

2009

Korilee Lilly v. Aaron Lilly : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KORILEE LILLY,
Petitioner-Appellee,

v.

AARON LILLY,
Respondent-Appellant.

Case No. [REDACTED]

BRIEF OF THE APPELLANT

Appeal From Final Judgment Issued By
The Third District Judicial Court, Salt Lake County
The Honorable Judge Glenn K. Iwasaki

ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

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STATEMENT OF JURISDICTION

This court has appellate jurisdiction under Utah Code Ann. § 78A-4-103(2)(h).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. **Issue:** Does the term “residence” in the Uniform Interstate Family Support Act mean where a military service-member parent *legally* resides or where the soldier *physically* resides even if he is only there under compulsion because of military orders?

Standard of Review: Statutory interpretation is a question of law. Brinkerhoff v. Brinkerhoff, 945 P.2d 113, 115 (Utah App. 1997). A correction of error standard applies. Id. No deference is given to the trial court’s interpretation. Id.

Issue Preserved: R:53-54; 91; 126-128; 168-174; 188-191; 199-214.

2. **Issue:** Do Utah military service-members retain their Utah residence under the UIFSA even if the military deploys them to serve outside the state of Utah?

Standard of Review: Statutory interpretation is a question of law. Brinkerhoff, 945 P.2d at 115. A correction of error standard applies. Id. No deference is given to the trial court’s interpretation. Id.

Issue Preserved: R:53-54; 91; 126-128; 168-174; 188-191; 199-214.

3. **Issue:** Did the court below erroneously decline subject-matter jurisdiction to modify the parties’ registered child support order?

Standard of Review: Jurisdiction is a question of law. Case v. Case, 2004 UT App 423, ¶ 5, 103 P.3d 171. A correction of error standard applies. Id. No

deference is given to the trial court's determination. Id.

Issue Preserved: R:53-54; 91; 126-128; 168-174; 188-191; 199-214.

4. **Issue:** Did the court below exceed its discretion by ordering Husband to pay Wife's attorney's fees and costs?

Standard of Review: Normally abuse of discretion. Bolliger v. Bolliger, 2000 UT App 47, ¶ 26, 997 P.2d 903. However, a discretionary decision premised on a flawed legal conclusion constitutes a per se abuse of discretion, Lund v. Brown, 2000 UT 75, ¶ 9, 11 P.3d 277, and conclusions of law are reviewed under a correction of error standard without deference to the trial court's decision. *See Brinkerhoff*, 945 P.2d at 115.

Issue Preserved: R:262-266; 318-322; 430-437.

5. **Issue:** Does this court retain authority to judicially review whether the court below mistakenly declined jurisdiction in the first place notwithstanding California's *subsequent* issuance of a modified child support order?

Standard of Review: Inapplicable because the court below never ruled on this issue. Even if it had, preclusion presents a question of law this court reviews under a correction of error standard without any deference to the court below. Gillmor v. Family Link, LLC, 2010 UT App 2, ¶ 10, 647 Utah Adv. Rep. 3.

Issue Preserved: R:439-532.

DETERMINATIVE STATUTES

Resolution of the issues presented on appeal is governed by the following provisions of the Uniform Interstate Family Support Act (the “UIFSA”). Both California and Utah have adopted substantially the same version of this uniform act.

“A tribunal of this state that has issued a child-support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child-support order if the order is the controlling order, and:

(a) at the time of the filing of a request for modification, this state is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued. ...”.

California Family Code § 4909 and Utah Code Ann. § 78B-14-205(1)(“**Section 205**”)

“If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order.”

Utah Code Ann. § 78B-14-613(1) and California Family Code § 4962 (“**Section 613**”).

STATEMENT OF THE CASE AND RELEVANT FACTS

This is a proceeding to modify a sister-state’s child support order in Utah pursuant to the Uniform Interstate Family Support Act. The court below dismissed this case after concluding it lacked subject-matter jurisdiction. That erroneous determination is the subject of this appeal.

When reviewing a dismissal for lack of jurisdiction where the trial court relied on documentary evidence without conducting an evidentiary hearing, this court accepts the plaintiff’s facts as true and resolves any disputes in plaintiff’s favor. *See Neways, Inc. v. McCausland*, 950 P.2d 420, 422 (Utah 1997).

Background on the Parties

Appellant Aaron Lilly (“**Husband**”) is a United States Marine from Utah. (R:53, 138-145). Husband was born, raised, and graduated high school in Utah. (R:466). Husband enlisted in the Marine Corps in Utah in 1994. Id. On September 1, 2001, Husband married Appellee Korille Lilly (“**Wife**”) in Utah. Id.

During Husband’s service in the military, the Marine Corps has deployed him to serve at duty stations throughout the world such as Russia, Germany, Slovenia, Japan, Thailand, the Philippines, and California. (R:294). Despite these numerous transfers, Husband has always held himself out as a resident of Utah by, among other things, paying Utah taxes on his military pay (R:153-156; 159-160), maintaining his Utah drivers license (R:136), the right to vote in Utah elections (R:127), listing his home as Kearns, Utah on military records (R:141), and declaring his intent to return to live in Utah once released from active-duty military service. (R:126-127, 468). It is impossible for Husband to serve within Utah because the Marine Corps does not have a base in Utah. (R:467-468).

Although Husband is, for the time being at least, stationed in California, it is a judicially noticeable fact that he is subject to the orders of his superior officers and can be transferred at any time at their whim. *See Teague v. Third District Court*, 289 P.2d 331, 333 (Utah 1955). Therefore, Husband’s presence in California is presumptively temporary because of his active-duty status.

While Husband was deployed to California under military orders, Wife tried to file for a divorce against him in Utah. (R:487). Wife claims she could not because she was not

living in Utah at the time. Id. Undaunted, in April of 2005, Wife filed for a divorce in California instead. Id. Although Husband was still a resident of Utah and only in California because of military orders, he did not oppose Wife's divorce suit going forward in California. (R:468). The parties' California Decree of Divorce contains no finding that Husband ever established a domicile in California during the course of his deployment there. (R:4-50). Rather, the decree simply notes Husband had a "place of residence" to exercise parent-time in both San Diego *and* in Salt Lake City. (R:8).

On June 12, 2005, Wife returned to live in Utah along with the parties' minor child. (R:179, 468). Wife and the parties' minor child have legally and physically resided in Utah ever since. Id.

The parties eventually reached a settlement in Wife's California divorce proceeding and the court issued a Decree of Dissolution of Marriage on December 6, 2006. (R:4-50). This Decree provided, among other things, that Husband would pay Wife \$1,000 per month in child support based on her earning no monthly income at the time. (R:12-13).

Following the divorce, Wife obtained gainful employment in Utah. (R:100-101, 258). Accordingly, Husband desired to modify child support to take into account Wife's higher income. (R:53-54). Husband also desired to transfer and modify the parties' child support order in Utah given the fact he still legally resided in Utah and Wife had re-established her residence in Utah. Id.

The Utah Proceeding

On November 13, 2007, Husband, acting *pro se*, registered the parties' California Divorce Decree in the Third District Court for Salt Lake County, Utah, to begin the process of modifying that order in Utah. (R:1-3). Pursuant to the Uniform Interstate Family Support Act and Uniform Child Custody Jurisdiction and Enforcement Act, Husband gave Wife twenty (20) days to oppose registration of their California Divorce Decree in Utah. *See* Utah Code Ann. § 78B-14-606. Wife never contested registration and the California Decree was subsequently registered as a Utah court order. (R:163).

On November 27, 2007, Husband, still acting *pro se*, filed a "Petition to Modify Custody Order" asking the Utah court to modify child support, albeit with an unconventional caption. (R:53-54). Husband then filed an amended "Parentage Petition" on December 27, 2007 renewing his request to modify child support. (R:59-77).

On December 3, 2007, the California court conducted a hearing on Wife's motion to increase Husband's child support obligation in California and denied her motion based on the fact Husband was moving the Utah court to modify child support. (R:105-106). The California court ruled that:

"If Utah refuses to exert jurisdiction over the issue [of modifying child support then] either party may file their motion to be heard before this [California] court. If no motion has been brought in Utah for modification of child support, either party may file a motion requesting modification of child support to be heard before this court." (R:106)(emphasis added).

Wife subsequently moved the Utah court to dismiss Husband's Parentage Petition. (R:86-88). At the hearing on Wife's motion on March 26, 2008, the Domestic Relations

Commissioner remarked that Utah might lack subject-matter jurisdiction to modify child support because of Husband's military deployment in California. (R:388, Hrg. Transcr. 9:22-11:16 (March 10, 2008)). Nevertheless, the court declined to dismiss the Petition to modify child support. Id. Instead, the court held a Parentage Petition was an improper mechanism to modify child support. Id. at 11:14-12:1. Accordingly, the court granted Husband leave of court to submit an amended Petition to modify child support. Id. at 12:4-11.

Husband then retained counsel in Utah and, on June 25, 2008, filed an amended petition to modify child support in Utah asserting Utah had subject-matter jurisdiction under Utah Code Ann. §§ 7B-14-205 and 613 because both parents and their child legally resided in Utah and neither party had a California residence. (R:126-134). Husband explained that his physical presence in California was merely temporary on account of his military deployment, that he had maintained his legal residence in Utah, and that he intended to return to Utah following his release from military service. (R:126-127).

Rather than waiting for Utah to decide whether it would assert jurisdiction, Wife ignored the California court's order deferring the question of jurisdiction to Utah and, on or about July 29, 2008, renewed her motion for California to increase Husband's child support obligation.

On August 18, 2008, Husband filed a motion asking the Utah court, among other things, to decide whether it would assert subject-matter jurisdiction. (R:168-174). At the September 17, 2008, hearing on Husband's motion, the Utah Commissioner denied

Husband's motion and held the UIFSA looks only at where a military service-member parent is physically stationed regardless of where his legal residence might be. (R:386, Hrg. Transcr. 24:9-27:5, 28:1-30:4 (September 26, 2008)). Accordingly, the Commissioner concluded Utah lacked subject-matter jurisdiction to modify child support as long as Husband remained stationed in California even though his Wife and daughter resided in Utah. Id. Husband filed a timely objection to the Commissioner's recommendation on September 26, 2008 and requested a hearing before the District Court Judge. (R:199-214).

On or about September 27, 2008, Wife moved the Utah court to compel Husband to pay all her attorney's fees and costs because she prevailed on the question of whether Utah should have accepted jurisdiction or not. (R:216-217). Husband opposed the motion. (R:262-266, 319-322).

On September 30, 2008, after Wife informed the California court that Utah had declined jurisdiction, California granted Wife's motion to increase Husband's child support and issued a modified support order. (R:484-500). The California court's stated basis for retaining jurisdiction was (1) because Husband made a "general appearance" litigating jurisdiction in California, (2) because Husband did not object to Wife registering the Utah child support order in California, and (3) because Husband was physically stationed in California. (R:485-488). However, the California court made no finding that Husband was ever domiciled in California. (R:484-499).

On October 22, 2008, the Utah Commissioner ordered Husband to pay all of Wife attorney's fees and costs because she prevailed on the jurisdictional dispute. (R:323-325).

Although the court found her fees were reasonable and Husband had the ability to pay, the court made no finding that Wife needed help paying her legal expenses. Id.

On October 28, 2008, the Utah District Court denied Husband's objection to the Commissioner's recommendation on the issue of jurisdiction, (R:315-316), and later denied his objection to the award of attorney's fees and costs. (R:360-361).

Following the resolution of several post-judgment matters and entry of a final appealable judgment, Husband timely appealed the Utah trial court's decision (1) that the residence of a Utah military-service member under the UIFSA is where the military stations that soldier, (2) that the UIFSA looks only to the physical and not legal residence of Utah service-members, (3) that Utah lacked subject-matter jurisdiction over this matter, and (4) ordering Husband to pay Wife's attorney's fees and costs. (R:559-584).

SUMMARY OF THE ARGUMENT

The Uniform Interstate Family Support Act (the "UIFSA") is a uniform act adopted by all fifty states for the purpose of ensuring interstate child support modification and enforcement laws are uniform across the country. The UIFSA is premised on the idea that only one state can have subject-matter jurisdiction to modify a child support order at any given time based on the "residence" of each parent. Because the purpose of the UIFSA is to narrowly restrict jurisdiction to a single state, the term "residence" must mean *legal* residence (of which there can only be one) as opposed to *physical* residence (of which there can be many). Construing "residence" as *legal* residence in the context of

the UIFSA is an acceptable plain-meaning interpretation because the UIFSA is a national law, and nationally “residence” in domestic relations statutes is construed as *legal* residence. Tellingly, every appellate court to consider what “residence” in the UIFSA means has uniformly treated it as *legal* residence. To disregard the compelling need to interpret the UIFSA in a consistent manner across state lines would promulgate further interstate jurisdictional conflicts and would promulgate absurd results by forcing courts to disregard common sense and consider military service-members deployed to, for example, Iraq as having an Iraqi residence under the UIFSA.

Second, it is undisputed that Husband was a bona-fide and actual resident of Utah at the time he enlisted in the Marine Corps in Utah. Because Husband has maintained his ties to Utah throughout his military service by, among other things, paying Utah taxes on his military pay, the right to vote in Utah elections, maintaining his Utah drivers license, and because he plans to return to Utah once released from military service, Husband’s legal residence presumptively remains in Utah.

Therefore, because Husband legally resides in Utah and because Wife and the parties’ child reside in Utah, Utah has subject-matter jurisdiction to modify the parties’ child support order under Section 613 of the UIFSA. Because the court below held otherwise based on Husband’s military deployment in California, its judgment must be reversed. Likewise, the trial court’s order commanding Husband to pay attorney’s fees and costs must also be reversed because it is premised on a flawed legal conclusion.

Wife cannot use claim preclusion to sustain the otherwise erroneous judgment of

the court below based on California's issuance of modified child support order *after* the court below mistakenly declined jurisdiction. California deferred the question of which state should exercise jurisdiction to this state in its initial ruling. Therefore, this court retains authority to judicially review whether it was error for the court below to decline jurisdiction and, finding such error, to reverse that decision while giving full faith and credit to California's judgment delegating the question of jurisdiction to Utah. The Restatement (Second) of Judgments authorizes this court to deny preclusive effect to a *subsequent* judgment made in reliance on an erroneous decision by the court below that would substantially infringe on the appellate authority of this tribunal and its power to ensure lower courts are correctly following the law.

For these reasons, the judgment of the court below must be reversed.

ARGUMENT

"From the Halls of Montezuma to the shores of Tripoli," military service-members are regularly moved across the globe as they fight to keep our nation safe from harm. As a result, Utah service-members and their families are often faced with great uncertainty when asked where their "residence" is.

The question posed by this appeal is whether, under the Uniform Interstate Family Support Act (the "UIFSA"), a Utah military service-member retains his residence in Utah even though the military orders him to serve outside Utah's borders for years at a time. For the reasons discussed in this brief, the answer is that a Utah service-member retains

his residence in Utah throughout the duration of his military service absent clear and convincing proof the service-member intends to abandon his Utah residence and permanently live elsewhere. Inasmuch as the court below held otherwise and mistakenly concluded it lacked jurisdiction because of Husband's military deployment to California, its judgment must be reversed.

This brief is divided into five parts. Because subject-matter jurisdiction is always a threshold issue, Case v. Case, 2004 UT App 423, ¶ 6, 103 P.3d 171, Husband will first discuss (1) why the term "residence" and its variations in the UIFSA means *legal* residence, (2) that he still *legally* resides in Utah, and therefore (3) Utah has subject-matter jurisdiction under Utah Code Ann. § 78B-14-613. Next, Husband will show (4) the court below exceeded its discretion by ordering Husband to pay Wife's attorney's fees and costs, and (5) California's *subsequent* reliance on the erroneous judgment of the court below carries no preclusive effect. Based on these points and the authorities discussed herein, the judgment of the court below must be reversed.

I. "RESIDENCE" IN THE UNIFORM INTERSTATE FAMILY SUPPORT ACT MEANS *LEGAL* RESIDENCE.

The question of whether the court below erroneously declined subject-matter jurisdiction to modify Husband's child support order is governed by the Uniform Interstate Family Support Act (the "UIFSA"). Case, 2004 UT App 423 at ¶ 7. The UIFSA is a uniform law Congress compelled all fifty states to adopt in order to ensure child support modification and enforcement laws are uniform across state lines. Id. at ¶¶ 7-8. This appeal presents a question of first impression: does the term "residence" in the

context of the UIFSA mean where a military-service member parent *physically* or *legally* resides?

The Utah Supreme Court explained that to resolve questions of statutory interpretation:

“[w]e look first to the plain language of the statutes to determine their meaning and to discern the intent of the legislature. We also examine the purpose of the statute and its relation to other statutes. Provisions within a statute are interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters. We do so because a statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each party or section should be construed in connection with every other part or section so as to produce a harmonious whole. Moreover, we avoid an interpretation that would embrace a result so absurd that it could not have been intended by the legislature.” Berneau v. Martino, 2009 UT 87, ¶ 12, 646 Utah Adv. Rep. 30 (internal citations and quotations omitted).

When determining whether a statutory term or phrase is ambiguous, a court must not read those words in isolation from the rest of the statute. FDA v. Brown & Williamson, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). The plain meaning – or ambiguity – of certain words or phrases may only become apparent when read in context with the rest of the statute. Id. (*citing* Brown v. Gardner, 513 U.S. 115, 118, 115 S.Ct. 552 (1994)) (“Ambiguity is a creature not of definitional possibilities *but of statutory context.*”)(emphasis added).

Finally, this court must remain mindful that the UIFSA is no ordinary Utah law. Because the purpose of the UIFSA is to make interstate child support enforcement and modifications laws uniform across the country, Case, 2004 UT App 423 at ¶¶ 7-8, the Utah Legislature has instructed Utah courts that “[i]n applying and construing it

consideration *must* be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” Utah Code Ann. § 78B-14-901 (emphasis added). Accordingly, this court always looks at how its sister-states have construed the UIFSA to ensure Utah’s UIFSA remains consistent with its sister-states. Case, 2004 UT App 423 at ¶¶ 16-17.

With these rules in mind, we turn to the main statutes at issue. Section 205 of the UIFSA provides that the state which issued an original child support order (in this case, California) retains “exclusive, continuing jurisdiction” to modify its order so long as it remains the “residence” of either parent or their child. *See* Utah Code Ann. § 78B-14-205(1)(a). Section 613 of the UIFSA in turn provides that if all of the parties “reside” in this state and the child does not reside in the issuing state (California), Utah acquires subject-matter jurisdiction to modify that support order. *See* Utah Code Ann. § 78B-14-613(1). The difficulty in harmonizing these statutes is the UIFSA does not define whether the word “residence” and its variations in Sections 205 and 613 means where a military service-member parent *legally* or *physically* resides.

A. THE DISTINCTION BETWEEN LEGAL AND PHYSICAL RESIDENCE.

Before beginning a discussion of why *legal* residence is the most sensible interpretation of this term, it is imperative to discuss the difference between one’s *physical* residence and *legal* residence (also known as domicile). *Physical* residence just means bodily presence as an inhabitant in a given place regardless of whether that stay is temporary or indefinite. Keene v. Bosner, 2005 UT App 37, ¶ 11, 107 P.3d 693. On the

other hand, *legal* residence requires *both* bodily presence in a given place *coupled with* the intention to make that place one's home. Id. Under these definitions, a person can have multiple *physical* residences but never more than a single *legal* residence at any given time. Id.

B. THE MEANING OF “RESIDENCE” DEPENDS ON THE CONTEXT IN WHICH IT IS USED.

Courts and legal scholars have long referred to “residence” as a slippery eel whose proper meaning ultimately depends on the context in which it is used. *See In re Morelli*, 91 Cal.Rptr. 72, 78-9 (Cal.App.2.Dist. 1970); Willis L.M. Reese & Robert S. Green, *That Elusive Word, “Residence,”* 6 Vand. L.Rev. 561 (1953). Utah’s legislature and courts have interpreted “residence” and “resides” differently depending on the context the terms are used in. Keene v. Bosner, 2005 UT App 37 at ¶ 11; Frame v. Residency Appeals Committee of Utah State Univ., 675 P.2d 1157, 1159 fn. 1 (Utah 1983)(“In some contexts the terms residence and domicile have different meanings, but for the purpose of this opinion we will treat them synonymously”); Government Emp. Ins. Co. v. Dennis, 645 P.2d 672, 674 (Utah 1982)(While domicile is the most steadfast of words, residence, on the other hand, has about as many colors as Joseph’s cloak and no precise, technical, and fixed definition applicable to all cases). For example, in the context of Utah’s Cohabitant Abuse Act, this court construed “residence” anew as *physical* presence to ensure victims of domestic violence could seek protective orders against their attackers wherever they might be found even if that was not their attacker’s legal domicile. Keene, 2005 UT App 37 at ¶¶ 11, 15. Conversely, in suits over voter registration statutes the Utah Supreme

Court interpreted “resides” and “residence” narrowly as *legal* residence to ensure a person could not vote in more than a single locale at a time. Dodge v. Evans, 716 P.2d 270, 275 (Utah 1985). The Utah Supreme Court has also interpreted “residence” as synonymous with domicile in divorce jurisdictional statutes unless the statute expressly requires *actual* physical residence. See Munsee v. Munsee, 363 P.2d 71, 72 (Utah 1961)(We consider the phrase bona fide residence to be synonymous with domicil[e]. But ‘actual residence’ requires something more).

In an effort to cage this slippery eel, this court has sometimes turned to the dictionary to determine how to interpret “residence.” Keene, 2005 UT App 37 at ¶ 11. When called upon to interpret this term anew in the context of Utah’s domestic violence laws, this court relied on Webster’s Dictionary which defines “residence” as “a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit.” Id. (*citing* Webster’s Third New International Dictionary 1931 (1993)). On the other hand, the Merriam-Webster Dictionary (which proclaims itself as being America’s “best-selling Dictionary”) defines “residence” as either “the place where one actually lives as distinguished from one’s domicile or a place of temporary sojourn” *or* “**the status of a legal resident.**” Merriam-Webster’s Collegiate Dictionary 1060 (11th Ed.)(emphasis added). The Merriam-Webster Dictionary also defines “reside” as either “to dwell permanently or continuously” *or* “**to occupy a place as one’s legal domicile.**” Id. (emphasis added). Consequently, an appeal to dictionaries used by laymen fails to authoritatively establish a

single “plain meaning” definition of the words “residence” and “resides,” but rather recognizes these words are open to more than one reasonable interpretation.¹

Given this inherent ambiguity, this court must analyze the UIFSA’s provisions in context to determine which interpretation of “residence” would (1) best fulfill the fundamental purposes of the UIFSA, (2) ensure child support modification laws remain uniform between the states, and (3) avoid absurd consequences not intended by the Legislature.

C. READ IN CONTEXT, “RESIDENCE” MEANS *LEGAL RESIDENCE*

Construing “residence” as *legal* residence is supported by the plain language and official comments of the UIFSA. In the words of the drafters, the purpose of Section 205 in the UIFSA is to ensure “only one valid support order may be effective at any one time” even though the parties and their children may move from state to state. In re Marriage of Amezquita, 124 Cal.Rptr.2d 887, 889-90 (Cal.App. 3 Dist. 2002). Under this section, California retains “continuing, exclusive jurisdiction” only if it is Husband’s “residence.” If California’s jurisdiction is exclusive then, by definition, neither Utah nor any other state could have jurisdiction. Therefore, the language of the UIFSA assumes a person

¹ The purpose of Utah’s domestic violence statutes are to enlarge – not restrict – which courts can have jurisdiction to give relief to domestic violence victims. Public policy is well-served by construing “residence” as broadly as possible to ensure perpetrators of domestic violence are held accountable for their wrongs. Conversely, the purpose of the UIFSA is to restrict – not enlarge – the number of states having jurisdiction to modify a child support order at any given time.

cannot have more than one “residence.”² *Id.* at 890. However, this does not support interpreting the term as *physical* residence because a person can have multiple physical residences, but can never *legally* reside in more than one place at a time. *Id.* Therefore, “residence,” viewed in context with the UIFSA as a whole, must mean *legal* residence of which there can only be one.

Furthermore, courts generally construe “residence,” whether used as a noun or a verb, as synonymous with *legal* residence in the context of statutes that prescribe residence as a qualification for the enjoyment of a privilege, the exercise of a franchise, or the venue for an action. *Dodge*, 716 P.2d at 275; *In re Marriage of Basileh*, 890 N.E.2d 779, 787 (Ind.App.2008); *See Utah Code Ann. § 20A-2-105*; 12 A.L.R.2d 757 § 3 (Majority rule is that residence in venue statutes, regardless of whether the term is used as a noun or a verb, is synonymous with domicile). Thus, under the UIFSA, if Husband’s “residence” remains in Utah he will continue to enjoy access to Utah’s courts for the purpose of modifying his existing child support order in addition to other rights and protections afforded to Utah residents. *Basileh*, 890 N.E.2d at 787. This constitutes the enjoyment of a privilege, the exercise of a franchise, and the setting of a proper venue for an action as envisioned by courts that have construed “residence,” in both noun and verb form, as meaning *legal* residence. *Id.* In a similar vein, Wife will enjoy the benefit of only

2 Compare with Utah Code Ann. § 78B-14-205(2)(a) which uses the term “state of residence” rather than “states of residence” or “a state of residence.” Furthermore, Section 205(1)(a) speaks in terms of “the residence” as opposed to “a residence” or “residences” further implying the drafter’s assumption that each parent would only have a single “residence.”

having to travel to a local Utah courthouse (rather than having to travel all the way out to California) if she ever wants to modify child support or bring an enforcement action against Husband.

D. LEGAL RESIDENCE IS AN ACCEPTABLE PLAIN-MEANING CONSTRUCTION OF “RESIDENCE.”

Interpreting the terms “residence” and “resides” in the UIFSA as meaning “*legal* residence” and “*legally* resides” does not stretch these words beyond an acceptable, plain-meaning limit. The commonly-used Merriam-Webster Dictionary expressly recognizes these words are often used as synonyms for domicile. *See* Merriam-Webster’s Collegiate Dictionary 1060 (11th Ed.). Furthermore, it is well-documented both in Utah, Munsee, 363 P.2d at 72, and on a national level, 27A C.J.S. Divorce § 154, that courts regularly construe “residence” and “resides” as *legal* residence in domestic relations statutes unless the statute explicitly requires *actual* residence. Because the UIFSA is a national law, the Utah Legislature was presumably aware of this and expected courts interpreting the UIFSA to look at how this term is defined on a *national level* in order to promote national uniformity of its jurisdictional provisions. *See* Utah Code Ann. § 78B-14-901.

E. INTERPRETING “RESIDENCE” AS LEGAL RESIDENCE IS ESSENTIAL TO PROMOTE NATIONAL UNIFORMITY.

Interpreting “residence” as *legal* residence is the only interpretation that will avoid interstate jurisdictional conflicts. Although this is a case of first impression for Utah, this court is not writing on a clean slate. Several of Utah’s sister-states have already analyzed what “residence” in the UIFSA means and they agree the term means *legal* residence.

Under Utah Code Ann. § 78B-14-901, courts construing the UIFSA *must* give consideration to the need to promote uniform interpretations of the UIFSA because conflicting interpretations will lead to jurisdictional uncertainty, encourage forum shopping, and will condemn more military families to costly, protracted litigation like this as they try to reconcile different versions of what was supposed to be a national, uniform law designed to prevent such conflicts.

California

Under facts similar to the instant case, the California Court of Appeal held the term “residence” in the UIFSA meant domicile. Amezquita, 124 Cal.Rptr.2d 887. After thoroughly examining the UIFSA’s official comments and statutory context, the court reasoned that because the UIFSA is designed to narrowly restrict jurisdiction to a single state and the UIFSA assumes each parent only has one “residence,” the term must mean domicile – of which there can only be one – rather than mere physical presence. Id. at 888-91. Because the father was only in California because of a military assignment and showed no intention to permanently live in California after retirement, he did not have a California residence under the UIFSA. Id. at 890-91.

Minnesota

Three years later, the Minnesota Court of Appeals held that because the UIFSA narrowly permits only one state to exercise continuing, exclusive jurisdiction and assumes each parent only has one “residence,” the term must mean domicile. Block v. Block, 2005 WL 89472 fn. 1 (Minn.App. Jan 18, 2005) (Unpublished).

Georgia

Following Amezquita and Block, the Georgia Court of Appeals concurred in its sister-state's reasoning that "residence" in the UIFSA means legal residence, and a military service-member father stationed in Georgia under military orders remained a legal resident of the state he joined the army in. Kean v. Marshall, 669 S.E.2d 463, 464-66 (Ga.App. 2008).

Alabama

In Lattimore v. Lattimore, the Alabama Court of Civil Appeals construed the term "residence" in the UIFSA as *legal* residence. 991 So.2d 239, 243-44 (Ala.Civ.App. 2008). However, because the appeal arose in the context of a motion to dismiss the court was required to accept as true the mother's claim that her service-member husband acquired a legal residence in Alabama. Id. Accordingly, the court remanded the case for further fact finding. Id. However, the court reaffirmed the longstanding presumption that "a person who is inducted into military service retains residence in the state from which he is inducted until a new residence is established or the initial residence is abandoned." Id.

Missouri

In State ex. rel. Havlin, the Missouri Court of Appeals held a father who left Tennessee because of a temporary overseas work assignment remained a resident of Tennessee under the UIFSA because he still paid taxes in his home state, maintained his voter registration, vehicle registration, and intended to return home after his overseas assignment was complete. 971 S.W.2d 938 (Mo.App. 1998). In doing so, the court

engaged in a domicile analysis and implicitly construed “residence” as meaning *legal* residence. Id.

Texas

The Court of Appeals of Texas held it lost exclusive, continuing jurisdiction under the UIFSA to modify a child support previously issued by a Texas court even though the father was physically living in Texas because he only was back in Texas because he was incarcerated in a Texas prison. Grimes v. McFarland, 2003 WL 21787030 (Tex.App.-Houston (14 Dist.))(Unpublished). The court held the father did not “reside” in Texas under the UIFSA because he was only in Texas under compulsion, and analogized his situation that of a military service-member stationed in Texas who likewise would not be considered a Texas resident. *Cf. Id. (citing Randle v. Randle*, 178 S.W.2d 570, 572 (Tex.Civ.App.-Galveston 1944)(Soldier stationed in Texas did not ‘reside’ in Texas).

Indiana

Construing the UIFSA’s federal counterpart, the Full Faith and Credit for Child Support Orders Act (the “FFCCSOA”), the Court of Appeals of Indiana held the term “residence” meant domicile. Basileh, 890 N.E.2d at 787. The court reasoned that courts treat “residence” and “domicile” as synonyms when construing a statute that prescribes residence as a qualification for the enjoyment of a privilege or exercise of a franchise, and the father would enjoy continued access to Indiana court’s if he remained a legal resident of Indiana. Id. Following further judicial review, the Supreme Court of Indiana summarily affirmed the Court of Appeals’ interpretation of “residence” and held it applied with

equal force to the UIFSA itself. In re the Marriage of Basileh, 912 N.E.2d 814, 817 fn. 1 (Ind. 2009).

Given the fact every state to consider what “residence” means in the context of the UIFSA has construed it as *legal* residence, this state cannot adopt a contrary interpretation without inviting jurisdictional conflicts. Military service-members from Utah would be thrust into perpetual confusion with no way of knowing, *short of costly protracted litigation like this*, where their “residence” is under the UIFSA was if this court said it was where they were physically stationed, but the state where they were stationed in (e.g. California, Texas, Minnesota, Georgia, Alabama, Indiana, or Missouri) said it was their legal residence.

F. INTERPRETING “RESIDENCE” AS PHYSICAL RESIDENCE WOULD LEAD TO ABSURD RESULTS AND JURISDICTIONAL CONFLICTS.

Finally, this court must reject any interpretation that could lead to absurd results. State ex. rel. Z.C., 2007 UT 54, ¶ 11, 165 P.3d 1206. The “absurd results” canon of statutory interpretation is an equally well-settled caveat to the “plain meaning” doctrine and states a court should not follow the literal language of a statute if doing so would lead to absurd results not intended by the Legislature. Id. Although the “plain meaning” canon enjoys a robust presumption in its favor, it is also true that a legislative body cannot, in every instance, be counted on to have said what it meant or to have meant what it said. Id.

Because service-members are subject to the orders of their superior officers, they have no choice where they want to live. Teague, 289 P.2d at 333. Consequently, to hold that Utah military service-members acquire a “residence” whenever the military

fortuitously happens to station them leads to patently absurd results. For example, it would defy common sense to say a service-member deployed to Iraq as part of our country's war on terror *resides* in Iraq or has an Iraqi *residence*. Rather, common sense tells us the soldier is probably there on a temporary assignment and will return home at the end of the war or his release from military service. Nevertheless, if the UIFSA is construed as looking at physical presence *regardless of whether that presence is compulsory* then, under the broad definition of this term espoused in Keene, this Utah soldier *resides* in Iraq and has forfeit any claim to having a Utah residence because he decided to serve his country. This is a patent example of an absurd result.

Adding to this absurdity, if the service-member's spouse then left Utah (assuming Utah issued their original support order), Utah would lose exclusive, continuing jurisdiction over child support order because of the soldier's deployment. *See* Utah Code Ann. § 78-14-205 (Issuing state loses exclusive jurisdiction when both parents and their child no longer have a "residence" in this state). As a result, Utah service-members would lose the stability associated with keeping their child support cases in Utah and would live in fear of having their support orders modified every time they got moved.

Likewise, service-members from Utah's sister-states temporarily stationed at Hill Air Force Base or Camp Williams thinking they still legally resided in their respective home-states would be surprised to discover they now had a Utah residence under the UIFSA and were subject to having their child support cases modified here. Under these absurd circumstances, it would be possible for *two* states (Utah and the soldier's home-

state) to have jurisdiction to modify a support order at the same time.

Because there is no way the Utah Legislature could have intended such absurd consequences, it is imperative Utah join with its sister-states who have uniformly agreed “residence” in the UIFSA means *legal* residence.

II. BECAUSE HUSBAND JOINED THE MILITARY IN UTAH, HE PRESUMPTIVELY CONTINUES TO LEGALLY RESIDE IN UTAH.

Having shown that “residence” in the UIFSA means *legal* residence, the next issue for this court to resolve is where Husband’s legal residence is. Because the court below did not make any findings of fact on this issue, (R: 556), the proper inquiry on appeal is whether Husband has made a prima-facie case that he has retained his Utah residency since joining the Marine Corps in Utah back in 1994. To resolve this question, it is necessary to first review the law of domicile.

In several different contexts, the Utah Legislature has defined *legal* residence (or domicile) as the place where (1) an individual has a fixed permanent home and principal establishment, (2) to which the individual if absent intends to return, and (3) in which the individual and his family *voluntarily reside, not for a special or temporary purpose, but with the intention of making a permanent home*. See Utah Code Ann. § 41-1a-202(a)(emphasis added); Cf. Utah Code Ann. § 20A-2-105. A legal residence, once established, cannot be lost until another legal residence is acquired. See Utah Code Ann. § 20A-2-105(4)(j)(iii); Utah Code Ann. §§ 20A-2-105(4)(c)(i); 31A-29-103; 25 Am. Jur. 2d Domicil § 28. While domicile presumptively follows physical residence, Allen v. Greyhound Lines, Inc., 583 P.2d 613, 615 (Utah 1978), this presumption does not apply

to military service-members. *See* Utah Code Ann. § 20A-2-105(4)(c)(i); Dodge, 716 P.2d at 274 (Acquisition of a domicile requires some free exercise of the will on the part of the person involved. An act done by him under physical compulsion will be legally ineffective for this purpose). Rather, the law presumes military service-members continue to legally reside in the state they joined the military absent proof they have abandoned their initial domicile and established a new one. *See* Teague, 289 P.2d at 333 (“This court might take judicial notice to the fact that a soldier is subject to transfer at any time and that his presence in any one place will probably be temporary.”); 21 A.L.R.2d 1163 (Practically all authorities agree that military personnel retain a domicile in the state from which they entered military service); 28 C.J.S. Domicile § 35 (Because a person in military service is subject to the orders of his superior officers, he retains a domicile or residence in the state from which he entered the service). This rebuttable presumption of continued residency can only be overcome by clearing and convincing proof that the service-member intends to make his duty station his new permanent home. 25 Am. Jur. 2d Domicil § 28. Simply put, a soldier’s mere physical presence in a place under military orders is insufficient to prove a change in domicile.

The pivotal case illustrating these principles involved a Navy sailor who, after spending 11 years away from his home-state of Maryland in military service, sued for a divorce in Maryland. Wamsley v. Wamsley, 635 A.2d 1322, 1322-23 (Md. 1994). Maryland’s highest court unanimously held that notwithstanding the sailor’s many years of absence while in military service, he still resided in Maryland because he joined the

Navy in Maryland, held Maryland out as his home on military records, maintained his driver's license and voter registration in Maryland, and paid Maryland income taxes. Id. at 1325-1326. This holding is in accord with how the majority of states have resolved similar issues. Id. at 1325 fn. 1.

Similarly, the California Court of Appeal held the fact a father was stationed in California under military orders was insufficient to give him a California domicile.

Amezquita, 124 Cal.Rptr.2d 887. The court explained that:

“[a]lthough Husband has lived in California for several years on military assignment, the record is uncontradicted that he does not intend to remain here after retirement and, instead, intends to return to New Mexico. He retains his New Mexico driver's license, and he votes and pays taxes there.” Id.

In re the Marriage of Thornton, the California Court of Appeal held that even acquisition of a house in California by a military service-member was insufficient to prove a soldier intended to make California his new domicile if contradicted by other evidence. 185 Cal.Rptr. 388, 393-94 (Cal.App 5 Dist. 1982). The Wamsley court explained:

“[t]he fact that members of the military are frequently moved about under military orders will more than explain why an individual occupies a place of abode beyond the state's borders. In the case of members of the military, as in other cases, the rules for determining domicile may be applied differently in a particular case, but the basic thrust thereof is to get the best indication of intent.” 634 A.2d at 1325. (internal citations omitted).

Here, there is no dispute whatsoever that Husband was born, raised, and graduated high school in Utah. Therefore, Husband was a bona-fide and actual resident of Utah under every conceivable definition of the term when he enlisted in the Marine Corps in

1994. The record clearly shows that throughout his deployments in Russia, Germany, Slovenia, Japan, Thailand, the Philippines, and California, Husband has always paid Utah income taxes on his military pay, remained registered to vote in Utah elections, maintained his Utah driver's license, held Utah out as his home on military records, and has submitted sworn testimony declaring his intention to return to live in Utah once released from military service. Under these facts, Husband has sufficiently proved that his domicile remains in Utah and he has never established a residence elsewhere.

Because the law presumes that Husband already is, *and remains*, a Utah resident, the burden of proof must necessarily shift to Wife to rebut this presumption by proving, *if she can*, that Husband abandoned his Utah residence and established a new domicile in California. However, the fact Wife sued Husband for a divorce in California while he was stationed there is insufficient to prove Husband ever formed the requisite intent to abandon his Utah residence and permanently remain behind in California. Rather, both California and Utah law allow divorce proceedings to go forward even if only one spouse is a domiciliary of that state. *See* Utah Code Ann. § 30-3-1(2) and California Family Code § 2320. California Family Code § 2322 even recognizes that it is possible for a husband and wife to each have a “separate domicile and residence for the purpose of a divorce proceeding depending upon proof of the fact and **not upon legal presumptions.**” (emphasis added).

Because Wife voluntarily chose California as the forum for their divorce – not

Husband – she presumptively claimed a California residence in the process.³ The record is devoid of any proof that Husband ever intended to remain in California following their divorce for any reason other than his military deployment. Under similar facts, the California Court of Appeal held that a military service-member stationed in California who was sued for divorce by his wife in California and consented to entry of child custody, support, and property division orders did not establish a California residence. In re the Marriage of Tucker, 277 Cal.Rptr. 403 (Cal.App. 1 Dist. 1994). Because the husband still paid Florida income taxes, voted in Florida elections, and listed Florida as his home on military records, his wife could not carry her burden of proving he ever formed the requisite intent to permanently reside in California after the divorce so as to make him a California domiciliary. Id. at 408-409.

In light of Husband's undisputed continuing connections to Utah (paying taxes, voter registration, drivers license, holding himself out as a Utah resident on military records, and subjective intent to return), the presumption Husband continues to legally reside in Utah remains un-rebutted. Therefore, the court below committed prejudicial error by dismissing Husband's Petition to modify without considering this presumption.

³ The Commissioner expressed his bewilderment at how this was possible given that Wife was only in California because she accompanied her military service-member husband there and presumably would have remained a Utah resident along with him. R:386, Hrg. Transcr. 9:21-10:18 (September 17, 2008). While Husband agrees the Commissioner's suspicions about Wife's claim to California residency are well taken, the time to litigate whether Wife ever had the requisite intent to become a California domiciliary has long passed, and the parties are presumably estopped to deny the validity of their original Divorce Decree.

Consequently, its judgment must be reversed and remanded for further proceedings.

III. BECAUSE BOTH PARTIES AND THEIR CHILD LEGALLY RESIDE IN UTAH, THIS STATE HAS SUBJECT-MATTER JURISDICTION UNDER SECTION 613 OF THE UIFSA.

Because Husband joined the Marine Corps in Utah and has maintained extensive ties to Utah for all the reasons discussed *supra*, Husband continues to legally reside in Utah. The court below made no findings sufficient to rebut this presumption. Therefore, under Section 205 of the UIFSA, Utah Code Ann. § 78B-14-205(1), California lost exclusive, continuing jurisdiction to modify the parties' child support order once Wife returned to Utah because she no longer had a California residence (*assuming she had one to begin with*) and Husband never acquired a California residence. Utah acquired jurisdiction to modify the parties' California support order under Section 613 of the UIFSA, Utah Code Ann, § 78B-14-613(1), once Wife returned to Utah because now both parents and their child legally reside in Utah. Consequently, it was error for the court below to dismiss Husband's Petition to modify, and its decision must be reversed.

IV. THE LOWER COURT EXCEEDED ITS DISCRETION BY ORDERING HUSBAND TO PAY WIFE'S ATTORNEY'S FEES BASED ON A FLAWED LEGAL CONCLUSION AND WITHOUT MAKING SUFFICIENT FINDINGS OF FACT.

Although courts have discretion to award attorney's fees in divorce cases, Bolliger v. Bolliger, 2000 UT App 47, ¶ 26, 997 P.3d 903, that discretion is not unlimited. *See Lund v. Brown*, 2000 UT 75, ¶ 9, 11 P.3d 277. For instance, a decision premised on flawed legal conclusions constitutes a per se abuse of discretion. *Id.* Courts have no discretion to act contrary to Utah law, and this court is the arbiter of what Utah law is.

The lower court's stated reason for ordering Husband to pay Wife's attorney's fees and costs was that Wife prevailed on the issue of whether Utah should have declined jurisdiction in the first place. R:387, Hrg. Transc. 10:6-11:22 (October 22, 2008, Hearing). The court below did not offer any alternative rationale besides this faulty legal conclusion to justify its decision to award fees and costs to Wife. Therefore, because the decision to decline jurisdiction was premised on an erroneous interpretation of the UIFSA, the court committed a per se abuse of discretion by forcing Husband to pay Wife's costs and fees.

In addition, this court has held time and time again that courts cannot award attorney's fees in divorce cases without making explicit findings of fact that (1) *the receiving spouse is in financial need of attorney's fees*, (2) the obligor spouse has the ability to pay, and (3) the fees and costs sought are reasonable. Jensen v. Jensen, 2009 UT App 1, ¶ 18, 203 P.3d 1020 (emphasis added). Failure to explicitly make **all** these requisite findings likewise constitutes an abuse of discretion because omitting a requisite finding precludes effective appellate review. Id.; Bakanowski v. Bakanowski, 2003 UT App 357, ¶ 10, 80 P.3d 153.

Although the court below was mindful of this well-known test and made findings as to reasonableness and Husband's ability to pay, Wife did not present any evidence by way of affidavit, exhibit, or proffer that she needed help paying her own legal expenses. Accordingly, the court made no finding that she needed help paying her legal expenses (especially given the fact she is enjoying a Utah cost-of-living while receiving extra child

support payments based on a higher California cost-of-living). By failing to present any evidence of this essential element of her demand for attorney's fees coupled with the court's failure to make any finding she needed help, there was no legal basis to award attorney's fees to Wife. Accordingly, in addition to exceeding its discretion by awarding attorney's fees premised on a flawed legal conclusion, the court below also exceeded its discretion by awarding attorney's fees to Wife without finding she was in need of help paying her legal fees.

For both these reasons, the lower court's decision to award Wife attorney's fees and costs must be vacated in its entirety.

V. CLAIM PRECLUSION DOES NOT APPLY BECAUSE CALIFORNIA DELEGATED THE QUESTION OF JURISDICTION TO UTAH.

California's *subsequent* September 30, 2008 ruling has no preclusive effect on this court's authority to correct the Utah District Court's erroneous decision declining jurisdiction in the first place because California's December 3, 2007 ruling delegated the authority to decide which state should exercise jurisdiction to Utah. California conditioned its retention of jurisdiction on Utah declining to observe jurisdiction over this case. Wife conceded this delegation before the court below and stated:

"The [California] Court declines to make orders on the issue of modification of child support based on the knowledge there is a pending motion in Utah. *If Utah refuses to observe jurisdiction over the issue, either party may file their motion to be heard before [the California] Court. So, the bottom line is basically the Court in California was just deferring to our Court to determine whether we were going to proceed, and then if this [Utah] Court did not proceed, find it has jurisdiction, then either party could proceed in California...*"

R: 388, Hrg. Transcr. 9:8-18 (March 10, 2008) (emphasis added).

It was not until *after* the Utah trial court erroneously declined jurisdiction over this matter that California modified its order. So, the question arises whether a California trial court has the power to bar this court from ever judicially reviewing an inferior Utah court's judgment just by issuing a subsequent order premised on the erroneous Utah judgment in controversy? The answer is that a California trial court cannot substantially infringe on this court's appellate authority in such a manner, and this court may refuse to grant preclusive effect to California's modification order consistent with the full faith and credit clause and California law.

The Utah Supreme Court has repeatedly endorsed the Restatement (Second) of Judgments as authority on under what circumstances a court may deny preclusive effect to a judgment issued by another court. *See* Salt Lake City v. Silver Fork Pipeline Co., 913 P.2d 731, 733 (Utah 1996); Sandy City v. Salt Lake County, 827 P.2d 227, 230-31 (Utah 1992).

Section 28 of the Restatement (Second) of Judgments allows re-litigation of an issue in circumstances such as this where a party could not, as a matter of law, have obtained judicial review of the judgment in the initial action. Because California issued an order modifying support *after* the Utah trial court erroneously declined jurisdiction, there was nothing a California appellate court could do to remedy this problem and force Utah to accept jurisdiction. Only a Utah appellate court had the power to correct a Utah court's erroneous decision declining jurisdiction. Thus, any appeal taken from the California trial court's decision would have been an exercise in futility and barred by law

because California had no choice but to offer Wife a proverbial “port in a storm” until Utah’s judgment declining jurisdiction was reversed. Under these special and unique circumstances, Section 28 of the Restatement (Second) of Judgments justifies denying any preclusive effect to California’s modification order because to hold otherwise would place Husband in an impossible catch-22 where neither California nor Utah’s appellate courts could judicially review this matter. This case simply does *not* present the kind of circumstances that the policies underlying preclusion were designed to guard against.

For similar reasons, Section 12 of the Restatement (Second) of Judgments also supports denying preclusive effect to California’s modification order. This section states:

“[w]hen a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation **except if:**

- (1) The subject matter of the action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) **Allowing the judgment to stand would substantially infringe on the authority of another tribunal or agency of government.”**

Id. (emphasis added).

Here, allowing California’s reliance on the erroneous judgment of the court below to infringe on this tribunal’s power to judicially review and correct the ruling of an inferior Utah court would substantially infringe on this court’s authority and duty to ensure Utah courts are correctly following Utah law. Granting preclusion in cases like this would render the decisions of District Court Judges and even Commissioners immune from judicial review so long as the prevailing party was able to persuade a sister-state’s court to rely on that judgment before the non-prevailing party could obtain judicial review before this court. This would prevent this court from ensuring Utah’s interstate support

modification laws are in harmony with its sister-states until it was too late. *See* Utah Code Ann. § 78B-14-901. Such a holding is untenable and would place Husband in an impossible catch-22. For these reasons, pursuant to Section 12 of the Restatement (Second) of Judgments, this court must not grant California's reliance on the erroneous decision of the court below any preclusive effect.

Fortunately, judicial review and reversal of the Utah court's judgment will not present any full faith and credit issues because a judgment issued by a sister-state is entitled to no more preclusive effect than it would possess under the laws of the State in which the judgment was rendered. *See* 28 U.S.C. § 1738. Under California law, an order giving effect to a void judgment is void itself. Residents for Adequate Water v. Redwood Valley County Water Dist., 41 Cal.Rptr.2d 123, 125 (Cal.App.1 Dist 1995)(*citing* Ventura County v. Tillett, 183 Cal.Rptr. 741 (Cal.App.2 Dist 1982)). Void judgments remain open to both direct and collateral attack even if the underlying judgment itself was not appealed. *Id.* It is well-settled law that void judgments have no preclusive effect. Roy Shepherd Ins. v. Mayer, 883 P.2d 1358 (Utah 1994).

Because California conditioned its retention of jurisdiction based on how Utah ruled, the validity of the California court's subsequent order is conditioned on the validity of the Utah court's judgment declining jurisdiction in the first place. As a general rule, the ruling of an appellate court is deemed to state the true nature of the law retrospectively. Malan v. Lewis, 693 P.2d 661, 676 (Utah 1984). Therefore, by holding that the court below misconstrued the UIFSA and erroneously declined jurisdiction in the first place,

this court will be retroactively vacating the very order California's assumption of jurisdiction is conditioned upon.⁴ Under California law, this will automatically render California's September 30, 2008, judgment void *on its face* because "an order giving effect to a void judgment is also void." In re Marriage of Brockman, 240 Cal.Rptr. 96, 97 (Cal.App.2d Dist 1987). Inasmuch as void judgments carry no preclusive effect, Wife's claim preclusion and full faith and credit defenses become moot. Roy Shepherd, 883 P.3d at 1358 (Once an appellate court eliminates the basis for res judicata, the judgment appealed may be reversed).

Reversing the judgment of the court below and thereby invalidating California's order made in reliance on that judgment will not infringe on California's authority nor deny its judgments full-faith and credit. Rather, this court will be giving full faith to California's December 3, 2007, decision conditioning its retention of jurisdiction based on how Utah ruled. If Utah asserted jurisdiction – California would not. Therefore, there is no full faith and credit issue by holding that Utah should have accepted subject-matter jurisdiction to begin with.

A. ALTERNATIVELY, CALIFORNIA IS OBLIGED TO VACATE ITS ORDER ONCE THIS COURT REVERSES THE JUDGMENT OF THE COURT BELOW.

Alternatively, if this court believes reversing the Utah court's decision declining

⁴ This solution is distinguishable and does not conflict with this court's recent decision in Maero v. Topaz, 2009 UT App 300, 221 P.3d 860, because the bankruptcy court in Maero never conditioned its ruling on how the Utah court ruled. Conversely, here California delegated the authority to decide which court should exercise jurisdiction to this court and conditioned its exercise of jurisdiction upon this court's ruling.

jurisdiction would only render California's judgment *voidable* – as opposed to *void* – then comment c of Section 16 of the Restatement (Second) of Judgments provides a solution to reconcile these otherwise inconsistent judgments:

“If, when the earlier judgment is set aside or reversed, the later judgment is still subject to a post-judgment motion for a new trial or the like ... a party may inform the trial or appellate court of the nullification of the earlier judgment and the consequent eliminating of the basis for the later judgment. The court should then normally set aside the later judgment.” Sandy City v. Salt Lake County, 827 P.2d 227, 230-31 (Utah 1992)(citing Restatement (Second) of Judgments § 16, com. c).

Under California law, a party may file a post-judgment motion to vacate a judgment giving effect to a void judgment at any time. California Code Civ. P. § 473(d); Cf. Utah R. of Civ. P. § 60(b)(5) (Courts may set aside a final order when the judgment it is based upon is later reversed or vacated). Upon being informed of this court's nullification of the Utah court's decision declining jurisdiction which formed the basis for its retention of jurisdiction, California would be obliged to set aside its judgment thereby eliminating any preclusive effect its decision might otherwise carry. Accordingly, after reversing the Utah court's erroneous judgment declining jurisdiction in the first place, this court may reverse and remand this case back to the trial court with instructions to grant Husband sixty (60) days to petition California to vacate its September 30, 2008, judgment in light of this reversal. Assuming California complies with its own precedents and vacates its order giving effect to a voided judgment, Wife's preclusion argument would still be rendered moot.

B. CALIFORNIA’S ORDER IS INCONSISTENT WITH THE FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT AND THEREFORE NOT ENTITLED TO PRECLUSIVE EFFECT.

Even assuming, *arguendo*, this court disagreed and felt reversing the Utah court’s order declining jurisdiction would not render California’s judgment void or voidable, California’s judgment is still not entitled to preclusive effect under the Federal Full Faith and Credit for Child Support Orders Act. The FFCCSOA governs which child support orders are entitled to full faith and credit, and which ones are open to collateral attack. 28 U.S.C. § 1738B.

Being an act of Congress, the FFCCSOA has conflict preemption over state law. The FFCCSOA states each state must enforce child support orders “made consistently with this section” by a court of another state. 28 U.S.C. § 1738B(a). Given the presumption Congress inserted the caveat “made consistently with this section” advisedly, *See Verslus v. Guaranty Nat. Companies*, 842 P.2d 865, 867 (Utah 1992), by negative implication a child support order made *inconsistently* with the FFCCSOA is not entitled to full faith and credit and is open to collateral attack. *Cf. Curtis v. Curtis*, 789 P.2d 717, 722 (Utah App. 1990)(Context of PKPA).

The FFCCSOA states a child support is made “consistently with this section” if (1) the court that makes the order, pursuant to the laws of the state in which the court is located and subsections (e), (f), and (g), -- (A) has subject-matter jurisdiction to hear the matter and enter such an order ...” 28 U.S.C. § 1738B(c). A court of a State that has previously issued a support order has jurisdiction to modify its support order if that State

is still “the child’s State or the *residence* of any individual contestant...” 28 U.S.C. § 1738B(d). Although the FFCCSOA does not define “residence,” California has construed this exact same language in the UIFSA as synonymous with “domicile,” and has held that military service-members stationed in California are not domiciled in California. Amezquita, 124 Cal.Rptr.2d 887; *accord* Basileh, 890 N.E.2d at 784-88 (“Residence” in FFCCSOA means domicile) *aff’d in part and vacated in part on other grounds* 912 N.E.2d 814 fn 1 (Ind. 2009); *See also* Tucker, 277 Cal.Rptr. 403 (Fact soldier is deployed to California; sued for divorce by wife in California; and consents to California divorce does not give the soldier a California domicile).

Consequently, the only way for California to assert jurisdiction to modify child support is to make a specific finding that Husband had a California domicile. However, the judgment and transcript of the California court’s September 30, 2008, proceeding are devoid of this requisite factual finding. The California court made no inquiry into where Husband was domiciled – it simply based its decision on the irrelevant fact Husband made a “general appearance” in California and did not oppose Wife registering the Utah support order in California. However, neither of these findings provide a basis for asserting jurisdiction under the FFCCSOA.

This court confronted a similar situation when a Mississippi court issued a final custody order based on the erroneous belief it had subject-matter jurisdiction because the appellant made a “general appearance” in Mississippi. Curtis v. Curtis, 789 P.2d 717, 718-20 (Utah App. 1990). Applying the FFCCSOA’s custody counterpart, the PKPA, 28

U.S.C. § 1738A, this court held, as a matter of federal law, Mississippi's order was void because federal law did not permit it to assert *subject-matter* jurisdiction using the *personal* jurisdiction doctrine of "general appearance." *Id.* at 720-726. This court correctly noted that while a "general appearance" in a foreign court waives any objection to personal jurisdiction, it does not confer subject-matter jurisdiction on that court. *Id.* at 725-26. Consequently, Mississippi's final custody order was invalid as a matter of federal law under the PKPA. *Id.*

Like the PKPA applied in *Curtis*, nothing in the plain language of the FFCCSOA allows California, as a matter of federal law, to assert subject-matter jurisdiction simply because Husband made a general appearance in California and did not oppose Wife registering the Utah child support order in California. In the absence of a specific finding that Husband was a California domiciliary, there was no statutory basis for California to assert subject-matter jurisdiction consistent with the FFCCSOA. Consequently, California's September 30, 2008, judgment is void for want of jurisdiction as a matter of federal law and not entitled to any preclusive effect.

C. PRECLUSION DOES NOT BAR THIS COURT FROM CONSIDERING WHETHER IT WAS ERROR TO AWARD ATTORNEY'S FEES.

Finally, even assuming, *arguendo*, this court held California's *subsequent* judgment made in reliance on the erroneous decision of the court below was entitled to preclusion regardless of how erroneous the predicate decision was, this does not impede this court from reviewing whether the court below exceeded its discretion by awarding attorney's fees based on a flawed interpretation of Utah law *before* California issued its

subsequent ruling. *Cf. Searle v. Searle*, 2001 UT App 367, ¶ 13, 38 P.3d 307 (*citing Lund*, 2000 UT 75 at ¶ 9). If the court below awarded attorneys fees because it misconstrued Utah law then its decision was still a per se abuse of discretion because a California trial court does not have the power to bind how this court interprets Utah law.

CONCLUSION AND PRECISE RELIEF REQUESTED

For the foregoing reasons, Husband asks this court for the following precise relief:

- (1) To hold that the term “residence” refers to *legal* residence in the context of the Uniform Interstate Family Support Act (UIFSA);
- (2) To hold that Utah military service-members, like Husband, who are physically absent from Utah because of military service presumptively retain their legal residence in Utah absent clear and convincing proof that they have established a legal residence elsewhere during the course of their deployment;
- (3) To hold that Utah acquired subject-matter jurisdiction over this matter under Utah Code Ann. §§ 78B-14-205 and 78B-14-613 once Wife left California because now both parents and their child legally reside in Utah;
- (4) To reverse the lower court’s judgment dismissing Husband’s Amended Petition to modify child support and remanding this case back to the trial court for further proceedings;
- (5) To hold that California’s September 30, 2008, order is void on its face and not entitled to preclusive effect because it is premised on a now vacated Utah

judgment, inconsistent with the FFCCSSOA, and California delegated the authority to decide which state should exercise jurisdiction to Utah. In the alternative, to grant Husband sixty (60) days to petition the California court to vacate or stay its September 30, 2008, order based on this court's reversal of the Utah court's decision declining jurisdiction in the first place; and

(6) To reverse the Utah District Court's judgments awarding attorney's fees and costs to Wife in their entirety.

Respectfully submitted this 15 day of February, 2010.

A handwritten signature in cursive script, appearing to read "Mark Wiser", is written above a horizontal line.

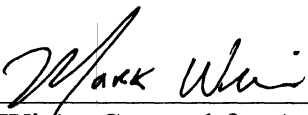
Mark Wiser, Esq.

Counsel for Appellant Aaron Lilly

CERTIFICATE OF SERVICE

I certify that on this 16 day of February, 2010, I caused two (2) copies of Appellant's Brief and Appendix to be sent to the following parties via first-class United States Mail, postage prepaid:

David R. Blaisdell, Esq.
Counsel for Appellee Korilee Lilly
5995 So. Redwood Rd.
Salt Lake City, UT 84123



Mark Wiser, Counsel for Appellant

APPENDIX

1. Order Dismissing Amended Petition to Modify, dated October 20, 2009.
2. Minute Entry denying Appellant's objections to the Domestic Relations Commissioner's recommendation awarding attorney's fees and costs to Petitioner, dated December 9, 2008.
3. Order Awarding Attorneys Fees to Petitioner dated November 3, 2008.
4. Minute Entry denying Appellant's objections to the Domestic Relations Commissioner's recommendation on the question of whether the UIFSA looks to *legal* or *physical* residence, dated October 28, 2008.
5. Order from September 17, 2008, hearing before the Domestic Relations Commissioner, dated October 1, 2008.
6. Unpublished decision of Block v. Block, 2005 WL 89472, 2005 Minn.App. LEXIS 26 (Minn.App. Jan 18, 2005).
7. Unpublished decision of Grimes v. McFarland, 2003 WL 21787030 (Tex.App-Hous. 14th Dist).

FILED DISTRICT COURT
Third Judicial District

OCT 20 2009

By _____ Deputy Clerk

MARK W. WISER #10754
LAW OFFICE OF MARK WISER
ATTORNEY FOR AARON LILLY
2825 E. COTTONWOOD PKWY, SUITE 500
SALT LAKE CITY, UT 84121
PHONE (801) 990-1230
FAX (801) 880-7070

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH

KORILEE LILLY
Petitioner,

v.

AARON M. LILLY,
Respondent.

**ORDER DISMISSING AMENDED
PETITION TO MODIFY**

Case No.: 074904948

Judge: Glenn K. Iwasaki

Commissioner: T. Patrick Casey

Petitioner Korilee Lilly's Motions for summary judgment and additional attorney's fees, along with Respondent Aaron Lilly's opposition thereto, came before this Court for a hearing on August 26, 2009, the Honorable Commissioner T. Patrick Casey presiding.

Petitioner was represented by counsel, David Blaisdell. Respondent was represented by counsel, Mark Wiser.

After reviewing the briefs and exhibits submitted by the parties, hearing oral argument, and being otherwise fully advised in the premises, the Commissioner made various recommendations concerning matters in dispute.

Wherefore, it is hereby the order of this Court as follows:

1. Respondent's Amended Petition to Modify Child Support is hereby dismissed without prejudice pursuant to Rules 12(b)(1) of the Rules of Civil Procedure.

2. This Court lacks subject-matter jurisdiction to consider Respondent's request to modify child support under the Uniform Interstate Family Support Act (Utah Code Ann. § 78B-14 *et seq*) because the parties' original child support order was issued in California and Respondent Aaron Lilly still physically lives in California. Petitioner has also not filed a writing consenting to this Court assuming jurisdiction over this matter.
3. This Court interprets the UIFSA's use of the terms "residence" and "resides" to mean which state a parent physically lives in as opposed to which state that parent legally ~~resides in or has a domicile.~~ *1/11/14*
4. This Court has not made any findings of fact on the question of whether Respondent remains domiciled in Utah or whether he acquired a California domicile during the course of his military deployment there. Consequently, if the appellate court reverses this Court's judgment and holds that the UIFSA looks to legal residence as opposed to physical residence, an evidentiary hearing will probably be necessary on remand to determine which state Respondent legally resides in.
5. Petitioner's Motion for Summary Judgment is DENIED because it became moot after the ruling on the Motion for Clarification. Nevertheless, if this Court's judgment is reversed on appeal then Petitioner may renew her motion on remand.
6. Petitioner's Motion for attorney's fees is DENIED on the basis this Court's grant of Respondent's Motion for clarification made Petitioner's opposition thereto and subsequent motion for summary judgment unnecessary. Nevertheless, the issue of attorney fees is reserved if the appellate court remands this matter.
7. This is the final order and judgment of this Court disposing of this matter as to all claims,

all parties, and the issue of attorney's fees and costs.

BY THE COURT

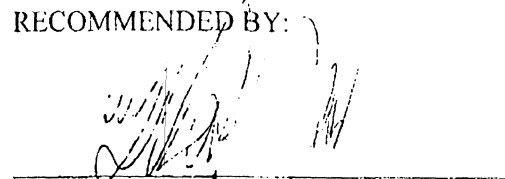
DATED this 20 day of Oct, 2009.



The Honorable Glenn K. Iwasaki
DISTRICT COURT JUDGE

RECOMMENDED BY:

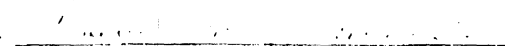
DATED this 17 day of Oct, 2009.



The Honorable T. Patrick Casey
DISTRICT COURT COMMISSIONER

Approved as to form:

DATED this day of , 2009.


David R. Blaisdell, Esq.
Counsel for the Petitioner

NOTICE TO ALL PARTIES

Pursuant to Utah R. Civ. P. 7(f)(2), this proposed Order will be filed with the Court five days after service upon you. Your objections, if any, must be filed with the Court within five days after service.

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

KORILEE LILLY	:	
	:	MINUTE ENTRY
Plaintiff	:	
	:	Case No. 074904948
-vs-	:	
	:	JUDGE GLENN K. IWASAKI
AARON M. LILLY	:	
	:	Date: DECEMBER 9, 2008
Defendant	:	
	:	
	:	

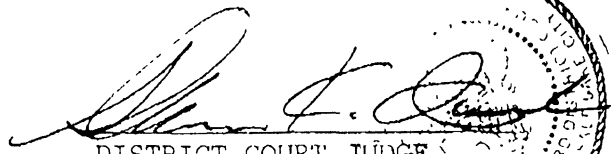
The Court has reviewed the requests for decisions submitted by the parties, Commissioner Casey's Minutes of September 17, 2008 and October 22, 2008, this Court's Minute Entry of October 28, 2008, Respondent's Partial Objection to Commissioner Casey's Recommendation of October 22, 2008 re: fees; Respondent's Motion to Alter or Amend this Court's Minute Entry of October 28, 2008, all supporting and opposition memos and rules as follows:

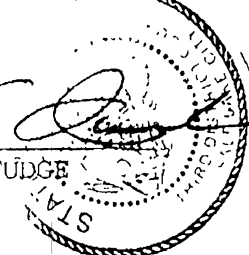
As to the Motion to Alter or Amend, the Court denies the Motion to Alter or Amend It's Minute Entry of October 28, 2008 which denied the objection to Commissioner Casey's Recommendation contained in the Minutes and subsequent order to the September 17, 2008 hearing. Also, the Court denies the Request for a "New Trial" or Oral Argument or Request for a De Novo Hearing.

Regarding the Respondent's Partial Objection to Commissioner Casey's Recommendation re: fees, the Court finds that Commissioner Casey correctly exercised his discretion and did not commit error, as alleged by respondent, in his recommendation.

This signed Minute Entry will be the Order of the Court on these issues.

Dated this 9th day of December, 2008.


DISTRICT COURT JUDGE



GKI/jmb

DAVID R. BLAISDELL #360
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Attorneys for Petitioner
5995 South Redwood Road
Salt Lake City, Utah 84123
Telephone: (801) 261-3407

FILED DISTRICT COURT
Third Judicial District

NOV - 2 2008

SALT LAKE COUNTY

ENTERED IN R' By _____
OF _____ Deputy Clerk

DATE 11/04/08

IMAGED

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, UTAH

KORILEE LILLY,	:	
Petitioner,	:	ORDER AWARDING ATTORNEYS
	:	FEES TO PETITIONER
vs.	:	
	:	
AARON MATTHEW LILLY,	:	Civil No. 074904948
Respondent,	:	Judge Iwasaki
	:	Commissioner Casey

Petitioner's Motion for Award of Attorneys Fees dated September 26th, 2008 duly came for hearing before the above-entitled Court on October 22, 2008, at 9:00 a.m., the Honorable Commissioner T. Patrick Casey presiding. Petitioner appeared in person and through her counsel of record, David R. Blaisdell and Respondent appeared through his counsel of record, Mark Wiser, but did not appear in person. The Motion was argued, submitted for ruling and the Court found that:

1. There has been no bad faith and a good faith dispute exists between the parties.
2. Both the provisions of the Uniform Interstate Family Support Act and 30-3-3, Utah Code Annotated are a predicate for the award of attorneys fees.

3. It is not appropriate to defer the award of attorneys fees pending appeal.

4. It is not appropriate for Petitioner to attempt to enforce the award of attorneys fees pending the ruling of Judge Iwasaki on Respondent's Objection to Commissioner's Recommendation.

5. Petitioner is the prevailing party.

6. The attorneys fees requested are reasonable in amount and relevant to the issues herein.

7. There is no evidence that Respondent is impecunious.

8. There are no facts that indicate that the requested attorneys fees should not be awarded.

Based upon the foregoing, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. Petitioner's Motion for Award of Attorneys Fees is granted.


2. Petitioner is awarded Judgment against Respondent in the sum of \$3,325.00 for her attorneys fees.

3. The issue of Petitioner's attorneys fees arising in conjunction with Respondent's Objection to Commissioner's Recommendation is reserved, to be determined by the Honorable Glenn K. Iwasaki in conjunction with such Objection.

4. Pending the determination of the Objection to Commissioner's Recommendation, Petitioner shall take no steps to enforce this Order.

DATED this 3 day of Nov., 2008.

BY THE COURT:


JUDGE GLENN K. IWASAKI



IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

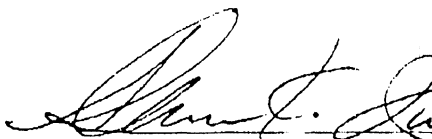
KORILEE LILLY	:	
	:	MINUTE ENTRY
Petitioner	:	
	:	Case No. 074904948
-vs-	:	
	:	JUDGE GLENN K. IWASAKI
AARON M. LILLY	:	
	:	Date: OCTOBER 28, 2008
Respondent	:	
	:	
	:	

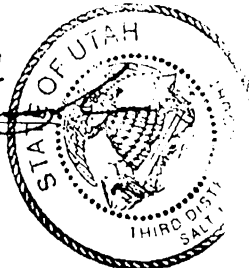
The Court has reviewed Commissioner Cascy's Minutes of September 17, 2008, Respondent's objections, Petitioner's response, Respondent's Motion to Strike, Petitioner's response, other relevant pleadings and denies the motion.

As an initial matter, the Court denies the Motion to Strike and has considered Petitioner's objections. With that said, the Court does not find any abuse of discretion nor error in law as to Commissioner Casey's recommendations.

The Court signed the submitted Recommendations and Order on October 1, 2008 and that will remain the order of the Court on these issues.

Dated this 28th day of October, 2008.


DISTRICT COURT JUDGE



GKI/jmb

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FILED DISTRICT COURT
Third Judicial District

OCT - 1 2008

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, UTAH

KORILEE LILLY,	:	ORDER
Petitioner,	:	
vs.	:	
	:	Civil No. 074904948
AARON MATTHEW LILLY,	:	
Respondent,	:	Judge Iwasaki Commissioner Casey

Respondent's Motion to Determine Residency and Choice of Law duly came for hearing before the above-entitled Court on September 17, 2008, at 9:00 a.m., the Honorable T. Patrick Casey presiding. Petitioner appeared in person and through her counsel of record, David R. Blaisdell and Respondent appeared in person and through his counsel of record, Mark Wiser. The Motion was argued, and the Court found that:

1. Respondent dwells, maintains an abode, has a bodily presence and lives in the physical sense in the State of California;
2. The parties maintained their marital residence in the State of California;

3. Both parties were residents of the State of California for the purpose of invoking jurisdiction for their divorce;

4. Respondent did not object to the exercise of jurisdiction of the parties' divorce by the State of California.

5. It is a fiction that Respondent lives in the State of Utah, and

6. No additional evidence was presented that was not presented at the hearing on March 10, 2008, at which time the Court ruled that this Court does not have jurisdiction to modify the California Judgment, without the written consent of each party;


Based upon the foregoing, and good cause appearing.

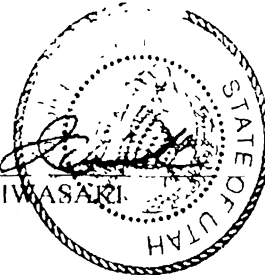
IT IS HEREBY ORDERED as follows:

1. Respondent's Motion To Determine Residency and Choice of Law is denied.
2. The State of Utah has no jurisdiction to modify the existing child support order contained in the Judgment of Dissolution entered in the State of California.
3. The State of California retains exclusive jurisdiction to modify the existing child support order contained in the Judgment of Dissolution.
4. The Court's prior Order dated March 26, 2008 remains in full force and effect.

DATED this 1 day of Oct, 2008.

BY THE COURT:


JUDGE GLENN K. IWASAKI



*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2002).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A04-942**

In re Darren Arnold Block, petitioner,
Appellant,

vs.

Melissa Kay Block
n/k/a Melissa Kay Holmberg,
Respondent.

**Filed January 18, 2005
Reversed
Hudson, Judge**

Dodge County District Court
File No. FX-03-293

George F. Restovich, Bruce K. Piotrowski, George F. Restovich & Associates, 117 East Center Street, Rochester, Minnesota 55904 (for appellant)

Michael J. Corbin, Corbin Law Office, 300 Depot Square Building, 303 Northeast First Avenue, Faribault, Minnesota 55021 (for respondent)

Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Respondent registered a Texas child-support decree in Minnesota, and the district court modified appellant's child-support obligation. Appellant argues on appeal that the district court lacked subject matter jurisdiction to modify the Texas decree under the Uniform Interstate Family Support Act. Because the district court lacked subject matter jurisdiction to modify the Texas decree, we reverse.

FACTS

The parties married in Minnesota. Both parties were domiciled in Minnesota at the time of their marriage. Appellant entered the United States armed forces shortly thereafter and was transferred to a military base in Texas. The parties' marriage was dissolved by final decree on April 17, 2000, in Coryell County, Texas. The Texas court found that it had jurisdiction over the dissolution because appellant was domiciled in Texas at the time of filing. Pursuant to the dissolution, the Texas court ordered appellant to pay regular monthly child support. The decree further authorized respondent to leave the jurisdiction and establish a primary residence for the parties' children. Respondent returned to Minnesota with the parties' children and established their domicile in Dodge County. The Army stationed appellant in South Korea, but appellant maintained a home in Texas.

In April 2003, respondent registered the Texas decree in Dodge County, Minnesota. Respondent moved to modify appellant's child-support obligation in Dodge County in June 2003, requesting that the district court assume subject matter jurisdiction. Appellant remained stationed in South Korea at the time of respondent's motion. The district court held a hearing on August 19, 2003. Appellant challenged the district court's subject matter jurisdiction under the Uniform Interstate Family Support Act (UIFSA), Minn. Stat. ch. 518C (2002). The district court agreed to assume jurisdiction and granted respondent's motion to modify the Texas child-support order on

December 16, 2003. Appellant moved for a new trial or amended findings. The district court upheld its December 16, 2003 order modifying appellant's child-support obligation on April 29, 2004. This appeal follows.

DECISION

Questions of subject matter jurisdiction are reviewed de novo. *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002). Because subject matter jurisdiction goes to a court's authority to preside over a matter, an appellant may raise the lack of subject matter jurisdiction for the first time on appeal. *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn. App. 1995) (citing Minn. R. Civ. P. 12.08(c)), *review denied* (Minn. May 31, 1995). "An appellate court will determine jurisdictional facts on its own motion even though neither party has raised the issue." *Carlson v. Chermak*, 639 N.W.2d 886, 889 (Minn. App. 2002). If this court determines that a district court lacked subject matter jurisdiction over a matter on appeal, it must dismiss the action. Minn. R. Civ. P. 12.08(c).

Appellant argues that the district court improperly assumed subject matter jurisdiction over the Texas child-support order under the UIFSA. Minnesota and Texas have both adopted the UIFSA. *See* Minn. Stat. §§ 518C.101–518C.902 (2002); Tex. Fam. Code Ann. §§ 159.001–159.902 (2002). When applying and construing a state's codification of the UIFSA, courts must give consideration to the need to promote uniformity in the law with respect to other states adopting similar provisions. *See* Minn. Stat. §§ 518C.901, 645.22 (2002); Tex. Fam. Code Ann. § 159.901 (2002). Under section 205 of the UIFSA, as codified in Texas, Texas courts retain continuing, exclusive jurisdiction to modify a child-support order issued in Texas

- (1) as long as this state remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or
- (2) until all of the parties who are individuals have filed written consents with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

Tex. Fam. Code Ann. § 159.205(a) (2002); *see also* Minn. Stat. § 518C.205(a) (2002) (providing a similar statement of law applicable to child-support orders issued by Minnesota courts).

A Minnesota court may modify a foreign child-support order if the order has been registered in Minnesota and, after notice and a hearing, the registering court finds that:

- (i) the child, the individual obligee, and the obligor do not reside in the issuing state;
- (ii) a petitioner who is a nonresident of this state seeks modification; and
- (iii) the respondent is subject to the personal jurisdiction of the tribunal of this state.

Minn. Stat. § 518C.611(a)(1) (2002). Additionally, a Minnesota court can assume jurisdiction to modify the Texas order if both parents are residents of Minnesota and the child no longer lives in Texas. *See* Minn. Stat. § 518C.613(a) (2002). And finally, a Minnesota court may modify a foreign child-support order if

the child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures in this chapter, the consent otherwise required of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child support order.

Minn. Stat. § 518C.611(a)(2) (2002).

Accordingly, unless the circumstances at hand satisfy one of the above three criteria, Texas retains exclusive jurisdiction over the Texas child-support order, and we must vacate the district court's orders for lack of subject matter jurisdiction.

The district court does not have jurisdiction to modify the Texas child-support order under either Minn. Stat. § 518C.611(a)(1) or Minn. Stat. § 518C.613(a) because the parties do

not satisfy the residency requirements. Respondent, a Minnesota resident, is the petitioner seeking modification in Minnesota. Under section 518C.611(a)(1), the district court lacks jurisdiction if the petitioner resides in Minnesota. *See Porro v. Porro*, 675 N.W.2d 82, 87 (Minn. App. 2004) (holding that the requirements for jurisdiction under section 518C.611(a)(1)(ii) were not met where the mother was a Minnesota resident). Further, because appellant is not a Minnesota resident, the district court cannot exercise jurisdiction under section 518C.613(a).^[1]

Respondent argues that Minnesota courts have subject matter jurisdiction over the Texas child-support order under Minn. Stat. § 518C.611(a)(2) because appellant did not present evidence at the district court level of Texas's conformity with the UIFSA. Under section 518C.611(a)(2), if Texas has not codified the UIFSA, or some other similar provision, Minnesota courts may assume jurisdiction over the Texas order without obtaining appellant's consent. Respondent's argument fails because it misconstrues this court's scope of review over the district court's subject matter jurisdiction. Subject matter jurisdiction is an issue that can be raised for the first time on appeal. *Cochrane*, 529 N.W.2d at 432 (citing Minn. R. Civ. P. 12.08(c)). And this court may take judicial notice of Texas's status as a signatory. *See* Minn. R. Evid. 201(b). Accordingly, because Texas is a signatory to the UIFSA, Minnesota courts do not have jurisdiction to modify the Texas child-support order under Minn. Stat. § 518C.611(a)(2) without the consent of the parties. *See* Tex. Fam. Code Ann. §§ 159.001–159.902.

Respondent next argues that the district court had subject matter jurisdiction under Minn. Stat. § 518C.611(a)(2) because this provision is unique to Minnesota. Texas's codification of the UIFSA does not contain a similar jurisdiction-granting provision and, therefore, respondent contends that Texas's codification is not “substantially similar” to the Minnesota statutes. We disagree. Respondent's argument isolates one subpart of a section in the Minnesota codification of the UIFSA and ignores the similarity between the rest of Minn.

Stat. §§ 518C.101–518C.902 and Tex. Fam. Code Ann. §§ 159.001–159.902. The Texas UIFSA is substantially similar to the Minnesota codification. Consequently, the district court does not have subject matter jurisdiction under section 518.611(a)(2) unless appellant files a written consent.


Finally, respondent argues that the Minnesota court had ancillary subject matter jurisdiction to modify the Texas child-support order under the UIFSA because the Minnesota court had subject matter jurisdiction for purposes of custody modification under Minnesota’s codification of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *See* Minn. Stat. §§ 518D.101–518D.317 (2002). Assuming that Minnesota had and exercised subject matter jurisdiction over the custody provisions of the Texas order under the UCCJEA, respondent’s argument is without merit. Any application of the ancillary jurisdiction doctrine to the UIFSA would defeat its explicit requirement of one state with exclusive jurisdiction, and its purpose of imposing uniformity. *See* Minn. Stat. § 645.22; National Conference of Commissioners on Uniform State Laws, UIFSA (2001) Prefatory Note II.B.3 (noting that the UIFSA was meant to ensure that “only one valid support order may be effective at any one time,” even though the parties and their children may leave the issuing state). Moreover, the two Minnesota cases addressing jurisdiction under the UIFSA and UCCJEA analyze the jurisdictional requirements separately without invoking ancillary jurisdiction. *See Schroeder v. Schroeder*, 658 N.W.2d 909, 912–13 (Minn. App. 2003); *Stone v. Stone*, 636 N.W.2d 594, 596–97 (Minn. App. 2001). Accordingly, the district court lacked subject matter jurisdiction to modify the Texas child-support order under the UIFSA.

Reversed.

^[1] Although respondent’s status as a Minnesota resident disposes of the jurisdictional issue under section 518C.611(a)(1), the parties devoted considerable argument to defining “residence” under the UIFSA. The terms “residence” and “domicile” are frequently used interchangeably by our legislature, particularly in the area of family law. *See* Minn. Stat. § 518.003, subd. 2 (2002) (defining “residence” to mean “the place where a party has

established a permanent home from which the party has no present intention of moving”). The UIFSA gives one state continuing exclusive jurisdiction over child-support matters. An individual therefore cannot have more than one residence. Thus, “residence” for purposes of the UIFSA means domicile.

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Affirmed and Memorandum Opinion filed August 5, 2003.

In The
Fourteenth Court of Appeals

NO. 14-02-00875-CV

WILBUR KEITH GRIMES, Appellant

V.

LOIS ANN McFARLAND, Appellee

**On Appeal from the 311th District Court
Harris County, Texas
Trial Court Cause No. 01-19454**

MEMORANDUM OPINION

Appellant, Wilbur Grimes, appeals the dismissal of his motion to modify child support and the special appearance granted to appellee, Lois McFarland. In a single issue, appellant contends the trial court erred in dismissing his motion to modify child support for lack of jurisdiction. We affirm.

FACTS

McFarland and Grimes divorced after Grimes was indicted for sexually assaulting their minor, female child. On May 5, 2001, they signed an Agreed Final Decree of Divorce. On the same day, McFarland and the child moved to Kansas. The trial court then signed and entered the divorce decree on June 18, 2001. McFarland traveled from Kansas to appear for the uncontested June divorce hearing. Grimes traveled to Tennessee, although there were several outstanding warrants for his arrest in Texas. While in Tennessee, on November 26, 2001, Grimes filed a Motion to Modify the Parent-Child Relationship in Harris County, contesting child

support and custody. He never served McFarland with a copy of his motion. Thereafter, while confined within a Texas jail, Grimes amended his motion and served McFarland in Kansas on January 28, 2002.

On February 26, 2002, McFarland filed a special appearance and her answer, alleging that she lived in Kansas, had no contact with Texas, and Grimes was now a resident of Tennessee. An evidentiary hearing before an associate judge was held on April 5, 2002. At the hearing, McFarland agreed to abate Grimes's obligation to pay child support during the pendency of the criminal case. The judge sustained her special appearance as to child support only. However, Grimes appealed the associate judge's ruling and requested a hearing de novo on all special appearance issues. On May 2, 2002, following a hearing before the presiding judge of the 311th District Court, McFarland's special appearance was sustained. The court, inter alia, rendered the following Finding of Fact: "neither the child (CKG) nor either of (her) parents presently reside in the State of Texas or have a significant connection with the State of Texas." The court also rendered the following Conclusion of Law: "this court has no personal or subject matter jurisdiction." The court issued an order ruling that it did not have jurisdiction or, in the alternative, declining to exercise jurisdiction under section 152.28 of the Family Code.

In four sub-issues appellant argues that (1) appellee waived her special appearance; (2) under the Family Code, Texas retained exclusive jurisdiction; (3) he was a resident and domiciliary of Texas; and (4) appellee was barred from "going behind" the divorce decree.

WAIVER

During the April 5, 2002 special appearance hearing before an associate judge, McFarland asked the court to enter temporary orders abating Grimes's child support obligations. In one of his sub-issues, Grimes contends that McFarland waived her special appearance when she agreed that he was not obligated to pay child support during the pendency of his aggravated sexual assault case. Generally, a party waives a special appearance if it seeks affirmative relief or invokes the trial court's jurisdiction on any question other than the court's jurisdiction before the trial court rules on the special appearance. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998). In this case, however, the court had already ruled on the special appearance. The associate judge ruled that Kansas had jurisdiction over the custody issue and that Texas would retain jurisdiction over all support issues. Based on the court's ruling, and still subject to her special appearance, McFarland then asked to abate Grimes's child support obligations pending final disposition of his criminal case. Because the court ruled on the special appearance before

McFarland offered or agreed to abate child support payments, we find she did not waive her special appearance. *Id.*

SPECIAL APPEARANCE

In Grimes's remaining sub-issues, he challenges the trial court's decision to grant McFarland's special appearance.^[1] When the trial court enters findings of fact and conclusions of law following the grant of a special appearance, we review findings of fact for sufficiency of the evidence and conclusions of law de novo. *See Linton v. Airbus Industrie*, 934 S.W.2d 754, 757 (Tex. App.—Houston [14th Dist.] 1996, writ denied). In conducting our review, we consider all of the evidence that was before the trial court, including the pleadings, any stipulations, affidavits and exhibits, the results of discovery, and any oral testimony. *BHP de Venezuela, C.A. v. Casteig*, 994 S.W.2d 321, 326 (Tex. App.—Corpus Christi 1999, pet. denied) (op. on reh'g).

A. Residency of McFarland and the Child

The Uniform Interstate Family Support Act ("UIFSA") addresses jurisdiction between competing states involving matters of child support. *See* TEX. FAM. CODE ANN. § 152.001 - 159.902 (Vernon Supp. 2001). UIFSA provides:

(a) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child support order:

(1) as long as this state remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued

TEX. FAM. CODE ANN. § 159.205(a)(1) (Vernon Supp. 2001).

Under UIFSA, the trial court retains jurisdiction if either the child, McFarland, or Grimes remained a resident of Texas. During the special appearance hearing, McFarland testified she and the child moved to Kansas in May 2001, after she signed the Agreed Divorce Decree. She returned to Texas only once, in June 2001, to prove up the uncontested divorce. There was also testimony that the child had firmly established relationships with physicians, counselors, and her school. According to McFarland's testimony, she and the child did not have any contact with Texas after June 2001. This evidence was undisputed, and Grimes has not challenged any of the trial court's findings of fact regarding their residency.^[2] Unchallenged findings of fact are binding on the appellate court unless the contrary is established as a matter of law or there is no evidence to support the trial court's findings. *See London v. London*, 94 S.W.3d 139, 149 (Tex.

App.—Houston [14th Dist.] 2002, no pet.). Because Grimes made no challenge to the trial court's findings regarding McFarland's and the child's residency, we are bound by those findings. *Id.* Therefore, we need only review the challenged findings as to Grimes's residency.

B. Residency of Grimes

Grimes is currently serving a twenty-two year prison sentence in Texas. He filed his amended Motion to Modify while incarcerated in Harris County. Section 159 of the Family Code does not define residency; however, residency has been defined in other family law contexts. For example, a requirement to file for divorce under Chapter 6 of the Family Code, is residency in the county in which suit is filed for the preceding 90-day period. TEX. FAM. CODE ANN. § 6.301 (Vernon Supp. 2003). In that context, residency has been defined as physical presence in a county, accompanied by good faith intent to remain permanently and definitely make that county one's home. *Randle v. Randle*, 178 S.W.2d 570, 572 (Tex. Civ. App.—Galveston 1944, no writ); *see also Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 262 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Further, there is no reason an inmate cannot file for divorce in the county where he is imprisoned; but he must intend to reside in that county permanently after his release from prison. *In re Marriage of Earin*, 519 S.W.2d 892, 893 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). By analogy, for Texas to be a state of residence, a party should have actual, physical presence in the state coupled with a good faith intent to make Texas home. For an inmate to establish residency in Texas, he or she must intend in good faith to reside here permanently after release from prison.

In this case, the trial court entered findings of fact that Grimes was a resident of Texas only while involuntarily incarcerated and that when he had the freedom to choose where to reside, it was not Texas. The evidence shows that Grimes physically lived in Memphis, Tennessee with his sister after leaving Texas in September 2001. He left Tennessee in December 2001 and turned himself in at the Harris County jail. Upon posting bond, he immediately returned to Tennessee. Grimes filed his Motion to Modify from Tennessee. Finally, he advised the Harris County Criminal Court that he no longer resided in Texas. We will reverse the trial court's findings for factual insufficiency only where they are "so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust." *Carlidge v. Hernandez*, 9 S.W.3d 341, 346 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951)). We have reviewed the record, and we find there was sufficient evidence to support the trial court's finding that Grimes was not a resident of Texas.

CONCLUSION

Because Grimes did not challenge the findings as to the residence of the child and McFarland; and because there is sufficient evidence supporting the trial court's finding that Texas was not Grimes's place of residence, we hold that the trial court did not err in granting the special appearance. Accordingly, we overrule Grimes's single issue and affirm the trial court's order.

/s/ Charles W. Seymore
Justice

Judgment rendered and Memorandum Opinion filed August 5, 2003.

Panel consists of Justices Anderson, Seymore, and Guzman.

[1] Grimes has limited his appeal to the special appearance granted on the child support issue.

[2] Grimes contends McFarland is collaterally estopped from denying her Texas residency because of averments in the divorce decree. To the extent such an argument is a challenge to the trial court's findings, it is only a challenge up to the date of divorce. It does not cover findings of residency *after* the date of divorce. Further, collateral estoppel is an affirmative defense that must be pleaded or it is waived. TEX. R. CIV. P. 94. Because Grimes failed to plead collateral estoppel, he waived the issue on appeal.