

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date	07-23-15				Dept: Dept. CE 64 [CE64]
Honorable	MARK A. JUHAS	Judge	M. ARNOLD		Deputy Clerk
Honorable		Judge Pro Tem	NONE		Court Assistant
5	A. SOTO	Deputy Sheriff	NOT REPORTED		Reporter

10:00 am

SD026864

Daniel Giersch (N/A)

Counsel For  
Petitioner:

VS.

Kelly Giersch (N/A)

Counsel For  
Respondent:

NO APPEARANCES

**NATURE OF PROCEEDINGS: COURT’S RULING ON MATTERS TAKEN UNDER SUBMISSION ON JULY 10, 2015**

This is the Court’s ruling on the submitted matter arising from the July 9 and 10, 2015 evidentiary hearing. Petitioner, Daniel Giersch, is represented by Fahi Takesh Hallin and Dena Kravitz; and Respondent, Kelly Rutherford, is represented by David Glass and Chelsea Storey. Neither party need do a formal order as this minute order will serve as the Court’s order.

Generally at issue before the Court are custody and visitation orders for the parties’ two children: Hermes Giersch (DOB 10/17/06) and Helena Giersch (DOB 6/8/09). Respondent requested that this Court make orders concerning the children; Petitioner objected to this Court’s jurisdiction to make any such orders. Both parties agree that the Petitioner, as the moving party, has the burden of proof in this matter by a preponderance of the evidence.

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After much discussion with the parties, the Court ultimately cast the question at bar as a very narrow jurisdictional one. Thus, the Court does not rule or make any findings on what is, or is not, in the children’s best interest.

On November 25, 2013, the Court entered a judgment concerning the children’s custody. In that judgment, the Court asserted jurisdiction and ordered, among other things, that the children were to reside in Europe with Petitioner. There is no apparent dispute between the parties that at the time of the original judgment California had jurisdiction of these two children under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). (Family Code §3400 et seq.)<sup>1</sup>. There is also no dispute between these parties that pursuant to the UCCJEA, this Court maintains jurisdiction as the original decree state until it relinquishes jurisdiction. Petitioner argues that California should relinquish jurisdiction and thus refrain from making any orders because the Respondent no longer resides in

<sup>1</sup> All further citations are to the Family Code unless otherwise noted.

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California. Respondent, on the other hand, argues that California has jurisdiction because she continues to be a California resident.

The primary purpose of the UCCJEA is to prevent forum shopping. In addition, the UCCJEA is designed to prevent multiple jurisdictions from making conflicting custody orders with resulting confusion for the children and parties. In the case at bar there are concurrent actions in both Monaco and California. For the children's sake there should be only one Court that has the ability to structure orders that concern the children's best interest.

For the purposes of this ruling, neither the father's nor the children's residence is in dispute. Petitioner moved with the children to Europe where they have lived continuously

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for more than two years. Additionally, there is no doubt that father is neither a California resident or domiciliary <sup>2</sup>.

Petitioner argues that the Respondent is precluded from making any residency argument in this Court because of representations made at numerous other Court appearances and in various pleadings. Petitioner pointed out that in various legal situations Respondent stated that her residence was New York. The Court does not believe that the Petitioner carried his burden to show that these various representations rise to the level of judicial estoppel. As a result, the Court did not place much emphasis on the various other actions, representations and petitions filed in this and other cases.

<sup>2</sup> Respondent argues that the Court should consider Petitioner's failure to comply with various terms under the judgment. As part of this ruling, the Court makes no findings as to compliance, as Petitioner's compliance is not relevant to the jurisdictional issues before the Court.

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The parties relied heavily on IRMO Nurie (2009) 176 Cal.App.4th 478. Both the case at bar and Nurie involve virtually identical legal and factual issues. Nurie quite articulately sets forth the law that controls in this matter and very clearly frames the factual issues before this Court.

Nurie states the governing law as follows:

The exclusive method of determining subject matter jurisdiction in custody cases is the UCCJEA. (§3421, subd. (b).) Under the UCCJEA, a California Court must ‘treat a foreign country as if it were a state of the United States for the purpose of’ determining jurisdiction.’ (§3405, subd. (a).) Nurie, supra, at 490.

Further:

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A Court that properly acquires initial jurisdiction has exclusive, continuing jurisdiction unless one of two subsequent events occurs: (1) a Court of the issuing state itself determines that ‘neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships,’ or (2) there is a judicial determination by either the issuing state or any other state that ‘the child, the child's parents, and any person acting as a parent do not presently reside in the issuing state’. (§3422, subd. (a)(1) & (a)(2).) Nurie, supra, at 490 3

<sup>3</sup> The relevant portion of Family Code section 3422 reads in full as follows:

(a) Except as otherwise provided in Section 3424, a Court of this state that has made a child custody determination consistent with Section 3421 or 3423 has exclusive, continuing jurisdiction over the determination until either of the following occurs:

(1) A Court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and

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The evidence in this case was primarily directed at section 3422 (a)(2). However, the Court notes that section 3422(a)(1) focuses on the children’s connection with California. Given the fact that the children have only spent approximately one week in California in over two years, if these children have any connection to California, it is tenuous at best. However, the Court did not receive enough evidence on this issue to make any findings in this regard. Because the argument in the instant matter focused on 3422(a)(2) the Court’s ruling relies exclusively on that subsection.

that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

(2) A Court of this state or a Court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

The reference to section 3424 is of no moment as neither party claims temporary emergency jurisdiction.

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The sole issue before the Court is whether the Respondent continues to reside in California. If she does not, under the UCCJEA, this Court has lost jurisdiction over these children. If she does, this Court retains jurisdiction over the children.

Respondent readily admitted that she maintains a residence in the state of New York; she claims that she resides in two states for the purpose of UCCJEA jurisdiction: New York and California. Under the current state of the law, she can indeed maintain two residences for the purpose of UCCJEA jurisdiction. Nurie, supra at 499. Therefore, just because she maintains a New York residence does not preclude this Court finding she is also a California resident.

Nurie describes in detail what Respondent must prove to maintain a jurisdictional residence in California:



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Husband claims he never stopped residing in California because he continuously owned a house here, which he kept for his own use and never rented out, even paying a gardener to maintain the grounds in his absence. He always maintained a car, telephones and a fax machine here, paid taxes and utilities here, and had built his career as an electrical engineer and marketing manager in the Silicon Valley. He has lived in California since 1983 and considers it his permanent home. We may infer from his declaration that he maintained furnishings and other personal possessions in his home in Fremont. We infer from the record that he physically resided in California at least from October 2005 to April 2006, and his residence here during other periods has not been precluded. These factors convince us that Husband continuously maintained a residence in California despite his physical presence in Pakistan for prolonged periods. Nurie, supra at 499.

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In light of the facts set forth above, Nurie’s holding is clear and concise:

While a parent's bare intent to return to the decree state may not be sufficient for retention of jurisdiction if he has otherwise moved from the state, we hold that if he maintains a functioning residence in the decree state, available for his own use at all times, he continues to ‘presently reside’ in that state. (emphasis supplied) Nurie, supra, at 499.

The evidence before this Court demonstrates that while the Respondent maintains some connections to California, she does not maintain sufficient ties to establish jurisdictional residence. Respondent clearly has past and current ties to California; but currently she is not a resident of California as the UCCJEA and IRMO Nurie envision.

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It is true that she maintains her long time accountant/ financial manager in Los Angeles. She has various pieces of business and personal finance mail sent to her personal accountant at his business address. She uses this business address and not a “residence” address on her tax returns (both California and New York), various other financial documents and her New York Driver’s license 4. It is apparent to the Court that she is present in California only for business trips and Court appearances.

Petitioner focused on the fact that the Respondent filed taxes in New York as well as California. Respondent is an actor; her work will be found in many locations, all of which may require a filing with the local taxing authority. Further, she can be a resident of two states under Nurie. Interestingly, however, in the one un-redacted California return in evidence, she indicated that she was never resident in California during the tax year.

<sup>4</sup> Courts often look to other factors like voter registration for assistance. She apparently is not registered to vote in any state, so this factor cannot be considered.

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Respondent testified that her California residence was a condominium on the west side of Los Angeles. Apparently, Respondent's parents own a hotel and when Respondent is in Los Angeles, she stays in a condominium that is in some way connected with the hotel. The Court believes that it is insignificant for jurisdictional purposes whether the Respondent owns or rents a home. It may even be insignificant that her parents maintain the financial expenses on the condo. Further, under the correct set of circumstances the Court believes that even a shared residence with a non-family member roommate would be adequate to maintain a jurisdictional residence.

The key fact before the Court is that the condo is not her exclusive residence as Nurie requires. There is no evidence that she (or anyone else) maintains the condo for her exclusive use. In fact, the evidence is that her parents may rent it out as part of their hotel

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business if the space is needed and they have use for it. There is no evidence that she maintains clothing or furnishings on a permanent (or temporary) basis at the condo; in fact the inference from the evidence is that she does not maintain any personal effects of any nature in the condo.

The last time Respondent was in California with the children, she did not spend even one night at the condo, choosing instead to stay at a friend's house. She may have had a good reason for that, but nevertheless, she did not stay at her "residence". The evidence is clear; the Respondent does not maintain a "functioning residence" in California and the Court so finds.

As noted in Court, the UCCJEA does not allow for a good faith or economic necessity exception to its potentially harsh provisions. At the time she initially moved to New York,

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she was filming a television show. When the show ended, she stayed in New York as it is significantly closer to Europe where the children are living. Further, she indicated that it was less expensive to travel to Europe from New York than California. There is no doubt that protracted litigation is both time consuming and expensive. It is certainly understandable that the Respondent resides on the east coast. The issue under the UCCJEA is her place of residence, not the reasonableness or necessity of the decision that got her there.

The Court realizes that Respondent may be in a difficult jurisdictional place; California does not have jurisdiction. The Court makes no finding as to whether there is or is not a potential Hague challenge to Monaco as the children’s “habitual residence” given the language of the judgment.

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In light of the above, the Court relinquishes jurisdiction over the two children as California no longer has jurisdiction under the UCCJEA over the children. The Court does not believe that it is obligated to relinquish jurisdiction to Monaco, only that it acknowledge that it no longer has jurisdiction over the children.

Both parties are to return to Department 64 to pick up the exhibits no later than August 14, 2015. To the extent that they have not signed a stipulation regarding maintenance and destruction of the exhibits pending passage of the appeal period, the parties must do so.

A copy of this minute order is sent via electronic mail on this date to the following addresses:

Fahi Takesh Hallin: [ftakesh@harris-ginsberg.com](mailto:ftakesh@harris-ginsberg.com)

Dena J. Kravitz: [dkravitz@harris-ginsberg.com](mailto:dkravitz@harris-ginsberg.com)

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### CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, Sherri R. Carter, Executive Officer/Clerk of the Superior Court, do hereby certify that I am not a party to the cause herein, and that on this date I served this Minute Order upon each party or counsel named below by depositing in the United States mail at the Courthouse in Los Angeles, California, one copy of the original filed/entered document in a separate sealed envelope to each address shown below with the postage thereon fully prepaid, in accordance with standard Court practices.

Date: July 23, 2015

Sherri R. Carter, Executive Officer/Clerk

By: \_\_\_\_\_  
M. Arnold, Deputy Clerk



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