

**NOTICE: THIS DOCUMENT  
CONTAINS SENSITIVE DATA**

**NO. 43,647**

**IN THE MATTER OF  
THE MARRIAGE OF**

**ANGELA GELBE-PINKUS  
AND  
MARK PINKUS**

**AND IN THE INTEREST OF  
TODD PINKUS, THOMAS PINKUS  
AND LUCY PINKUS, CHILDREN**

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

**IN THE DISTRICT COURT OF**

**510<sup>th</sup> JUDICIAL DISTRICT**

**DENTON COUNTY, TEXAS**

**PLEA TO THE JURISIDCTION AND, IN THE ALTERNVATIVE, MOTION TO  
DECLINE JURISDICTION DUE TO INCONVENIENT FORUM**

COMES NOW Respondent, MARK PINKUS, (“HUSBAND”), who files this his Plea to the Jurisdiction and, in the alternative, Motion to Decline Jurisdiction Due to Inconvenient Forum and, in support of the same would show as follows:

**I.**

**FACTUAL AND PROCEDURAL HISTORY**

1.01 On December 27, 2008 the parties were married in Denton County, Texas.

1.02 On March 1, 2013, the parties’ twin sons, Todd Pinkus and Thomas Pinkus were born in Texas (collectively referred to herein as the “Twins”).

1.03 On June 1, 2018, Husband and the Twins began to reside in San Francisco, California while Wife remained at the parties’ marital residence in Denton, County, Texas.

1.04 Between June 1, 2018 and mid-August 2018, the Twins spent every other week with Husband in San Francisco, California, and every other week with Wife in Denton County,

Texas.

1.05 In mid-August 2018, with Wife's consent, the children began living with Husband full-time in San Francisco and attending kindergarten in San Francisco.

1.06 On November 1, 2018, the parties' daughter, Lucy Pinkus ("Lucy") was born in Texas.

1.07 On December 3, 2018, Wife filed for divorce in Denton County, Texas. At that time, the Texas court entered Agreed Temporary Orders that awarded Wife temporary custody of the children and allowed the Twins to remain in San Francisco for the remainder of the 2018-2019 school year. Lucy remained in Texas with Wife.

## II.

### PLEA TO THE JURISDICITON

#### A. THE LAW

##### 1. Subject Matter Jurisdiction Cannot be Waived or Conferred by Agreement.

The UCCJEA is a subject matter jurisdiction statute. *Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 585 (Tex. App.—Dallas 2006, no pet.). Subject matter jurisdiction cannot be waived or conferred by agreement, can be raised at any time, and must be considered by a court sua sponte. *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004); *see also Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (explaining that subject matter jurisdiction "cannot be conferred upon any court by consent or waiver"). Jurisdiction is determined based on the circumstances as they existed on the date suit was filed. *In re Burk*, 252 S.W.3d 736, 740 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding [mand. denied]). A court must have subject matter jurisdiction over a case to issue a binding judgment. *Id.*

## 2. Home State Jurisdiction Requires 6 Consecutive Months

The UCCJEA makes the “home state” of a child the primary factor in determining which state has jurisdiction over all subsequent child custody proceedings. *In re Dean*, 393 S.W.3d 741, 743 (Tex. 2012). “Home state” means the 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. Tex. Fam. Code §152.102 (7). Specifically, Section 152.102(7) defines “home state” as follows:

“ Home state” means the state in which a child lived with a parent or a person acting as a parent or a person acting as a parent for *at least six consecutive months* immediately before the commencement of a child custody proceeding. . .”

Tex. Fam. Code §152.102 (7). Accordingly, for Texas to be a child’s home state, the *child* must have lived in Texas for six *consecutive* months immediately before the commencement of a child custody proceeding. *See* Tex. Fam. Code § 152.102(7). The Texas Supreme Court has clarified that a child’s physical location is the central factor to be considered when determining a child’s home state. *Powell v. Stover*, 165 S.W.3d 322, 328 (Tex. 2005). The UCCJEA was intended to make the determination of jurisdiction more straightforward. *Id.* at 326. The use of the word “lived” in the statute strongly connotes physical presence. *Id.* The *Powell* court noted it’s significant the legislature used the word “lived” as opposed to “resided” or “was domiciled” when it defined “home state” in the statute since the test for “residence” or “domicile” typically involves an inquiry into a person’s subjective intent. *Id.* The Texas Supreme Court concluded that the Legislature used the word “lived” precisely to avoid complicating the determination of a child’s home state with inquiries into the states of mind of the child or the child’s adult caretakers. *Id.* Specifically, the Texas Supreme Court held:

The Family Code defines "home state" as the state in which a child "lived" with a parent. Tex. Fam. Code § 152.102(7). The word "lived" strongly

connotes physical presence. *See Webster's Third New International Dictionary* 1323 (1961) (defining "live" as "to occupy a home"). We think it significant that the Legislature chose the word "lived" as opposed to "resided" or "was domiciled." The test for "residence" or "domicile" typically involves an inquiry into a person's intent. *See Mills v. Bartlett*, 377 S.W.2d 636, 637, 7 Tex. Sup. Ct. J. 343 (Tex. 1964) ("Volition, intention and action are all elements to be considered in determining where a person resides and such elements are equally pertinent in denoting the permanent residence or domicile."). In our view, the Legislature used the word "lived" "precisely to avoid complicating the determination of a child's home state with inquiries into the states of mind of the child or the child's adult caretakers." *Escobar v. Reisinger*, 2003 NMCA 47, 133 N.M. 487, 64 P.3d 514, 517 (N.M. Ct. App. 2003).

The purposes behind the UCCJEA further suggest that a child's physical location is the central factor to be considered when determining a child's home state. The UCCJEA was intended to make the determination of jurisdiction more straightforward. For instance, the comments to the original version of the UCCJEA, written by the National Conference of Commissioners on Uniform State Laws and adopted substantially unchanged by Texas, state that the UCCJEA should be interpreted to "avoid jurisdictional competition and conflict with courts of other States," to "promote cooperation with the courts of other States," to "discourage the use of the interstate system for continuing controversies over child custody," and to "deter abductions of children." Uniform Child Custody Jurisdiction & Enforcement Act § 101 cmt., 9 U.L.A. 657 (1999). The UCCJEA achieves this purpose by prioritizing home-state jurisdiction, which helps to avoid the jurisdictional competition and conflict that result when courts in different states determine jurisdiction based on subjective factors. *See Welch-Doden v. Roberts*, 202 Ariz. 201, 42 P.3d 1166, 1173 (Ariz. Ct. App. 2002). The UCCJEA was thus intended to give prominence to objective factors. We believe that the UCCJEA should be construed in such a way as to strengthen rather than undermine the certainty that prioritizing home-state jurisdiction was intended to promote, and thus decline to apply a test to determine where a child "lived" based on the parties' subjective intent. *See Escobar*, 64 P.3d at 517 (determining a child's "home state" should not involve "inquiries into the states of mind of the child or the child's adult caretakers"); *see also In re Marriage of Schoeffel*, 268 Ill. App. 3d 839, 644 N.E.2d 827, 829, 206 Ill. Dec. 59 (Ill. App. Ct. 1994) (stating that "the intent of the parties is not controlling for purposes of the [UCCJA]").

*Powell v. Stover*, 165 S.W.3d 322, 326 (Tex. 2005).

**3. Child's Temporary Absence from State does not Count**

Although a temporary absence of a parent is part of the period for home state purposes, there is no provision for a *child's* temporary absence from the state. *In re Tieri*, 283 S.W.3d 889, 893 (Tex. App.—Tyler 2008, no pet.) (emphasis added) (children's temporary absence from state not counted for purposes of home state analysis).

**B. APPLICATION OF LAW TO FACTS**

**1. *Agreed Temporary Order Cannot Confer Jurisdiction***

The parties could not, and did not, agree or consent to this Court exercising jurisdiction to make an initial child custody determination by signing Agreed Temporary Orders in December 2018. The UCCJEA is a subject matter jurisdiction statute, and subject matter jurisdiction cannot be conferred by waiver or agreement. See *Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 585 (Tex. App.—Dallas 2006, no pet.); *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004); see also *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (explaining that subject matter jurisdiction "cannot be conferred upon any court by consent or waiver"). Accordingly, Husband's plea to the jurisdiction can be raised at any time and is ripe for consideration.

**2. *Twins Did not Live in Texas for Six Consecutive Months.***

This court lacks jurisdiction because the Twins did not reside in Texas for six consecutive months prior to the commencement of this proceeding. Under the UCCJEA, a child must have lived in Texas for six *consecutive* months immediately before the commencement of a child custody proceeding. See Tex. Fam. Code § 152.102(7). Although a temporary absence of a parent is part of the period for home state purposes, there is no provision for a *child's* temporary absence from the state. *In re Tieri*, 283 S.W.3d 889, 893 (Tex. App.—Tyler 2008, no pet.) (emphasis added). Here, the Twins began living in California on June 1, 2018, and only visited

Texas periodically until mid-August 2018. The Twins were then enrolled in kindergarten in California, and did not return to Texas prior to the commencement of this proceeding on December 3, 2018. As such, the Twins did not live in Texas for six consecutive months prior to the commencement of this proceeding, and their absence from Texas beginning on June 1, 2018 cannot be counted for purposes of a home state analysis. *Id.* Accordingly, this Court lacks jurisdiction to make an initial child custody determination regarding the Twins and this case should be dismissed to the extent it relates to the them.

### III.

#### **MOTION TO DECLINE JURISDICTION DUE TO INCONVENIENT FORUM**

##### **A. THE LAW**

Pleading in the alternative, even if Texas has jurisdiction to make an initial custody determination (which it does not), the Court may decline to exercise its jurisdiction if it determines that it is an inconvenient forum and that a court of another state is a more appropriate forum. Tex. Fam. Code § 152.207 (a). To determine inconvenient forum, a court must first determine whether it has jurisdiction to make or modify a custody determination. *In re Forlenza*, 140 S.W.3d, 378 (Tex. 2004); *In re T.B.*, No. 02-16-00006-CV, 2016 WL 3889293 (Tex. App.—Fort Worth July 14, 2016, no pet. h.); *see* Tex. Fam. Code Ann. §§ 152.201, .203, .207. After first determining whether Texas has jurisdiction, the court must then allow the parties to present information, shall consider the factors contained in Section 152.207 to determine whether Texas is an inconvenient forum, and whether another state would be a more convenient and appropriate forum. Tex. Fam. Code Ann. § 152.207; *Lesem v. Mouradian*, 445 S.W.3d 366, 372–73, 375 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The statutory factors that the court shall consider include:

- (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) the length of time the child has resided outside this state;
- (3) the distance between the court in this state and the court in the state that would assume jurisdiction;
- (4) the relative financial circumstances of the parties;
- (5) any agreement of the parties as to which state should assume jurisdiction;
- (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

Tex. Fam. Code Ann. § 152.207(b); *Lesem*, 445 S.W.3d at 372–73; *Barbarawi v. Rayyan*, 406 S.W.3d 767, 775 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

## **B. APPLICATION OF LAW TO FACTS**

Here, the Court should decline to exercise jurisdiction over the Twins because it's an inconvenient forum under the circumstances. Tex. Fam. Code § 152.207 (a). Husband would show that there is no family violence between the parties, and the children have resided in California since June 1, 2018 (over eight months at the time of the hearing). The children's school records, recent medical information, and all witnesses regarding the same are located in California. Wife agreed for the children to live in California beginning on June 1, 2018 and to attend kindergarten in California for the remainder of the 2018-2019 school year. Moreover, the parties' both amassed substantial wealth during their marriage and therefore have the financial

ability and flexibility to travel freely between Denton County, Texas and San Francisco, California, which is only approximately three hours away by airplane. As such, there would be no hardship on either party if the suit regarding the Twins went forward in California. For these reasons, this Court should decline jurisdiction and stay these proceedings as they relate to the Twins until this action can resume in California.

**PRAYER**

Respondent, Mark Pinkus, prays that this case be dismissed for lack of jurisdiction as it relates to Todd Pinkus and Thomas Pinkus.

Alternatively, Respondent, Mark Pinkus, prays that this Court decline to exercise its jurisdiction as it relates to Todd Pinkus and Thomas Pinkus due to inconvenient forum.

Respondent, Mark Pinkus, prays for such further relief, general or specific, legal or equitable, to which he shows himself justly entitled to receive.

Respectfully Submitted,

Tisdale, Indelicato & Key  
227 Oak Street, Suite 1200  
Denton, Texas 76201  
Tel: (xxx) xxx-xxxx  
Fax: (xxx) xxx-xxxx  
E-mail: Aimee@TIK.com

By: /s/ Aimee Pingnot Key  
Aimee Pingnot Key  
State Bar No. 24041697  
Attorney for MARK PINKUS,  
Respondent



**NOTICE OF HEARING**

The above motion is set for hearing on February 23, 2019 at \_\_\_\_\_M. in the 510th District Court of Denton County, Texas.

SIGNED on \_\_\_\_\_.

\_\_\_\_\_  
JUDGE OR CLERK

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document has been delivered or forwarded to all counsel and unrepresented persons as listed below, [ ] by personal delivery or receipted delivery service, or [ ] by certified or registered mail, return receipt requested, by depositing the same, postpaid, in an official deposit under the care and custody of the United States Postal Service, or [ ] by facsimile to the recipient's facsimile number identified below, or [ X ] by e-service to the recipient's email address identified below and the electronic transmission was reported as complete, on this the 19<sup>th</sup> day of February, 2019, in accordance with the Rule 21a of the Texas Rules of Civil Procedure:

Karl E. Hays

/s/ Aimee Pingenot Key  
Aimee Pingenot Key