

1989

Utah v. W.D. : Petition for Writ of Certiorari

Utah Supreme Court

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R. Paul Van Dam, Attorney General; Sandra L. Sjogren, Assistant Attorney General.

Recommended Citation

Legal Brief, *Utah v. W.D.*, No. 890130.00 (Utah Supreme Court, 1989).

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BRIEF

890130

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
in the interest of:

W.D.
8/24/87

A Person Under Eighteen
Years of Age.

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Case No.

Court of Appeals
Case No. 870578-CV

Priority #13

890130

Petition for a Writ of Certiorari
to the Utah Court of Appeals

Petition for Writ of Certiorari from a decision of the Court
of Appeals, dated March 8, 1989.

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Martha Pierce
UTAH LEGAL SERVICES, INC.
124 South 400 East
Salt Lake City, Utah 84111

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PETITIONERS

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ATTORNEYS FOR RESPONDENT

FILED

APR 7 1989

Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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in the interest of:

W.D.
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Salt Lake City, Utah 84114

ATTORNEYS FOR RESPONDENT

PARTIES TO THE PROCEEDINGS

Christine Drake and William Mick, parents of W.D., aka Billy Mick.

State of Utah, Department of Social Services, Divison of Family Services.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	*	
in the interest of:	*	
	*	Case No.
	*	
W.D.	*	
8/24/87	*	Court of Appeals
	*	Case No. 870578-CV
A Person Under Eighteen	*	
Years of Age.	*	Priority #13
	*	
	*	

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Utah Court of Appeals misapplied this Court's analysis in determining jurisdiction pursuant to the Utah Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act so as to deprive a Utah family of the protection of Utah Courts?

2. Whether the Court of Appeals violated Petitioners' constitutional rights to family integrity, to travel and to due process of law?

3. Whether the Court of Appeals violated the purpose of the Juvenile Court Act and related statutes?

DECISION IN COURT OF APPEALS

The decision in the Court of Appeals is reported at 103 Utah Adv. Rep. 26.

JURISDICTION OF THIS COURT

The decision of the Court of Appeals in this matter was entered on March 8, 1989. This Court has jurisdiction to review this matter by writ of certiorari pursuant to Utah Code Ann. §78-2-2 (3)(a).

CONTROLLING CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendments 5, 9, and 14; Constitution of Utah, Article 1 Sections 7 and 25; 28 U.S.C. Section 1738A; Utah Code Ann. Section 78-3a-1(7); Sections 78-45c-1 et seq.

STATEMENT OF THE CASE

This is a juvenile court dependency case filed in the Juvenile Court for Salt Lake County on August 31, 1987. The petition was dismissed on November 18, 1987, by order of the Honorable Franklyn B. Matheson. The Utah Court of Appeals affirmed in a decision by the Honorable Richard C. Davidson on March 8, 1989.

STATEMENT OF FACTS

This case involves a dispute between Utah parents and the San Francisco, California Department of Social Services over the care and placement of their newborn infant son, born in Salt Lake City on August 24, 1987 (Tr.214-5). Because of financial difficulties, the mother left the infant at Holy Cross Hospital for a few days after birth (Tr. 15). The Utah Division of Family Services filed a dependency petition in the Juvenile Court of Salt Lake County, and received an Order of Temporary Custody on August 31, 1987, placing the child in a temporary shelter home (Tr. 37-40, 41, 356, R.1).

The San Francisco, California Department of Social Services filed a similar petition for temporary custody in Juvenile Court in San Fransisco on September 4, 1987, falsely alleging that the child was in San Francisco, and the Juvenile Court there issued a detention order for the Utah infant (Tr.49, 50, 146-8, 153-5,

Ex.3). A California social worker appeared in Utah with this detention order and removed the baby from the Utah shelter home on September 5, 1987 (Tr.49,50,289-91). The Utah petition was subsequently dismissed on the ground that California was the more appropriate forum in which to litigate this dependency case pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA) Utah Code Ann. §78-45C-1 and related statutes (Tr.334-338, R.38-44). The parents appealed.

The Utah Court of Appeals affirmed, in a case of first impression, finding that while Utah had "home state" jurisdiction pursuant to the UCCJA, California had "substantial connection" jurisdiction, because the mother and the father had lived there and the fetus had been "conceived and carried nearly to term there" (103 Utah Adv.Rep.27).

The Court further held that there exists no preference for home state jurisdiction and that it was proper for the Utah court to decline to exercise its jurisdiction solely because California "had access to the greatest amount of relevant information" and thus the best interests of the child were automatically served by requiring the Utah parents to travel to California to visit the child and contest the matter in court in San Francisco (103 Utah Adv.Rep.28).

In a concurring and dissenting opinion, Judge Orme found that the proper procedure would have been to stay proceedings pursuant to Utah Code Ann. §78-45c-7(5). The proceedings would have been stayed until further evidence was available regarding the parents and regarding California's basis for continued jurisdiction over

this Utah infant and his Utah family (103 Utah Adv.Rep.28-29). Both the majority opinion and Judge Orme's opinion raise concerns about the perjured California court documents and the fact that the infant was physically removed from Utah while our court still had jurisdiction but opined that subsequent events in the proceedings had rendered these objectionable acts unimportant (103 Utah Adv.Rep.28 n.1 and 29 n.2).

ARGUMENT

INTRODUCTION

This is apparently a case of first impression in the United States and clearly one of first impression in Utah. A social services agency in California initiated a juvenile court case in California concerning a newborn infant in Utah after the baby was already the subject of a juvenile court proceeding in Utah and already in a shelter home in Utah. The social services agency in California is the only party to this proceeding who has any interest in maintaining this case in the courts of California. Both parents reside in Utah and the Utah Department of Social Services is of course located in this state.

The Utah Juvenile Court saw no reason to retain its jurisdiction over the parties and the case. Consequently, the court left this Utah family with no alternative but to travel to California to visit their baby and try to get the child back from the California authorities.

By failing to differentiate this case from the run of the mill UCCJA interstate custody dispute between two private contestants, the Court of Appeals has warped the intent of the UCCJA and must

be reversed.

POINT I.

**THE COURT OF APPEALS MISUNDERSTOOD AND
MISINTERPRETED THIS COURT'S BEST INTEREST
ANALYSIS IN PRIOR UCCJA CASES**

The Court of Appeals correctly argued that the most appropriate forum is determined by the best interests of the child. The Court then cited the five factors of Utah Code Ann. §78-45c-7(3) which are used to determine jurisdictional best interests.

(a) If another state is or recently was the child's home state;

(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) If the parties have agreed on another forum which is no less appropriate; and

(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 78-45c-1.

Unfortunately, the Court of Appeals did a cursory and sloppy analysis of the five factors as they relate to jurisdiction of California and Utah over W.D., the infant. The Court concluded that Utah "may be" the home state of the child, but that the Court "need not decide that issue." Such a failure to determine the child's home state is unhelpful in serving the best interests of the child.

In any event, California did not meet the home state requirement at the time of the commencement of the proceeding.

Furthermore, California's connections with the infant after its birth were the result of misstatement and misconduct and therefore such connections should not be judicially cognizable:

[W]e cannot condone the manner in which W.D. was taken to California before Judge Matheson declined jurisdiction nor the misstatement of information contained in the California petition.

(103 Utah Adv.Rep.28, n.3) See Tr. 49, 50, 146-8, 153-5, 289-91.

Despite such a showing of bad faith and misrepresentation on the part of the California petitioner, the Utah Court of Appeals inappropriately approved Utah's deferring of jurisdiction to California thereby failing to apply both the Utah and the California unclean hands provision:

If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances.

Utah Code Ann. §78-45c-8(1).

The Court failed to correctly apply the first prong of the substantial connection test which is "the child and his parents, or the child and at least one contestant, have a significant connection with this state," Utah Code Ann. §78-45c-3(1)(b)(i) (emphasis added). While the parents may have had significant connections to California prior to their move, the child had no significant connections to California. Further, the child had never been in California until California authorities removed the child from his parents and took him to California.

The Court inappropriately suggested that the location of the fetus during conception and pregnancy provides a substantial connection to California. (103 Utah Adv.Rep 27) The language of the UCCJA suggests that the location of the fetus during conception and pregnancy is not significant for determination of home state. Utah Code Ann. §78-45c-2(5). This statutory language plus common sense suggests a logical conclusion that the location of the fetus during conception and pregnancy is not a significant connection for the child once that child is born. Without the child's significant connection to the state of California, the question of the parents' significant connection cannot be reached.

Because the Court failed to apply the first step of the substantial connection analysis, it improperly reached the second step of the analysis regarding substantial evidence.

Once the Court improperly reached the second prong of the substantial connection test, it then incorrectly applied that test. The second prong requires there to be "substantial evidence concerning the child's present or future care, protection, training, and personal relationships;" Utah Code Ann. §78-45c-3(1) (1987); Cal. Civil Code §5152 (West 1983) (emphasis added). The Court overlooked the requirement that such evidence must pertain to present or future care. Instead, the Court looked to old information the California authorities had regarding "the parents' mode of living, psychological makeup, marital relationship, parenting skills, and past interrelationship with W. D.'s older sister." (103 Utah Adv.Rep. 27) (emphasis added). The Court did not show how such evidence was relevant to the child's present or

future care. In fact, this evidence was gathered to describe the child's sister's past care, protection, training, and personal relationships. Information regarding the child's sister's welfare is beyond the Court's purview.

The Court also failed to correctly apply the significant connection and substantial evidence test as it related to Utah's jurisdiction over the child.

The child was born in Utah. Utah was the only state the child lived in until the California authorities took the child. The mother lived in Utah and intended to continue to live in Utah with her child. Additionally, the child's father moved to Utah shortly after the child's birth. He also intended to find work and continue to live in Utah with the child. Therefore, the child as well as both his parents have significant connections to the state of Utah, thus satisfying the first prong of the substantial connection test.

The Court also failed to correctly apply the second prong of the test to Utah. Because both the mother and the father intended to continue to live in Utah with the child and because they intended to keep the child and care for him in Utah, all evidence concerning the child's present and future care, protection, training, and personal relationships was in Utah.

In addition, the Court of Appeals misconstrued the definitional section of the federal Parental Kidnapping Prevention Act (PKPA). Without analysis the court concluded that "The PKPA does not apply to child neglect and dependency proceedings"(103 Utah Adv.Rep.28 n.1).

In a footnote and without any analysis, the court made an important policy decision which has the effect of nullifying the application of a federal law to Utah.

A more thorough analysis of the PKPA and its language would likely lead to the opposite conclusion, as the Arizona Court of Appeals held in Matter of Pima County Juvenile Action, 147 Ariz.527, 711 P.2d 1200,1206 (1985). This Court needs to consider the applicability of PKPA to cases like this one and provide guidance to lower courts on this subject. Likewise if this Court were to interpret PKPA as applying here, the mode of analysis concerning the exercise of jurisdiction between one state with home state jurisdiction and another with significant connection jurisdiction would always be resolved in favor of the home state, a result directly contrary to the decision of the Court of Appeals in the present case.

POINT II

APPLICATION OF THE UCCJA TO REMOVE A UTAH CHILD FROM THE STATE AND HIS UTAH FAMILY VIOLATES FUNDAMENTAL RIGHTS PROTECTED BY THE UTAH AND UNITED STATES CONSTITUTIONS TO FAMILY INTEGRITY AND TO TRAVEL.

The Court of Appeals in its decision repeatedly castigates the baby's mother for moving to Utah, decrying this as "shop[ping] for jurisdiction", 103 Utah Adv.Rep.28. This analysis, based at best on a very selective reading of the record, also establishes a dangerous precedent. Are new residents of the state of Utah somehow second class citizens who are not entitled to full protection of

the courts of this state? Again this analysis is half-baked and has the potential of setting in motion a series of unwanted results in later cases which this Court should stop here.

This is particularly true where this partial analysis contravenes a right protected by the Utah and U.S. Constitutions--the right to travel. This right has been recognized by the U.S. Supreme Court in United States v. Guest, 314 U.S.160 (1966) among other cases and, based on our state constitution, in City of Salina v. Wisden, 737 P.2d 981,983 (Utah 1987).

Making this decision even more egregious is the conclusion that some Utah citizens are not entitled to the protection of our courts, contrary to the policy enumerated in state statute and case law that "the jurisdiction of our courts should be extended to protect the citizens of this State consistent with concepts of fairness and equal justice under due process of law." Union Ski Company v. Union Plastics Corp., 548 P.2d 1257,1259 (Utah 1976). It seems ironic that a citizen of Utah damaged by a defamatory telephone conversation initiated outside Utah can assert jurisdiction in Utah, Berrett v. Life Ins. Co. of the Southwest, 623 F. Supp. 946 (D.Utah 1985), but that Utah parents deprived of the custody of their child cannot litigate the matter in a Utah court.

The situation created by the Court of Appeals' decision is more than ironic--it offends the sanctity of the family long since recognized by this court. In In re J.P., 648 P.2d 1364, 1372,1377 (Utah 1982), this Court found that a parent has a fundamental right, protected by the Constitution, to sustain his relationship

with his child. The Court also found an "inherent and retained right of a parent to maintain parental ties to his or her child under Article I, §7 and §25 and that the United States Constitution recognizes and protects the same right under the Ninth and Fourteenth Amendments."

The J.P. case is about termination of a parent's rights. That is not the case here. But sanctioning the removal of a twelve-day old infant from the state and then telling the parents that visitation and further litigation will take place in California is just as drastic as termination. Certainly there is no way for a low income family to bond with a baby in a shelter home in another state; there is no way to feed the child or engage in the labor and joy of assisting in the child's development and training. At the least, retaining jurisdiction in Utah would be necessary to effectuate state policy as articulated in the J.P. case and in the Juvenile Court Act, Utah Code Ann. §78-3a-1(7), to "attempt to preserve and strengthen family ties where possible."

The Court of Appeals' ruling sanctions a state-sponsored severing of family ties and gives the state carte blanche to disrupt family life. This important policy revision, again made without full analysis and in disregard of this Court's earlier cases should be reviewed and corrected by this Court.

POINT III

THE COURT OF APPEALS FAILED TO PROTECT PETITIONERS' DUE PROCESS RIGHTS BY ALLOWING THE CALIFORNIA COURT TO TAKE JURISDICTION IN VIOLATION OF CALIFORNIA LAW AND DUE PROCESS

The opinion of the Court of Appeals in this case essentially states that the Utah courts must decline jurisdiction in UCCJA cases regardless of the manner in which the other state handles the case and whether or not the other state's actions are taken in accordance with the UCCJA, due process and principles of fairness. Again because this is a case of first impression, the Court of Appeals needs guidance from this Court. If this were a modification case, an initial inquiry would be whether the court of the other state "assumed jurisdiction under statutory provisions substantially in accordance with this act...", Utah Code Ann. §78-45c-13. The same type of analysis is needed here before the Utah court chooses to decline jurisdiction.

Even a superficial analysis would disclose that the California proceedings were defective. A partial list of horrors is as follows: the petition failed to comply with California law regarding information about the child's whereabouts; the telephone notice to the mother in Salt Lake City at 4:00 p.m. of a detention hearing in San Francisco the next morning was woefully inadequate; and the California court failed to communicate with the Utah court even after being apprised of the UCCJA requirement to do so. Yet, under the Court of Appeals analysis, none of these problems need be remedied and Utah must forego the resolution of this case and the protection of its citizens to somehow comply with a very odd

view of the UCCJA.

This Court should review this case to determine the proper remedy for failure to comply with the UCCJA, the PKPA or due process by a state competing with Utah for UCCJA jurisdiction.

Finally, this is a contest between Utah parents and a California social services agency. None of the policy considerations that form the backdrop of the UCCJA and the PKPA apply here, or if they do, they should be applied against San Francisco Social Services. In a "normal" custody case, two contestants with an interest in obtaining custody of the child are situated in different states. The rules of the UCCJA and PKPA are designed to facilitate the determination of custody. But here, the only basis for the Juvenile Court of California taking custody is if there is an emergency that requires action concerning a child in California. There is no such child. When California began its case and even when the social worker picked up the baby in Utah, he was in a shelter home under the care of the Utah Social Services Department.

California's emergency jurisdiction should have only continued until the proper home state could be determined and then arrangements should have been made to have all further custody determinations rendered in the home state. There can be no question that the home state is and was Utah. But to allow California to continue to make custody placements and orders long after any emergency has expired again flaunts the purpose of the UCCJA and again incorrectly decides a question of first impression in this state.

Many other courts, in considering the emergency provisions of the UCCJA, similar to Utah Code Ann. §78-45c-3(1)(c), have found that the state in which the emergency occurs has jurisdiction only long enough to deal with the emergency. See E.P. v. District Court of Garfield County, 696 P.2d 254, 262, 263 (Colo.1985). California should have never taken jurisdiction in this case in the first place or, at the least, should have returned the matter and the child to Utah as soon as the child was in shelter and there was no longer any emergency. Utah should not have removed itself from resolving the question of custody but should have kept jurisdiction of the matter all along. Such a procedure was incorrect and should be reversed by this Court.

CONCLUSION

This Court should take this opportunity to correct the numerous analytical errors in the Court of Appeal's decision and provide guidance to lower courts regarding the correct interpretation of the UCCJA to protect the rights of Utah citizens to use the Courts of this state to protect their rights. The Petition for a Writ of Certiorari should be granted.

DATED this 7th day of April, 1989.

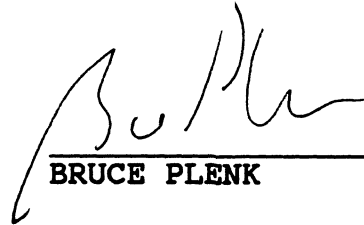
UTAH LEGAL SERVICES, INC.
Attorneys for Petitioners


By: BRUCE PLENK


BY: MARTHA PIERCE

CERTIFICATE OF MAILING

I do hereby certify that I mailed a true and correct copy of the foregoing PETITION FOR A WRIT OF CERTIORARI to: Paul Van Dam, Attorney General, and Sandra Sjogren, Assistant Attorney General, 236 State Capital, Salt Lake City, Utah 84114 on this 7th day of April, 1989, postage prepaid.



BRUCE PLENK

IN AND FOR SECOND DISTRICT JUVENILE COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, In the interest of	:	<u>MINUTE ENTRY AND ORDER</u>
	:	
DRAKE, William DC3 (08/24/37)	:	Case No. 734134
	:	
<u>A person under eighteen years of age</u>	:	

WHEREAS a Motion to Set Aside, Motion for New Hearing, Motion for Shelter Hearing and Motion for Restoration of Custody, filed for and on behalf of Christine Drake and William Mark Drake, natural parents of William Drake, came on for hearing before the above entitled Court on September 29, 1987; and,

WHEREAS, Bruce Plenk, Esq., and Jeffrey Burkhardt, Esq., appeared and argued said Motions on behalf of the Petitioners, and Frederick Oddone, Chief Deputy Salt Lake County Attorney, appeared and argued in opposition to said Motions on behalf of the State of Utah, Division of Family Services, and,

WHEREAS, the Court being fully advised in the premises, it hereby orders as follows:

ORDER

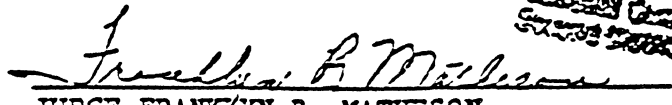
1. Pursuant to the provisions of Utah Code Annotated Section 78-3a-45, the Motion to Set Aside the previous Order of Dismissal signed by this Court on September 14, 1987, is granted on the grounds that the issuing of said Order without notice to the parents and hearing may have significant effect on the alledged custodial rights of said parents.
2. Pursuant to the provisions of Utah Code Annotated Section 78-3a-46, the Motion for New Hearing in relation to said previous Order of Dismissal is granted to said parents on the grounds that new evidence as to the residence and domicile of the mother may be available which might effect said Order.
3. The Motion to Dismiss on the grounds that the previous Motion to Dismiss was not signed by a duly licensed attorney is denied on the grounds that the appropriate state attorney stood ready and willing to correct said omission on notification thereof.
4. The Motion for New Shelter Hearing is denied on the grounds that there appears no irregularity to the Court in the original shelter hearing and that the granting of such request for rehearing is discretionary with the Court, (See Rules 8 & 13, UJCRPP).
5. The Motions for Restoration of Custody and for an Order returning the child to the State of Utah are taken under advisement pending the new hearing herewith granted regarding the previous order of dismissal, it being anticipated by the Court that the respective parties will present evidence and/or argument at such hearing relevant to such issues to assist the Court in ruling thereon.

(2)

6. The Court takes under advisement any ruling regarding application of the Uniform Child Custody Jurisdiction Act as argued by the petitioner pending further hearing.

Dated this 21st day of October, 1987.

BY THE COURT


JUDGE FRANKLYN B. MATHESON

FILED
OCT 22 1987
County Court
Clerk's Office

cc: Bruce Plenk, Esq.
Jeffrey Burkhardt, Esq.
County Attorney
Division of Family Services

ts/0524A

SECOND DISTRICT JUVENILE COURT
IN AND FOR SALT LAKE COUNTY

STATE OF UTAH, in the interest of	:	MEMORANDUM DECISION
	:	
DRAKE, WILLIAM	:	Case No. 748134
AKA BABY BOY MICK	:	
	:	
<u>A person under eighteen years of age</u>	:	

STATEMENT OF FACTS AND ISSUE

A. Statement of Facts

1. August 1, 1937. Christine Drake arrived in Salt Lake City, from California. She lived at a succession of addresses.
2. August 24, 1937. Christine was delivered of a child, William Drake, at the Holy Cross Hospital in Salt Lake City.
3. August 26, 1937. That Utah Division of Family Services was contacted by authorities of Holy Cross Hospital. The authorities expressed concern as to releasing the child from the Hospital with the mother, as the mother appeared unable to see to the proper care of the child. The mother was released from the hospital. The child was held. The evidence is contradictory as to whether the mother left the child in the hospital voluntarily pending securing of a place to live, or whether she was refused permission to take the child from the hospital by a hospital worker.
4. August 31, 1937. Petition No. 748134 alleging the child to be dependent was filed with the Utah Juvenile Court by the Utah Division of Family Services. An Order was issued giving temporary custody of the child to the Utah Agency. The child was released by the Hospital to the Agency and placed by the Agency in shelter care. The Petition was set for hearing on November 2.
5. September 1, 1937. A shelter care hearing was held in the Utah Juvenile Court. A Commissioner found probable cause for the need of continued shelter care, and affirmed custody in the Agency for shelter care. The Commissioner set the matter for further review on September 9 and gave authority to the Agency to release the child from shelter prior to that date at its discretion.
6. September 3, 1937. Petition No. 504431 was filed in the Juvenile Court of San Francisco County, California, alleging the child to be dependent and in need of supervision, together with a Request for Order of Detention.
7. September 4, 1937. An Order of Detention was issued by the San Francisco Juvenile Court after hearing in that Court.
8. September 5, 1937. The child was released by the Utah Agency worker from shelter to the physical custody of a San Francisco welfare worker for transportation of the child from Utah to San Francisco for placement.

9. September 14, 1937. A Motion for Dismissal of Utah Petition 743134 was filed in the Utah Juvenile Court by the Salt Lake County Attorney and an Order of Dismissal was signed by a Juvenile Court Judge ex-parte.
10. September 13, 1937. The natural parents of the child moved the Utah Juvenile court to set aside its previous Order of Dismissal and to grant a new hearing in relation thereto, and asked for an Order restoring physical custody of the child to the parents and directing the return of the child to the State of Utah.
11. September 29, 1937. Oral argument was heard by the Utah Juvenile Court on the parent's Motion to set aside the previous Order of Dismissal.
12. October 21, 1937. A Minute Entry and Order of the Utah Court setting aside its previous Order of Dismissal and granting a new hearing was entered.
13. November 5, 1937. A legal Memorandum was received from the parents in support of their Motion for restoration of custody.
14. November 17, 1937. A legal Memorandum was received from the State of Utah in support of dismissal and deference to California jurisdiction.
15. November 18, 1937. After a hearing the Utah Juvenile Court found that California was the more appropriate forum to determine and supervise custody of child, and issued a Minute Order that the Utah Petition of August 31 be dismissed.

B. Issue

The basic operational issue before the Court is whether release of the child by the Utah authorities to the State of California authorities was appropriate and, if not, whether the Utah Court should now attempt to secure the return of the child to Utah. The legal issue is whether or not there is any provision of law which mandates restoration of Utah jurisdiction regarding said child and assertion thereof by the Utah Court.

Decision

1. It is the position of this Court that irrespective of the legal residence of the mother at the time of the birth of the child in Utah and without specifically finding in relation to that issue, that the Utah Juvenile Court had in personam jurisdiction to intervene in the protection of the child (Utah Code Section 78-3a-24), and justification to do so especially in light of the apparent indigent circumstances of the mother and concerns expressed by the hospital attendants as to her ability to care for the child following birth. (See Section 78-45c-3(c)).

2. It was therefore appropriate for the State of Utah to intervene and take temporary physical custody of the child. The procedures followed were according to the provisions of the Utah Juvenile Court Act. Attempt was made to notify the mother as to the hearing held to confirm placement of the child in shelter but her whereabouts could not be ascertained. Subsequently, upon her being located and before the child was removed from the State of Utah, she was given the opportunity to request a second shelter hearing which she failed to do. Although the Shelter Order did in fact affirm and perpetuate the separation of the mother from her child, due process requirements were observed and the Court finds no impropriety or inappropriate motive in the procedures followed by the State Agency in assuming the physical custody, care and protection of the child.

3. The Juvenile Court may dismiss a petition and terminate the proceedings relating to a child at any time if such action is in the interest of justice and the welfare of the child. Section 73-3a-23; Rule 23, UJCRPP. Since it is the finding of the Court, as hereinafter set out, that the State of California is the most appropriate and convenient forum to determine custody of the child, termination of the Utah proceedings by the Utah Juvenile Court is appropriate.

4. Release of the child by the Utah agency to the California authorities was not a "placement" of the child by the Utah agency. The Utah agency was not attempting to arrange for the care of the child in another jurisdiction or acting in the capacity of a sending agency with intention of retaining jurisdiction over the child to determine matters relating to the custody, care or control of the child. It was understood that the California authorities were assuming full responsibility of the child including cost of care with advance knowledge and under California Court Order. There was, therefore, no "placement" outside of the State of Utah by the Utah Agency without Utah Court approval in violation of Section 73-3a-42(3) and no violation of the Interstate Compact on Placement of Children (Section 55-8b-1 et. seq). The Utah Agency in transferring the child to the California Agency, was acting under legal advice and the assumption, however incorrect the assumption might have been, that the State of California had custody jurisdiction of the child at that time and that the State of Utah was simply releasing any further custodial relationship with the child to a State having appropriate jurisdiction. There was no willing or knowing attempt or intent to circumvent the law, nor was there any apparent conspiracy to take any action other than that in the best interest of the child.

5. Counsel agree and the Court concurs that the provisions of the Uniform Child Custody Jurisdiction Act, adopted in both Utah and California, do apply in this case. The Court, having concluded that there was no violation of any other applicable statute or inappropriate procedure followed by the Utah authorities, feels further that application of and reliance on said Act should now determine resolution

of the differences between the parties as to whether or not this Court should assert Utah jurisdiction and Order return of the child to Utah.

6. The Court analyzes the Uniform Child Custody Jurisdiction Act in the context of the instant case as follows:

a. It is the general purpose of the Act to assure that litigation concerning the custody of a child takes place in the State with which the child and his family have the closest connection and where significant evidence concerning the care, protection, training and personal relationships is readily available. In light of the mother's previous prolonged residence in the State of California in comparison with her very short presence in Utah, that the father of the child lives and works in California, that extended family members reside in that State, that custody proceedings are pending in that State regarding a sibling of the child, and that welfare and state agencies are most familiar with the family in that State, the child and family have a closer connection with the State of California and that this state should decline to exercise its jurisdiction. See 73-45c-1(c).

b. Although this State may be considered the "home state" of the child at the time of his birth, (Section 73-45c-2(5)), and that this State had jurisdiction to make a custody determination (Section 73-45c-3(1)(c)), California could likewise claim such jurisdiction (Section 73-45c-3(1)(b)). The best interest of the child should be the determining factor. (Section 73-45c-3(1)(d)).

b. The State of California may have been precipitous in making a custody determination on September 4 in light of the Shelter Order of this Court of September 1 and the Petition for custody filed in this State on August 31 [Section 73-45c-6(1)]. Nonetheless, this Court may decline (dismiss) jurisdiction at any time before making a decree if it finds it is an inconvenient forum and that another state is a more convenient forum. Section 73-45c-7(1).

d. It is the finding of this Court that California has a closer connection with the child and his family (73-45c-7(3)(b)) for the reasons enumerated under paragraph 6a and above, and that therefore that State is the more appropriate forum. 73-45c-7(1).

e. Having so found this Court may dismiss the proceedings filed in this State. 73-45c-7(5).

7. It is my conclusion that this Court may decline jurisdiction in this matter, dismiss the Utah proceedings, and that this Court is neither under compulsion to assert jurisdiction over the child nor to demand his return to the State of Utah.

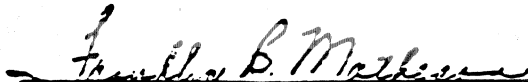
ORDER

Petition number 748134 as filed with this Court on August 31, 1987 is hereby dismissed.

Date of Memorandum Decision December 4, 1987.

Effective Date of Order November 13, 1987.

BY THE COURT


JUDGE FRANKLYN B. MATHESON

cc: County Attorney

Bruce Plenk, Esq.

Jeff Burkhardt, Esq.

Cite as
103 Utah Adv. Rep. 26

IN THE
UTAH COURT OF APPEALS

State of Utah in the interest of: W. D.,
v.
Christine DRAKE,
Appellant.

No. 870578-CA
FILED: March 8, 1989

Third District Juvenile Court, Salt Lake
County

Honorable Franklyn B. Matheson

ATTORNEYS:

Bruce Plenk, Salt Lake City, Jeffrey
Burkhardt, Salt Lake City, for Appellant
R. Paul Van Dam, Sandra L. Sjogren, Salt
Lake City, for Respondent

Before Judges Davidson, Garff, and Orme.

OPINION

DAVIDSON, Judge:

On November 18, 1987, the juvenile court, dismissed a pending state petition ruling that California was the more appropriate and convenient forum to determine custody of W. D. The natural parents of W. D. appeal the dismissal. We affirm.

FACTS

Prior to W. D.'s birth, Christine Drake and William Mick, W. D.'s natural parents, lived together in San Francisco, California. Drake had previously given birth to another child, I. D., in 1984 but California authorities had taken her into protective custody. Drake and Mick sought the return of the child so the California authorities, over a period of several years, conducted evaluations of the parents, administered placement programs, and were involved in court hearings with the parents.

Following a hearing held on July 31, 1987, at which the California court recommended termination of parental rights in I. D., Drake left San Francisco and traveled to Salt Lake City. She was eight months pregnant with W. D. and came to Utah because she and Mick had decided that Utah law would allow them to retain custody of this child after its birth. Mick stayed behind in San Francisco. Drake arrived in Salt Lake City on August 1, 1987, bringing with her little money and few belongings. For most of that month, she lived at various places within the city, including the women's shelter.

On August 24, 1987 Drake delivered W. D. at Holy Cross Hospital. Two days later, Drake left the hospital, leaving W. D. behind. On

August 31, after Drake had failed to visit W. D., a petition was filed with the juvenile court by the state. The petition alleged that W. D. was a dependent child and that California had jurisdiction over W. D., and was willing to adjudicate the "infant's legal status if the infant is returned to California." An order of temporary custody, placing custody of W. D. with the Utah Division of Family Services ("Family Services"), was issued by the court. A shelter hearing pursuant to Utah Code Ann. §78-3a-30 (Supp. 1988) was held the next day. However, the case worker was unable to find Drake to notify her of the hearing. As a result, custody was left with Family Services. The next day, September 2, Drake appeared, met with the case worker, and was informed about the shelter hearing. Drake refused to give her address and did not request another hearing.

On these same facts, a petition was filed in California on September 3, which also alleged that W. D. was a dependant child. A hearing was held in San Francisco on September 4. Notice was given to both Drake and Mick, and Mick was present with counsel. Following the hearing, a detention order for W. D. was issued. On September 5, California officials flew to Salt Lake City, picked up W. D. from Family Services personnel, and returned with him to California.

On September 12, Judge Matheson signed an ex parte order dismissing the case in Utah. Subsequently, Drake and Mick moved to set aside the dismissal. This motion was granted and a new hearing date set to consider the state's motion to dismiss. A hearing was held on the 5th and 18th of November 1987. During the hearing, each of the parents were represented by counsel and each side presented evidence and argument. At the conclusion, the court found that California was the more appropriate and convenient forum to determine custody, and granted the state's motion to dismiss the petition.

The question before us is whether the Uniform Child Custody Jurisdiction Act ("UCCJA"), Utah Code Ann. §78-45c-1 to-26 (1987), required the juvenile court to retain jurisdiction rather than defer to California as the more appropriate and convenient forum.

DISCUSSION

The parents first argue that California did not have any basis for jurisdiction over W. D. since Drake left before the child was born.

Like Utah, California has adopted the UCCJA. Cal. Civil Code §5152 (West 1983). The pertinent provisions of these statutes are identical. They provide that a state court has jurisdiction to make or modify a child custody order if any of the following conditions are met:

(a) This state is the home state of the child at the time of commencement of the proceeding . . .

(b) It is in the best interest of the child that a court of this state assume jurisdiction because . . . the child and his parents, or the child and at least one contestant, have a significant connection with this state, and . . . there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(c) The child is physically present in this state and . . . the child has been abandoned or . . . it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent

Utah Code Ann. §78-45c-3(1) (1987); Cal. Civil Code §5152 (West 1983).

The statutes define "home state" as "the state in which the child immediately preceding the time involved 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 the persons mentioned." Utah Code Ann. §78-45c-2(5)(1987); Cal. Civil Code §5151(5). Under this definition California fails to qualify as W. D.'s "home state." Utah may qualify as W. D.'s "home state" since he was born here, but problems arise in whether the child "lived from birth" with Drake and whether the state is a "person acting as parent." However, we need not decide that issue. Unlike the PKPA¹ the Utah UCCJA does not give a preference to the "home state." The significant connection or substantial connection basis "comes into play either when the home state test cannot be met or as an alternative to that test." 9 UCCJA (U.L.A.) §3 comment, 144 (1988) (emphasis added). Even though a certain state may be the "home state," if "the child and his family have equal or stronger ties with another state," that other state also has jurisdiction. *Id.*; see also *Smith v. Superior Court of San Mateo County*, 68 Cal. App. 3d 457, 137 Cal. Rptr. 348, 352 (1977). Therefore, the fact that Utah may technically have "home state" jurisdiction will not prevent California from also having jurisdiction under the "substantial connection" basis.

In the instant case, Drake and Mick had lived in California for several years. W. D. was conceived and carried nearly to term there. At the time the petition in California was filed, Mick was still living in San Francisco² and Drake had only left to find another

state with more favorable custody laws. Under these circumstances Drake, Mick and W. D. all had substantial connections with California, thereby meeting the first requirement of the substantial connection test. Additionally, California authorities had information on the parents' mode of living, psychological makeup, marital relationship, parenting skills, and past interrelationship with W. D.'s older sister. This was enough to meet the required need of substantial evidence on W. D.'s care, protection, training, and relationships to satisfy the second requirement. Although W. D. had never been in California his physical presence "while desirable, [was] not a prerequisite for jurisdiction to determine his custody." Cal. Civil Code §5152(3); see also Utah Code Ann. §78-45c-3(3) (1987). California had jurisdiction to issue the detention order even before W. D. was transported to that state.³

Alternatively, the parents argue that since a petition had been filed in Utah and a temporary custody order issued four days prior, the California court was not "exercising jurisdiction substantially in conformity with this act" when it issued its detention order.

Utah Code Ann. §78-45c-6(1) (1987) limits the exercise of a court's jurisdiction under some circumstances:

A court of this state shall not exercise its jurisdiction under this act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

California is bound by a similar provision Cal. Civil Code §5155(1) (West 1983).

We reject the parents' interpretation of this section. The unilateral filing of a petition in one state does not prohibit the filing of a petition in another state which also has jurisdiction. *Peterson v. Peterson*, 464 A.2d 202, 205 (Me. 1983). But more importantly, the purpose of section 78-45c-6(1) "is to encourage judicial restraint in exercising jurisdiction whenever another state appears to be in a better position to determine custody of a child." 9 UCCJA (U.L.A.) §7, comment, 234 (1988). Ultimately, it is "less important which court exercises jurisdiction but that courts of several states involved act in partnership to bring about the best possible solution for a child's future." 9 UCCJA (U.L.A.) prefatory note, 118 (1988) (emphasis added). See also *Brokus v. Brokus*, 420 N.E.2d 1242, 1247 (Ind. App. 1981); *Rexford v. Rexford*, 631 P.2d 475, 479 (Alaska 1980).

Given this purpose, we will not quibble over the point at which one court or the other acquired priority-in-time jurisdiction. Had the courts both attempted to exercise continuing jurisdiction over the matter, priority-in-time would have been important. *In re Guardianship of Donaldson*, 178 Cal. App. 3d 477, 223 Cal. Rptr. 707, 714 (Cal. Ct. App. 1986). However, a court which has priority-in-time jurisdiction can "yield jurisdiction" if another court is the more appropriate forum. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand. L. Rev. 1207, 1231 (1969).

Finally, the parents argue that the court abused its discretion in determining that California was the more appropriate forum in which to litigate the custody of W. D.

Just which forum is the most appropriate is determined by the best interests of the child. Utah Code Ann. §78-45c-7(3) (1987); Utah Code Ann. §78-45c-3(1)(b) (1987); *Tuttle v. Henderson*, 623 P.2d 1275, 1276 (Utah 1981). See also *Trent v. Trent*, 735 P.2d 382, 383 (Utah 1987); *Kelly v. Draney*, 754 P.2d 92, 95 (Utah App. 1988). Several factors may be taken into account by the judge in determining best interests:

- (a) if another state is or recently was the child's home state;
- (b) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;
- (c) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- (d) if the parties have agreed on another forum which is no less appropriate; and
- (e) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in §78-45c-1.

Utah Code Ann. §78-45c-7(3).

Furthermore, "[a]lthough the child is the center of attention in a custody proceeding, the main inquiry is directed toward . . . adults and toward making a prediction for the future concerning the superior ability of one of them to surround the child with the necessary security, affection, and all other needs of a growing child." Bodenheimer, 22 Vand. L. Rev. at 1223. In the instant case, substantial information concerning the parents' abilities and past history was in California. The mother had only recently come to Utah, but had lived for years in California. Finally, the exposed purpose in coming to Utah was to shop for jurisdiction.

Under these circumstances, we cannot say

the judge abused his discretion in deciding that California had access to the greatest amount of relevant information, and so, in the best interests of the child, was the most appropriate and convenient forum to litigate the custody of W. D.

We affirm.

Richard C. Davidson, Judge

I CONCUR:

Regnal W. Garff, Judge

1. Parental Kidnapping Prevention Act 28 U.S.C.A. §1738A (West Supp. 1988). The PKPA does not apply to child neglect and dependency proceedings, *State ex rel. Dep't of Human Serv. v. Avinger*, 104 N.M. 255, 720 P.2d 290, 292 (1986), and so is not important to the resolution of this case.
2. The facts and circumstance considered are those in existence when the petition was filed. *Rexford v. Rexford*, 631 P.2d 475, 478 (Alaska 1980).
3. Although we cannot condone the manner in which W. D. was taken to California before Judge Matheson declined jurisdiction, nor the misstatement of information contained in the California petition, we believe the subsequent hearings provided the parents adequate due process to protect their rights. See *In re Summers v. Wulffenstein*, 616 P.2d 608, 610 (Utah 1980).

ORME, Judge (concurring and dissenting):

I concur in the substantive analysis set forth in the main opinion and agree with the conclusion that the Utah court did not abuse its "discretion in deciding that California had access to the greatest amount of relevant information, and so, in the best interests of the child, was the most appropriate and convenient forum to litigate the custody of W. D." I disagree only with the conclusion that dismissal of the Utah action was the appropriate means for implementing that decision.

I believe the Utah court erred in dismissing the petition filed with it rather than simply staying the proceeding as authorized in Utah Code Ann. §78-45c-7(5) (1987).¹ Events were simply too unsettled to warrant outright dismissal. The Utah proceeding should have been kept alive pending further clarification of the situation: Would Drake remain in Utah and establish a legitimate residence here, or would she return to California? Would Mick stay on in California or join Drake in Utah? If Mick came to Utah, would California in fact retain jurisdiction over W. D. since W. D. was born in Utah and was still in Utah when the California petition was filed?²

Indeed, as it happened, Mick joined Drake in Utah, the two are enrolled in parenting classes, W. D. has been placed in a shelter home here, and Utah social workers are assisting with the transition to unification of the family--but all under the supervision of a California court. Had the action here been kept alive, the Utah court would have been in a position to monitor the situation and could

have reactivated the Utah proceeding after it became apparent that Utah actually would have the greatest interest in W. D. and his family.

Conceding that, all things considered, California may have initially seemed the sensible forum to exercise jurisdiction, nonetheless, the Utah court should have merely stayed the proceeding before it rather than dismissing it outright. I would vacate the order of dismissal, remand with instructions to enter an order merely staying the Utah proceeding, and thereby permit Utah, on appropriate motion, to reassert jurisdiction over this Utah family.

Gregory K. Orme, Judge

1. Section 78-45c-7(5) provides, with my emphasis:

If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, *or it may stay the proceedings* upon condition that a custody proceeding be promptly commenced in another named state *or upon any other conditions which may be just and proper*, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

2. The California petition falsely recited, under penalty of perjury, that W. D. was in emergency custody *in California* when the petition was filed there on September 4, 1987. However, Mick attended the hearing on the petition held that same day, with counsel. The actual facts fortunately emerged at the hearing and the California court made its decision, fully informed of the fact that W. D. was actually in Utah at the time.

AMENDMENT IX

[Rights retained by people.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF UTAH

ARTICLE I

DECLARATION OF RIGHTS

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law

1896

Sec. 25. [Rights retained by people.]

This enumeration of rights shall not be construed to impair or deny others retained by the people.

1896

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody 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, 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 or visitation 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 determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody 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; and
- (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.

(c) A child custody 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 he 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 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 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 determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose 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 a 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 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.

(Added Pub.L. 96-611, § 8(a), Dec. 23, 1980, 94 Stat. 3569.)

78-3a-1. Juvenile court — Purposes — Jurisdiction.

The juvenile court is established as a forum for the resolution of all matters properly brought before it, consistent with applicable constitutional and statutory requirements of due process. The court has the jurisdiction, powers, and duties under this chapter to:

- (1) promote public safety and individual accountability by the imposition of appropriate

sanctions on persons who have committed acts in violation of law,

- (2) where appropriate, order rehabilitation, reeducation, and treatment for persons who have committed acts bringing them within the court's jurisdiction,

- (3) adjudicate matters that relate to abused, neglected, and dependent children and to provide care and protection for these children by placement, protection, and custody orders;

- (4) adjudicate matters that relate to children who are beyond parental or adult control and to establish appropriate authority over these children by means of placement and control orders;

- (5) order appropriate measures to promote guidance and control, preferably in the child's own home, as an aid in the prevention of future unlawful conduct and the development of responsible citizenship

- (6) remove a child from parental custody only where the minor's safety or welfare, or the public safety, may not otherwise be adequately safeguarded, and

- (7) consistent with the ends of justice, strive to act in the best interests of the children in all cases and attempt to preserve and strengthen family ties where possible

1988

78-45c-1. Purposes — Construction.

- (1) The general purposes of this act are to

- (a) avoid jurisdiction competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being,

- (b) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child,

- (c) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state,

- (d) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child,

- (e) deter abductions and other unilateral removals of children undertaken to obtain custody awards,

- (f) avoid relitigation of custody decisions of other states in this state insofar as feasible,

- (g) facilitate the enforcement of custody decrees of other states,

- (h) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child, and

- (i) to make uniform the law of those states which enact it

- (2) This title shall be construed to promote the general purposes stated in this section

1980

78-45c 2. Definitions.

As used in this act

- (1) 'Contestant' means a person, including a parent who claims a right to custody or visitation rights with respect to a child,

- (2) 'Custody determination' means a court decision and court orders and instructions providing for the custody of a child, including visitation rights, it does not include a decision relating to child support or any other monetary obligation of any person.

- (3) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for dissolution of marriage, or legal separation, and includes child neglect and dependency proceedings,

- (4) "Decree" or 'custody decree' means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree,

- (5) "Home state" means the state in which the child immediately preceding the time involved 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 the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period;

- (6) "Initial decree" means the first custody decree concerning a particular child,

- (7) 'Modification decree' means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court,

- (8) "Physical custody" means actual possession and control of a child,

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

- (10) "State" means any state, territory or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia

1980

78-45c-3. Bases of jurisdiction in this state.

- (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met

- (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state,

- (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships,

- (c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is

78-45c-8. Misconduct of petitioner as basis for refusing jurisdiction — Notice to another jurisdiction — Ordering petitioner to appear in other court or to return child — Awarding costs.

(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner as violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) Where the court declines to exercise jurisdiction upon petition for an initial custody decree pursuant to Subsection (1), the court shall notify the parent or other appropriate person and the prosecuting attorney of the appropriate jurisdiction in the other state. If a request to that effect is received from the other state, the court shall order the petitioner to appear with the child in a custody proceeding instituted in the other state in accordance with Section 78-45c-20. If no such request is made within a reason-

able time after such notification, the court may enter in a petition to determine custody by the petitioner if it has jurisdiction pursuant to Section 78-45c-2.

(4) Where the court refuses to assume jurisdiction to modify the custody decree of another state pursuant to Subsection (2) or pursuant to Section 78-45c-14, the court shall notify the person who has legal custody under the decree of the other state and the prosecuting attorney of the appropriate jurisdiction in the other state and may order the petitioner to return the child to the person who has legal custody. If it appears that the order will be ineffective and the legal custodian is ready to receive the child within a period of a few days, the court may place the child in foster care home for such period, pending return of the child to the legal custodian. At the same time, the court shall advise the petitioner that any petition for modification of custody must be directed to the appropriate court of the other state which has continuing jurisdiction, or, in the event that that court declines jurisdiction, to a court in a state which has jurisdiction pursuant to Section 78-45c-3.

(5) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorney's fees and the cost of returning the child to another state.

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78-45c-9. Information as to custody of child and litigation concerning required in pleadings — Verification — Continuing duty to inform court.

(1) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath as to each of the following whether:

(a) he has participated, as a party, witness, or in any other capacity, in any other litigation concerning the custody of the same child in this or any other state;

(b) he has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(c) he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(2) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(3) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

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78-45c-14. Modification of foreign decree — Prerequisites — Factors considered.

(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

(2) If a court of this state is authorized under Subsection (1) and Section 78-45c-8 to modify a custody decree of another state it shall give due consideration

to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with Section 78-45c-22.

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necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with Paragraphs (a), (b), or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(2) Except under Paragraphs (c) and (d) of Subsection (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

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78-45c-6. Proceedings pending elsewhere — Jurisdiction not exercised — Inquiry to other state — Information exchange — Stay of proceeding on notice of another proceeding.

(1) A court of this state shall not exercise its jurisdiction under this act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising

jurisdiction substantially in conformity with this act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under Section 78-45c-10 and shall consult the child custody registry established under Section 78-45c-16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Sections 78-45c-19 through 78-45c-22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

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78-45c-7. Declining jurisdiction on finding of inconvenient forum — Factors in determination — Communication with other court — Awarding costs.

(1) A court which has jurisdiction under this act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) if another state is or recently was the child's home state;

(b) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(c) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) if the parties have agreed on another forum which is no less appropriate; and

(e) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in Section 78-45c-1.

Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised

by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorney's fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

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