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BRIEF

PREME COURT

HE STATE OF UTAH

LARRY EUGENE PLUMB,

Plaintiff/Respondent

vs. Case No. 14465

PENELOPE JEANNE PLUMB,

Defendant/Appellant.

BRIEF OF RESPONDENT

An appeal from a decision of the T
District Court in and for Salt Lak
County, State of Utah, the Honorab
Gordon R. Hall, presiding.

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MAY 14 1976
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

LARRY EUGENE PLUMB,)
)
Plaintiff/Respondent)
)
vs.)
) Case No. 14465
PENELOPE JEANNE PLUMB,)
)
Defendant/Appellant.)
)
_______________________________)

BRIEF OF RESPONDENT

NATURE OF THE CASE

Where the custodial parent, after voluntarily relinquishing the right to custody of the parties' minor child, deceitfully removes the minor child from the forum state (Utah), does the forum state have continuing jurisdiction to adjudicate the child's custody.

DISPOSITION IN THE LOWER COURT

The District Court of Salt Lake County issued an Order against the appellant to show cause why custody of the parties' minor child, Scott Plumb, should not be changed from the appellant to the respondent. Appellant, domiciled in South Dakota, specially appeared to contest the District Court of Salt Lake County's jurisdiction. Judge Gordon R. Hall denied

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appellant's Motion to Dismiss for Lack of Jurisdiction and on January 13, 1976, awarded custody of Scott Plumb to respondent.

RELIEF REQUESTED ON APPEAL

Respondent prays that the court affirm Judge Hall's January 13, 1976, order which awarded respondent custody of Scott Plumb, the parties' minor child.

FACTS

The parties to this appeal were married on July 26, 1971, in Wilmot, South Dakota (R.1). On April 9, 1974, the parties were granted a Decree of Divorce by the District Court of Salt Lake County, State of Utah (R.8). By the terms of the Decree, the appellant was awarded custody of the parties' minor child, Scott Plumb, subject to the respondent's visitation rights (R.9). Sometime subsequent to the Decree, but prior to August, 1974, appellant voluntarily relinquished custodial rights of the minor child to the Utah State Division of Family Services, which department placed the child with respondent's parents (R.4; Sup. R.2). During the month of August, 1974, appellant surreptitiously and without permission or consent of the Division of Family Services and without

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informing respondent's parents, removed the minor child from the State of Utah (R.24; Sup. R.2). On April 4, 1975, appellant's parents petitioned the Fifth Circuit Court in Robert County, South Dakota, requesting to be appointed the guardian of the parties' minor child alleging inter alia, that appellant had neglected, abandoned and had done nothing for the minor child (R.24, 25; Sup. R.2). On April 17, 1975, respondent filed an Order to Show Cause with the District Court of Salt Lake County, requesting that the Decree of Divorce be modified to award respondent the care, custody and control of the parties' minor child (R.24, 25, 26; Sup. R.2). Appellant, served by mail in South Dakota, pursuant to Rule 4(f) of the URCP, made a special appearance to contest the court's jurisdiction (R.34, 39, 41-45, 54, 55). On June 27, 1975, Judge Gordon R. Hall denied appellant's Motion to Dismiss for Lack of Jurisdiction and on January 13, 1976, entered an Order amending the Decree of Divorce of April 9, 1974, by awarding the care, custody and control of Scott Plumb to the respondent (R.62, 63). Scott Plumb presently is within the jurisdiction and residing with the respondent Larry Plumb in Salt Lake City, Utah.

ARGUMENT

THE UTAH COURT HAD CONTINUING JURISDICTION TO MODIFY AND

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AMEND ITS ORIGINAL DECREE OF DIVORCE RESPECTING THE CUSTODY OF THE PARTIES' MINOR CHILD.

Section 30-3-5, Utah Code Annotated (1953) states in pertinent part:

> "The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children, and their support and maintenance, or the distribution of property as shall be reasonable and necessary."

Section 30-3-5 recognizes that the Utah Courts maintain continuing jurisdiction to hear custody disputes subsequent to Divorce Decrees. This continuing jurisdiction is in addition to the broad equitable powers conferred upon the court to determine rights of the parties, and custody of children.

POINT I

THE UTAH COURT RETAINED JURISDICTION OVER THE PARTIES' MINOR CHILD BECAUSE IT WAS HIS STATE OF DOMICILE.

Judge Hall in the Findings of Fact and Conclusions of Law filed with his January 13, 1976, Order stated:

> "That prior to August, 1974, defendant had voluntarily placed Scott Plumb in the care of the Utah State Division of Family Services. The Division of Family Services had then placed Scott Plumb in the home of plaintiff's parents, Mr. and Mrs. Larry Plumb. On or about August, 1974, defendant took Scott Plumb to South Dakota without permission or consent of the Division of Family Services and without informing Mr. and Mrs. Larry Plumb. (Sup. R.2)."

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In this finding, it is apparent that the lower court based jurisdiction, in part, on the determination that Utah was Scott's state of domicile. (Sup.R.2). The finding was based upon the respondent's affidavit as well as testimony given by the appellant and a representative of the Utah Division of Family Services at a hearing held on May 28, 1975 (R.24-25; 32, 34). That testimony as capsulized in respondent's affidavit was that even though appellant had been awarded custody of Scott Plumb in the original Decree of Divorce, appellant voluntarily relinquished her custodial and parental rights and obligations to the Utah State Division of Family Services. That Division in turn placed Scott in the custody of respondent's parents. (R. 24-25).

It is a well settled legal principal that when the custodial parent gives custody of a minor child to another with the intention of relinquishing parental rights and obligations, the abandoned child's domicile is that of the other parent who has not abandoned him. See Restatement 2nd, Conflicts of Law, Section 22, Comment C; See also Lyons vs. Egan, 110 Colo. 227, 132 P.2d 794 (1942). Since Scott already was domiciled in Utah at the time appellant relinquished her custodial rights, Scott retained domicile in the State of Utah and remained subject to the jurisdiction of the Utah Courts.

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It should be noted that the question of what constitutes abandonment relates to the rules of domicile and that the forum court decides that issue based upon its own standards and rules. See Restatement 2nd, Conflicts of Law, Section 8 and 13. It should also be noted that during the course of the proceedings below, appellant failed to rebut the allegations contained in respondent's affidavit, failed to introduce testimony in evidence subsequent to the May 28, 1975, hearing and failed to make timely objection to the District Court's finding relating to the abandonment of the parties' minor child. Therefore, the issue of whether Scott was actually abandoned is not before this court.

Not only did Scott retain a domicile in the State of Utah, by virtue of the respondent's domicile, but when he was abandoned, he became a ward of the State and the State, exercising its sovereign power of guardianship, was authorized to exercise parental authority and consequently retain jurisdiction over the minor. See Johnson vs. Johnson, 105 Ariz. 233, 462 P.2d 782 (1969) (43 CJS Infants Section 4); cf Hentz vs. Hentz 371 Mich. 335, 123 NW 2d 757 (1963).

Further, appellant's surreptitious and deceitful taking of the parties' minor child out of the jurisdiction does not defeat the District Court's jurisdiction or vitiate appellant's

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voluntarily relinquishment of custodial responsibilities to the Division of Family Services. As noted, the jurisdiction of the Utah Court has never been relinquished. Scott remained domiciled here in Utah during the time appellant lived here and she relinquished her custodial rights over Scott prior to departing from the jurisdiction. Thus, where the jurisdiction of the Utah Court had attached in the original divorce proceedings, it cannot be affected by the residential change of a non-custodial parent, 24 Am Jur 2d, Divorce and Separation Section 8,13 and 8,24. In Lassiter vs. Wilson, 207 Ala. 699, 93 So. 598 (1922), the Alabama Court held that once jurisdiction had attached, the subsequent removal of an infant beyond the territorial jurisdiction of the court does not affect jurisdiction. See also Greef vs. Greef, 6 Wis. 2d 269, 94 NW 2d 625 (1959).

It is generally well accepted that under the "clean hands" doctrine, a court from a sister state will refuse to exercise jurisdiction over a child deceptively brought into the state to defeat the jurisdiction of a domiciliary court. In Leathers vs. Leathers, 328 P.2d 853 (1958), a mother deceptively brought the children into California from Illinois, the children's state of domicile, and immediately petitioned the California court to grant her custody of the minor children. On appeal,

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the California court refused to entertain jurisdiction because the mother seeking relief in the California court had come to the court with "unclean hands", Id. at 858. See Also Bowman vs. Bowman, 125 Cal. at 602, 13 P.2d 1049, 14 P.2d 558 (1932), In Re: Cameron's Guardianship, 66 Cal. App. 2d 884, 153 P.2d 385 (1944); In Re: Kyle, 77 Cal. App. 2d 634, 176 P.2d 96 (1947); Application of Dehning, 135 Cal. Ap. 2d 635 287 P.2d 782 (1955); 13 ALR 2d at 318 and 319.

Based upon the court's finding that Scott was domiciled in Utah and subject to the supervision of the Division of Family Services, he therefore was subject to Utah jurisdiction and Judge Hall's Order of January 13, 1976, should be affirmed by this court. See Sampsell vs. Superior Court, 32 Cal. 2d 763, 777, 197 P.2d 739, 748 (1948).

POINT II

BY STATUTE, THE LOWER COURT, HAVING JURISDICTION OVER THE PARTIES TO THE ORIGINAL DIVORCE DECREE HAD CONTINUING JURISDICTION TO MODIFY AND AMEND THE CUSTODY PROVISIONS.

As previously noted, Section 30-3-5 grants the lower court "continuing jurisdiction to make subsequent changes or new orders with respect to . . . the custody of children . . . ." Appellant argues at length the minority view that the Utah court may exercise "continuing jurisdiction" only when the child is domiciled within the State's territory of jurisdiction. Since the

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lower court found Scott to be domiciled with the State, appellant argues a position upon which this court could affirm the lower court's order.

Assuming arguendo, that the court had found that Scott was not domiciled in Utah, the great weight of authority holds that Utah still had jurisdiction to modify or amend its own Decree. This authority is based upon the proposition that where a court had original jurisdiction over the parties involved in a divorce action, the court retains continuing jurisdiction to modify or amend the custody provisions of its original decree. See Hentz vs. Hentz, Supra.; Davis vs. Davis, 1 Cal. Rptr. 923 (1960); Lyerla vs. Lyerla, 403 P.2d 99 (Kans. 1965); Conrad vs. Conrad, Mo. App. 296 SW 196 (1927); Hersey vs. Hersey, 27 Mass. 545, 171 NE 815, 70 Atl. 518 (1930), Tinker vs. Tinker, 134 Okl. 97, 290 P. 185 (1930); Van Gundy vs. Van Gundy, 244 Iowa 488, 56 NW 2d 43 (1952), Levell vs. Levell, 183 Or. 39, 190 P.2d 527 (1948); Sherwood vs. Sherwood, 48 Wash. 2d 128, 291 P.2d 674 (1955); Graves vs. Wooden, Mo. App. 291 SW 2d 665 (1956), 27B CJS Divorce, Section 317 (1)(c), pages 533-534, (1959) and 9 ALR 2d 457 to 458.

Typical of the cases supporting the majority view is the 1960 California Case of Davis vs. Davis, Supra. In that case a California court had granted the parties a divorce with the

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mother being given custody of the parties' minor children. After the Decree, the mother remarried and with the children moved to the State of Oklahoma. The father, being denied visitation rights, sought and obtained from the California court an Order to Show Cause against the mother. After hearing, the California court modified its Decree and awarded custody to the father. The wife appealed, arguing that because the children were domiciled in Oklahoma, the California court had no jurisdiction to change custody. Affirming the modified order, the California Supreme Court opined that by statute:

> ". . . jurisdiction is exclusively reserved to the divorce court in California to modify its custody awards and our courts have agreed that the fact that the children later become domiciled in another jurisdiction does not deprive the court of jurisdiction to modify its custody awards previously made." Id. at 924.

This reasoning is applicable to the case at bar. The Utah court had original jurisdiction over the parties to the divorce action and dissolved their marital obligations. By statute (§30-3-5) the Utah court retained jurisdiction to modify the custody provisions of the Decree even though the minor child had been removed from the jurisdiction.

It is significant that the California court in Davis, Supra, rejected the reasoning of the Montana court in the case

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of Application of Enke, 129 Mont. 353, 287 P.2d 19, Cert. denied sub nom. 350 US 923, 76 S. Ct. 212, 100 L.ed. 808 (1944), which is relied upon by appellant, because it represented a minority view. The court further recognized that the Enke case was not in harmony with Sampsell vs. Superior Court, Supra, (also relied upon by appellant) because Sampsell held that "courts of two or more states may have concurrent jurisdiction over the custody of a child". (Citations omitted) Id. at 925.

Similarly, in Hentz vs. Hentz, Supra., a mother who was domiciled in Texas returned to Michigan, the court granting the original divorce, and petitioned the court for a change of custody. The facts indicate that after the parties were divorced in Michigan, the father and children moved to Illinois and established domicile there. Affirming the modification of the Decree, the Michigan court indicated that by statute:

> ". . . there is a continuing authority and jurisdiction in the court granting a Decree of Divorce to alter its provisions as to child custody. . . . that continuing jurisdiction cannot be determined by action of one of the parties in taking the children, either with or without statutory or court permission, out of the state and causing them to be domiciled elsewhere." Id. at 762.

As further justification of this position, the court continued:

> "In this, as in all cases involving minors custodial control, 2 principles of law are involved. One is the natural right of a parent or parents to the custody of their

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> child or children. . . . but this right is not absolute. For children too have rights and when they are violated by the parents in the exercise of their custodial control, then the children become subject to the judicial control as wards of the court." Id at 762.

This reasoning is particularly appropriate in the present appeal because not only did the appellant violate her custodial control, by relinquishing her right of custody to the state agency, she also sought to insulate her activities by removing the child from the jurisdiction. Thus under its broad equitable powers and its original jurisdiction, the Utah court had the right to modify the custodial rights of the parties and to protect the rights of the children involved.

In Lyerla vs. Lyerla, 403 P.2d 989 (1965), Kansas had a statute which gave the court jurisdiction to modify custody if "the court has previously exercised jurisdiction to determine the custody of a child who was at the time domiciled in the state". Factually, Kansas had granted the parties a divorce and placed the parties' minor children in the mother's custody. On permission of the court, the mother removed the children to Nevada. Due to visitation disputes, the father petitioned the Kansas court for change of custody. While the court recognized it had actual jurisdiction over one of the parties' minor children, it also stated that because the District Court had

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previously exercised jurisdiction over the child's custody when the divorce was granted, the trial court by statute could exercise continuing jurisdiction. It further noted that this right of continuing jurisdiction would alone justify the court's actions. Id. at 993.

It should also be noted that the Kansas court indicated that the statutory change which provided for continuing jurisdiction where the court had previously exercised jurisdiction supplanted and therefore overruled the decision relied upon by the appellant in Leach vs. Leach, 184 Kansas 335, P.2d 435 (1959).

CONCLUSION

On appeal, appellant is requesting this court to reverse an order in which the District Court, exercising continuing jurisdiction, modified the custody provisions of its original divorce decree. In essence, the appellant is asking this court to ignore the provisions of §30-3-5, UCA which specifically grants to District Courts that power.

Appellant argues that the District Court had no authority to modify the decree because the parties' minor child was not physically within the state, a situation brought about by the appellant's ignoble act. However, the District Court rightly found that even though Scott Plumb had been removed

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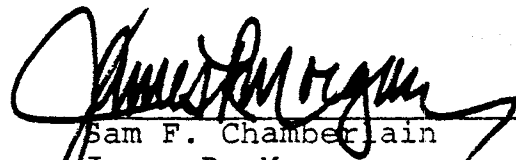
from the jurisdiction, Utah remained his State of domicile. On this basis the District Court acted properly in exercising jurisdiction to modify the original divorce decree. Respondent respectfully requests that this court affirm Judge Gordon R. Hall's January 13, 1976, Order.

DATED this 12th day of May, 1976.

Respectfully submitted,



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