*sic*]," as noted above. Ord. 5-6; *see* Section I.C. *supra*. In short, then, the Referee determined that Ms. McK's relocation to New York was legally equivalent to wrongful abduction of a child for the purpose of obtaining jurisdiction, and consequently, that the "unjustifiable conduct" standard applied.

In this regard, the Referee's logic was deeply flawed. As already noted, above, the plain language of the UCCJEA as enacted in New York suggests that "child" applies only to a person under 18 years of age who has been born and is therefore separate from the mother. *See* IA *supra*. Furthermore, as previously stated,

the purpose of the UCCJEA is to prioritize home state jurisdiction. *Id.* But the "unjustifiable conduct" rejection of jurisdiction is imperative. N.Y. DOM. REL. LAW § 76-g (McKinney 2002) ("the court *shall* decline") (emphasis added). Accordingly, if the Referee's interpretation were followed, home state jurisdiction would be jeopardized any time a woman gave birth in a state other than the one in which she conceived or resided in at the time of conception. Such a result would prioritize not a child's home state, as defined by statute, but the state of conception, or perhaps, the mother's prior state of residence. In this regard, too, then, the Referee's opinion undermines the UCCJEA's intent.

The most troubling element of the Referee's opinion in this section, however, is conceptual. By likening the abduction of a live child to the movement of a pregnant woman, the Referee apparently missed that eggs, embryos, and fetuses are *necessarily* inside the women that carry and nurture them in their bodies. The distinction is everything. In order for the mother of a child to abduct the child across state lines, the mother must first gain control of the child and then determine where it travels. By contrast, a pregnant woman *cannot help* but dictate the geographic itinerary of the egg, embryo, or fetus that by biological necessity goes where she goes. This makes an enormous difference when it comes to prescribing conduct on moral grounds. Because a person must take definitive steps beyond their own

movement to "abduct"[20] a child across state lines, it is fair and reasonable to identify those actions and penalize them in certain specified circumstances. But when a woman seeks to continue her pregnancy to term, any prohibition on intra- or interstate travel of a fertilized egg, embryo, or fetus becomes proscription of the woman's personhood and basic liberties

This problem is immediately evident from a neutral reading of the Referee's opinion. In attempting to determine Ms. McK's justifications for relocating while pregnant, the Referee commented disapprovingly of Ms. McK's motivations, citing her: limited connection to New York; 'sudden plans' to attend college in New York; extensive work history in California; presence of family in California; property ownership in California; and so on. Ord. 4-5. Clearly, Ms. McK's move and her reasons for doing so were not matters into which B M is legally entitled to involve himself[21] and should not have been the court's concern.

Predictably, the Referee could cite no relevant authority for her decision under this section. The cases she did cite all concerned an extant child having been transported to a different jurisdiction after the point of birth, and some concerned

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[20] In ordinary parlance the transitive verb "abduct" means "to seize and take away (as a person) by force," Merriam-Webster Dictionary, found at http://www.merriam-webster.com/dictionary/abduct (08/20/2013). The same is true in legal parlance: Black's Law Dictionary defines abduction as "[t]he act of leading someone away by force or fraudulent persuasion" and notes that it is loosely defined as kidnapping. BLACK'S LAW DICTIONARY 4 (9th ed. 2009).

[21] Even had B M been her husband, the state would give him no say. *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69 (1976); *Wilner v. Prowda*, 601 N.Y.S.2d 518, 521 (N.Y. Sup. Ct. 1993).

either illegal abduction, or the presence of a valid, pre-existing custody order in another state. *See Michael McC. v. Manuela A.*, 848 N.Y.S.2d 147 (N.Y. App. Div. 2007) (cited by the Referee, Ord. 3, this case stands for the proposition that the clock does not stop for purposes of home state determination when a live, birthed child's residence is interrupted by detention in a foreign jurisdiction); *EB v. EFB*, 793 N.Y.S.2d 863 (N.Y. Sup. Ct. 2005) (cited by the Referee, Ord. 3, this case stands for the proposition that, once a valid, initial custody determination has been made, the jurisdiction presiding over the initial determination maintains continuing jurisdiction in accordance with N.Y. DOM. REL. LAW § 76-a (McKinney 2002); *Matter of Grace G. v. Beeno G.*, 2006 WL 2037249 (N.Y. Fam. Ct. July 14, 2006) (cited by the Referee, Ord. 5 (incomplete citation), this case stands for the proposition that wrongful abduction of a live, birthed child, combined with lying to the court and deliberate manipulation of multiple jurisdictions may constitute "unjustified conduct"). Even superficial analysis of these authorities reveals that they offer no support for the Referee's position in this case.

For the foregoing reasons, the Referee's interpretation of the statute to decline home state jurisdiction of the New York courts is entitled to no weight, and must be reversed.

II. This Court should reverse the Referee's Order refusing to exercise New York jurisdiction because, if upheld, it would render the

UCCJEA unconstitutional in violation of pregnant women's rights to equality, liberty, and due process of law.

The New York Domestic Relations Law Section 76, as written, defines a "child" as a person once born who is under the age of 18 for the purposes of child custody jurisdiction,[22] and is therefore consistent with the constitutional rights of the parties. The Referee's Order, by contrast, would treat eggs, embryos, and fetuses as within the reach of the UCCJEA, thereby permitting control of the pregnant women who carry them. This reading has numerous constitutional implications; attaching penalties to a woman's freedom of self-determination because she is pregnant violates rights to equal protection, substantive due process, travel, and privacy. The Referee's Order must be reversed to avoid conflict with these constitutional rights. *See New York Post Corp. v. Leibowitz*, 2 N.Y.2d 677, 687 (1957) (finding that a statute which is clear and constitutional as applied correctly must be so applied to avoid unconstitutional application).[23]

State laws and actions which violate fundamental rights are subject to strict scrutiny review – they are unconstitutional unless necessary to achieve a compelling

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[22] *See* Part IA *infra*.

[23] Even if the Referee's interpretation of the UCCJEA were somehow a plausible alternative, the mere fact of its encroachment upon constitutional liberties would be sufficient to reject it under the canon of constitutional avoidance. *See, e.g., Immigration and Naturalization Serv. v. Enrico St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, ... we are obligated to construe the statute [in favor of the alternative] to avoid such problems" (internal citations omitted)); *Matter of Coates*, 173 N.E.2d 797 (N.Y. 1961) (construing Mental Hygiene law to require notice and a hearing for involuntary confinement to avoid constitutional conflict). *See generally,* 16 C.J.S. *Constitutional Law* § 191 (2013).

government interest. *Saenz v. Roe*, 526 U.S. 489, 498-99 (1999) (right to travel is fundamental and requires showing of compelling governmental interest); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (Noting of substantive due process protections, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965) (right to privacy is fundamental and infringements are subject to strict scrutiny); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (discussing wide scope of liberties protected by due process). Laws which discriminate on the basis of gender are subject to heightened scrutiny under the Equal Protection Clause – these are unconstitutional unless *substantially* related to important governmental objectives. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

As a matter of New York law, there is no state interest – let alone an important or compelling one – in providing a forum for custody determinations before a child is born. In *Wilner v. Prowda*, the Supreme Court of New York addressed this very point and summarily dismissed any notion to the contrary, asking, "[W]hat interest does this State have in restricting [a pregnant woman's] right to travel solely to give [a putative father] his choice of venue? This court sees none." 601 N.Y.S.2d 518, 521 (N.Y. Sup. Ct. 1993).

But even if the State's interest were defined very broadly – for instance, as an interest in timely or efficient custody determinations – the Referee's construction could not pass muster. This is because, supposing such an interest was sufficiently important or compelling, "[s]tatutes affecting constitutional rights must be drawn with 'precision,' and must be 'tailored' to serve their legitimate objectives." *Dunn. v. Blumstein*, 405 U.S. 330, 343 (1972) (internal citations omitted). There is simply no reason to think that allowing custody proceedings only after the time of birth is in any way inefficient; as a result, the Referee's interpretation is overreaching, curtailing substantially more freedom than is necessary to achieve any valid objective. Moreover, the Referee's interpretation would fail the tailoring requirement because custody proceedings before a child is born would often be highly inefficient. The possibilities of miscarriage, termination, and still-birth suggest that custody proceedings before a child is born will often disserve an interest in efficiency by wasting judicial resources. Finally, entertaining custody filings when the "home state" of the child is unknown and unknowable is an invitation to wasteful, unnecessary litigation, as occurred in this matter.

As a result, the constitutional infringements inherent in the Referee's opinion, detailed below, are without justification. Accordingly, the UCCJEA may not be afforded the interpretation applied by the Referee, and the decision below rejecting New York home state child custody jurisdiction must be reversed.

A. The Referee's interpretation of the UCCJEA violates the rights of women to equal protection.

The Referee interpreted the UCCJEA as permitting custody proceedings over eggs, embryos, and fetuses as if they were already outside of, or separate and apart from, a pregnant woman.[24] Her Order created a gender-based government infringement of substantive due process rights, the constitutional right to travel and procreative privacy. Plainly, the Order created a government mechanism that would permit both states and putative father's-to-be to exert unjustified control over the location and life plans of pregnant women in a manner not reciprocated with respect to the expectant fathers. Taken to its logical conclusion, the Referee's Order would require pregnant women, upon conception, to subvert their individual aspirations and liberties to the interests of State governments and expectant fathers. This would violate Equal Protection by discriminating on the basis of gender.

The United States Constitution provides that "no state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend.

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[24] In federal Equal Protection analysis, a line of cases is frequently cited for the proposition that classification based on pregnancy denying disability benefits was discrimination between pregnant and non-pregnant persons, not discrimination based on gender and thus not subject to strict scrutiny, *see Geduldig v. Aiello*, 417 U.S. 484 (1974) (state scheme for disability income replacement excluded disability due to pregnancy); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (same result in the private employment sector under Title VII). A pattern of invidious treatment of pregnant women substantially depriving them of core rights and protections under the law was not at issue in those cases as is present here. Moreover, the Title VII holding was later limited by a holding that imposing burdens that single out only those who are pregnant is sex discrimination, *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (imposing loss of seniority for disability due only to pregnancy), and then Congress, of course, reversed *Gilbert* with the passage of the Pregnancy Discrimination Act of 1978 (codified at 42 U.S.C. 2000e-2(k)).

XIV. The New York Constitution similarly guarantees that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. ART. I, §11. The U.S. Supreme Court and the New York Court of Appeals have recognized that these constitutional clauses protect individuals against state action classifying on the basis of gender, and as previously noted, any infringing state action must be substantially related to an important government interest.

1. *The Referee's order unconstitutionally grants only putative fathers the power to circumvent home state jurisdiction.*

The UCCJEA as codified by New York makes a child's home state the presumptive jurisdiction for initial, and therefore continuing, custody determinations. *See* Part I.A *supra*. The Referee, however, held that B M's pre-birth filing in California created a "simultaneous proceeding" with "jurisdiction substantially conforming [to the UCCJEA]," dismissing Ms. McK's petition in part on this basis. The net result of this holding is that the putative father was able to work an end-around to the UCCJEA's presumption of home-state jurisdiction. The manner in which this decision contravenes the intent behind the UCCJEA has already been established. *See* Part I.A. *supra*. For present purposes, what is relevant is that the Referee's holding also creates a power in expectant fathers that is unavailable to future mothers.

This is evident from the following: where a future father files for custody in any state having personal jurisdiction over a pregnant woman, home state

jurisdiction may be defeated by his choice of venue. But the same does not hold true for the future mother, because presumably, her choice of venue will be the same state in which she gives birth, i.e., the home state. So filing before a child is born by a pregnant woman would confer no advantage – it would only serve the defensive end of defeating the expectant father's choice of a venue in the 'race to file' that the Referee's vision would establish. The future father, on the other hand, would have every incentive to file *immediately* upon conception in the state of his choosing. Provided the state had personal jurisdiction over the pregnant woman, he would be successful in subverting not only the woman's interests, but also those of the child and the legislatures supporting the UCCJEA "home state" jurisdictional system.

2. *The Referee's order unconstitutionally singles out women for regulatory burden under the "unjustified conduct" exception for subject matter jurisdiction of the UCCJEA.*

Additionally, the Referee's "unjustifiable conduct" analysis, equating Ms. McK's interstate move while pregnant with child abduction, also singles out pregnant women for special regulation. The Referee subjected Ms. McK's decision to relocate to a probing analysis, examining the timing of her move, the relative extent of her ties to both states, and the comparative custody and support laws of both states. Ultimately, the Referee concluded that the evidence supported an inference of impermissible "forum shopping", Ord. 3, transforming Ms. McK's life planning into a deceitful act of 'child abduction.' Effectively, Ms. McK was saddled

with the burden of proving that her relocation was undertaken irrespective of any future custody or support proceedings. Under the Referee's construction, no such burden would apply to the movements of future fathers – their choice of forum before a child is born would be immune to scrutiny in any state having personal jurisdiction over the expectant mother.

Furthermore, the Referee's decision also discriminates by forbidding only the pregnant woman from considering the desirability of a forum in determining where to live and file. As a preliminary matter, the Referee's focus on this factor was wrongheaded – the Supreme Court held in *Shapiro v. Thompson* that a pregnant woman has a right to consider the various benefits offered by a prospective new State of residence. 394 U.S. 618, 632 (1969) ("[W]e do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance.").[25]

But even supposing the Referee was permitted to hold such a supposed consideration against Ms. McK, no such scrutiny would be applied to expectant fathers under the Referee's rubric. In the present case, B M doubtless filed in California because he prefers that forum – his vigorous, preemptive litigation in the

[25] *Shapiro* was overruled in part on other grounds. *See Edelman v. Jordan*, 415 U.S. 651 (1974). Consequently, *Shapiro*'s holding with regard to discrimination against pregnant women who evaluate the relative public assistance of states before relocating remains the law.

present case affirms the point. *See* TAN 8 *supra.* Yet the Referee did not consider the favorability of California's laws to B M – the mirror image of the favorability of New York's laws to Ms. McK – in examining the propriety of his choice of forum. Consequently, the Referee likewise did not rely on that difference to presume irrefutably that his motives were improper. Expectant mothers are thus restricted in ways that expectant fathers are not. These restrictions "perpetuate the legal, social, and economic inferiority of women" and violate both the New York Constitution and the United States Constitution. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Finally, the Referee's interpretation of "unjustifiable conduct" also promotes gender discrimination in the award of attorneys' fees and court costs. Section 76-g(3) *mandates* assessment of costs and fees against a party seeking jurisdiction who is deemed responsible for "unjustifiable conduct. N.Y. DOM. REL. LAW § 76-g(3) (McKinney 2002) Since the Referee's reading of the "unjustifiable conduct" standard places unique strictures on women, as noted above, the associated penalty of §76-g would also have discriminatory effect. The extent of fees and costs in custody litigation may be substantial, further chilling the movement of pregnant women for fear they will be unable to meet their special burden of disproving that their relocation was designed to gain access to a particular forum. The mobility of putative fathers would, again, not be so burdened.

In sum, the Referee's opinion discriminates against women in a way that reinforces long disavowed, pernicious stereotypes. The decision below revives and reinforces the notion that "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother," *Bradwell v. Illinois*, 83 U.S. 130, 142 (1873). The clear implication of the Referee's interpretation is that pregnant women must prioritize their pregnancies over every other aspect of their lives, whereas men are not so constrained, and may even use the fact of insemination and conception as a means of controlling the pregnant woman. Clearly, it was not Ms. McK's duty, once pregnant, to completely subordinate her interests and personal liberties any more than it was B M's. Consequently, the Referee's opinion must be subjected to heightened constitutional review for gender discrimination under the Equal Protection Clause, which necessarily renders the decision below void.

B. The Referee's decision construes the UCCJEA to violate the substantive due process rights of pregnant women.

The Fourteenth Amendment to the United States Constitution and Article I, section 6 of the New York Constitution protect certain substantive due process rights against state intrusion. Substantive due process rights are those which are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted). To date, the Supreme Court has recognized a number of rights as fundamental within the substantive due process paradigm, including numerous

elements of self-determination, such as the right to marry, enjoy marital privacy, use contraception, have children, abort a pregnancy, and direct the education and upbringing of one's children. *See Loving v. Virginia*, 388 U.S. 1 (1976) (right to marry); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to have children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parental rights to care and control of one's children, including right to impart useful knowledge); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (same); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy and contraception). It is in the nature of rights of this type that the government may not infringe upon them "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (internal citations omitted).

The decision of the Referee infringes on the substantive due process rights of women without sufficient justification. Specifically, as detailed in what follows, the Referee's opinion is in violation of general liberty interests in self-determination, the right to travel, and the right to privacy.[26]

[26] The Due Process Clause of the Fourteenth Amendment requires states to codify their laws with sufficient precision to give citizens fair notice of the consequences of their conduct. *Kolender v. Lawson*, 461 U.S. 352, 359 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). While the so-called 'void-for-vagueness' doctrine is more commonly applied in the criminal context, it protects citizens in the civil arena, as well. *Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233 (1925). The rule in civil cases is that the statutory language must not be "so vague and indefinite as really to be no rule or standard at all." *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967). Additionally, a civil statute violates the guarantee of due process where it is sufficiently vague that it threatens to chill constitutionally-protected conduct. *Colautti v. Franklin,* 439 U.S. 379, 390-91, 394, 396 (1979); *Lanzetta v. New Jersey,* 306 U.S. 451(1939).

1. *The Referee's decision infringes upon the core liberty interests of women in self-determination.*

As the U.S. Supreme Court noted in 1923 concerning the right to liberty protected by the Fourteenth Amendment of the United States Constitution:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness. . . [.]

Meyer v. Nebraska, 262 U.S. at 399-400. The Supreme Court has thus recognized there is no 'one way' to pursue a meaningful life, and that individuals are protected in the multitude of decisions and practices that are essential to self-actualization.

By moving from California to New York, Ms. McK exercised numerous facets of this broad liberty interest. She sought education and improved career opportunities. She determined an optimal location for enjoyment of veteran's benefits. She decided on a new home for herself and her future child. And, necessarily, she parted ways with her former home and environs and made myriad decisions about how and when to do so, including a determination to sublease her home until the housing market recovered. All of these component decisions can

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The Referee's Order rewrites the UCCJEA so nonsensically and with such intrusion on fundamental rights that the result should fail scrutiny as void for vagueness as well.

fairly be characterized as personal, *protected* life choices, the kind which the government is not permitted to intrude upon arbitrarily in a free society.

The decision of the Referee impinged on these liberties by rejecting jurisdiction. As previously discussed, Ms. McK was penalized for the decision to move, and under the ruling below, must expend time and resources to go to California for initial and continuing custody proceedings. In reaching her decision, the Referee specifically chastised Ms. McK for her personal decisions, calling them "irresponsible, reprehensible," unjustified, pretextual, and an act of gamesmanship. Ord. 5. This coarse judgment and penalization of Ms. McK's self-determination is forbidden by the most basic liberty protections.

2. *Interpreting the UCCJEA to encompass the decisions of pregnant women in relation to the fetuses they carry and nurture violates women's constitutional right to travel.*

The Referee interpreted the UCCJEA in a manner that would violate the right to travel in several respects. As a result, this Court must reject the Referee's construction to avoid creating a standard that would be unconstitutional.

The right to travel is fundamental. *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974). It is so central to personal liberty that, like the right to be free from slavery, it is protected against encroachment even by private citizens. *Saenz*, 526 U.S. at 498; *see* U.S. CONST. amend XIII. In application, the Supreme Court has determined that "the right to

travel" provides umbrella protection for three distinct rights: (1) the right to enter and leave a foreign State; (2) the right to be treated as "a welcome visitor" in a foreign State; and (3) upon permanent relocation to a foreign State, the right to be treated equally with other, prior residents. *Saenz*, 526 U.S. at 500. Any of these composite rights, and so the right to travel generally, is violated by conduct that either (a) deters migration from a would-be departure State or (b) attaches a penalty upon arrival in a destination State. *Memorial Hosp.*, 415 U.S. at 257. Where State action burdens the right to travel by either of these means, that action is unconstitutional unless necessary to a compelling state interest. *Id.*

The present case primarily concerns the third composite right – the right to equal treatment upon relocation.[27] Competent evidence on the record below shows that Ms. McK left California to establish permanent residence in New York. The Referee's Order interprets the UCCJEA, as codified in California and New York, in a manner that would deter and penalize migration. Specifically, the Referee's Order runs afoul of the right to travel in its interpretation of § 76-e ("Simultaneous Proceedings"), § 76-f ("Inconvenient Forum"), and § 76-g ("Jurisdiction Declined by Reason of Conduct"). N.Y. DOM. REL. LAW §§ 76-e-g (McKinney 2002). Consequently, the Referee's reading of §§76-e-g must be justified by a compelling state interest if the UCCJEA, so interpreted, is to be salvaged. Since the use of these

[27] By asserting subject matter jurisdiction knowing that New York had "home state" status, the California court also deterred migration from a departure State.

provisions in this matter cannot be justified, the Referee's interpretation must be rejected.

As discussed above, § 76-e requires dismissal upon finding that another state has jurisdiction substantially in conformity with the UCCJEA. N.Y. DOM. REL. LAW § 76-e (McKinney 2002). The Referee dismissed Ms. McK's petition under this Section to permit subject matter jurisdiction over pregnant women. *See* Part I.B. *supra*.

This interpretation runs afoul of the right to travel. As discussed above, Part I.B. *supra*, the Referee's statutory construction would allow a putative father to file in the state of the pregnant woman's residence, as happened here, and establish subject matter jurisdiction under § 76(1)(b) at any point after conception, since both mother and "child" would automatically be present and satisfy the "significant connection" and "substantial evidence" standards. N.Y. DOM. REL. LAW § 76(1)(b)(i)-(ii) (McKinney 2002). The effect of such a filing would be to penalize a woman for departure in violation of the right to travel, as illustrated precisely by this case.

It bears noting as well, that once a state has asserted subject matter jurisdiction over a pregnant woman, that state is the presumptive jurisdiction for all future modifications to the custody decision under § 76-a ("Exclusive, continuing jurisdiction"). A pregnant woman considering relocation would thus have to

consider the costs of repeated return to the state of departure for court proceedings, or alternatively, face the consequences of non-appearance. This, too, would burden the constitutionally protected right to travel.

The Referee's opinion also penalizes the pregnant woman upon arrival in a new state of permanent residence. As borne out in this case, the mother would be deprived of access to the courts of her new residence for any custody determinations in the child's home state. Because the Referee's interpretation of California's proceeding as "jurisdiction which is substantially conforming" to the UCCJEA impinges on the right to travel in this manner, it must be subjected to strict scrutiny review.

As suggested above, the Referee's interpretation of § 76-f, forum inconvenience, would also render it unconstitutional in violation of the right to travel. *See* Part I.C. *supra*. In dismissing Ms. McK's petition under § 76-f inconvenient forum provision, the Referee made no attempt to disguise the fact that she would not consider any factor or evidence suggesting that New York, the arrival destination, was the more convenient forum. This was because, in the words of the Referee, "[a]ny convenience of New York as a forum is dependent upon the child's presence in New York, which is the direct result of the Petitioner unilaterally removing [*sic*] the child [*sic*] from California." Ord. 6. To acknowledge factors suggesting the greater convenience of New York, the Referee continued, would be to

"reward the Petitioner's highhanded conduct." *Id.* The Referee thus examined only a portion of the relevant evidence in admitted attempt to punish Ms. McK for her relocation from California to New York while pregnant.

If the UCCJEA may be read to permit a court to put a thumb on the scale in this manner, it is unconstitutional in violation of the right to travel. It is foundational to the right to travel that individuals may not be penalized upon arrival in a destination state and must be entitled to the same treatment as that state's other residents. This fact does not change merely because the individual in question is a woman who happens to be pregnant. Nor does the fact of pregnancy restrict a woman's power to relocate "unilaterally" or "without prior arrangement with the child's putative father." Ord. 6. On the contrary, due respect for the right to travel requires that the UCCJEA be understood to insist upon consideration of all relevant facts under all of the factors enumerated in § 76-f as part of any analysis under that section.

Finally, the Referee's interpretation of the UCCJEA as codified in New York also infringes on the right to travel with respect to its application of § 76-g. That section requires a State to decline otherwise valid jurisdiction if it finds "unjustifiable conduct" by the party presenting the Petition. N.Y. DOM. REL. LAW § 76-g (McKinney 2002). The Referee found impermissible forum-shopping, and

therefore "unjustifiable conduct," in Petitioner relocation across state lines while pregnant. *See* Part I.D. *supra.*

If Section 76-g is understood to permit dismissal on grounds of suspected forum-shopping in the circumstances of this case, then that Section is in violation of the right to travel. The factors considered by the Referee would presumptively support a finding of forum-shopping whenever a pregnant mother departed for a state with which she had comparatively few ties, or when a putative father had previously filed in a foreign state. This would deter and penalize relocation because, under the UCCJEA as interpreted by the Referee's order, the new state of residence could properly decline jurisdiction.

For these reasons, the Referee's interpretation of the UCCJEA would violate the right to travel without sufficient justification as required by the Constitution. Accordingly, the Referee's interpretation of Sections 76-e–g must be rejected.

3. *Interpreting the UCCJEA to encompass the decisions of pregnant women in relation to the fetuses they carry violates women's constitutional guarantee of privacy.*

By permitting putative fathers to file for custody before a child is born, the Referee also opened the door to an arresting breach of a woman's right to procreative privacy. Taken to its logical conclusion, the decision below would allow biological fathers to file for custody at any point during pregnancy and potentially make a woman's pregnancy the focus of a court proceeding subject to judicial

control. This contradicts the standard in both New York and the United States that women are free to make medical decisions during pregnancy and, along with exercising other possible options, to terminate their pregnancies without requiring permission or consent from biological fathers. It is unconstitutional to require such consent for medical decision-making and termination of pregnancies. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).[28]

The New York Supreme Court has recognized:

> [S]pouses or putative fathers have no interest in a fetus sufficient either to require or prevent an abortion. . . . [W]hat the abortion cases have made clear is that a husband does not have a protected interest in "the potential life of the child." (Planned Parenthood of Central Mo. v. Danforth, supra, 428 U.S. at 69...). As the Supreme Court noted in Casey "a State may not give to a man the kind of dominion over his wife that parents exercise over their children" (505 U.S. at 897...).

Wilner v. Prowda, 601 N.Y.S.2d 518, 520-21(N.Y. Sup. Ct. 1993) (citation updated).

Additionally, the right to procreational privacy incorporates the right to carry a pregnancy to term. *See Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992) (noting that its decision in *Roe v. Wade*, 410 U.S. 113 (1973), "had been sensibly

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[28] Most New York Due Process Clause decisions in the right to privacy realm have cited federal authority interchangeably with New York precedent, making no distinction between New York's constitutional provision and the federal Due Process Clause. *See, e.g., Hope v Perales*, 611 N.Y.S.2d 811 (1994); *Matter of Raquel Marie X.*, 559 N.Y.S.2d 855 (1990), *cert denied sub nom. Robert C. v Miguel T.*, 498 US 984 (1990); *Doe v Coughlin*, 523 N.Y.S.2d 782 (1987), *cert denied* 488 U.S. 879 (1988); *Rivers v Katz*, 504 N.Y.S.2d 74 (1986).

relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry to term); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of the right to privacy.").

Yet the Referee's interpretation of the UCCJEA – allowing courts and putative fathers to control whether or not pregnant women may leave the state – could perversely push some women to terminate wanted pregnancies. If, as suggested by the court below, a pregnant woman's relocation is considered an unjustifiable "appropriation of the child [*sic*] while in utero," some women may feel pressure to terminate a wanted pregnancy in order to exercise the right to travel, including for reasons of pursuit of education or career. An interpretation of the UCCJEA that pressures a woman to terminate pregnancy violates the right to carry a pregnancy to term incorporated in the right to privacy. The government has no interest, much less a compelling one, in achieving such a result.

CONCLUSION

For all the reasons elaborated above, Amici urge this Court to affirm New York as the home state, reverse the Referee's Order and take child custody jurisdiction in this matter.

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** The Reproductive Justice Clinic is part of the NYU School of Law Clinical Law Program which trains law students in the practice of law through work on actual cases representing clients under attorney faculty supervision. The Reproductive Justice Clinic specializes in legal and policy work relating to reproductive freedom, equality, and liberty. The Clinic is part of Washington Square Legal Services, Inc. (WSLS), a not-for-profit entity under which the Law School's clinical law legal practice is conducted. The Student Practice Order issued by the First Department to WSLS authorizes its supervision of law students in the practice of law according to the guidelines set forth in the Order. As is true with all briefs and reports from clinics and centers at NYU School of Law, this brief does not purport to present the school's institutional views, if any.

PRINTING SPECIFICATIONS STATEMENT

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CERTIFICATE OF SERVICE

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APPENDIX A

Appendix A

Amicus curiae NOW-New York State (NOW-NYS) is the statewide chapter of the National Organization for Women in New York State. It is the largest women's political action organization in New York, representing over 40,000 women and men in 24 chapters. The chapter is dedicated to fighting for women's equality, and to improving the status of women in New York.

Amicus curiae Law Students for Reproductive Justice (LSRJ) is a non-profit organization with over 100 chapters on law schools and thousands of alumni from across the country that trains and mobilizes law students and new lawyers to foster legal expertise and support for the realization of reproductive justice. LSRJ works to ensure that all people can exercise the rights and access the resources they need to thrive and to decide whether, when, and how to have and parent children with dignity, free from discrimination, coercion, or violence.

Amicus curiae Backline promotes unconditional and judgment-free support for the full spectrum of decision, feelings, and experiences with pregnancy, parenting, adoption, and abortion. Through direct service and social change strategies, Backline is building a world where all people can make the reproductive decisions that are best for their lives, without coercion or limitation, and where the dignity of lived experiences is affirmed an honored.

Amicus curiae The Every Mother is a Working Mother Network (EMWM) is a national multi-racial grassroots network of mothers, other carers and supporters campaigning to establish that raising children is work and that caring work has economic value, entitling us to welfare and other resources. EMWM coordinates *DHS: Give Us Back Our Children* in Philadelphia and *DCFS: Give Us Back Our Children* in Los Angeles, self-help action and support groups of mothers, grandmothers, other family members, former social workers, foster parent and supporters working together against the unjust removal of children from their families by child welfare departments, not because of abuse or neglect, but because of poverty, racism and sexism.

Amicus Curiae The California Chapter of National Organization for Women (California NOW) works to promote gender equity and women and girls' empowerment in every aspect of society. California NOW plays a key role in institutionalizing gender equity and believes that all levels of government should adhere to the principal that all human beings are born free and equal in dignity and rights and must enjoy the equal protection of the law against discrimination based

on their sexuality, sex, gender, race, color, age, ethnicity, disability, language, religion, immigration status, national or social origin, or other status. California NOW is dedicated to reproductive justice and works to ensure the state recognizes women and girls' full human and civil rights and that those rights are retained during every stage of pregnancy and motherhood.

APPENDIX B

[redacted]

At a term of the Family Court of the State of New York, held in and for the County of New York, at 60 Lafayette Street, New York, NY 10013, on May 30, 2013

PRESENT: [redacted] Referee

In the Matter of a **Custody/Visitation** Proceeding

File #:
Docket #: [redacted]

S[redacted] A[redacted] McK[redacted]

Petitioner,

- against -

ORDER ON MOTION
(Corrected)

S[redacted] B[redacted] M[redacted]

Respondent.

An Order to Show Cause was filed with this Court on April 11, 2013, requesting an order of dismissal of the custody petition filed by the Petitioner Mother, S[redacted] A[redacted] McK[redacted] (hereafter "Petitioner") against the Respondent, S[redacted] B[redacted] M[redacted] (hereafter "Respondent") and currently pending in this Court. The argument for dismissal is on three grounds: 1) pursuant to Family Court Act §580-201 in that the Court lacks personal jurisdiction over the non-resident with regard to the issues of paternity; 2) that a petition between the parties involving the same relief is pending before the court of the Superior Court of California, County of San Diego, Family Court; and 3) that the Petitioner did not serve the Summons herein. The Petitioner opposes the motion by affidavits and arguments by counsel contending that New York has both personal and subject matter jurisdiction. Thus, the Petitioner argues the motion should be dismissed.

A Referee of this Court upon examining the motion papers, supporting affidavits, Reply Affirmation, California Proceedings attached as addendum to Respondent's Order To Show Cause, Memorandum of Law in Support of Motion to Dismiss, Respondent's Affidavit and Affirmation (filed 5/28/13) in relation thereto finds that the motion should be GRANTED and the custody petition is DISMISSED for the reasons that follow.

COUNSEL: B[redacted] *Attorney for Respondent* (Limited appearance); J[redacted] Z[redacted] Of Counsel to B[redacted] *Attorney for Respondent* (Limited appearance) and K[redacted] *Attorney for Petitioner*

BACKGROUND

The Petitioner and the Respondent lived in California and engaged in a sexual relationship which resulted in a child born on February 23, 2013. Before the child's birth, the Respondent lived and worked in California for at least the past 10 years, owned a home, was registered to vote, and had relatives residing in that state. Nevertheless, the Petitioner suddenly decided to move to New York on or about December 2012 for the purpose of attending school and an alleged desire to have a happier life in a place where she felt she belonged. (*See* Affidavit of Petitioner dated 4/23/13 and 5/28/13.)

Of note and crucial to these proceedings, is that the Respondent filed a petition in California November 15, 2012 for a determination of parentage, custody, visitation and child support. Pursuant to the requirements of the Uniform Child Custody Jurisdiction Enforcement Act (hereafter "UCCJEA"), this Court has been in communication with the assigned California Judge, the Hon. [redacted] Based on those conversations and the minutes of the proceedings as provided by counsel for Respondent, this Court has learned that Judge [redacted] determined that California has both subject matter and personal jurisdiction. The jurisdictional bases found were pursuant to California's Uniform Parentage Act Family Code §7600 et seq. and §7620. Personal jurisdiction was found by substituted service of process on the Petitioner herein.

Several issues are raised by the Petitioner and Respondent's papers. First, whether New York has personal jurisdiction when the Respondent is a non-resident, a summons was not attached to the petition served, has no substantial ties to this state where his alleged son resides. Second, whether New York is the home state of the child and should exercise jurisdiction. Third, assuming New York has subject matter jurisdiction, whether this Court should decline to exercise it because of the Petitioner's deception when she filed her custody petition and failed to mention the California case. Related to this issue is whether such failure is "unjustifiable conduct" or an indication that the Petitioner was "forum shopping" as contemplated under the UCCJEA. Lastly, whether New York is a convenient forum to determine the custody of the subject child since California has a pending case assigned to one Judge.

APPLICABLE LAW AND ANALYSIS

Jurisdiction Under the UCCJEA

Jurisdiction in child custody matters is governed by Domestic Relations Law Article 5-A, New York's codification of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Domestic Relations Law §§ 76 (1) sets out all possible grounds for subject matter jurisdiction over a child custody dispute. Domestic Relations Law §§ 76 (2) indicates "subdivision one of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state."

The UCCJEA, codified in New York under the Domestic Relations Law section 75 *et. seq.*, was enacted to "provide an effective mechanism to obtain and enforce orders of custody and visitation across state lines ..." (*See* NY CLS Dom Rel §§ 75 (2013)). Under NY CLS Dom Rel §§ 75-g, "notice required for the exercise of jurisdiction when a person is outside this state shall be given in a manner prescribed by the law of this state for service of process, as provided in paragraph (a), (b) or (c) of this subdivision, or by the law of the state in which the service is made, as provided in paragraph (d) of this subdivision. Notice must be given in a manner reasonably calculated to give actual notice. If a person cannot be served with notice within the state, the court shall require that such person be served in a manner reasonably calculated to give actual notice, as follows: (a) by personal delivery outside the state in the manner prescribed by section three hundred thirteen of the civil practice law and rules; or (b) by any form of mail requesting a receipt; or (c) in such manner as the court, upon motion, directs, including publication, if service is impracticable under paragraph (a) or (b) of this subdivision; or (d) in such manner as prescribed by the law of the state in which service is made."

In this case, service is disputed by Respondent because a summons was not attached to the petition when it was served. The Respondent argues the subsequent mailing of the summons does not cure the defect. Although this Court is cognizant that the Respondent is making a limited appearance, the fact of the matter is that a summons was served by counsel for Petitioner soon after the first appearance in court. To argue the matter should not be heard as a result of this argues form over substance. In addition, this Court considers the fact that the Respondent has not denied receiving the summons and petition sent by the Petitioner's attorney to his home via certified mail and via UPS to in Trabuco, California. This Court also considers and is persuaded by the fact that the Respondent has filed responsive pleadings seeking dismissal of the custody petition and his California lawyer has also acknowledged service of the New York custody petition in those proceedings. Thus, he has actual notice of the fact that the Petitioner is seeking custody of his alleged child and the notions of due process/substantial justice are not offended.

Domestic Relations Law §§ 76 (3) clarifies that "physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination." The Respondent's argument that he has no minimum contacts in New York is belied by the fact that he does business in New York as shown in the article that he signed autographs in [redacted] New York on 2/28/13 (*See* Exhibit P, Affidavit, 5/28/13) and by the fact that his putative child is currently in New York. Consequently, personal jurisdiction has been acquired and issue is joined. Although it appears that New York and California have both acquired personal jurisdiction over their respective respondents, personal jurisdiction is unavailing to determine which court should entertain the custody dispute.

The next issue to be addressed is whether California or New York is the home state of the child. Home state has been defined as the state in which a child has lived with a parent or person acting as a parent for a period of six months prior to the filing of the petition or in the case of a child less than six months old, the state in which the child has lived since birth. (*See* DRL §75-a) Here, the Petitioner filed the petition February 25, 2013, merely two days after the child was born. On the literal construction of the statute, New York is then the home state of the subject child.

However, the Respondent does not concede the home state of the child is New York and persuasively argues that the Petitioner removed the child to New York to avoid service of process of the California proceedings and in order to shop for a more favorable forum in which to litigate the custody of the child because New York, unlike California, does not promote joint custody. It is in this argument of "forum shopping" where the Respondent's case is the strongest and persuasive. The intent of the UCCJEA is to terminate wrongful custodial takings or withholdings and to prevent forum shopping . *(See Matter of Michael McC. v. Manuela A.*, 48 AD3d at 95; *EB v. EFB*, 7 Misc 3d at 429), This Court finds the Petitioner's actions to be such a withholding because she left to New York merely two months before she was due, had no ties to New York prior to the Fall of 2012, she owns a home in California, worked in California for at least 10 years before filing of her custody petition in New York, has extended family in California which assisted her during her pregnancy and had a settled life in California. Moreover, it appears that the Petitioner did not have substantial ties to New York prior to her precipitous move. The Petitioner's explanations of why she moved to New York are unavailing, lack merit and do not present extenuating circumstances. Thus, this Court declines to exercise jurisdiction over the custody application.

The Petitioner here does not really have "significant connection" to the State of New York and the child has limited connection. At the time of filing of the proceedings, the child and his mother were both in New York, but the child had only been present in the state for two days. The Petitioner resided in California for at least ten years and went to New York for better financial benefits. The Petitioner admitted she gets in New York a higher housing and work stipend. New York also has longer provisions than California for child support. These facts sustain a finding of the Petitioner's significant connection to California, but not New York. The significant connections standard is a more stringent test than a "minimum contacts" test (*See Vernon v. Vernon*, 100 N.Y.2d 960, 972, 800 N.E.2d 1085, 768 N.Y.S.2d 719 [2003]).

For the past ten years the Petitioner has not been to New York for an extended period of time, has not been to school in New York and there are no relevant records predating the filing of this petition to be found in this state. There is no substantial evidence regarding the Petitioner's ability to care for the child, protection, training, and personal relationships either. The New York Court of Appeals has held that "substantial evidence" requires an "optimum access to relevant evidence" (*Vanneck v. Vanneck*, 49 N.Y.2d 602, 610, 404 N.E.2d 1278, 427 N.Y.S.2d 735 [1980)]). The lack of evidence regarding the Petitioner's ability to care for the child before the date of filing makes it clear that this court may not take jurisdiction pursuant to Domestic Relations Law §§ 76 (1) (b). The California Court is also in a better position to address the Petitioner's allegation that the Respondent would be an unfit parent to whom custody should not be given.

Even though New York may be the home state of the child, California may be assumed as the appropriate state to litigate matters in because it was there where the first proceeding was filed. Domestic Relations Law §§ 75-e indicates that a court may not exercise its jurisdiction under the UCCJEA if "at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this article, unless the proceeding has been terminated or is stayed by the court of the other state." The California action was commenced by the filing of the Petition on November 15, 2012. The Petitioner did not file the New York action until February 25, 2013. California is accorded jurisdiction by Domestic Relations Law §§ 76 (1) (d), and since the action was first commenced in California, New York may not exercise jurisdiction over the matter unless and until California terminates or stays its proceedings.

Petitioner's Unjustifiable Conduct:

Domestic Relations Law §§ 76-g (1) states, "if a court of this state has jurisdiction under this article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction." A finding that the Petitioner engaged in "unjustifiable conduct" necessitates a declination of jurisdiction. The unjustifiable conduct provision of the UCCJEA is designed to deter removing a child across state lines to secure jurisdiction. Generally, courts apply this provision where a child has been removed contrary to an existing custody order (*see Adoption House v. P.M.*, 2003 Del. Fam. Ct. LEXIS 227 [Del. Fam Ct, Oct. 9, 2003] (noting that "the few courts determining what constitutes unjustifiable conduct' have all considered factual scenarios involving whether a child had been brought into a state illegally.")).

In the instant case, there is no custody order from any jurisdiction, and as such the Petitioner's removal of the child to New York was not itself illegal. However, the absence of any custody order is substantially the result of the Petitioner's leaving the state of California before a

determination of parentage, custody and visitation was made. The Petitioner also failed to conveniently omit it from her sworn custody petition and has to date failed to file an amended petition rectifying this omission.

This Court's research and the cases noted in the memorandums of law indicate that most reported cases of unjustifiable conduct do deal with outright illegality. However, the Comment to UCCJEA Section 208 (the equivalent to New York's Domestic Relations Law §§ 76-g) makes clear that "the statute need not be interpreted in such a restrictive fashion: 'There are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. This section ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct which creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties.' (Unif Child Custody Jurisdiction & Enforcement Act §§ 208, 9 ULA cmt at 684-85 [1999]) (*See In the Matter of Grace G.*, 12 Misc.3d 1184(a), 824 NYS2d 763).

While Petitioner did not "abduct" the child, her appropriation of the child while in utero was irresponsible, reprehensible and her withholding of important information from the California proceeding from this court in the instant case shows a settled purpose to manipulate the courts to her own ends. The Petitioner herself admits that she was going to file a paternity petition in California in September 2012 and engaged in settlement negotiations both directly with the Respondent and thru an attorney. She knew the Respondent was going to file a case in October 2012, yet left a few days after she was asked if the lawyer she had would accept service of the court papers. The Petitioner was aware of the California proceedings as indicated in her conversations with the media and promised to "fight in court."

The Petitioner has engaged in creating an atmosphere designed to camouflage her true intent: e.g., text messages or messages to a friend referencing her move to New York to go to school; mentioning other schools of interests (when Columbia was probably her only real choice); getting the media involved to defuse the notion (Why would she get the media involve if she was wrong?) The media may be used to expose injustice or it may be used by a manipulative person to create an air of injustice. If the latter is the case, then it is an injustice on top of an injustice on the Respondent and that too is wrong. The Petitioner has created a play where the end result is that she relocates to New York, the father pays child support until the child is 21 and she has sole custody. Now she has to create the story that gets her to that end result. That is where the misdirection is used to camouflage her true intent. These bad faith actions, totally at odds with the purposes of the UCCJEA, constitute unjustifiable conduct requiring this court to decline jurisdiction.

New York as an Inconvenient Forum

Even if the mother's conduct is not considered so reprehensible as to mandate declination of jurisdiction under the "unjustifiable conduct" provision, it weighs heavily in the more discretionary inconvenient forum analysis. "Paragraph 1 of Domestic Relations Law section 76-f indicates that a court which otherwise has jurisdiction may determine that it is an inconvenient forum and that a court of another state is more appropriate." (*See In the Matter of Grace G., supra*).

The enumerated factors to be considered, laid out in Domestic Relations Law §§ 76-f (2), favors California, instead of New York, because the Respondent lives there and that court thru its investigative arms may be in a better position to assess any of the concerns of parental fitness as the

child's Father. The Petitioner's claim of her financial circumstances lack merit in that she paid in full for her 8 month sublet and has privately retained counsel to represent her in this matter. The California Court is also in a better position to determine all issues with this family in that one judge, Judge [redacted], would be able to assess credibility of the parties, the parentage of the child, the child's custody and best interest, and child support. Whereas in New York, the case is assigned to two different jurists and the case may take longer to litigate. In California, the case is being expeditiously handled and is scheduled for mediation May 31, 2013.

The factors to be considered in an inconvenient forum are not exhaustive, and the Domestic Relations Law §§ 76-f (2) states that the court "shall consider all relevant factors" in its analysis. The Petitioner's conduct must be considered a relevant factor in determining whether New York is the most convenient forum. Here, the petitioner brought the child to a state which she had no connection to, without prior arrangement with the child's putative father. Any convenience of New York as a forum is dependent upon the child's presence in New York, which is the direct result of the Petitioner unilaterally removing the child from California to New York in December 2012. Therefore, for this court to accept jurisdiction, would reward the Petitioner's highhanded conduct. It is a basic purpose of the UCCJEA to deter parents from taking children to distant states to generate custody jurisdiction. In accordance with the principles of the UCCJEA, this court determines that Petitioner's wrongful conduct must not be rewarded, and that California, which is willing to assume jurisdiction, is the more appropriate forum in which to litigate this child's custody.

WHEREFORE it is ORDERED that the motion of S[redacted] B[redacted] M[redacted] is granted and the custody petition is DISMISSED.

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.

Dated: May 30, 2013 **ENTER**

[redacted]
[redacted] Referee

Check applicable box:
☐ Order mailed on [specify date(s) and to whom mailed]:_____
☐ Order received in court on [specify date(s) and to whom given]:_____