

2009

Korilee Lilly v. Aaron Lilly : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David R. Blaisdell, Esq.; Blaisdell & Church; Counsel for Petitioner-Appellee.

Mark W. Wiser, Esq.; Law Office of Mark Wiser; Counsel for Respondent-Appellant.

Recommended Citation

Reply Brief, *Lilly v. Lilly*, No. 20090933 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/2004

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

KORILEE LILLY,
Petitioner-Appellee,

v.

AARON LILLY,
Respondent-Appellant.

Case No.: **20090933 CA**

REPLY BRIEF OF THE APPELLANT

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

David R. Blaisdell, Esq.
BLAISDELL & CHURCH
Counsel for Petitioner-Appellee
5995 So. Redwood Rd.
Salt Lake City, UT 84123
Tel: 801-261-3407
Fax: 801-261-3503

Mark W. Wiser, Esq. #10754
LAW OFFICE OF MARK WISER
Counsel for Respondent-Appellant
2825 E. Cottonwood Pkwy. Ste. 500
Salt Lake City, UT 84121
Tel: 801-990-1230
Fax: 801-880-7070

FILED
UTAH APPELLATE COURTS
JUN 07 2010

FILED
UTAH APPELLATE COURTS
JUN 04 2010

IN THE UTAH COURT OF APPEALS

KORILEE LILLY,
Petitioner-Appellee,

v.

AARON LILLY,
Respondent-Appellant.

Case No.: **20090933 CA**

REPLY BRIEF OF THE APPELLANT

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

David R. Blaisdell, Esq.
BLAISDELL & CHURCH
Counsel for Petitioner-Appellee
5995 So. Redwood Rd.
Salt Lake City, UT 84123
Tel: 801-261-3407
Fax: 801-261-3503

Mark W. Wiser, Esq. #10754
LAW OFFICE OF MARK WISER
Counsel for Respondent-Appellant
2825 E. Cottonwood Pkwy. Ste. 500
Salt Lake City, UT 84121
Tel: 801-990-1230
Fax: 801-880-7070

TABLE OF CONTENTS

Table of Contents	1
Table of Authorities	1-3
Reply Points and Authorities	4-28
I. Corrections to Wife’s Statement of the Case and Facts	4-6
II. The Court Below Exceeded Its Discretion Awarding Attorney’s Fees Based on a Flawed Interpretation of Utah Law	6-9
III. Under the Common-Law Rule, Soldiers Remain Domiciled in the State They Joined the Military In – Not Where They are Fortuitously Stationed	9-12
IV. “Residence” in the UIFSA Means “Legal Residence.”	12-19
V. Because Husband Joined the Military in Utah He Presumptively Remains Domiciled in Utah	19-22
VI. California’s September 30, 2008, Ruling Carries No Preclusive Effect Because It is Neither “Final” Nor Valid Under Federal Law	22-28
Certificate of Service	29
Appendix	29

TABLE OF AUTHORITIES

United States Supreme Court

<u>Barber v. Barber</u> , 323 U.S. 77 (1944)	23
<u>Barnhart v. Peabody Coal Co.</u> , 537 U.S. 149 (2003)	11-12
<u>Halvey v. Halvey</u> , 330 U.S. 610 (1947)	23
<u>Moore v. Sims</u> , 442 U.S. 415 (1979)	12

Utah Supreme Court

<u>Allen v. Greyhound Lines, Inc.</u> , 583 P.2d 613 (Utah 1978)	20-22
<u>Berneau v. Martino</u> , 2009 UT 87, 223 P.3d 1128	17
<u>Brookside Mobile Home Park, Ltd. v. Peebles</u> , 2002 UT 48, 48 P.3d 968	7-8
<u>Dodge v. Evans</u> , 716 P.2d 270 (Utah 1985)	11, 20-22
<u>Estate of Jones</u> , 858 P.2d 983 (Utah 1993)	23

<u>Fatt v. Utah Tax Comm'n</u> , 884 P.2d 1233 (Utah 1994)	10
<u>Fullenwider Co. v. Patterson</u> , 611 P.2d 387 (Utah 1980)	24
<u>H.U.F. and G.F. v. W.P.W.</u> , 203 P.3d 943 (Utah 2009)	24
<u>Munsee v. Munsee</u> , 363 P.2d 71 (Utah 1961)	15-16, 18
<u>Neways, Inc. v. McCausland</u> , 950 P.2d 420 (Utah 1997)	5-6, 20
<u>Normandeu v. Hanson Equip. Inc.</u> , 2009 UT 44, 215 P.3d 152	7-8
<u>Paffel v. Paffel</u> , 732 P.2d 96 (Utah 1986)	24
<u>West v. Thomson Newspapers</u> , 872 P.2d 999 (Utah 1994)	17

Utah Court of Appeals

<u>Barton v. Barton</u> , 2001 UT App 199, 29 P.3d 13	18, 25
<u>Connell v. Connell</u> , 2010 UT App 139, ___ P.3d ___	9
<u>Curtis v. Curtis</u> , 789 P.2d 717 (Utah App. 1990)	26-28
<u>Fullmer v. Fullmer</u> , 761 P.2d 942 (Utah App. 1988)	5, 20
<u>Keene v. Bonser</u> , 2005 UT App 37, 107 P.3d 693	16-18
<u>Searle v. Searle</u> , 2001 UT App 367, 38 P.3d 307	6-7
<u>State v. Garner</u> , 2002 UT App 234, 52 P.3d 467	13

Decisions by Other Federal and State Courts of Appeal

<u>DuBroff v. DuBroff</u> , 833 F.2d 557 (5th Cir. 1987)	12
<u>In re the Marriage of Amezquita</u> , 124 Cal.Rptr.2d 887 (Cal. App. 3d 2002)	14, 25-26
<u>In re the Marriage of Basileh</u> , 890 N.E.2d 779 (Ind. App. 2008) <i>aff'd</i> 912 N.E.2d 814 (Ind. 2009).	25
<u>In re the Marriage of Thornton</u> , 185 Cal.Rptr. 388 (Cal. App. 5d 1982)	4, 27
<u>In re the Marriage of Tucker</u> , 277 Cal.Rptr. 403 (Cal. App. 4d 1991)	14
<u>Kasap v. Folger Nolan Fleming & Douglas, Inc.</u> , 166 F.3d 1243 (D.C.Cir. 1999)	28
<u>Morrow v. Winslow</u> , 94 F.3d 1386 (10th Cir. 1996)	12
<u>Stifel v. Hopkins</u> , 477 F.2d 1116 (6th Cir. 1973)	11, 21
<u>Wamsley v. Wamsley</u> , 635 A.2d 1322 (Md. 1994)	11
<u>White v. Bennett</u> , 553 S.W.2d 845 (Ky. App. 1977)	23-24

Statutes and Court Rules

28 U.S.C. § 1738A	18, 26-28
28 U.S.C. § 1738B	24-28
50 U.S.C. § 501-596	9-12
California Family Code § 3651	24
Utah Code Ann. § 30-3-1	15-16
Utah Code Ann. § 78B-12-110	23
Utah Code Ann. § 78B-14-205	15, 18
Utah Code Ann. § 78B-14-313	8-9
Utah Code Ann. § 78B-14-601	26
Utah Code Ann. § 78B-14-602	26
Utah Code Ann. § 78B-14-610	26
Utah Code Ann. § 78B-14-613	15, 26
Utah Code Ann. § 78B-14-901	12, 18-19
Utah Rules of Civil Procedure § 101	5

Miscellaneous Authorities

21 A.L.R.2d 1163 § 13	9-12
27C C.J.S. Divorce § 1286	23
<i>Domicile as Affected by Compulsion</i> , 13 U. Pitt. L. Rev. 697 (1952)	21
<i>Domicile of United States Soldiers Serving in Federal Territory</i> , 27 Harv. L. Rev. 472 (1914).	10-11
Restatement (Second) of Conflicts of Law § 17	11, 20-22
Restatement (Second) of Conflicts of Law § 19	22
Restatement (Second) of Conflicts of Law § 109	23-25
Restatement (Second) of Conflicts of Law § 110	28
Restatement (Second) of Judgments § 81	23

REPLY POINTS AND AUTHORITIES

I. CORRECTIONS TO WIFE’S STATEMENT OF THE CASE AND FACTS

Wife incorrectly asserts in her statement of the case that the California court assumed jurisdiction (*after* the Utah court below declined jurisdiction) based on a finding that “[Husband] is a resident of California.” However, the official transcript of the proceedings in California shows that the court did **not** rely upon this finding as basis for assuming jurisdiction. (R: 484-487). Rather, the California court explicitly held it’s assumption of subject-matter jurisdiction was based on two other reasons. (R:486-488). First, Husband made a “general appearance” by litigating jurisdiction without making a special appearance. (R:488). Second, because Husband did not challenge Wife registering the Utah support order in California for enforcement purposes. *Id.*

In ¶ 8(a) of Wife’s facts she notes that after the court below declined jurisdiction the California court found that Husband was a “resident” of California. However, the face of the order does not identify whether this referred to Husband’s *physical* or *legal* residence. Under California law a soldier stationed there may properly be considered a “resident” of California, but this is distinct from a finding that the soldier’s “residence” or “domicile” is in California. *Cf. In re Marriage of Thornton*, 185 Cal.Rptr. 388, 395 (Cal. App. 5d 1982)(“Clearly husband was a resident, through not a domiciliary, of California during these proceedings.”). Because the transcript of the California proceedings shows that the court did not engage in a domicile analysis but instead merely looked at where Husband was physically “living” under military orders, (R:485, 488), it is clear it only

found that Husband was a *physical* – not *legal* – resident of California.

In ¶ 9 of Wife’s facts she fails to disclose that that the Utah court formally held it lacked subject-matter jurisdiction on September 17, 2008 – *prior* to California’s September 30, 2008, proceeding. (R:225). The fact the written order (drafted by Wife) from the September 17 hearing was not signed until October 1, 2008, is irrelevant because, under Utah R. of Civ. P. § 101(k), the recommendation of a court commissioner made in open court “is the order of the court” unless later modified by the court.

In ¶¶ 6 and 9 of Wife’s facts she fails to disclose that the court later clarified the findings she cites to make it clear that it was only referring to the parties’ *physical* – not *legal* – residence in California. (R:556, ¶ 4, Hrg. Trans. August 26, 2009 8:10-9:16, R: 550). The court made it clear it had made no findings on the issue of where Husband’s *legal* residence was and would need to hold an evidentiary hearing on remand. (R: 556).

Wife also neglects to disclose that Husband controverted all these factual allegations by sworn declaration to the extent they suggested his *legal* residence was in California or that he ever invoked the jurisdiction of California’s courts. (R:466-471). In Neways, Inc. v. McCausland, 950 P.2d 420, 422-423 (Utah 1997), the Utah Supreme Court held that when jurisdiction is disputed and the court renders a decision based on documentary evidence alone without the aid of an evidentiary hearing,¹ the plaintiff’s

¹ When, as here, the trial court merely relies on documents and proffered testimony, this court is “in as good a position to review the proffer as was the trial court, as no assessment of witness credibility occurred below.” Fullmer v. Fullmer, 761 P.2d 942, 945 (Utah App. 1988). Accordingly, this court reviews the evidence before the trial court *de novo* and draws its own legal conclusions therefrom. *See Id.*

facts must be accepted as true unless specifically controverted by affidavits or by depositions, but any disputes in the documentary evidence are resolved in plaintiff's favor. Id. If the court does not hold an evidentiary hearing, it cannot weigh the evidence. Id. at 422.

Here, because (1) Wife failed to introduce any affidavits or depositions controverting Husband's version of the facts, (2) the court did not conduct an evidentiary hearing, and (3) Wife relies on findings the court made based on her motion to dismiss, all of Husband's facts must be accepted as true under Neways.

Regarding ¶ 12 of Wife's facts, Wife fails to mention that Husband had already objected to the trial court's prior award of attorney's fees and costs thereby giving the trial court an opportunity to rule on the issue of fees and costs. (R: 318-322, 430-437).

II. THE COURT BELOW EXCEEDED ITS DISCRETION AWARDING ATTORNEY'S FEES BASED ON A FLAWED INTERPRETATION OF UTAH LAW.

Reaching the Merits: While California's subsequent order made in reliance on incorrect judgment of the court below is invalid for the reasons discussed *infra* in this brief, even momentarily assuming this court were to hold otherwise, this court still retains the authority to review whether the court below awarded attorney's fees to Wife based on a flawed interpretation of Utah law. If the court below misinterpreted the UIFSA then its subsequent decision to award fees and costs to Wife was a per se abuse of discretion because the court would have never declined jurisdiction in the first place and she would not have been the prevailing party. *Cf. Searle v. Searle*, 2001 UT App 367, ¶ 13. 38 P.3d

307 (This court can reach the merits of the underlying judgment from which relief is sought to determine whether the trial court abused its discretion because a decision premised on a flawed legal conclusion constitutes an abuse of discretion). Wife does not dispute this point in her brief.

Issue Preservation: While Wife does not deny that Husband informed the court below that it was error to award her attorney's fees based on an erroneous interpretation of the UIFSA and failing to find that Wife needed help paying her legal expenses, Wife asserts that because Husband did not reraise these objections when she moved for additional attorney's fees after the trial court denied Husband's objections to the ruling declining jurisdiction and awarding Wife attorney's fees, he cannot now challenge the court's January 15, 2009, decision to award additional attorney's fees.

Wife is mistaken because in order to preserve an issue for appeal an appellant need only present the issue to the trial court in such a way that the court has an opportunity to rule on that issue. Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 14, 48 P.3d 968. This is done by (1) raising the issue in a timely fashion, (2) specifically raising the issue, and (3) providing the trial court with supporting evidence and/or relevant legal authority. Id. Once a party has raised an issue and the trial court has had an opportunity to rule on that issue, the issue is preserved. Id.; See also Normandeu v. Hanson Equip. Inc., 2009 UT 44, ¶ 24, 215 P.3d 152 (Issues raised in opposition to a pre-trial motion did not have to be reraised at trial to preserve them for appeal). There is simply no need "to reraise the same issue in order to preserve it for appeal." Normandeu, 2009 UT 44 at ¶ 24.

Therefore, because Husband timely objected to the trial court's decision awarding attorney's fees and costs premised on an erroneous legal conclusion and inadequate findings of fact and the court had an opportunity to rule on these issues, Husband's objection to *all* the trial court's awards of attorney's fees and costs is preserved.

The Court Below Found Mandatory Attorney's Fees Were Unjustified: Wife argues she is entitled to a mandatory award of attorney's fees under the UIFSA as a sanction against Husband because she prevailed on the jurisdictional dispute thereby triggering a statutory presumption that Husband requested a hearing in this case for the primary purpose of delay. *See* Utah Code Ann. § 78B-14-313(2). The official comments to Section 313 of the UIFSA explain that this section is intended to:

“provid[e] a sanction to deal with a frivolous contest regarding compliance with an interstate withholding order, registration of a support order, or comparable delaying tactics regarding an appropriate enforcement remedy.”

However, the fatal flaw with Wife's argument for a mandatory award of fees is that the court below found nothing to indicate that Husband commenced this action for the purpose of delay. Rather, the court found – and Wife did not dispute – that Husband brought his suit in good-faith based on a genuine dispute over the application of the law as opposed to a frivolous delaying tactic. (R: 323, ¶ 1, Hrg. Transc. October 22, 2008, 8:10-11:22, R: 387). The court specifically held that it was **not** imposing attorney's fees as a “punitive sanction” against Husband. (Hrg. Transc. October 22, 2008 11:9-22). Therefore, Wife is not entitled to a mandatory award of attorney's fees under the UIFSA.

Discretionary Award is Erroneous Absent a Showing of Need: Wife does not

deny that she failed to present any evidence showing she was in need of attorney's fees nor that the court made no finding she was in need. Wife fails to offer any reason why a discretionary award of fees should be upheld in light of these facts other than pointing out that this court has never addressed what factors a court awarding discretionary fees under the UIFSA must consider. But, because (1) this court has consistently held that a showing of need by the spouse requesting attorney's fees is *sine qua non* to a discretionary award of attorney's fees when establishing a child support order, Connell v. Connell, 2010 UT App 139, ¶ 29, ___ P.3d ___, and (2) there is nothing in the UIFSA suggesting a contrary test should apply, there is no reason why this court should not extend this well-known test to reviewing discretionary awards of attorney's fees under the UIFSA. To hold otherwise would preclude meaningful appellate review and would encourage arbitrary and capricious fee awards under the UIFSA. Therefore, the trial court's judgments of attorney's fees and costs must be reversed.

III. UNDER THE COMMON-LAW RULE, SOLDIERS REMAIN DOMICILED IN THE STATE THEY JOINED THE MILITARY IN – NOT WHERE THEY ARE FORTUITOUSLY STATIONED.

Wife's argues this court should reject the common-law rule that "[p]ractically all of the authorities are in agreement" on that "a person inducted into the military service retains his domicile or residence in the state from which he entered the military service" 21 A.L.R.2d 1163 § 13 (collecting cases)(the "**military residence rule**"), because the Federal Service-members Civil Relief Act ("**SCRA**"), 50 U.S.C. § 501-596, does not identify where a soldier's residence for child support jurisdictional purposes is but does

state that a soldier retains his home domicile for voting and tax purposes. Invoking the canon *expressio unius est exclusio alterius*, Mother suggests Congress' failure to specify where a soldier's residence is for divorce jurisdictional purposes in the SCRA gives rise to the negative interference that a soldier's domicile is wherever the military fortuitously happens to station that soldier.

Before addressing the glaring flaws in Wife's argument, it is first necessary to discuss the unique rules of statutory construction applicable to legislation affecting military service-members. The Utah Supreme Court explained in Fatt v. Utah Tax Comm'n, that in interpreting the SCRA:

“[t]he Act is to be interpreted liberally and in favor of those in the armed services. A court must read the Act with an eye friendly to those who dropped their affairs to answer their country's call. The judiciary should resolve all reasonable doubts under the Act in favor of military personnel and construe the Act in light of its paternal policy and consistent with its broad spirit of gratitude. **The underlying purpose of servicemen's legislation has been to enlarge, not to restrict or cut down the rights afforded those in the military service.**”

884 P.2d 1233, 1235 (Utah 1994)(internal citations and quotations omitted and emphasis added); *See also Id.* at 1236 (The rules of statutory construction favor members of the armed services).

The fatal flaw in Wife's argument is that she erroneously assumes – *without citation to **any** authority* – that the SCRA is the spring from which the military residence rule flows from (as opposed to independent state or common-law grounds). To the contrary, it has been well-documented by courts and legal scholars alike that the military residence rule has been around for centuries and originated in the English common-law. *See Domicile of United States Soldiers Serving in Federal Territory*, 27 Harv. L. Rev. 472 (1914)(citing *Dicey, Conflict of Laws*, 2 ed., 144 and Ex parte Cunningham, 13 Q.B.D.

418, 425); Stifel v. Hopkins, 477 F.2d 1116, 1121-23 (6th Cir. 1973).

In Dodge v. Evans, 716 P.2d 270, 274 (Utah 1985), our Supreme Court implicitly adopted the military residence rule when it endorsed the Restatement (Second) of Conflicts of Law § 17 as authoritative in Utah based on the “long-standing common law rule [that] a person cannot change his domicile solely as a result of involuntary confinement.” Comment d of § 17 of the Restatement specifically concurs in the military residence rule. Tellingly, practically all states and legal authorities to consider the military residence rule have adopted it in one form or another, *See Wamsley v. Wamsley*, 635 A.2d 1322, 1325 fn 1. (Md. 1994) (collecting cases), and Wife has failed to offer so much as a single authority to the contrary.

Because Mother does not contend that the SCRA preempts this common-law rule, it is irrelevant what protections the SCRA does and does not provide to service-members *in addition to* the common-law military residence rule because Husband’s argument is not premised on the SCRA. Rather, Husband merely argues the SCRA is an illustrious example and extension of the military residence rule.

However, even assuming *arguendo* this court held otherwise, the United States Supreme Court has held that the *exclusio alterius* canon does not apply to every statutory listing or grouping. Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Rather, “it has force only when the items expressed are members of an ‘associated group or series’ justifying the interference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Id.* If the expressed and omitted items do not go hand in hand then the

canon is simply inapplicable. *Id.* at fn. 12.

Here, Wife offers no analysis how the right to retain one's residence for child support jurisdictional purposes while in military service goes hand in hand with retaining it for voting and tax purposes. Rather, there is a strong common law presumption that the federal government should not become involved in family law matters. *See Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *Morrow v. Winslow*, 94 F.3d 1386, 1387 (10th Cir. 1996); *DuBroff v. DuBroff*, 833 F.2d 557, 561 (5th Cir. 1987) ("There is perhaps no state administrative scheme in which federal court intrusions are less appropriate than domestic relations law."). Consequently, the canon is simply inapplicable here and Wife's reliance on the SCRA to overcome the common-law military residence rule is misplaced.

IV. "RESIDENCE" IN THE UIFSA MEANS "LEGAL RESIDENCE."

Wife does not dispute that **every** appellate court to consider what "residence" in the UIFSA means has explicitly or implicitly construed it as synonymous with *legal* residence. Wife likewise does not deny that **every** appellate court to consider where a military service-member "resides" under the UIFSA has followed the common-law rule that soldiers presumptively reside in the state where they joined the military – not where they happen to be physically stationed. Finally, Wife does not dispute that the Utah Legislature has instructed this court to give consideration to the need to adopt uniform interpretations of the UIFSA across state lines. *See Utah Code Ann. § 78B-14-901.*

Without offering any criticism of the legal analysis employed by appellate courts in

Utah’s sister-states to reach the unanimous conclusion that “residence” in the UIFSA means *legal* residence, Wife contends these decisions should all be ignored because – as is the case in almost every appeal – no single precedent completely mirrors all the facts of this case. However, Wife’s argument is far more damaging to her own position because she has failed to direct this court’s attention to **any** authority adopting a position contrary to how California, Georgia, Alabama, Indiana, Missouri, Texas, and Minnesota appellate courts have uniformly interpreted the UIFSA.

Although Wife attempts to collectively distinguish all the authorities cited by Husband based on various factual distinctions listed on Pg. 22-23 of her brief, she offers no analysis as to how any of these distinctions are relevant under the UIFSA. While it is well established that this court will not consider claims that are inadequately briefed, State v. Garner, 2002 UT App 234, ¶ 8, ¶ 12, 52 P.3d 467 (When a party fails to offer any meaningful analysis regarding a claim, we decline to reach the merits), Husband will nevertheless strive to address these claimed distinctions in turn.

First, Wife suggests this case is distinguishable because although Husband was born, raised, and joined the military in Utah, the military has never subsequently deployed him to Utah. But, Wife offers absolutely no analysis as to how this claim is relevant under the UIFSA, case law, or military residence rule given the undisputed fact Husband is from Utah and intends to return to his home here once released from military service.

Next, Wife contends both her and Husband were “residents”² of California during

2 Wife does not specify where she means they were both *physical* or *legal* residents

their marriage and Husband did not object to California handling their initial divorce. However, Wife does not deny that (1) they were married in Utah, (2) that she was only in California because she accompanied Husband on his military deployment there, and (3) she was the petitioner who invoked California's jurisdiction seeking a divorce – Husband was merely the respondent. Wife offers no analysis how Husband's physical presence and accommodation to her desire for an immediate divorce is relevant under the UIFSA or case law given the undisputed fact he was only in California because of military orders. To the contrary, In re the Marriage of Tucker, 277 Cal.Rptr. 403, 408-409 (Cal. App. 4d 1991), the California Court of Appeal held that a soldier deployed to California who was sued for a divorce by his wife (who accompanied him there) and who consented to California entering, *inter alia*, initial child support orders did **not** acquire a California residence. Because the wife failed to show her soldier husband intended to stay in California after his release from military service, California was not that soldier's residence even though California had just issued him and his wife a divorce decree. Id. at 408. Consequently, this factual distinction is simply immaterial.

Wife next argues this case is distinguishable from Amezquita because it did not involve the "relocation of the obligee and the parties' child from the issuing state." This argument is wholly without merit because Amezquita **did** involve the relocation of the obligee and child. 124 Cal.Rptr.2d 887, 888 (Cal.App. 3d 2002).

of California. Because the court below found there was a genuine issue of fact as to Husband's legal residency, Husband presumes Wife is referring to *physical* residency.

Finally, Wife emphasizes none of Utah's sister-states have considered "residence" in the UIFSA when a child support obligor – rather than the obligee – seeks to modify a support obligation in the state where the obligee and child have relocated to. Again, Wife offers absolutely no analysis how this distinction is relevant under Section 613 or 205 of the UIFSA or case law. Rather, the plain language of Section 613 of the UIFSA suggests it makes no difference which parent commences the modification action so long their residence is in the same state.

Wife then asserts that this court should disregard how its sister-states have unanimously analyzed military residence under the UIFSA because Utah has never adopted the common-law military residence rule. However, what Wife fails to mention is that Utah has never had an opportunity to consider the military service rule because this is a case of first impression. Therefore, under Wife's logic it is just as accurate for Husband to say that Utah, like all its sister-states, has never *rejected* the military residence rule either.

Next, while Wife concedes that both "residence" and "resides" have been interpreted differently throughout Utah law depending on the context the terms are employed in, Wife incorrectly asserts that Utah has consistently interpreted "residence" in family law contexts as requiring actual *physical* residence as opposed to mere domicile. However, that is not an accurate statement of the law.

Divorce Proceedings: When called upon to construe the term "actual and bona-fide resident" in Utah's divorce jurisdiction statute, Utah Code Ann. § 30-3-1(2), our

Supreme Court held that “bona-fide residence” is “synonymous with domicil[e].” Munsee v. Munsee, 363 P.2d 71, 72 (Utah 1961). However, because the statute imposed the additional requirement that one be an “*actual* resident” of Utah in addition to having a Utah domicile, the court imposed a physical presence requirement. Id. 72-73.³

Based on this parsing of the statute, the fatal flaw in Wife’s argument that this court should interpret “residence” in the UIFSA the same as how the Supreme Court interpreted “actual **and** bona-fide residen[ce]” in Utah Code Ann. § 30-3-1(2) is the fact that the UIFSA does not require “**actual** residence” (or words to that effect) – it just requires mere “residence.” Therefore, interpreting “residence” in the UIFSA as synonymous with domicile is consistent with the Supreme Court’s logic in Munsee.

Cohabitant Abuse Proceedings: Wife’s continues to place great – albeit mistaken – reliance on this court’s decision in Keene v. Bonser, 2005 UT App 37, 107 P.3d 693, that “residence” in the context of Utah’s Cohabitant Abuse Act means actual physical presence – not domicile. In doing so, Wife ignores all the warning signs this court placed throughout its opinion in Keene that the Utah Legislature had adopted a broader view of cohabitation and residence in the cohabitant abuse context than “Utah case law has in other contexts.” Id. at ¶ 8, ¶ 14, and ¶ 25.

While Wife is correct that the dictionary is an appropriate place to begin analyzing

3 Following Munsee the Utah Legislature amended Utah Code Ann. § 30-3-1(2) to allow military service-members stationed in Utah to sue for a divorce here even though they are “not legal residents of this state.” By negative implication, if an out-of-state soldier stationed in Utah is **not** a legal resident of Utah then a Utah soldier stationed outside of Utah must presumptively remain a legal resident of Utah.

the words of a statute, it is not the end of the analysis. For example, in West v. Thomson Newspapers the Utah Supreme Court criticized this court's over-reliance on the dictionary to interpret the meaning of an allegedly defamatory word, warning that:

“[a]lthough a dictionary may define and give some content to allegedly defamatory words, it cannot be dispositive. ... The problem with the lexicographical approach utilized by the court of appeals is that it ignores context. As Justice Holmes explained, ‘A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.’”
872 P.2d 999, 1009 (Utah 1994).

The Supreme Court further lamented that:

“An additional problem with the court of appeals’ approach is that it leads to confusing and irreconcilable results. The meanings that dictionaries attribute to particular words are far from universally consistent. In fact, most dictionaries – including the one relied on by the majority below – lists multiple, sometimes conflicting, definitions for a single word.”
Id. at 1009 fn. 15.

This is especially true when, as here, the so-called “plain meaning” of the words “residence” and “resides” varies depending on whether this court consults Websters or the Merriam-Webster dictionary, and even then they list multiple, and sometimes conflicting, potential definitions for “resides” and “residence.” In such cases, context and the duty to avoid absurd results will ultimately be this court’s guiding star to find the proper meaning of “residence” in the UIFSA. *See Berneau v. Martino*, 2009 UT 87, ¶ 12, 223 P.3d 1128.

The Keene court justified its broad interpretation of “residence” in the context of the Cohabitant Abuse Act because the Act is intended to give victims of domestic violence the ability to invoke the jurisdiction of a Utah court wherever their attacker might be found regardless of where their permanent residence might be. 2005 UT App 37

at ¶ 15. Conversely, the UIFSA takes a completely opposite approach and is premised on the idea that only a single court should be allowed to exercise jurisdiction over a child support matter at any given time. Utah Code Ann. § 78B-14-205. Therefore, Keene's broad interpretation of "residence" should appropriately remain confined to the cohabitant abuse context as intended by the Legislature.

Interstate Child Custody Proceedings: This court has interpreted "residence" under the PKPA (also known as the Full Faith and Credit for Custody Determinations Act), 28 U.S.C. § 1738A, as being where a parent "*legally* resided" (e.g. his domicile) prior to the commencement of an action. Barton v. Barton, 2001 UT App 199, ¶ 13, 29 P.3d 13.

Synthesis of "Residence" in Utah Family Law Statutes: In summary, the rule that can be synthesized from reading Munsee, Keene, and Barton together is that the word "residence," whether in noun and verb form, typically means *legal* residence in the family law context unless (1) the statute explicitly requires *actual* residence (as in Munsee) or (2) the context of the statute suggests the Legislature intended a broader interpretation (as in Keene). Ultimately, the proper meaning of this elusive word will vary on the context in which it is used and is not subject to a universal definition applicable to all situations.

Therefore, because the UIFSA uses "residence" by itself without requiring "actual" residence, combined with the fact the context of UIFSA is premised on the idea that each person has only one "residence," the term must mean *legal* residence. However, even assuming this court disagreed, Wife's argument must still be rejected because she

has completely failed reconcile her argument that this court should look solely to Utah case law to interpret “residence” in the context of the UIFSA with the Legislature’s directive in Utah Code Ann. § 78B-14-901 that Utah courts must give consideration to the need to interpret the UIFSA uniformly across state lines. After all, the whole purpose in the enacting the UIFSA was to break away from the problem of individual states setting their own unique – and inevitably conflicting – jurisdictional requirements for interstate child support matters. Therefore, unless all fifty-states are interpreting the UIFSA consistently it will fail its fundamental purpose of avoiding jurisdictional disputes. For this reason, this court must reject Wife’s suggestion to look solely at Utah law when construing “residence” in the UIFSA.

For these reasons – along with the reasons in Husband’s opening brief – this court should hold that “residence,” in the context of the UIFSA, means *legal* residence.

V. BECAUSE HUSBAND JOINED THE MILITARY IN UTAH HE PRESUMPTIVELY REMAINS DOMICILED IN UTAH.

Wife misleading relies on various “findings” by the court below stating that Husband was a “resident” of California, and argues this court should therefore find Husband’s domicile to be in California. What Wife fails to mention is that the court below later clarified these findings and said it was referring just to Husband’s *physical* residence – not his *legal* residence – and that there was a genuine issue of fact concerning his domicile. (R:556, ¶ 4, Hrg. Trans. August 26, 2009 8:10-9:16, R: 550).⁴ Furthermore,

⁴ Because the court below did not make findings on the question of Husband’s legal residency and he does not challenge the undisputed fact he is physically living in

because the court below dismissed this case for lack of jurisdiction based on documentary evidence and proffered testimony without holding an evidentiary hearing, this court is required to accept Husband's version of the facts as true on appeal and resolve all disputes in his favor. *See Neways*, 950 P.2d at 422-423; *Fullmer*, 761 P.2d at 945. To the extent this court finds any conflict between Husband's facts and Wife's allegations or the trial court's findings, this court must resolve the conflict in Husband's favor.

Next, Wife relies on *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613, 614 (Utah 1978) for the proposition that "domicile follows residency and the burden of proof is on the person contending otherwise," and argues Husband is therefore domiciled in California because he is physically stationed there, albeit under military orders. Wife's argument is flawed because while *Allen* correctly states the *general* rule that domicile follows physical residency, she ignores the Utah Supreme Court's subsequent decision in *Dodge v. Evans*, 716 P.2d at 274, that, based on the common-law rule espoused by the Restatement (Second) of Conflicts of Laws § 17, "[a] person does not acquire a domicil[e] of choice by his presence in a place **under physical or legal compulsion.**" (emphasis added). Applying this rule to the context of a prison inmate who claimed he was domiciled in Salt Lake County because he physically resided there and all his earthly possessions were in Salt Lake, the Utah Supreme Court held he was **not** domiciled there because he was only in Salt Lake under compulsion.

The Supreme Court cited comment a in § 17 of the Restatement to explain the

California, albeit under military orders, Husband is under no duty to marshal the evidence

rationale for special situations that reverse the general presumption of Allen:

“Acquisition of a domicil[e] of choice requires some free exercise of the will on the part of the person involved. An act done by him under physical compulsion or because of criminal or comparable sanctions⁵ will be legally ineffective for this purpose.”

Comment b goes on to explain:

“A person does not acquire a domicil[e] of choice in a place to which he goes, and in which he remains, under compulsion of the sort described in the rule of this Section. The fact that he decides not to leave is immaterial ...”

Comment d of the Restatement then goes on to specifically apply this rationale to military service-members and states:

“[a] soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, will probably not acquire a domicil[e] there though he lives in the assigned quarters with his family.⁶ He must obey and cannot choose to go elsewhere.”

In other words, the Restatement, consistent with the common-law military residence rule, establishes a rebuttable presumption that a soldier retains his legal residence in the state he joined the military in unless that soldier:

“regard[s] the place where he lives as his home, [but] [s]uch an attitude on his part may be difficult to establish in view of the nomadic character of military life and

to show that a non-existent finding is clearly erroneous.

5 In Husband’s case, he would presumably face a court martial and criminal sanctions under the Code of Military Justice if he were to disobey military deployment orders and return to Utah without leave.

6 Many courts and commentators have criticized the Restatement’s “on/off-base” distinction as immaterial because a soldier can only live off-base with his commanding officer’s permission, and even then that officer still retains the power to unilaterally revoke that permission or deploy the soldier elsewhere at any time. Thus, even a soldier living off-base near his duty station lacks the freedom to choose where he wants to live. See Stifel, 477 F.2d at 1122-1123 (citing *Domicile as Affected by Compulsion*, 13 U.Pitt. L. Rev. 697, 700 (1952)).

particularly if he intends, upon the termination of his service, to move to some other place.” Id.

Because a home-state domicile continues until it is superseded by a new domicile, Restatement (Second) Conflict of Laws § 19, the burden of proof that a soldier has abandoned his home-state domicile and acquired a new one must rest on the party alleging such a change. Id. at comment c. Therefore, because Wife is the party alleging a change in Husband’s domicile, she bears the burden of proving that Husband has abandoned his Utah domicile and that he is not in California because of military service.

Because (1) the court below did not make any findings of fact on the question of where Husband legally resides and (2) Wife does not claim that Husband intends to remain in California for any reason other than obedience to military orders (Appellee Br. Pg. 28), the judgment of the court below must be reversed and this case remanded for further fact finding to determine where Husband’s domicile is. On remand, the trial court should be instructed, consistent with the military service rule, to presume that Husband’s legal residence is in Utah with Wife having the burden of persuasion to show otherwise. If Wife fails to rebut this presumption then the court below shall assume subject-matter jurisdiction over this child support modification proceeding.

VI. CALIFORNIA’S SEPTEMBER 30, 2008, RULING CARRIES NO PRECLUSIVE EFFECT BECAUSE IT IS NEITHER “FINAL” NOR VALID UNDER FEDERAL LAW.

California’s subsequent order made in reliance on the erroneous decision of the court below declining jurisdiction is not entitled to full faith and credit (and therefore carries no preclusive effect) because, in addition to the reasons stated in Husband’s

opening brief, it (1) is not a “final” child support order, and (2) it is invalid because it is inconsistent with the Federal Full-faith and Credit for Child Support Orders Act (“FFCCSOA”), 28 U.S.C. § 1738B, which preempts California law.

As the Utah Supreme Court explained in Estate of Jones, a sister-state’s judgment is not entitled to full-faith and credit unless it is **both** “valid” and “final.” 858 P.2d 983, 985 (Utah 1993). In addition, a judgment issued by a court without subject-matter jurisdiction is not entitled to full-faith and credit and is void. Id.; *See also* Restatement (Second) of Judgments § 81 (A judgment rendered in one state and relied upon as the basis for a defense in another state may be avoided in the second state on the grounds that, *inter alia*, the first state lacked jurisdiction).⁷

Child Support Orders Subject to Modification Are Not “Final”: While admittedly the subsequent California order is “final” in the sense that an appeal can be taken from it, *Cf.* Utah Code Ann. § 78B-12-110, it is not “final” under the full-faith and credit clause because it remains subject to modification under the laws of the state that issued it. *See* White v. Bennett, 553 S.W.2d 845, 846-847 (Ky. App. 1977)(*citing* Barber v. Barber, 323 U.S. 77 (1944) and Halvey v. Halvey, 330 U.S. 610 (1947)); the Restatement (Second) of Conflicts of Law § 109; *See also* 27C C.J.S. Divorce § 1286. Section 109(1) of the Restatement of Conflicts explains that:

“[a] judgment rendered in one State of the United States need not be recognized or enforced in a sister state insofar as the judgment remains subject to modification in

⁷ Wife claims – without any citation to authority – that a void judgment can only be avoided if challenged in the issuing state. However, the Restatement, the FFCCSOA and PKPA take a contrary position.

the State of rendition either as to sums that have accrued and are unpaid or as to sums that will accrue in the future.”⁸

Comment a explains that “[o]rders for the support of ... a child are typical judgments of this sort.” Because California Family Code § 3651 plainly states that California child support orders are subject to modification, Wife cannot rely upon the full-faith and credit clause to demand recognition of California’s ruling.

Likewise, Wife’s reliance on the H.U.F., Paffel, and Fullenwider decisions are all distinguishable because, unlike child support orders, neither paternity determinations nor monetary judgments are subject to modification and thus fall outside the scope of Section 109 of the Restatement’s finality exception. Furthermore, Wife’s authorities are distinguishable because none of these cases involved situations like this where that first state delegated the question of jurisdiction to the second state.

California’s Subsequent Order Is Void Under The FFCCSOA: Given the obvious problems with child support orders not being covered by the full-faith and credit clause, in 1994 Congress enacted the FFCCSOA, 28 U.S.C. § 1738B, which requires states to recognize their sister-state’s otherwise non-final child support orders so long as that order was made “consistently” with the provisions of the FFCCSOA. 28 U.S.C. § 1738B(a)(1). For a modified child support order to be made “consistently” with the FFCCSOA by a state that issued the initial child support order, that state must be the “residence” of either the obligor, obligee, or the child of the parties. 28 U.S.C. §

⁸ *But see* Restatement (Second) of Conflicts § 109(2) (Although the constitution does not require states to enforce modifiable judgments issued by their sister-states, the

1738B(d).

Although the FFCCSOA, like the UIFSA, does not define the term “residence,” California has construed this exact same language in the UIFSA as synonymous with domicile. Amezquita, 124 Cal.Rptr.2d at 890. Likewise, In re the Marriage of Basileh the Indiana Court of Appeals thoroughly analyzed the term “residence” in the FFCCSOA and, after considering the legislative history and the statutory context of the Act, likewise came to the conclusion it referred to *legal* residence. 890 N.E.2d 779 (Ind. App. 2008) *aff’d* 912 N.E.2d 814, 817 fn. 1 (Ind. 2009). This court has also interpreted “residence” in the FFCCSOA’s child custody counterpart, the Full Faith and Credit for Custody Determinations Act, 28 U.S.C. § 1738A, as synonymous with *legal* residence. Barton, 2001 UT App 199 at ¶ 13. Therefore, this court should follow the same analysis used to conclude “residence” in the UIFSA means *legal* residence to find that “residence” in the FFCCSOA means domicile as well.

Because there is no dispute that Wife and parties’ child do not have a California “residence,” the only way for California to issue a modified child support consistent with the FFCCSOA would be to make a specific finding that Husband had a California “residence.” However, the judgment and transcript of the September 30, 2008, California proceedings are devoid of this requisite finding of fact because the court did **not** find that California was Husband’s residence, nor did it base its decision to assume jurisdiction on where Husband was domiciled. (R:484-488).

constitution does not prohibit them from doing so either).

Rather, California specifically said it was basing its decision on the irrelevant fact that Husband made a general appearance (thereby subjecting himself to the personal jurisdiction of the court) and because he did not contest Mother registering the Utah support order back in California. (R:486-488). However, neither of these facts provides California with a basis for asserting jurisdiction consistent with the FFCCSOA.

Failure to Object to Registration of a Foreign Support Order Cannot Confer Subject-Matter Jurisdiction: Nothing in the statutory scheme of the UIFSA or FFCCSOA allows a court to assume subject-matter jurisdiction because a parent registers a support order in that state for enforcement purposes and the other parent does not contest it. *See* Utah Code Ann. § 78B-14-610. Under the UIFSA, a party can *register* a child support in any state they want regardless of where the obligor, obligee, or child is located. *See* Utah Code Ann. § 78B-14-601 to 602. Even in Amezquita the California Court of Appeal held the mother was entitled to register her foreign support order in California for enforcement purposes even though her military husband did not “reside” there and thus California lacked jurisdiction to modify that order. 124 Cal.Rptr.2d at 891 (*citing* California Family Code § 4959).

Therefore, to the extent the California court assumed jurisdiction on this basis, its order is null and void as a matter of federal law under the FFCCSOA.

California Cannot Assert Subject-Matter Jurisdiction Just Because It Has Personal Jurisdiction: This court was confronted with a situation similar to the case at bar in Curtis v. Curtis, 789 P.2d 717 (Utah App. 1990), when a Mississippi court issued a

final custody order based on the erroneous belief it had subject-matter jurisdiction consistent with the Full Faith and Credit for Child Custody Determinations Act (or PKPA), 28 U.S.C. § 1738A, because the appealing parent made a “general appearance” litigating the question of subject-matter jurisdiction in Mississippi. 789 P.2d at 718-720. This court held it was error for Utah to recognize Mississippi’s subsequent final order because, as a matter of federal law, Mississippi could not use the personal jurisdiction doctrine of a “general appearance” to acquire subject-matter jurisdiction. Id. at 725-726. Because Mississippi’s order was inconsistent with the Full Faith and Credit for Child Custody Determinations Act, this court concluded Mississippi’s final order was null and void as a matter of federal law. Id. at 726.

Because here, as in Curtis, it is clear from the court transcript that California assumed jurisdiction because it had personal jurisdiction without making a specific finding that California was Husbands “residence” or domicile, it’s judgment is inconsistent with the FFCCSOA and therefore void as a matter of federal law.

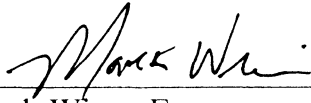
California Made No Finding That Husband’s “Residence” Was In California: Recognizing these fatal deficiencies, Wife implicitly contends California complied with the FFCCSOA by finding that Husband was a “resident” of California. However, the fatal flaw with this argument is that, according to the California Court of Appeal, there is a distinction between a service-member being a “resident” of California and having a “residence” or “domicile” in California. *Cf. In re Marriage of Thornton*, 185 Cal.Rptr. 388, 395 (Cal. App. 5d 1982)(“Clearly [the military service-member] husband was a

resident, through not a domiciliary, of California during these proceedings.”). A military service-member stationed in California may properly be considered a “resident” of California although their “residence” is in their home-state. Unfortunately, the face of the California court’s September 30, 2008, order did not clarify whether it found that Husband was *physically* living in California or whether he was actually domiciled there. However, a inspection of the transcript of the California proceeding shows the court merely looked at where Husband was “living” under military orders. (R: 485-488). Consequently, because the California court failed to make a finding of fact that California was Husband’s domicile, its judgment is patently inconsistent with the FFCCSOA. Therefore, as in Curtis, its judgment is void as a matter of federal law.

A California Appellate Court Could Not Correct This Error Because This Controversy Is Moot Until This Court Reverses the Utah Court’s Judgment:

Although Wife is correct that a dismissal for lack of jurisdiction is not “on the merits” and does not give rise to claim preclusion, it still “constitute[s] a binding determination on the jurisdiction question which is not subject to collateral attack.” Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1248 (D.C.Cir 1999); *See also* Restatement (Second) of Conflicts of Law § 110 comment b. Consequently, there was clearly nothing a California appellate court could do to remedy this catch-22 because this controversy was moot in California. All Husband could do is wait to directly challenge the erroneous decision of the court below in this court first. Given these special and unique circumstances, this court must decline to recognize California’s ruling.

Respectfully submitted this 7 day of June, 2010.

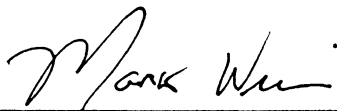


Mark Wiser, Esq.
Counsel for Appellant Aaron Lilly

CERTIFICATE OF SERVICE

I certify that on this 7 day of June, 2010, I caused two (2) copies of Appellant's Reply 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. Transcript of the September 30, 2008, Hearing in California
2. The Full-Faith and Credit for Child Support Orders Act ("FFCCSOA")

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

DEPT 43; HON. PATTI C. RATEKIN, COMMISSIONER

-----)	
IN RE THE MATTER OF)	
)	
KORILEE LILLY,)	
petitioner,)	CASE NO. D489897
)	FSD HEARING
-- and --)	
)	
AARON MATTHEW LILLY)	
respondent.)	
-----)	

Reporter's Transcript

TUESDAY, SEPTEMBER 30, 2008

FOR THE COUNTY OF SAN DIEGO:

DEPARTMENT OF CHILD SUPPORT SERVICES
BY: TERRY EDLUND, ESQ.

For the Petitioner: PRO PER

For the Respondent: PRO PER

 **COPY**

LAURA LONGARINI CSR 12384
official Court reporter
San Diego Superior Court
SAN DIEGO, CALIFORNIA 92101

1 MONDAY, MAY 27, 2008; San Diego, California
2 Department 43 Honorable Patti Ratekin, Commissioner
3 9:00 A.M. CALENDAR

4 -- 000 --

5 MR. EDLUND: Your honor, we're ready to proceed
6 on item number five.

7 THE COURT: Ma'am, please state your name for
8 the record.

9 MS. LILLY: Korilee lilly.

10 MR. LILLY: ARRON LILLY.

11 THE COURT: THANK YOU.

12 MR. EDLUND: This is A local self CASE, one
13 child INVOLVED, KAITElyn, CURRENTLY age five.

14 We're here before the court on the notice of
15 motion that the county FILED at the custodial parent's
16 request seeking to modify the underlying order. The
17 underlying order is AN original California order that was
18 registered at one time, I believe, in Utah.

19 And now the county Has REGISTERed the San Diego
20 order and filed a motion to modify. We did have the
21 opportunity to meET AND CONFER with the parties upstairs.
22 and from the notes it appears that the respondent IS
23 challengING the jurisdiction of this court under
24 continuing exclusive jurisdiction, saying that this court
25 does not have the ability to modify AN underlying order
26 as the mother lives out of state and he's ONLY in
27 California for military purposes. Indicates that Utah Is
28 his state of residence.

1 THE COURT: ONE of the problem is, sir, that you
2 filed a response submitting THIS to THE JURISDICTION of
3 the court. In order to object to jurisdiction you must
4 not file any documents, you must COME IN AND make a
5 special appearance. You have waived any contest for the
6 jurisdiction of this court to deal with this order.

7 When was it registered?

8 MR. EDLUND: IT WAS REGISTERED IN march OF 2008.
9 My notes ALSO indicate that he's contesting the
10 commissioner.

11 MR. LILLY: Ma'AM, your honor, I currently have
12 AN objection to the commissioner's recommendation, that
13 was in Utah. And we have yet to have a hearing date for
14 that. I was told by judge OXNEY in December 2003 AT the
15 other courthouse across San Diego -- I'm not EXACTLY sure
16 of the address. I WAS told by judge OXNEY if there is
17 any pending motion in Utah, WE'RE basically giving them a
18 chance to decide on the case FIRST. I ACTUALLY have a
19 copy of WHAT'S been filed with Utah to include judge
20 oxney's comments.

21 THE COURT: ONE of the problem is they
22 registered this April, you have 25 days to object to
23 registration. As far as I can tell there was no
24 OBJECTION to registration. So THE ORDER WAS registered
25 here. Then they filed A motion to modify, you filed a
26 response, WHICH submits to the California jurisdiction.

27 So, as to your objection FOR me hearing the
28 case, I'll note that objection and issue a findings and

1 recommendation.

2 MR EDLUND: I believe there ARE issues
3 regarding jurisdiction of modification for child support
4 and modification of custody and visitation.

5 THE COURT: I'm ONLY dealing with --

6 MR. LILLY: I object, your honor I'm not here
7 to argue, and nothing HAS BEEN annotated on any FORM that
8 we're here to discuss visitation and custody.

9 THE COURT: RIGHT, WE'RE NOT.

10 MS LILLY: we've had -- we were married and
11 have lived here the ENTIRE time we got divorced here.
12 I tried to file for A divorce in Utah BUT we couldn't
13 BECAUSE we never lived there together. we had to file
14 THROUGH California. THE divorce was set up and
15 finalized. we lowered the child support to get him to
16 sign the papers to MAKE The divorce finalized.

17 California knew that I was moving to Utah, back
18 to my home SO THAT I COULD CONTINUE WITH MY education AND
19 GET AN EDUCATION SO I COULD provide for our daughter.
20 The California courts Knew that I was going there. THE
21 Utah judge -- arron put FORTH THE thing to the Utah judge
22 requesting for A child support order, whatever. The
23 judge in December, on December 3rd, judge OXNEY said that
24 arron told them there was something pending IN Utah,
25 which there was not. And JUDGE OXNEY SAID --

26 MR. LILLY: I object your honor. Your honor, I
27 object. There was A --

28 THE COURT: sir, she's speaking right now.

1 MS. LILLY: Thank you, your honor.

2 Judge OXNEY said IF EITHER ONE -- that was fine
3 if we went to Utah, BUT if either one of us wanted to
4 bring it before her again that she would make THE
5 Decision. We've then taken IT to the court in Utah. I
6 have AN attorney there. ARRON filed A foreign order,
7 something about the foreign registration and that's all
8 that he filed.

9 THE COURT: Let me try to short circuit this.
10 where do you live?

11 MS. LILLY: I LIVE IN west Jordan Utah. I'VE
12 lived there since June 13th.

13 THE COURT: SIR, where do you live?

14 MR. LILLY: I live in San Diego.

15 THE COURT: she's trying to modify SO she has
16 to come to California where you live. She's registered
17 the order here. You're here. YOU'VE made A general
18 appearance based upon the filing of your motion.

19 well, FIRSt of all, based on your failure to
20 object to the registration, which was served on April
21 8th. And second, by your filing OF your response and
22 your income and expense declaration on September 23rd,
23 YOUR failure to make a special appearance contesting
24 jurisdiction. Therefore, we have jurisdiction. I'm ONLY
25 talking about child support. I'm not talking about
26 custody, visitation, anything to do with the child. I'm
27 merely talking about child support.

28 MR. EDLUND: Your honor, my notes indicate if

1 the court was GOING TO find that California had
2 jurisdiction to modify, THE notes say, send back upstairs
3 and they will run the guideline calculations.

4 THE COURT: I can do that. I don't need them to
5 go back upstairs, unless you want to go UPstairs AND work
6 out AN agreement.

7 MR. LILLY: I'd rather go back upstairs.

8 MS. LILLY: You can do it.

9 MR. LILLY: Your honor, is there any possibility
10 to request a continuance so this could be heard in Utah?
11 It's GOING TO GO IN FRONT OF THE JUDGE.

12 THE COURT: No, The JURISDICTION OVER child
13 support is here.

14 MS. LILLY: Thank you, your honor.

15 THE COURT: Did you want to go back upstairs and
16 TRY TO TALK ABOUT SOMETHING AND work out SOME agreement?

17 MR. LILLY: I'm willing to.

18 MS. LILLY: I don't care either way.

19 THE COURT: OKAY. WE'LL SEND IT BACK UPSTAIRS.
20 See you back in a few minutes.

21 MR. LILLY: Thank you.

22 (Brief recess)

23 MR. EDLUND: Terry Edlund APPEARING on behalf of
24 the County of San Diego.

25 THE COURT: MAY THE record reflect both parties
26 ARE present.

27 MR. EDLUND: Your honor, this is a local self
28 case WITH one child involved, Kaitlyn, age five. THERE

1 IS AN existing order IN PLACE AT a thousand dollars a
2 month child support. Respondent is current in HIS
3 payments. We're before the court pursuant to A NOTICE OF
4 motion that the COUNTY FILED AT THE request of the
5 custodial parent. THE motion was filed on JULY 30th,
6 2008.

7 We WERE previously before the court THIS morning
8 where the court did rule that the court had jurisdiction
9 to modify the support order considering the residence of
10 both parties. We had AN opportunity to meet and confer
11 with the parties after the court made that ruling and we
12 were not ABLe to reach a stipulation with the parties.

13 The contention is the time share. The custodial
14 parent is claiming a 10 percent TIME SHARE and the father
15 is claiming a 25 percent time share. With regard to the
16 custodial parent mother's earnings, she has a new job
17 that'S startING in March, March 31st, 2008. We have HER
18 paystubs AND year-to-date earnings from March 31, 2008
19 through September 26th, 2008 with the year-to-date of 13
20 -- excuse me \$13,702.52 year-to-date.

21 I don't believe there is A dispute with the
22 year-to-date, what THE DISPUTE IS that she's recently
23 received a raise and she's in the medical profession and
24 SHE HAS ALL kinds of different pay rates and it's the
25 father's issues that she is now making more money AND he
26 wants to have that somehow applied over ALL OF THE
27 year-to-date.

28 MR. LILLY: That's incorrect. My ITEM OF

1 CONTENTION is JUST that it's a year-to-date beginning in
2 March and she just started this job and just got a raise
3 and I was wondering if there was any way that the court
4 can do AN hourly computation, the year-to-date will be
5 low BECAUSE she did not START working until WELL INTO the
6 THIRD month of the year.

7 THE COURT: If I use the year-to-date that
8 encompasses that period of time, There OBVIOUSLY is SOME
9 issue ABOUT THE FACT that the prior year-to-date is
10 calculated at that lower hourly rate.

11 MR. EDLUND: She also has A deduction of health
12 insurance of \$72 a month.

13 THE COURT: Okay. what's her current hourly
14 rate?

15 MS. LILLY: \$12.81.

16 THE WITNESS: \$12.81. Father's income, he is in
17 the military. He has taxable earnings \$3,443 per month.
18 nontaxable of \$3,098.

19 THE COURT: I got \$3,092 per month off THE
20 PAYCHECK STUBS; do you know what they used?

21 MR. EDLUND: I do not your honor.

22 THE COURT: He did not have a paycheck stub,
23 THAT WAS THE PROBLEM.

24 MR. EDLUND: It was THE I.E.S. that he provided.

25 THE COURT: Thank you.

26 MR. EDLUND: He ALSO has A health insurance
27 DEDUCTION of \$29 per month.

28 THE COURT: HOW IS the kronos calculated?

1 MR. EDLUND: I'm sorry, your honor?

2 THE COURT: Kronos.

3 MR. LILLY: Taxable income, Ma'am?

4 THE COURT: They did not include it in the
5 number that you gave me.

6 IS THERE Any objection to his job-related
7 expenses of 160?

8 MS. LILLY: IT'S probably A bit lower, but
9 that's fine.

10 THE COURT: Sir, does your spouse work?

11 MR. LILLY: Yes, ma'am.

12 THE COURT: what does she earn?

13 MR. LILLY: I'm not sure of the exact figure.

14 MS. LILLY: She is present your honor.

15 THE COURT: what did you come up with for
16 mother's income?

17 MR. EDLUND: I calculated it to be \$2,395 per
18 month.

19 THE COURT: Okay. I don't really know what to
20 DO about her income because of the structure of her pay.
21 it's difficult to figure out exactly what it's going to
22 be at any given time.

23 MS. LILLY: Your honor.

24 THE COURT: Yes.

25 MS. LILLY: I get a raise once a year. and when
26 I started on as A pharmacy tech there was AN opportunity
27 to take a test to make A LITTLE BIT more MONEY. They
28 start you out at ONLY 11.54. I took a test and I passed

1 it. There is only one more test available to take and
2 pass, BUT I HAVE to wait six months before I can even
3 take it. Other than that they give ONE regular raise a
4 year.

5 MR. LILLY: I'll concur with the figure that you
6 JUST said, the \$2,300.

7 MS. LILLY: Okay.

8 MR. EDLUND: \$2,395.

9 THE COURT: Now, the time share; what's the time
10 share?

11 MR. LILLY: By the divorce decree, your honor,
12 it's 25/75 and THE visitation schedule HAS not changed, i
13 still get her every two weeks, every three months. There
14 is no pending request by her to have that modified in any
15 way. So, I'd like to stay as per the order in the
16 divorce decree of 25/75 as it is.

17 MS. LILLY: I've gone through the calendars, I
18 write when he took her and brings her home. Of the three
19 years it's only been -- had her eighty-eight days. He
20 does not take her two weeks, every three months. A lot
21 of times he takes her ten -- every six months. That's
22 why I said the TEN percent because I've gone through the
23 records.

24 THE COURT: Is it your testimony that you
25 exercise every visitation?

26 MR. LILLY: Every visitation with the exception
27 if I get her on- or off-holiday. I'd have to go all the
28 way up to Utah to have her for one day. I had to forego

1 my holiday visitations. But my full-on two weeks every
2 three months. I've just had her two weeks after my
3 three-month period almost to the day. I have a signed
4 paper that we agreed to, TWO WEEK period of time, and i
5 have E-mails that she's requested to cut into those days.
6 to say, can you bring her back a day early and then the
7 FIRST day I was supposed to bring her back 7:00 in the
8 morning

9 MS LILLY: Objection.

10 MR. LILLY: I have a -- you know, I didn't get
11 her until 3:30 in the afternoon that day. knowing that I
12 would have to drive from San Diego to salt lake city. I
13 was supposed to pick her up at 7:00 a.m. I exercise my
14 visitation is almost to the "T". There is one time that
15 I had delayed it a little bit because we got married to
16 guarantee that my daughter COULD be in the wedding. I
17 didn't want to cut her out of the wedding. It was
18 earlier, previous to three months.

19 THE COURT: But your testimony is two weeks
20 every three months; that's what you have?

21 MR. LILLY: Yes, ma'am.

22 THE COURT: And yours is he does not exercise
23 it?

24 MS. LILLY: Here's a record of his visitation.

25 THE COURT: For the future, if you want me to
26 consider anything like that then you need to get it in
27 ahead of time. I'm going to use A 15 percent time share.

28 You're remarried, sir?

1 MR. LILLY: Yes, ma'am.

2 THE COURT: Do you have any other children?

3 MR. LILLY: No.

4 THE COURT: Ma'am, are you remarried?

5 MS. LILLY: No.

6 THE COURT: You have no other children in your
7 home?

8 MS. LILLY: No.

9 THE COURT: What I'll do is make the following
10 findings and order: there is one minor child. 15 percent
11 time share. Father is married filing jointly with two.
12 Mother is head of household and two. Father's gross
13 taxable wages are \$3,763. He has nontaxable income of
14 \$3,072. I'm not utilizing any new spouse income, it's
15 not on his income and expense declaration and he does not
16 know what it is. Health insurance premium is \$29
17 Guideline -- I'm going to give him a \$160 other guideline
18 deduction for job-related expenses. Father's net is
19 \$6,018. Mother is head of household and two. She has
20 gross taxable wages of \$2,395.

21 Does she have any deductions?

22 MR. EDLUND: There is none noted, your honor.

23 THE COURT: Any health insurance?

24 MS. LILLY: I do have health insurance. It's
25 not very much, like \$72.

26 MR. EDLUND: I did report that your honor, she
27 has a \$72 a month health insurance deduction.

28 THE COURT: Pretax. \$72 pretax health insurance

1 for mother.

2 MR. LILLY: Your honor, there is one thing that
3 wasn't noted is my travel expenses. I have to travel to
4 Utah to pick her up and then back here and then to return
5 her. upstairs we claimed that and it would be agreed on
6 the \$250

7 MS. LILLY: In the court's decree it says that
8 he's responsible for full travel expenses.

9 MR. LILLY: Those are my expenses, \$250.

10 THE COURT: Do you know where that is in the
11 judgment, Ma'am?

12 MS. LILLY: The divorce decree?

13 THE COURT: Yes.

14 MR. LILLY: It's on Page four, paragraph five.
15 Subparagraph A. Last sentence

16 THE COURT: Page four of the judgment?

17 MR. LILLY: Yes, your honor.

18 THE COURT: Here we go. Says that you bEar
19 your travel-associated expenses. Seems to be an
20 agreement between the two of you?

21 MR. LILLY: Yes, your honor. It said in the
22 calculation -- It sthe, what are your travel expenses?
23 although we agreed that I pay for THEM, you do not recoup
24 100 percent of your expenses.

25 THE COURT: I'm sorry, but I don't understand
26 your argument.

27 MR. LILLY: My argument is that the travel
28 expenses, although it is right that I do bEar the travel

1 expenses, I mean, maybe I'm misunderstanding the form, I
2 take it -- I perceive it's asking what my travel expenses
3 are to go and pick up my daughter. I could claim those
4 in the calculation.

5 MR. EDLUND what happens, your honor, they put
6 the travel expense in the guideline calculator upstairs,
7 it splits that cost between the parties and gives him
8 \$125 deduction. It does not appear to be appropriate to
9 have done that.

10 THE COURT. That issue is not before me today.
11 no one filed it, no one briefed it, no one discussed it,
12 filed a declaration on it. Right now the judgment says
13 that you're to bear all the costs. to put it in the
14 GUIDELINE and split it, which is not how I read the
15 agreement. But, it may be something that you wish to
16 seek legal counsel on to see if you can file something
17 That is not before me today. It was not properly put
18 before me today.

19 MR. LILLY: As explained upstairs, it does not
20 split it, she could put any travel that she takes.
21 That's how it was explained upstairs. it's not actually
22 split.

23 THE COURT: I don't know who did that.
24 Hopefully mr. edlund will speak to them about that. the
25 judgment provides that you pay -- the way that I'm
26 reading it right now that you bear all the costs for
27 travel. So, if i put it in the add-on information, what
28 it does is IT splits IT between the two of YOU, allocates

1 it half and half. which is not -- at least in the
2 initial reading of your judgment that's not what I think
3 that you intended. But --

4 MR. EDLUND: Unless there is a stipulation by
5 the parties to stipulate to modify that, that's not
6 properly before the court.

7 THE COURT: well, it's not properly before me
8 and it does split it By putting it in the machine it
9 splits it and I don't think I can do that given the
10 current state of your agreement.

11 Like I said, I'm not ruling on that, I have not
12 made an order. I'm not making it an order. That can't
13 be changed. I'm saying it's not an order before me
14 today. Right now I'm going to use those factors. Child
15 support is \$1,225. That will -- when was the motion
16 filed?

17 MR. EDLUND: It was filed on July 30th, request
18 to be effective August 1st.

19 THE COURT: That will be effective August 1st.
20 any arrears paid at \$100 a month, commencing
21 November 1st, 2009. Each party to pay one-half of
22 uncovered healthcare pursuant to family code section
23 4063. One-half of healthcare associated with employment
24 and standard health insurance order.

25 Are you covering your child on your health
26 insurance?

27 MR. LILLY: Yes, ma'am.

28 THE COURT: If that somehow is not available to

1 you any longer you need to come in before it terminates
2 so I can make provisions for the health insurance for the
3 child.

4 Anybody have any questions?

5 MS. LILLY: No.

6 MR. LILLY: No.

7 THE COURT: Like I said, sir, I haven't ruled on
8 the travel expenses at this point in time because it was
9 not put in as an issue. If you want to bring that as an
10 issue, my suggestion would be that you see an attorney
11 and see about that.

12 Have a seat, I'll prepare the findings and
13 recommendations for you.

14 MR. EDLUND: I believe that concludes the
15 calendar.

16 THE COURT: It does.

17 (proceedings concluded)

18 --000--

19

20

21

22

23

24

25

26

27

28

Reporter's Certificate

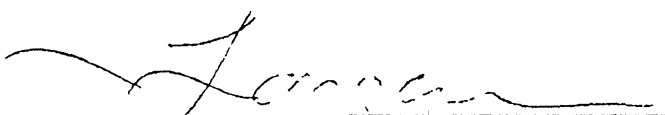
STATE OF CALIFORNIA)
) SS:
COUNTY OF SAN DIEGO)

I, LAURA LONGARINI, Certified Shorthand Reporter,
NO 12384, An Official Court Reporter of the Superior Court
of the County of San Diego, State of California, do hereby
certify

That I reported in machine shorthand the proceedings
held in the foregoing case;

That my notes were transcribed into typewriting under
my direction; and the foregoing pages, 1 to 15, contain a
correct transcription of the proceedings.

Dated this 10TH day of JUNE 2009.



LAURA LONGARINI, CSR NO. 12384
Official Court Reporter
San Diego Superior Court

(Government Code 69954(d): Any court, party, or person
who has purchased a transcript may, without paying a
further fee to the reporter, reproduce a copy or portion
thereof as an exhibit pursuant to court order or rule, or
for internal use, but shall not otherwise provide or sell
a copy or copies to any other party or person.)

C

Effective: August 5, 1997

United States Code Annotated Currentness

Title 28 Judiciary and Judicial Procedure (Refs & Annos)

Part V Procedure

Chapter 115 Evidence, Documentary (Refs & Annos)

→ **§ 1738B. Full faith and credit for child support orders**

(a) **General rule.**--The appropriate authorities of each State--

(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State, and

(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i)

(b) **Definitions.**--In this section

“child” means--

(A) a person under 18 years of age, and

(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State

“child's State” means the State in which a child resides

“child's home State” means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

“child support” means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

“child support order”--

(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum, and

(B) includes--

(i) a permanent or temporary order, and

(ii) an initial order or a modification of an order

“contestant” means--

(A) a person (including a parent) who--

(i) claims a right to receive child support,

(ii) is a party to a proceeding that may result in the issuance of a child support order, or

(iii) is under a child support order, and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

“court” means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

“modification” means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

“State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

(c) Requirements of child support orders.--A child support order made by a court of a State is made consistently with this section if--

(1) a 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; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

(d) Continuing jurisdiction.--A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

(e) Authority to modify orders.--A court of a State may modify a child support order issued by a court of another State if--

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

(f) Recognition of child support orders.--If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

(1) If only 1 court has issued a child support order, the order of that court must be recognized.

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

(3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

(4) If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

(5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

(g) **Enforcement of modified orders.**--A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

(h) **Choice of law.**--

(1) **In general.**--In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

(2) **Law of State of issuance of order.**--In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

(3) **Period of limitation.**--In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

(i) **Registration for modification.**--If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

CREDIT(S)

(Added Pub.L. 103-383, § 3(a), Oct. 22, 1994, 108 Stat. 4064, and amended Pub.L. 104-193, Title III, § 322, Aug. 22, 1996, 110 Stat. 2221; Pub.L. 105-33, Title V, § 5554, Aug. 5, 1997, 111 Stat. 636.)

Current through P.L. 111-140 approved 2-16-10

Westlaw. (C) 2010 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

END OF DOCUMENT