

1997

# Mark Andrew Larson v. Karin Sofia Ohlander : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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MARK ANDREW LARSON,

Plaintiff/Appellee,

v.

KARIN SOFIA OHLANDER,

Defendant/Appellant.

APPELLANT'S BRIEF

Priority No. 4

Appeal No. 970375-CA

*Trial Ct. Judge: Schofield*

*Fourth District Court, Utah County  
State of Utah*

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OCT - 9 1997

APPEALS

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## JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction pursuant to U.C.A. §§78-2a-3(h)(1996). The order appealed from is a final order disposing of all claims of all parties.

## ISSUES PRESENTED ON APPEAL

1. Whether the trial court erred in failing to postpone a custody ruling until after all jurisdictional appeals are concluded? The standard of review from a denial of a continuance request is abuse of discretion. *Christenson v. Jewkes*, 761 P.2d 1375 (Utah 1988)("[t]rial courts have substantial discretion in deciding whether to grant continuances").

2. Does Utah have subject matter jurisdiction over this child custody dispute? An appellate court reviews an exercise of subject matter jurisdiction *de novo*. *Crump v. Crump*, 821 P.2d 1172 (Utah Ct. App. 1991).

## DETERMINATIVE AUTHORITY

The determinative statutory authorities for this appeal is as follows:

U.C.A. §§78-45c-3 (1990):

- (1) A court of this state . . . 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 . . .
  - (b) it is in the best interest of the child that a court of this state assume jurisdiction because:

- (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 . . .
- (d) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with Subsection (1)(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 custody of the child . . .

U.C.A. §§78-45c-23(1980):

The general policies of this act extend to the international area. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

## STATEMENT OF THE CASE

### Nature of the Case:

This appeal is from a final order of the Fourth Judicial District Court, Hon. Anthony W. Schofield granting Plaintiff/Appellee (hereafter Mr. Larson) custody of Julia, the child of the parties, over the objection of Defendant/Appellant (hereafter Ms. Ohlander).

### Course of Proceedings, and Disposition in the Court Below:

Mr. Larson filed a complaint in the Fourth District Court, seeking a divorce, and custody of Julia, his daughter. After trial, the Fourth District Court, J. Anthony W. Schofield, entered Findings of Fact, Conclusions of Law, and a Decree of Divorce Nunc Pro Tunc. This Decree gave custody to Mr. Larson.

### Statement of Facts:

Mr. Larson met Ms. Ohlander in Sweden while serving an L.D.S. mission, in 1986. (R. 45). Ms. Ohlander visited Mr. Larson in Utah, after his return from his mission, in 1989. (Id.). The two

were married on October 27, 1989, in South Jordan, Utah. (Findings of Fact No. 1, R. 578). Mr. Larson is a United States citizen, while Ms. Ohlander is a citizen of Sweden. (Id.) They established their marital home in Utah County, Utah. (Id.). The parties had a child, Julia, born on August 13, 1990, in Provo, Utah. (Findings of Fact No. 4, R. 5). At the end of 1990, the parties went on vacation with Julia to Sweden to visit the family of Ms. Ohlander for Christmas. (Findings of Fact No. 11, R. 577). At the end of the visit, Ms. Ohlander decided to remain in Sweden with Julia, and went into hiding with Julia. (Id.) Mr. Larson eventually returned to the United States without either Ms. Ohlander or his daughter. (Id.)

Ms. Ohlander commenced a divorce and custody action in the Sandviken District Court in Sweden on January 30, 1991. (Findings of Fact No. 12, R. 576; R. 46). Mr. Larson was served with process from the Swedish court, but failed to respond. (R. 37). On May 10, 1991, the Sandviken District Court ordered temporary custody to Ms. Ohlander, by default. (Id.; R. 391) However, over the next few months, Mr. Larson persuaded Ms. Ohlander to return to Utah. Ms. Ohlander arrived with Julia in Utah on June 3, 1991. (Findings of Fact No. 13, R. 576). The parties lived together with Julia in Utah until January 13, 1992, when Ms. Ohlander moved to Sweden with Julia, without Mr. Larson's consent. (Findings of Fact No. 14, R. 576).

Upon her return to Sweden, Ms. Ohlander continued the prior divorce and custody action which had been filed in Sweden in 1991. (Findings of Fact No. 15, R. 576). Mr. Larson, who is fluent in Swedish (Finding of Fact No. 26, R.573), appeared in the action in Sandviken, with counsel provided by the Swedish Legal Aid Authority, and consented to a final divorce. (R. 40-46). He contested custody and visitation, but on November 13, 1992, the Sandviken District Court continued temporary custody in Ms. Ohlander, granting Mr. Larson "access" [visitation] for one month each



year. (R. 43; R. 390). Mr. Larson appealed this ruling to the Court of Appeal for Southern Norrland, through his Swedish counsel. (R. 35-38). On January 12, 1993, the Court of Appeal ordered that Mr. Larson's visitation be limited to four weeks, spaced throughout the year, in Sweden only, and under Ms. Ohlander's supervision. (R. 35; R. 390).

Mr. Larson exercised this visitation, under the terms of the Court of Appeal ruling, in May, 1993. (Finding of Fact No. 20, R. 575; R. 390). The visitation in Sweden occurred during specified daytime hours on seven consecutive days, under Ms. Ohlander's personal supervision. (Id., R. 574). Sometime after this May, 1993, supervised visitation, Mr. Larson decided that the Swedish courts lacked jurisdiction to decide custody of Julia. (Finding of Fact No. 21, R. 574). As a consequence, he filed an action for divorce in Utah County in June, 1993. (Id.). Despite the fact that he had just been in Sweden visiting Julia in the home of Ms. Ohlander, Mr. Larson obtained an order for service by publication upon Ms. Ohlander on the basis that he did not know her whereabouts. (R. 54). Default was entered against Ms. Ohlander, and a Decree of Divorce entered on October 21, 1993. (Id.).

On November, 1993, Mr. Larson, now remarried, went to Sweden to visit Julia. (Findings of Fact No. 24, R. 573). This visitation was again under the supervision of Ms. Ohlander, during specified daytime hours, and mostly in her apartment. (Id.). Mr. Larson, however, was able to trick Ms. Ohlander, and to flee Sweden with Julia. (Id.; R. 390). Julia then lived in Utah County for the next two months with Mr. Larson. (Finding of Fact No. 25, R. 573).

On January 26, 1994, Ms. Ohlander filed a petition pursuant to the Hague Convention in the

federal district court of Utah. (Finding of Fact No. 29, R. 572).<sup>1</sup> This petition sought the return of Julia to Sweden pursuant to 42 U.S.C. §§ 11601-11610 (1994). Judge Bruce S. Jenkins issued an *ex parte* order directing any peace officer in Utah to deliver custody of Julia to Ms. Ohlander, pending a hearing. (Id., R. 571-2). This order from Judge Jenkins included a direction not to remove Julia from Utah. In compliance with that order, Mr. Larson delivered Julia to Ms. Ohlander on January 30, 1994. (Finding of Fact No. 30, R. 571). However, on February 1, 1994, Ms. Ohlander returned to Sweden with Julia. (Finding of Fact No. 31, R. 571).

Once back in Sweden, Ms. Ohlander refused to appear again before Judge Jenkins, and as a result, was found in contempt on August 15, 1994. (Finding of Fact No. 32, R. 570-571). In October, 1994, Mr. Larson filed an application with the Swedish Central Authority for the return of Julia. (R. 645). Additionally, on December 19, 1994, Mr. Larson filed the instant divorce proceeding in Utah County, seeking a divorce and custody of Julia. (R. 1-3). Ms. Ohlander appeared specially, contesting the jurisdiction of the Utah County court to decide custody. (R. 14-17). On February 6, 1995, the previous Decree of Divorce obtained by Mr. Larson by default was set aside and the action dismissed. (R. 56).

In response to Mr. Larson's Hague application in Sweden, Ms. Ohlander moved to dismiss her own petition before Judge Jenkins. (R. 645). Additionally, on January 27, 1995, Mr. Larson filed his own Hague petition in the Swedish courts, "for the return of Julia to the U.S.A." (R. 370). Judge Jenkins denied Ms. Ohlander's motion to dismiss solely on the basis of her contempt. (R. 644). Judge Jenkins then conducted a bench trial on the Hague issue of "habitual residency". (Id.). On

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<sup>1</sup>See *Ohlander v. Larson*, 113 F.3d 1573 (10<sup>th</sup> Cir. 1997) for detailed discussion of the nature and purposes of a petition under the Hague convention relating to child custody disputes.

June 12, 1995, he entered a judgment declaring that Julia's "habitual residency" had always been in Utah. (R. 248, 253). He further directed the Utah County state district court to assume and determine custody of Julia. (R. 248, 252). Ms. Ohlander appealed to the Tenth Circuit from that ruling by Judge Jenkins, and sought a stay of enforcement, which he denied. (Finding of Fact 45, R. 565).

On the other side of the Atlantic, on July 5, 1995, the Gavleborg County Administrative Court denied Mr. Larson's Hague petition. (Finding of Fact No. 43, R. 565-566; R. 231). Mr. Larson appealed to the Sundsvall Administrative Court of Appeal, which ruled in Mr. Larson's favor on August 25, 1995. (Finding of Fact No. 43, R. 565; R. 224-231). This court of appeal ordered the return of Julia to Mr. Larson by August 31, 1995. (Id.) However, Ms. Ohlander went into hiding, pending her appeal to the Swedish Supreme Administrative Court. (Finding of Fact No. 44, R. 565). During the Hague proceedings in Sweden, Julia was in great fear of being removed from her mother, relatives and school, and packed off to Utah. (Finding of Fact No. 44, R. 565; R. 408). This was largely due to the sudden abduction Mr. Larson perpetrated the prior November. (Id.) Published accounts, which included interviews with Ms. Ohlander and Julia, graphically set forth the climate of fear created by Mr. Larson's prior abduction. (R. 410-418; cf. Finding of Fact No. 42, R. 566). Ms. Ohlander's appeal to the Swedish Supreme Administrative Court was granted, and that court ruled that Julia's habitual residency, at the time of her removal to the U.S.A. in November, 1993, was in Sweden. (R. 363-372; Finding of Fact No. 48, R. 564). This ruling was issued on December 20, 1995. (Id).

Meanwhile, pursuant to Judge Jenkins's ruling on habitual residency, Ms. Ohlander's counsel withdrew his special appearance (R. 150), and answered the complaint for divorce and custody. (R.

181-184). This answer contained the affirmative defense that the Utah County court lacked subject matter jurisdiction over the custody request. (R. 183). On September 22, 1995, Mr. Larson sought a temporary custody order from the court in the present case. (R. 270-271).<sup>2</sup> Mr. Larson submitted an affidavit in support of his order to show cause alleging that Ms. Ohlander refused contact with him. (R. 266-269). This affidavit covered his attempts to see Julia while he was in Sweden in 1995 during the Swedish Hague proceedings. (Id.) Apparently, Mr. Larson failed to seek any visitation relief from the Swedish district court in Sandviken. (Id.) Ms. Ohlander averred that she had never denied Mr. Larson his court-ordered visitation in Sweden. (R. 390). She further averred that she had been the primary physical caretaker of Julia since her birth. (R. 388-390). At that time, Julia was well-adjusted in her environment, and has a close relationship with her grandmother and other relatives. (R. 388). Julia attended kindergarten while Ms. Ohlander attended the university in the morning. (R. 389). In the afternoon, Ms. Ohlander personally provided care for Julia. (Id.) Julia speaks only Swedish. (Id.) Despite having been ordered to do so by the Swedish district court in Sandviken, Mr. Larson has never supported Julia financially at all. (R. 388).

In spite of the supportive and successful environment in Sweden for Julia, on February 1, 1996, Judge Schofield issued a ruling changing temporary custody of Julia to Mr. Larson. (Finding of Fact No. 49, R. 563; R. 434-438). This assertion of child custody jurisdiction by Judge Schofield was based exclusively on Judge Jenkins' order. (R. 437). There was no analysis to support jurisdiction under the U.C.C.J.A. (Id.). Judge Schofield based his ruling changing custody to Mr. Larson in large part on Mr. Larson's affidavit claim that he was denied visitation, which was not ordered by the Swedish court. Of course, this ruling was despite the affidavit of Ms. Ohlander that she provided all

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<sup>2</sup>Ms. Ohlander's present counsel appeared on October 12, 1995.

court-ordered visitation. Ms. Ohlander did not comply with the change of custody order from Judge Schofield and was held in contempt. (R. 442).

Mr. Larson sought further punishment of Ms. Ohlander, for her refusal to turn Julia over to him. (R. 460-461). This matter was heard on May 23, 1996. Ms. Ohlander's counsel, in response, made an oral motion for appointment of a guardian ad litem. (R. 462). Judge Schofield took the oral motion under advisement, and continued the hearing until June 11, 1996. Ms. Ohlander's counsel thereafter made a written request for a guardian ad litem. (R. 463-470). Judge Schofield granted appointment of a guardian ad litem, and ordered Ms. Ohlander's counsel to recommend local counsel to act in that capacity. (Finding of Fact No. 52, R. 562; R. 480). Pursuant to a request from Ms. Ohlander's counsel, attorney Lori Fowlke agreed to act as guardian ad litem, and she was appointed to act as such. (R. 482-483). At the hearing on June 11, 1996, Mr. Larson asked for telephone visitation. (R. 479). Judge Schofield ordered that Ms. Ohlander telephone Mr. Larson each Thursday at 10:00 a.m. M.S.T. (R. 481). Pursuant to that order, Ms. Ohlander telephoned Mr. Larson for Julia at least 13 of the 19 scheduled times before trial. (Finding of Fact No. 50, R. 553).

Ms. Ohlander's counsel arranged to have the guardian ad litem's cost funded by the Swedish government. (R. 496). The guardian traveled to Sweden, and personally visited Ms. Ohlander, Julia, and other persons in Sweden with knowledge of Julia's circumstances. (Finding of Fact No. 52, R. 562). She prepared a detailed report to the court, submitted and received by Judge Schofield at trial. (Defendant's Ex. 10.; R. 551).

Trial was held on October 18, 1996, over Ms. Ohlander's objection, and request to wait until after the Tenth Circuit ruled on her appeal from Judge Jenkins' order. (R. 510-518). Ms. Ohlander failed to appear at trial in person; however, she was represented by her counsel. (R. 552). The

guardian ad litem, Mr. Larson and his current wife were the only witnesses. (Id.). Judge Schofield, predictably, found that the evidence favored Mr. Larson's claim for custody. (R. 550). On May 14, 1997, Judge Schofield entered "canned" Findings of Fact and Conclusions of Law prepared entirely by Mr. Larson's counsel (R. 553-579, and a Decree of Divorce (R. 580-585). This appeal followed on June 13, 1997.

Subsequent to the decree entered by Judge Schofield, the Tenth Circuit vacated Judge Jenkins' findings and rulings, and ordered that Ms. Ohlander's Hague petition in Utah be dismissed without prejudice. *Ohlander v. Larson*, 114 F.3d 1531 (10<sup>th</sup> Cir. 1997). As a result of the Tenth Circuit's ruling, Ms. Ohlander has filed a motion pursuant to Utah R. Civ P. 60(b), to set aside the final judgment in this case. (R. 592-595). Oral argument is scheduled on October 17, 1997. Mr. Larson has petitioned to the United States Supreme Court for a writ of certiorari to the Tenth Circuit, which petition Ms. Ohlander has opposed. The petition for certiorari has not yet been disposed of, as of the date of this brief.

#### SUMMARY OF ARGUMENT

Judge Schofield abused his discretion by proceeding to trial to determine custody, despite the pending appeal to the Tenth Circuit concerning the "habitual residency" of Julia. Had he waited, the current confusion, and conflicting rulings, might have been avoided.

Judge Schofield erred by failing to independently determine whether Utah had subject matter jurisdiction under U.C.A. §§78-45c-3(a)-(d) (1990). Neither Judge Jenkins nor the parties could confer that jurisdiction upon him. The undisputed facts show that none of these statutory bases for jurisdiction is present. Accordingly, the custody ruling should be set aside.

## ARGUMENT

### I

#### **Judge Schofield Should Not Have Proceeded To Trial Until The Habitual Residency Issues Were Resolved After Appeal**

Ms. Ohlander made a motion to continue the trial until after the Tenth Circuit ruled on the Hague petition, and the "habitual residency" determination. However, Judge Schofield felt obligated to assert jurisdiction based upon Judge Jenkins' order. It is understandable, given the language in Judge Jenkins' ruling, that Judge Schofield felt that way. However, Judge Jenkins' did not, and cannot, determine whether jurisdiction was proper under the U.C.C.J.A. Judge Schofield had an obligation to independently determine whether he had subject matter jurisdiction. Neither the parties, nor Judge Jenkins, could confer subject matter jurisdiction on the court. The need for this independent analysis was more critical because Judge Jenkins' order was not final, and was the subject of an ultimately successful appeal by Ms. Ohlander.

Given the highly unusual procedural posture of this case, Judge Schofield should have delayed making a custody determination until the "habitual residency" issue was finally determined. The error of proceeding in haste is apparent by the situation now presented, with both parties appealing (again) in different courts, with the latest appellate edition now pending before Judge Schofield by way of post-judgment motion. The best course this court can take is to vacate the findings, conclusions, and decree entered by Judge Schofield, and to direct him not to hold a final trial until all appeals that may relate to subject matter jurisdiction are over.

### II

#### **Utah Lacks Subject-Matter Jurisdiction Over This Custody Dispute.**

Subject-matter jurisdiction must be based upon one of the statutory bases set forth in U.C.A. §§78-45c-3 (1990), which adopts the U.C.C.J.A. The fact that this case involves a foreign country, Sweden, does not change the analysis. U.C.A. §§78-45c-23 (1980) applies the same analysis to custody determinations by foreign countries as with other States of the United States of America. Judge Schofield made no findings that he had jurisdiction under any portion of the U.C.C.J.A. Consideration of each statutory basis for jurisdiction shows that there is no subject matter jurisdiction in this court.

The facts in the record show that the child, Julia, was not present in Utah during the six continuous months prior to December 19, 1994. Recall that the last time Julia was physically present in Utah for six continuous months was from June, 1991, until January, 1992. After Julia's abduction to Utah in November, 1993, Ms. Ohlander obtained possession of Julia with Judge Jenkins' assistance on January 30, 1994. On February 1, 1994, she left Utah with Julia, and has failed to return since. Judge Schofield therefore did not have "home state" jurisdiction over Julia. U.C.A. §§78-45c-3(1)(a)(i) and (ii).

There is no "best interest" jurisdiction, under U.C.A. §§78-45c-3(1)(b)(ii). Julia has lived in Sweden since January, 1992. With the exception of Mr. Larson, all relevant witnesses to Julia's situation live in Sweden, including Ms. Ohlander and Julia. This is amply borne out by the fact that the guardian ad litem was required to travel to Sweden to interview those persons, other than Mr. Larson and his wife, with relevant knowledge of Julia's circumstances. The only significant connection this litigation has with Utah is the fact that Mr Larson lives here. The best interest of Julia cannot be served by Utah asserting custody jurisdiction, and having her fate decided by default, because her mother will not appear here. Contrast this to the Swedish courts, which have had Mr.



Larson's personal appearance and evidence to consider before making custody decisions. There is no basis in the record for a "best interest" subject matter jurisdiction.

There is no jurisdiction based upon physical presence, U.C.A. §§78-45c-3(1)(c). Julia was not present in Utah when this action was commenced in December, 1994, and was not present when Mr. Larson first sought an order of temporary custody in September, 1995. She is not abandoned, and there is no emergency to protect her because of neglect.

Finally, there is no basis in the record for jurisdiction under U.C.A. §§78-45c-3(1)(d). Sweden has exercised jurisdiction, and certainly has not declined jurisdiction in favor of Utah.

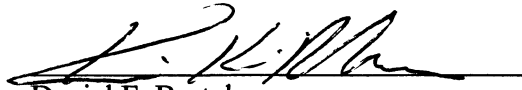
### CONCLUSION

The entire custody litigation in this case is built upon a single jurisdictional predicate: Judge Jenkins' direction that a Utah state district court assume and decide the custody question. Judge Jenkins did not examine whether there was subject-matter jurisdiction under the U.C.C.J.A. Judge Schofield acted pursuant to Judge Jenkins' direction, which abdicated his obligation to independently determine jurisdiction. Neither the parties nor Judge Jenkins could confer subject-matter jurisdiction upon Judge Schofield.

RELIEF REQUESTED

This court should do one of two things: either vacate the final judgment, and remand with directions to grant a continuance until all jurisdictional appeals are over; or simply reverse on the issue of subject-matter jurisdiction and remand for dismissal of that portion of the case.

DATED this 9 day of October, 1997.

A handwritten signature in black ink, appearing to read "D. F. Bertch", written over a horizontal line.

Daniel F. Bertch

Kevin K. Robson

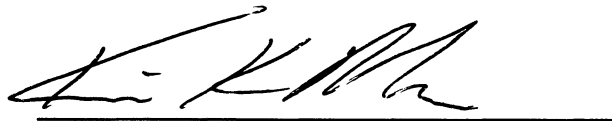
Attorneys for Appellant Ms. Ohlander

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of October, 1997, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

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