

1986

Wendy Marie Christensen Rawlings v. Mark Douglas Weiner : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
COURT OF APPEALS
KFD
50
A.O.
DOCKET NO. 860274-CA

IN THE UTAH COURT OF APPEALS

WENDY MARIE CHRISTENSEN
RAWLINGS,

Plaintiff/Cross-Appellant,

vs.

MARK DOUGLAS WEINER,

Defendant/Cross-Respondent.

*

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*

REPLY BRIEF OF
CROSS-APPELLANT

Case No. 860274-CA
Priority No. 7

Cross-Appeal from the First District
Court of Box Elder County, State of Utah,
the Honorable Omer J. Call, District Judge

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WENDY MARIE CHRISTENSEN	*	
RAWLINGS,	*	
	*	REPLY BRIEF OF
Plaintiff/Cross-Appellant,	*	CROSS-APPELLANT
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IN THE UTAH COURT OF APPEALS

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	*	
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Plaintiff/Cross-Appellant, Wendy Marie Christensen Rawlings, by and through counsel, offers the following in reply to the Brief of Cross-Respondent.

SUMMARY OF ARGUMENTS

1. Even though the Box Elder District Court is the court of original jurisdiction, the jurisdictional requirements as stated in UCA 78-45c-3 must still be met in order for the court to modify a divorce decree as to custody and visitation matters. Those requirements are not met in this action for the Court to consider a modification of the Decree and the District Court, therefore, does not have jurisdiction.

2. The District Court did not properly consider the jurisdictional matters presented to it nor was the District Court's exercise of jurisdiction consistent with the Utah UCCJA.

3. Even if it were considered that the District Court did have jurisdiction, the District Court did not properly

consider the convenient forum issues to determine if Utah should exercise jurisdiction and the District Court abused its discretion in retaining jurisdiction.

4. Even if it were determined that the District Court had jurisdiction, and at the time properly exercised its jurisdiction, jurisdiction should be transferred to Washington pursuant to the Utah UCCJA due to the retirement of Judge Call and Cross-Respondent's continued harassment through ongoing litigation and custody disputes.

ARGUMENTS

I.

THE FIRST DISTRICT COURT DOES NOT MEET
THE JURISDICTIONAL REQUIREMENTS OF THE
UTAH UCCJA IN ORDER TO RETAIN A JURIS-
DICTION OVER THE MODIFICATION PETITION.

Although the Cross-Appellant may have indicated in her original Brief that Utah may have jurisdiction because it is the decree state, any such recognition is a misstatement and Cross-Appellant strongly argues that the Box Elder District Court, at the time of the Hearing on Cross-Respondent's Order to Show Cause, did not have jurisdiction to hear any issues relevant to custody and visitation as contemplated in the Utah UCCJA.

Cross-Appellant fully recognizes that the Uniform Act prefers the jurisdiction of the decree state over another state in considering modification of custody decrees.

However, it should be further noted that the Act contemplates and requires a continued and ongoing jurisdictional review as matters are brought before the courts regarding modification of decrees. So far, none of the cases cited in either Cross-Appellant's Brief or Respondent's Brief are exactly on point with the instant action. Each of the cases deals with either determining jurisdiction in an original decree, or with the more common situation where one party has moved from the decree state and requests the new home state, the non-decree state, to modify the custody or visitation provisions of the decree state.

In the instant action, the custodial parent has moved from Utah, the decree state, to Washington, the non-decree state. Approximately eighteen (18) months later the non-custodial parent (Cross-Respondent Mark Weiner) filed an Order to Show Cause which included request for the Court to grant him full custody of the parties' five children. The Order to Show Cause was served on the custodial parent, Wendy Rawlings, in Washington. In other words, the non-custodial parent residing in the decree state is requesting the decree state to modify the decree and is requiring the custodial parent to return to the decree state to defend and respond to any such action.

As stated earlier, although the decree state is given preference, that preference is not absolute, and the decree state must still comply with the jurisdictional requirements of the UCCJA in order to modify the Decree.

A closely similar factual case is *SZMYD v. SZMYD*, Alaska, 641 P.2d 14 (1982). In that case, the parties were divorced in Alaska in October of 1977 and the wife was granted custody of the couple's one-year-old child. A year later, in the fall of 1978, the wife and child moved to Washington State. They resided in Washington for two years and then moved to California in early September, 1980. On December 5, 1980, the husband filed a motion in Alaska, the decree state, to modify the custody decree. The wife moved to dismiss the action for lack of jurisdiction, or alternatively, on the grounds that Alaska was an inconvenient forum, which motion the Superior Court denied. The wife sought a review of that denial to the Alaska Supreme Court which stayed the Superior Court proceedings in order to hear her petition.

In reaching the first issue, whether the Alaska trial court had jurisdiction to hear the modification petition, the Alaska Supreme Court ruled that even though the trial court had the continuing right to modify custody decrees, the trial court must always determine whether jurisdiction exists in order to modify a decree (641 P.2d at 17). The Court explained its ruling in the footnotes (No. 7) and stated:

This view is consistent with the uniform act. See *RATNER*, *supra* note 2, at 395:

"Section 14(a) apparently narrows the scope of significant-connection, substantial-evidence, best-interest jurisdiction by confining modification jurisdiction to the initial-decree state if it meets the prerequisites of the Act." (emphasis in original).

In our view, the UCCJA intended that continuing jurisdiction in the original state must rest on some significant connection with a party. See Commissioners' Note to UCCJA Section 14. This is frequently easy to satisfy due to the "significant connection" basis for jurisdiction found in Section 3(a)(2) of the UCCJA. See note 8, *infra*. Alaska's version omits that basis and thus even further narrows both initial and continuing jurisdiction.

This view is also consistent with the language of Section 14 of the UCCJA. That provision prohibits a non-decree state from exercising modification jurisdiction unless "the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act...." (emphasis added). [Statutory citation omitted]. That modification jurisdiction cannot be exercised absent compliance with the jurisdictional prerequisites of Section 3 [Statutory citation omitted]. It is also consistent with the uniform act's underlying purpose that the appropriate forum make custodial determinations, assuming that the "appropriate forum" is substantially defined by which state meets the jurisdictional prerequisites.

Our approach is further consistent with the late Professor Bodenheimer's view that the act was intended "to strengthen the continuing jurisdiction of the state of the initial decree...." Bodenheimer, *supra* note 2, at 214. Reading the provisions together, once there is a decree, one must look first to the issuing state to see if it continues to have modification jurisdiction, i.e., does it still satisfy the act's jurisdictional prerequisites? UCCJA Section 14. If it does, the decree-state has jurisdiction, perhaps exclusively unless it chooses to decline it on inconvenient forum grounds. See Bodenheimer, *supra* note 2, at 216-19, 222-24. (641 P.2d 17).

As stated in the above-citation, Alaska does not include in its jurisdictional requirements the significant-connection test included in Utah's UCCJA, Section 78-45c-3(b), which states as one basis that Utah may assume jurisdiction if:

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state

substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

In determining if the Alaska Superior Court had jurisdiction pursuant to Section 3 of the Act (less the equivalent of Utah's subsection (1)(b) thereof) the Supreme Court of Alaska held that since the wife had recently moved from the State of Washington and was currently residing in California, and since California was not the "home state," the child not having resided in California for six months, no other state had jurisdiction at the relevant time. The Alaska Supreme Court seems to have reluctantly held that the trial court had jurisdiction pursuant to Subsection (a)(4) of Section 3 of the Act (U.C.A. 78-45c-3(1)(d)) because no other state appeared to have jurisdiction. It can be easily read into the holding as dictum, that if the wife had either continued to reside in Washington where she had resided for two years, or if she had resided in California for more than six months at the time the petition to modify was filed in Alaska, thus allowing another state to satisfy the jurisdictional requirements as the "home state," the Alaska Supreme Court would have held that the trial court simply did not have jurisdiction. The Court did, however, conclude that Alaska was an inconvenient forum and directed the trial court to dismiss the petition to modify. A review of the inconvenient forum provisions will be discussed later in this brief.

In reviewing whether the District Court in the instant action had jurisdiction, the Court must review Section 3 of the UCCJA. The jurisdictional requirements are stated as follows:

78-45c-3. Bases of jurisdiction in the State. (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(2) Except under paragraphs (c) and (d) of subsection (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

It is clear from the facts that the only possible basis for jurisdiction in Utah in the instant action would be Section 78-45c-3(1)(b). Utah is not the children's home state (78-45c-3(a)); the children are not physically present in the state and there is no claim for emergency jurisdiction (78-45c-3(1)(c)); and Washington would have jurisdiction under the prerequisites of the act since it is the home state and the children physically reside in Washington (78-45c-3(1)(d)). Therefore, for Utah to have jurisdiction, the requirements of 78-45c-3(1)(b) must be met, and there must be a finding of "significant connections" and "substantial evidence."

While it is conceded that Mark Weiner continues to reside in Utah, it is strongly argued that the children no longer have significant connections with the State of Utah, having, at the time the Order to Show Cause was served, not resided in Utah for eighteen months and having currently not resided in Utah for almost three and one-half years. There is no "substantial evidence" concerning the children's present or future care, protection, training and personal relationships in Utah and it is not in the best interest of the children for Utah to assume jurisdiction.

The significant connection and substantial evidence requirements must further be considered in light of the stated purposes of the Act, one of which is included in Section 78-45c-1(c), which states:

(c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the **CLOSEST CONNECTION** and where **SIGNIFICANT** evidence concerning his care, protection, training and personal relationships is **MOST READILY AVAILABLE**, and that courts of this state decline the exercise of jurisdiction when the child and his family have a **CLOSER CONNECTION WITH ANOTHER STATE**; (emphais added)

Many of the cases cited in Cross-Appellant's Brief further stress that the courts must consider which state has the closest connection and in which state the most significant evidence is most readily available. That was not done by the District Court in the case at bar.

Also, as pointed out in Cross-Respondent's Brief, the original drafters of the Act at least considered the possibility of a situation similar to the instant action. In the Commissioners' Notes on Section 14 (which section deals with modification provisions) the Reporter states:

The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all of the persons involved have moved away, or the contact with the state has otherwise become slight, modification jurisdiction should shift elsewhere. (Emphasis added.)

In the instant action, since the children no longer have the most significant connection with Utah and substantial evidence concerning their future care, etc. cannot be found in Utah, the provisions of 78-45c-3(1)(b) are not satisfied. Furthermore, since no other jurisdictional requirements are

met under Section 3, the District Court did not have jurisdiction to consider the matter of Cross-Respondent's request for change of custody. The rulings of the District Court to the contrary should be reversed and the Order to Show Cause requesting a change of custody should be dismissed.

II.

THE DISTRICT COURT DID NOT EXERCISE JURISDICTION CONSISTENT WITH THE UCCJA.

Cross-Appellant readily recognizes that prior to her moving to Washington in June of 1984, the District Court had heard many matters relative to visitation. As indicated in Cross-Appellant's previous brief and in the recitation of facts in Cross-Respondent's brief, there had been almost a dozen orders to show cause issued or heard in the slightly more than two and one-half years from the time of the divorce until Cross-Appellant moved. Thereafter, the Court modified the decree regarding visitation, which was consented to by Cross-Appellant and was necessary due to the distance involved. That was scheduled on or about October 23, 1984, approximately four months after Cross-Appellant moved to Washington.

Although the Court issued an order directing the clerk to withhold child support payments pending receipt of an address and phone number from Wendy Rawlings, at no time was Wendy

Rawlings' counsel given notice of any such motion nor did the District Court afford Wendy Rawlings an opportunity of a hearing to determine the facts alleged by Mark Weiner. When Wendy Rawlings' counsel became aware of the order and contacted the Court, the matter was clarified.

Cross-Respondent's Order to Show Cause was issued on or about October 23, 1985, but not served on Wendy Rawlings until on or about December 3, 1985.

Since the Washington Court had initially exercised emergency jurisdiction to hear some matters regarding visitation in Washington, the Washington Court recognized that the jurisdictional question would need to be ultimately resolved and informed Cross-Appellant's Washington counsel that it would contact the Utah Court to discuss the matter. Pursuant to Section 14 of the UCCJA, the Washington Court properly recognized that it should defer jurisdiction to Utah unless Utah declined to exercise jurisdiction. In contacting Judge Call, Commissioner Gaddis of the Washington Court was informed that Judge Call desired to retain jurisdiction and thus, Washington elected to defer jurisdiction. Commissioner Gaddis stated in his January 13, 1986 Order Declining Jurisdiction that "Upon communication with said Court it [the Utah Court] has elected and determined to continue exercising sole and exclusive child custody jurisdiction." (See Addendum to Cross-Appellant's Brief.)

Unfortunately, the Utah Court interpreted the discussion between the two judges somewhat differently than the Washington Court. In his Statement and Order dated December 23, 1985, a copy of which is attached to Brief of Cross-Appellant at Page A1, Judge Call stated "... Commissioner Gaddis of said Washington Court contacted this court declining to accept jurisdiction, noted the problems the minor children were having because of the visitation fights, and urged this court to retain jurisdiction for the purpose of enforcing, adjusting or modifying the custody and visitation orders."

In Judge Call's subsequent Memorandum, dated February 26, 1986, in response to Wendy Rawlings' request to partially set aside Judge Christoffersen's Memorandum Decision of December 23, 1985, refusing to transfer jurisdiction allegedly because Washington had declined to take jurisdiction, Judge Call simply stated that the Memorandum Decision of Judge Christoffersen appeared to be "Accurately based on the Washington Court's conclusion that Utah was the proper forum." At no time has Judge Call issued any findings of fact or conclusions of law or otherwise clarified his ruling or even given any basis for his decision to retain jurisdiction. Cross-Appellant's Washington attorney has requested further clarification from Commissioner Gaddis, which clarification will be provided to this Court when received. Cross-Appellant argues that the District Court failed to adequately consider the provisions of the Utah UCCJA and that the court's exercise of jurisdiction was not consistent with the Utah UCCJA.

In *HEPNER v. HEPNER*, 469 N.E.2d 780 (Ind.App. 3 Dist. 1984), the Indiana Appeals Court ruled that the Indiana trial court lacked the power to assume jurisdiction over a modification petition because the trial court failed to seriously address the issue of its jurisdiction under the UCCJA. In that case, the parties were divorced in Indiana some time prior to 1983. Over the next several years following the divorce, petitions and cross-petitions were filed alleging various contemptuous acts regarding visitation and support. The wife and child subsequently moved from Indiana to Illinois and had resided in Illinois for over six months when the wife petitioned the Indiana court to terminate the husband's visitation. When that order was denied in Indiana, the wife filed a similar motion in Illinois, whereafter the husband filed a petition in Indiana requesting that the wife be again held in contempt of court.

Although there is extensive reference to the record and the trial court's discussion with the wife's attorney regarding the provisions of the UCCJA, indicating that the court was attempting to base its decision claiming jurisdiction pursuant to the Act, the Indiana Appeals Court ruled that the trial court had not properly considered the issue of jurisdiction, both as to simultaneous proceedings and as to inconvenient forum consideration. The Appeals Court stated:

The [trial court] clearly failed to follow the Act. It was correct in its statements concerning the purpose

of the UCCJL. However, we would refer the court to other policies behind the act which are to: [avoid jurisdictional competition, promote cooperation with the courts of other states, assure that litigation concerning the custody of a child take place in the state with the closest connection and most significant evidence and to decline jurisdiction when a child and his family have a closer connection with another state, and to promote and expand the exchange of information and other forms of mutual assistance between the courts.]"

The District Court in the instant action also failed to follow the Act and further failed to even consider the purposes or provisions of the Act by never giving any statements, reasons, or hints why the Court ruled that it had jurisdiction.

III.

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER THE INCONVENIENT FORUM PROVISIONS OF THE ACT.

Another factor which needs to be pointed out in showing that the trial court was not exercising jurisdiction consistent with the Act is the court's failure to address or even consider the inconvenient forum issues as required in UCA 78-45c-7, which states in relevant to part:

(1) A court which has jurisdiction under this act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) If another state is or recently was the child's home state;

(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) If the parties have agreed on another forum which is no less appropriate;

(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 78-45c-1.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

As indicated earlier, the Alaska Supreme Court in *SZMYD*, *supra*, looked very closely at the inconvenient forum issues in determining whether Alaska should exercise its jurisdiction. The Alaska court noted that the purpose of the inconvenient forum provisions were to, "Encourage jurisdictional restraint whenever another state appears to be in a better position to determine custody of a child." Commissioners' Note to UCCJA Section 7." 641 P.2d at 19. The Alaska Supreme Court had remanded the case to the trial court for a statement of reasons why the trial court had not granted the motion since it was difficult to determine where there had been an abuse of discretion without such reasons.

After remand, the trial court provided the following reasons:

1. The State of Washington, which was the child's prior home state, was not a convenient forum since none of the parties at the time of the initiation for this request for custody modification lived in Washington. The mother and child living in California for only a short time and the father having his residence in the State of Alaska. California was not the home state of the child.

2. The child was born in the State of Alaska and lived in Alaska for almost three years. The child has had more contact with the State of Alaska than California.

3. The father has had more contact with Alaska than the mother has had with California.

4. More people involved with the child were from the State of Alaska than the State of California.

5. Substantially, the relations on both the father's and the mother's side were living in Alaska in the Fairbanks area at the time of the request for custody modification. The only people involved in California were the mother and child.

6. The objection by the mother as to the cost is not a factor since the father is required to pay the cost of transportation as well as arrangements for the mother while in Alaska." 641 P.2d at 19-20.

The Supreme Court of Alaska then indicated that other jurisdictions, on substantially similar facts, had stayed or dismissed proceedings in favor of a more appropriate forum. The court noted that the underlying theme in those decisions was the focus on the child's situation and connections with a particular forum; that is, which forum is best in light of the child's best interest? The court then analyzed the decision of WILLIAM L. v. MICHELLE P., 99 Misc.2d 346, 416 N.Y.S.2d 477 (Fam.Ct. 1979), where a New York court concluded that New York should not exercise its jurisdiction even though the decree

had been entered in New York, because the children and mother had not been in New York for approximately four years.

The Alaska Supreme Court then reviewed the facts relevant to its case, including home state, closer connections, source of evidence, relative hardship, and contravention of UCCJA purposes, and held that it was an abuse of the trial court's discretion not to decline to exercise jurisdiction. The Alaska Supreme Court held that California was the more appropriate forum in light of the child's best interest, even though the child had only resided in California, at the time of the hearings, for approximately six months.

Likewise, the Louisiana Appellate Court in *MILLER v. MILLER*, 463 So.2d 939 (La.App. 2 Cir. 1985) held that Louisiana was not the appropriate forum since Louisiana had not been the child's home state for over four years and in spite of the fact that the child had visited in Louisiana with his father on numerous occasions. In that case, the parties were divorced in Florida after which the father moved to Louisiana. The mother then moved with the child to Massachusetts. The father thereafter sought to modify the Florida decree in Louisiana. The Appeals Court held that even though Florida was no longer the child's home state, Louisiana was not the most appropriate forum to determine custody matters since the child had closer and more recent significant connections with Florida. The court also held that the trial court had failed to make the statutory inquiries regarding the jurisdictional questions and further added:

The applicant [the custodial mother] should not be required to defend modification of the Florida custody decree in a state which had not been the child's home state in over four years. Ms. Miller had the right or privilege under the forwarded decree to move herself and the child to Massachusetts. Ms. Miller should not be required to litigate in Louisiana simply because Florida no longer may be the home state.

In the instant action, Cross-Appellant has cited numerous specific reasons why Washington is the most convenient forum to determine issues regarding custody and visitation of the children (See Brief of Cross-Appellant, Argument II, Page 26-31). In addition, Mark Weiner has had counsel appear in his behalf at Washington proceedings. He travels to Washington numerous times during the year for visitation (for which the court has allowed travel expenses) and has had frequent contact with school teachers and officials, church and other acquaintances in the Seattle area. In contrast, Wendy Rawlings is in Utah perhaps one or two times a year. The trial court's failure to even consider those matters, let alone issue findings of fact relative to such issues, is an obvious abuse of discretion and a failure by the court to exercise jurisdiction consistent with the purposes and intent of the Utah UCCJA.

IV.

THE PROVISIONS OF THE UTAH UCCJA DO NOT ALLOW THAT JURISDICTION BE USED AS HARASSMENT

As stated in UCA Section 78-45c-1(d), one of the purposes of the UCCJA is to "discourage continuing controversies over

child custody in the interest of greater stability of home environment and of secure family relationships with the child. This has been emphasized in the most recent opinions of our Supreme Court dealing with petitions to modify divorce decrees to change custody, from HOGGE v. HOGGE, 694 P.2d 51 (Utah 1982) through KRAMER v KRAMER, 57 Utah Adv.Rep. 14 (May 15, 1987). Pursuant to what has now become the majority opinion of the Utah Supreme Court in determining modification child custody orders, the trial court must first make the threshold determination whether there has been a significant change in circumstances sufficient to warrant the reopening of the custody decree, or as stated in KRAMER. supra:

"The change in circumstances threshold is high to discourage frequent petitions for modification of custody decrees. The test was designed to 'protect the custodial parent from harassment by repeated litigation,' and to protect the child from 'ping-pong custody wars.'" (See HOGGE v HOGGE, 694 P.2D 51, 53, 54 (Utah 1982).

The Court further stated:

"The essential premise of our recent child custody cases is the view that stable custody arrangements are of critical importance to the child's proper development [citations omitted]. The two part HOGGE test is founded upon that premise. No matter how well intentioned, changes in custody could do more harm than good [citations omitted]. For this reason when a trial court is asked to determine whether there has been a change of circumstances sufficient to warrant reopening a custody decree, ordinarily it must focus exclusively on the parenting ability of the custodial parent and the functioning of the established custodial relationships." 57 UAR at 15.

In order for the trial court to be consistent with the rulings from our Supreme Court dealing with petitions to

change custody, it is essential that the court first determine if there has been the necessary change in circumstances by receiving testimony dealing with the parenting ability of the custodial parent and the functioning of the established custodial relationship. That can only be accomplished where there is evidence available to provide such testimony. That testimony cannot be provided to the court when the custodial parent and the children have not resided in the state for a significant period of time, such as in the instant action.

At the hearing on Defendant's request for change of custody, Defendant called six witnesses, Wendy Rawlings, himself, Nels Sather, Charles Burbank, Dr. Kim Openshaw, and Dr. Jack M. Reiter. Other than the parties to this action, only Dr. Reiter had had any substantial contact with Plaintiff or the children in excess of two years. Furthermore, Dr. Reiter was a psychiatrist residing in Seattle, Washington and appointed by the Washington Court to do home study-psychological evaluation, and was familiar to the Washington Court. In other words, Defendant brought his primary witness from Washington to a hearing in Utah.

Plaintiff was only able to have herself, her husband, and her parents, Wendell and Rosalee Christensen, testify on her behalf. Plaintiff was not able to afford the expense of bringing other therapists, counselors, school and church officials, and other people to testify.

The same will be true for any future hearings. The District Court is simply unable to make the kinds of

determinations as is required by the Utah Supreme Court and in compliance with the Utah UCCJA.

Furthermore, as noted earlier, Defendant has filed numerous orders to show cause requiring Plaintiff to appear in court. After Defendant originally filed the appeal in this action, Defendant again filed a Petition to Modify the decree requesting custody, which Petition has been stayed pursuant to court order at Plaintiff's request pending an outcome of this appeal. In other words, if this Court were to uphold the District Court's decision regarding jurisdiction, Plaintiff will again be forced to defend herself in the District Court regarding the petition for change of custody, which is an absolute contravention of the purposes of the Utah UCCJA.

As stated in RATNER, PROCEDURAL DUE PROCESS AND JURISDICTION TO ADJUDICATION (a) Effective-Litigation Values vs. The Territorial Imperative; (b) The Uniform Child Custody Jurisdiction Act, 75 N.W.U.L.Rev. 363, 398-99 (1980), the optimum-evidence home-state [Washington] need not be subordinated to the decree-state [Utah] jurisdiction in all situations. "Only when concealment of the child prevents enforcement by the winner within six months should anti-harassment require the apparent home state to yield modification jurisdiction to another forum." Ratner also indicates that removal, retention, and deprivation of visitation rights can be inhibited through the enforcement of the Act in the home-state without the subordination of the home-state

jurisdiction by a blanket preference to the decree-state that impairs the access to evidence and the anti-harassment purposes of the Act. (See RATNER, *supra*, 398)

It should also be further noted that Judge Call, since the hearing on this action, has retired from the bench. Therefore, any claims that the District Court had made prior rulings and was therefore familiar with the action, although never specifically stated by the court, no longer have any force and effect and are completely moot. A new judge in Utah would have no better insight or ability to decide visitation and custody matters than would a Washington judge. However, since the children reside in Washington, since the most significant and closest connections with the children are in Washington, and since the most substantial evidence concerning the children's current and future welfare is found in Washington, Washington is in a much better position than is a Utah court to make any determinations regarding any such modifications. Therefore, this matter should be transferred to the Washington court for further consideration of any custody or visitation matters.

CONCLUSION

In order for the District Court to have heard any action regarding custody and visitation, it was incumbent upon the court to make a determination whether it was vested with

jurisdiction. Although the District Court felt that it had jurisdiction, at no time was any reason given for such a ruling or any findings of fact or conclusions of law issued by the court. Even had there been such, it is clear pursuant to UCA 78-45c-3 that the District Court did not have jurisdiction to hear the action.

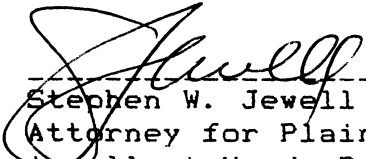
Even if it were held that the District Court did have jurisdiction, it is abundantly clear that it should not have exercised any such jurisdiction but should have deferred to the jurisdiction of the Washington pursuant to UCA 78-45c-7 since all of the factors indicated therein for determining the most convenient forum clearly favored the Washington court. None of the factors favor the Utah Court.

Finally, even if this court had jurisdiction at such time and had been the most convenient forum, since the trial judge has retired from the bench, and since Defendant/Cross-Respondent has indicated that he will continue to pursue his quest to obtain custody of the children at all costs, including the children's well being, it is incumbent upon this court to transfer jurisdiction of custody and visitation matters in this action to the Washington court in accordance with the purposes and provisions of the Utah UCCJA.

Therefore, this court should reverse the ruling of the District Court regarding jurisdiction and/or transfer

jurisdiction of custody and visitation matters to the
Washington court.

DATED this 18 day of December, 1987.



Stephen W. Jewell
Attorney for Plaintiff/Cross-
Appellant Wendy Rawlings

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of
the foregoing REPLY BRIEF OF CROSS-APPELLANT to Larry E.
Jones, HILLYARD, ANDERSON & OLSEN, 175 East First North,
Logan, Utah 84321 and deposited the same in the U.S. Mail,
postage prepaid envelope this 18 day of December, 1987.