

2010

# Marco A. Donjuan v. Gabrielle McDermott : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

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Marco A. Donjuan,

Petitioner and Appellant,

v.

Gabrielle McDermott,

Respondent and Appellee.

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)  
) ***SUPPLEMENTAL BRIEF OF***  
) ***APPELLEE***  
)  
)  
)

) Case No. 20100012-SC  
)  
)  
)

) Trial Court No. 094100254  
)  
)

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**On Appeal From a *Memorandum Decision and Order* of  
The First Judicial District Court for Box Elder County, Utah  
The Honorable Ben H. Hadfield**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
SUPPLEMENTAL STATEMENT OF FACTS .....	1
ARGUMENT .....	3
I.    ONLY THE ORDERS OF THE UTAH COURT ARE ENTITLED TO FULL FAITH AND CREDIT. ....	3
A.    The Georgia court dismissed Mr. Donjuan’s request for custody. ....	3
B.    Because Utah is the child’s “home state” only a Utah court could have entered an order consistently with the PKPA .....	5
II.   THE PKPA IS A FULL FAITH AND CREDIT STATUTE AND DOES NOT GRANT OR DENY SUBJECT MATTER JURISDICTION .....	9
CONCLUSION .....	13
CERTIFICATE OF SERVICE .....	14
ADDENDUM A .....	15

## TABLE OF AUTHORITIES

### CASES

<u>Adoption of Zachariah K.,</u> 6 Cal. App. 4 <sup>th</sup> 1025, 8 Cal. Rptr. 2d 423 (Cal. Ct. App. 1992) .....	9
<u>Alma Evans Trucking v. Roach,</u> 714 P.2d 1147 (Utah 1986) .....	6
<u>Alternative Options &amp; Servs. v. Chapman,</u> 2004 UT App 488 & n.9, 106 P.3d 744 .....	7
<u>Arkansas Dept. of Human Servs. v. Cox,</u> 349 Ark. 205, 82 S.W.3d 806 (2002) .....	7, 8
<u>Atkins v. Atkins,</u> 308 Ark. 1, 823 S.W.2d 816 (1992) .....	6
<u>Baker v. General Motors Corp.,</u> 522 U.S. 222, 118 S. Ct. 657 , 139 L. Ed. 2d 580 (1998) .....	11
<u>Bigelow v. Virginia,</u> 421 U.S. 809, 95 S. Ct. 2222 (1975) .....	7
<u>Burns v. Alcala,</u> 420 U.S. 575, 95 S. Ct. 1180 , 43 L. Ed. 2d 469 (1975) .....	6
<u>Columb v. Columb,</u> 161 Vt. 103, 633 A.2d 689 (1993) .....	10
<u>Doe v. Baby Girl,</u> 376 S.C. 267, 657 S.E.2d 455 (2008) .....	4, 5, 9
<u>Doe v. Bolton,</u> 410 U.S. 179, 93 S. Ct. 739 , 35 L. Ed. 2d 201 (1973) .....	7
<u>Glanzner v. State,</u> 835 S.W.2d 386 (Mo. Ct. App. 1992) .....	9, 10

<u>Hampton v. McConnel</u> , 16 U.S. 234, 4 L. Ed. 378, 3 Wheat. 234 (1818) .....	11
<u>Hanson v. Leckey</u> , 754 S.W.2d 292 (Tex. Ct. App. 1988) .....	10
<u>In re Adoption of child by T.W.C.</u> , 270 N.J. Super. 225, 636 A.2d 1083 (1994) .....	6, 9
<u>In re Adoption of Nelson</u> , 202 Kan. 663, 451 P.2d 173 (1969) .....	7
<u>J.D.S. v. Franks</u> , 182 Ariz. 81, 893 P.2d 732 (1995) .....	6, 10
<u>Mancusi v. Mancusi</u> , 136 Misc.2d 898, 519 N.Y.S.2d 476 (1987) .....	10
<u>O’Dea v. Olea</u> , 2009 UT 46 , 217 P.3d 704 .....	11, 12
<u>People ex rel. A.J.C.</u> , 88 P.3d 599 (Colo. 2004) .....	5
<u>Peterson v. Peterson</u> , 464 A.2d 202 (Me. 1983) .....	5
<u>Rogers v. Platt</u> , 199 Cal. App. 3d 1204, 245 Cal. Rptr. 532 (Cal. Ct. App. 1988) .....	8, 9
<u>Sheila L., on behalf of Ronald M.M. v. Ronald P.M.</u> , 195 W. Va. 210, 465 S.E.2d 210 (1995) .....	4, 10
<u>Thompson v. Thompson</u> , 484 U.S. 174, 108 S. Ct. 513 , 98 L. Ed. 2d 512 (1988) .....	4, 6, 10
<u>Underwriters Nat’l Assurance Co. v. North Carolina Life &amp; Accident &amp; Health Ins. Guar. Ass’n</u> , 455 U.S. 691, 102 S. Ct. 1357 , 71 L. Ed. 2d 558 (1982) .....	11

## **STATUTES**

28 U.S.C. § 1738A(a) .....	5
28 U.S.C. § 1738A(a) and (g) .....	3
28 U.S.C. § 1738A(b)(1) .....	6
28 U.S.C. § 1738A(b)(4) .....	6
28 U.S.C. § 1738A(c)(2)(A) .....	6
28 U.S.C. § 1738A(c)(2)(B-E) .....	6
O.C.G.A. § 19-7-22 .....	1
Utah Code Ann. § 78B-6-121(3) .....	12
Utah Code Ann. § 78B-6-121(3)(b) .....	2, 3

## **RULES**

Utah R. Civ. P. 11(a)(1) .....	3
--------------------------------	---

## **OTHER AUTHORITIES**

Anne B. Goldstein, <u>The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act</u> , 25 U.C. Davis L. Rev. 845 (1992) .....	9
Joan H. Hollinger, <u>Adoption Law &amp; Practice</u> , § 4.07(2)(a) (2009) .....	9

## SUPPLEMENTAL STATEMENT OF FACTS

On May 19, 2009, more than two months before the child was born in Utah, Marco Donjuan filed a Petition to Legitimate and for Custody & Child Support (“Georgia Petition”) in a Georgia superior court. R. 104-107. Mr. Donjuan requested that the child be declared his legitimate child, that he be granted legal and physical custody of the child, that Ms. McDermott be restrained and enjoined from unilaterally removing the unborn child from the court’s jurisdiction, and that he be awarded child support. R. 106.

Ms. McDermott moved to dismiss the Georgia Petition.<sup>1</sup> R. 133-138. On July 20, 2009, eleven days before the birth of the child, the Georgia court dismissed the legitimation claim, which included Mr. Donjuan’s requests for custody and visitation, among other requests. R. 148-149. It wrote:

With respect to Plaintiff’s legitimation claim under O.C.G.A. § 19-7-22, Defendant’s Motion to Dismiss is hereby GRANTED and such claim is hereby DISMISSED for failure to state a claim upon which relief can be granted, and all relief requested thereunder, *including Plaintiff’s requests to legitimate the minor child, for custody, visitation, and an award of child support, and to restrain and enjoin Defendant from leaving the jurisdiction of the Court*, is hereby DENIED.

R. 149 (capitalization in original; italics added). The court stayed Mr. Donjuan’s remaining paternity claim. *Id.*

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<sup>1</sup> Ms. McDermott argued, among other things, that: (1) a legitimation action was premature because no child had been born; (2) under Georgia law, a paternity action only addresses the issues of biological fatherhood, child support against the father, and visitation; (3) Mr. Donjuan did not request visitation in the Georgia Petition; and (4) Mr. Donjuan could not control Ms. McDermott’s right to travel prior to the child’s birth. R. 134-136.

On July 9, 2009, Mr. Donjuan received a letter from Ms. McDermott's counsel, informing him that Ms. McDermott had relocated to Utah and intended to deliver her child in Utah and place her child for adoption under Utah law.<sup>2</sup> R. 20, ¶ 2, 34, 37. Mr. Donjuan admitted receiving this letter on or about that date. R. 179, ¶ 3.

On July 28, 2009, eight days after his Georgia legitimation and custody claim had been dismissed, Mr. Donjuan filed his Petition to Establish Paternity ("Utah Petition") in the First District Court in Box Elder County, Utah. R. 3-6. He admitted that he was notified that Ms. McDermott "may give birth in Utah[.]" R. 3. He also requested affirmative relief from the district court, including a request that the court "issue a[] Decree and Order Establishing Paternity in this matter." R. 4, ¶ 7, R. 6. The Utah Petition, however, was not accompanied by a sworn affidavit as required by Utah Code Ann. § 78B-6-121(3)(b) and the Utah Petition was not itself verified.

Ms. McDermott gave birth to the child on July 31, 2009, in Salt Lake City, Utah. R. 20, ¶ 1. Ms. McDermott's counsel thereafter confirmed with the clerk of the district court that Mr. Donjuan had not filed a sworn affidavit or any other document containing the sworn legal commitments required by Utah Code Ann. § 78B-6-121(3)(b). R. 20, ¶ 4. On August 3, 2009, Ms. McDermott appeared before the Third Judicial District Court and executed her consent to adoption. R. 21, ¶ 5, 49.

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<sup>2</sup> Ms. McDermott used to live in Utah and returned to stay with her brother and his family, who live here, during the final months of her pregnancy. *See* R. 179, ¶¶ 6-9.



On August 11, 2009, Mr. Donjuan filed his Amended Petition to Establish Paternity (“Amended Petition”), also seeking affirmative relief. R. 9-14. The Amended Petition contains a faxed signature page, purportedly signed by Mr. Donjuan, but it is not signed by his counsel as required by Utah R. Civ. P. 11(a)(1).<sup>3</sup> R. 14.

On October 8, 2009, Mr. Donjuan filed a motion to change venue, arguing that the Third District Court in Salt Lake County, Utah was the appropriate venue because the adoptive parents’ adoption petition was pending there and they resided there. R. 175-183. He did not argue that the Georgia court was the proper venue. *Id.* On November 17, 2009, the district court denied Mr. Donjuan’s Motion to Change Venue and his Motion to Stay Decision. R. 269-271. Then, on December 3, 2009, the district court granted Ms. McDermott’s Motion to Dismiss, concluding that Mr. Donjuan had not strictly complied with Utah Code Ann. § 78B-6-121(3)(b). R. 274-277.

## **ARGUMENT**

### **I. ONLY THE ORDERS OF THE UTAH COURT ARE ENTITLED TO FULL FAITH AND CREDIT.**

#### **A. The Georgia court dismissed Mr. Donjuan’s request for custody.**

The Parental Kidnaping Prevention Act (“PKPA”) may apply when a custody or visitation order has been entered in one state and another state is asked to make a custody or visitation order regarding the same child. *See* 28 U.S.C. § 1738A(a)

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<sup>3</sup> An original signature page for the Amended Petition is not included elsewhere in the record.

and (g);<sup>4</sup> *see also Thompson v. Thompson*, 484 U.S. 174, 183, 108 S. Ct. 513, 522, 98 L. Ed. 2d 512 (1988) (“the PKPA is a mandate directed to state courts to respect the custody decrees of sister States”); *Doe v. Baby Girl*, 376 S.C. 267, 278, 657 S.E.2d 455, 461 (2008) (“The PKPA is primarily concerned with when full faith and credit should be given to another State’s custody determination.”).

Importantly, in this case, Mr. Donjuan’s claim for legitimation “including [his] requests to legitimate the minor child, for custody, visitation, and an award of child support,” was dismissed by the Georgia court eight days before he filed his Utah Petition. R. 149. Thus, the Georgia court had not entered a custody or visitation order and no proceeding was even pending in Georgia seeking a custody or visitation determination when Mr. Donjuan’s Utah Petition was filed or when the district court entered its ruling in this case.<sup>5</sup> Under these circumstances, even with the remaining paternity claim in Georgia, absent a custody or visitation order or claim pending in Georgia the PKPA could not apply to preclude the Utah district court from acting in these proceedings. *See Sheila L., on behalf of Ronald M.M. v. Ronald P.M.*, 195 W. Va. 210, 465 S.E.2d 210, 221-22 (1995) (Ohio court did not have continuing jurisdiction under the PKPA where Ohio

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<sup>4</sup> A copy of the PKPA is attached as Addendum A.

<sup>5</sup> Ms. McDermott also finds it interesting that Mr. Donjuan would assert the PKPA in an attempt to preclude the Court from hearing a case he filed, not Ms. McDermott. Mr. Donjuan filed both the Georgia and Utah proceedings, yet now claims the Utah court should not have acted on his petition.

parentage action did not include request for custody determination). As such, the Utah district court properly made a ruling regarding Mr. Donjuan's rights.

**B. Because Utah is the child's "home state" only a Utah court could have entered an order consistently with the PKPA.**

Even if the Georgia court had made some custody or visitation determination, rather than dismissing such claims, a state must only give full faith and credit to a custody or visitation determination from another state if it was "made consistently with the provisions of [the PKPA]." 28 U.S.C. § 1738A(a); *Doe*, 376 S.C. at 279, 657 S.E.2d at 461 ("when another state has already entered a custody determination concerning this child, the inquiry is 'whether the first-in time court's exercise of jurisdiction was in accordance with the PKPA and whether that jurisdiction continues'" (citation omitted)). Importantly, the issue is not which case is filed first, but which court is the first to *exercise jurisdiction consistent with the PKPA* by entering a custody or visitation determination entitled to full faith and credit. *See People ex rel. A.J.C.*, 88 P.3d 599, 611 (Colo. 2004) (was "the first-in time court's exercise of jurisdiction [] in accordance with the PKPA"); *Peterson v. Peterson*, 464 A.2d 202, 205 (Me. 1983) ("[i]n no sense are the principles of full faith and credit furthered by attaching significance to a 'race to the courthouse.'"); *Doe*, 376 S.C. at 278-81, 657 S.E.2d at 461-62 (because Illinois order was not entered "consistently with" the PKPA, South Carolina courts did not need to give it full faith and credit).

If one state is the child’s “home state,” orders from other states cannot be consistent with the PKPA and are not entitled to full faith and credit. *Compare* 28 U.S.C. § 1738A(c)(2)(A) *with* 28 U.S.C. § 1738A(c)(2)(B-E); *see also Thompson*, 484 U.S. at 177, 108 S. Ct. at 515; *Atkins v. Atkins*, 308 Ark. 1, 6, 823 S.W.2d 816, 819 (1992); *J.D.S. v. Franks*, 182 Ariz. 81, 90, 893 P.2d 732 (1995) (“The PKPA prefers home state jurisdiction over significant connection jurisdiction.”); *In re Adoption of child by T.W.C.*, 270 N.J. Super. 225, 233, 636 A.2d 1083, 1087 (1994) (“the PKPA allows ‘significant connection’ jurisdiction only if no state qualifies as the home state”).

“Home state” under the PKPA

means the State in which, immediately preceding the time involved, *the child lived* with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child *lived from birth* with any of such persons.

28 U.S.C. § 1738A(b)(4) (emphasis added).

Utah is the child’s home state in this case and has always been the child’s home state because the child was born in Utah and has “*lived from birth*” in Utah. The child has never “lived” in Georgia. “Child” is defined in the PKPA as “a person under the age of eighteen.” 28 U.S.C. § 1738A(b)(1). This Court in *Alma Evans Trucking v. Roach*, 714 P.2d 1147, 1148 (Utah 1986), wrote that the “ordinary and usual” meaning of the word “child” is “a child which has been born.” *Accord Burns v. Alcala*, 420 U.S. 575, 579, 580-81, 95 S. Ct. 1180, 1183, 1184-85, 43 L. Ed. 2d 469 (1975) (“ordinary meaning” of the “word ‘child’ [] refer[s] to an individual already born, with an existence separate

from its mother”). *See also In re Adoption of Nelson*, 202 Kan. 663, 666, 451 P.2d 173, 176 (1969) (“child” has the “plain, ordinary meaning—a living child,” and “an individual in being as distinguished from one not yet born, as a fetus which has no existence of its own apart from its mother . . . .”); *Alternative Options & Servs. v. Chapman*, 2004 UT App 488, ¶ 35 & n.9, 106 P.3d 744 (definition of “child” in Interstate Compact on the Placement of Children does not include an unborn child).

In *Arkansas Dept. of Human Servs. v. Cox*, 349 Ark. 205, 82 S.W.3d 806 (2002), the child was conceived in Florida, but the mother traveled to Arkansas to deliver the child there. The mother then left the child with a grandmother in Arkansas after birth.<sup>6</sup> A Florida court entered an *ex parte* pick-up order that required the child be returned to Florida, and the Arkansas Department of Human Services complied with the Florida order, even though the order had never been registered in or enforced by an Arkansas court. The grandmother challenged the Arkansas agency’s enforcement of the order.

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<sup>6</sup> An expectant woman’s constitutional right to travel is not discussed in this case, but is surely implicated when an expectant mother travels to another state to obtain services. In *Doe v. Bolton*, 410 U.S. 179, 200, 93 S. Ct. 739, 751, 35 L. Ed. 2d 201 (1973), an abortion case, the supreme court held that the Privileges and Immunities component to the right to travel protected “persons who enter Georgia seeking the medical services that are available there.” It reasoned that “[a] contrary holding would mean that a State could limit to its own residents the general medical care available within its borders.” 410 U.S. at 200, 93 S. Ct. at 751-52. In *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222 (1975), the supreme court noted that states may not prevent expectant women from traveling to other states to obtain services legally available there. *See id.* at 823-24, 95 S. Ct. at 2233-34. “A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.” *Id.* at 824, 95 S. Ct. at 2234.

Because the child was born in Arkansas and had never been in Florida, the court held that “Florida never had jurisdiction under the PKPA or under the UCCJEA to make a child-custody determination” because Arkansas was the child’s “home state.” *Id.* at 212, 82 S.W.3d at 811. The Arkansas court wrote further:

It is undisputed that Cheyenne was born in Arkansas and had never been in Florida as of May 15, when the Florida court purported to issue an *ex parte* order to take Cheyenne into custody. . . . The fact that Cheyenne may have been conceived in Florida is therefore of no impact in the analysis of jurisdiction. . . . Under the UCCJEA, jurisdiction is decided on whether the state making the custody determination is the home state. Arkansas is the home state. . . . Florida did not have jurisdiction in substantial conformity with the UCCJEA. It had no jurisdiction over Cheyenne.

*Id.* at 214, 82 S.W.3d at 812-13. While this quote references the UCCJEA, the court noted that “the definition of ‘home state’ is the same in PKPA as in the UCCJEA.” *Id.* at 212, 82 S.W.3d at 811.

Because the child in this case was born in Utah, R. 20, ¶ 1, has lived with the prospective adoptive parents from birth, *see* R. 181, and has never been to Georgia, Utah was and is the child’s “home state” and the only state that could enter orders entitled to full faith and credit under the PKPA. Thus, nothing that has been filed in the Georgia court could affect the proceedings in the Utah courts.<sup>7</sup>

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<sup>7</sup> This case is different from the typical interstate adoption case involving a newborn, where the child has no home state because she is born in one state and taken to the state of the adoptive parents shortly after birth. In these cases, courts have interpreted the phrase “lived with” in the definition of “home state” to require “a deliberate manifestation to share a common place with the person during a *substantial* period of time involved.” *Rogers v. Platt*, 199 Cal. App. 3d 1204, 1214, 245 Cal. Rptr. 532, 538

## II. THE PKPA IS A FULL FAITH AND CREDIT STATUTE AND DOES NOT GRANT OR DENY SUBJECT MATTER JURISDICTION.

Several courts have recognized that the PKPA is not a jurisdictional statute, but simply a full faith and credit statute.<sup>8</sup> In *Glanzner v. State*, 835 S.W.2d 386 (Mo. Ct. App. 1992), the court noted that a California court had subject matter jurisdiction to issue a custody order, but because Missouri was the child's home state under the PKPA, the

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(Cal. Ct. App. 1988) (emphasis added). A newborn in an interstate adoption usually never "lives with" adoptive parents in the state of birth because the adoptive parents are not "living" there; they are simply waiting for Interstate Compact compliance. *See Doe*, 376 S.C. at 282, 657 S.E.2d at 463 ("[C]ourts in several jurisdictions have decided that when a baby who is born in one State, but within days of birth is transported to another State, the baby simply has no home state."); *In re Adoption of Child by T.W.C.*, 270 N.J. Super. at 235, 636 A.2d at 1088-89 (no home state where child was born in Connecticut and placed in the custody of New Jersey residents who returned to New Jersey upon obtaining ICPC approval); *In re Adoption of Zachariah K.*, 6 Cal. App. 4th 1025, 1029-30, 8 Cal. Rptr. 2d 423, 425 (Cal. Ct. App. 1992) (no home state where child was born in California and placed with Oregon couple who returned home with child a week after the birth); *Rogers*, 245 Cal. Rptr. at 538 (no home state where child was born in California and released to adoptive parents who traveled with child to the District of Columbia two days after the birth); Joan H. Hollinger, *Adoption Law & Practice*, § 4.07(2)(a) (2009) (newborn infants placed with adoptive parents who reside in another state typically do not have a "home state").

<sup>8</sup> Professor Anne B. Goldstein explains:

The PKPA is a federal law and therefore *can neither grant nor withhold state jurisdiction*; that is a matter for state law. All the PKPA can do, *and all that it does*, is specify which state decrees are entitled to enforcement under the Full Faith and Credit Clause. The PKPA neither requires a state to exercise jurisdiction only when its orders would be entitled to full faith and credit nor prohibits a state from enforcing (as a matter of comity) a custody decree not entitled to full faith and credit.

Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act*, 25 U.C. Davis L. Rev. 845, 925 (1992) (emphasis added).

California order was not entered consistently with the PKPA and was not entitled to full faith and credit. 835 S.W.2d at 389-90. The Missouri court wrote that “[t]he PKPA does not grant or deny initial jurisdiction to a state . . . it governs only the enforcement and modification of foreign decrees and the treatment of concurrent proceedings.” *Id.*

*See also J.D.S. v. Franks*, 182 Ariz. 81, 893 P.2d 732, 739 (Ariz. 1995) (“A state need not comply with the PKPA to exercise initial jurisdiction.”); *Mancusi v. Mancusi*, 136 Misc.2d 898, 903, 519 N.Y.S.2d 476, 479 (1987) (“The PKPA jurisdictional standards do not govern jurisdiction to render an initial custody decree in state courts.”); *Hanson v. Leckey*, 754 S.W.2d 292, 294 (Tex. Ct. App. 1988) (“The PKPA . . . does not confer upon any court jurisdiction to litigate child custody.”); *Sheila L., on behalf of Ronald M.M. v. Ronald P.M.*, 195 W. Va. 210, 465 S.E.2d 210, 221-22 (1995) (Ohio had jurisdiction over paternity action, but only West Virginia could enter an order consistent with PKPA); *Columb v. Columb*, 161 Vt. 103, 108, 633 A.2d 689, 692 (1993) (“the PKPA governs the enforceability of one state's custody order in another state and the other state's power to modify that order; it does not purport to control the jurisdiction to issue an initial order.” (Citation omitted)).

Where “the [PKPA] is intended to have the same operative effect as the [general] full faith and credit statute,” *Thompson*, 484 U.S. at 181, 108 S. Ct. at 517, it does not make sense that it would affect a court’s subject matter jurisdiction. Nowhere that Ms. McDermott can find has the United States Supreme Court or this Court held that the general full faith and credit statute strips a court of subject matter jurisdiction when



asked to give full faith and credit to a prior judgment of a sister state. Rather, a prior judgment of a sister state simply must be given the same effect as it would have had in the state where rendered.

Regarding the general full faith and credit statute, the United States Supreme Court has written:

A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.

*Baker v. General Motors Corp.*, 522 U.S. 222, 233, 118 S. Ct. 657, 663-64, 139 L. Ed. 2d 580, 592 (1998). *See also Underwriters Nat’l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704, 102 S. Ct. 1357, 1365, 71 L. Ed. 2d 558, 570 (1982) (“This Court has consistently recognized that, in order to fulfill this constitutional mandate, ‘the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.’” *Quoting Hampton v. McConnel*, 16 U.S. 234, 4 L. Ed. 378, 3 Wheat. 234, 235 (1818)).

That the PKPA does not define a state court’s subject matter jurisdiction is important in this case because it means the failure to raise the PKPA in the district court waived the issue on appeal. *See O’Dea v. Olea*, 2009 UT 46, ¶ 18, 217 P.3d 704.

Yet, even if the Georgia order were given full faith and credit, it did not grant Mr. Donjuan any rights to the child. The Georgia order did not grant him custody of or visitation with the child—it specifically dismissed those claims. R. 149. And, despite Mr. Donjuan’s assertions to the contrary, it did not prohibit Ms. McDermott from traveling to Utah prior to the child’s birth.<sup>9</sup> *Id.* It did not even adjudicate him to be the child’s father—the court stayed the paternity issue for later. *Id.* The Georgia order and proceedings simply do not affect the Utah proceedings and excuse Mr. Donjuan in any way from strictly complying with the requirements of Utah law. *See O’Dea*, 2009 UT 46, ¶ 43, 217 P.3d 704 (where an unmarried father is placed on inquiry notice of a “qualifying circumstance,” “[h]is compliance with other states’ paternity laws do not overcome this notice”). It is undisputed that he knew of a “qualifying circumstance” prior to the placement of the child, yet he did not fully and strictly comply with the requirements of Utah Code Ann. § 78B-6-121(3). As such, the Court can affirm the decision of the district court.

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<sup>9</sup> Although the Standing Domestic Relations Order does contain language prohibiting a party from removing a “child” from the jurisdiction of the Georgia court, nothing in that Order indicates that it precluded Ms. McDermott from traveling to another state during the pregnancy and delivering in that state. R. 124-127. To the extent that it could be so interpreted, the Georgia court’s more specific Order on Defendant’s Motion to Dismiss clarifies that Ms. McDermott was not restrained or enjoined from leaving Georgia during the pregnancy and supersedes any language to the contrary in the general standing order. R. 149.

## CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court that dismissed Mr. Donjuan's petition.

DATED this 12<sup>th</sup> day of January, 2011.

WOOD JENKINS LLC

A handwritten signature in cursive script, reading "Lance D. Rich", is written over a horizontal line.

Larry S. Jenkins

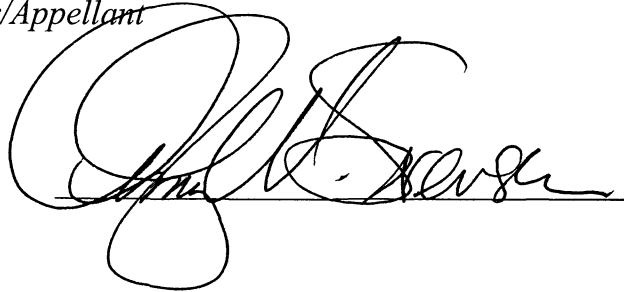
Lance D. Rich

Attorneys for Respondent/Appellee

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12 day of January, 2011, two true and correct copies of the foregoing ***SUPPLEMENTAL BRIEF OF APPELLEE*** were mailed in the U.S. mail, postage prepaid, to the following:

Jennifer D. Reyes  
Dale M. Dorius  
DORIUS & REYES  
P.O. Box 895  
29 South Main  
Brigham City, UT 84302  
*Attorneys for Petitioner/Appellant*

A handwritten signature in black ink, appearing to read "Dale M. Dorius", written over a horizontal line.

## **ADDENDUM A**

**The federal Parental Kidnapping Prevention Act (PKPA):**  
28 U.S.C. § 1738A:

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE  
PART V. PROCEDURE  
CHAPTER 115. EVIDENCE; DOCUMENTARY

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 1738A (2004)

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.