

2000

# Jennifer Melissa Thurston v. Ronald Thurston : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JENNIFER MELISSA THURSTON,	:	Case Number 20000228-CA
	:	
Petitioner and Appellant,	:	
vs.	:	
	:	
RONALD THURSTON,	:	Priority Number 4
	:	
Respondent and Appellee.	:	

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BRIEF OF THE APPELLEE

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RESPONSE TO APPEAL FROM THE FINAL ORDER TRANSFERRING JURISDICTION  
AND DISMISSAL BY THE SIXTH JUDICIAL DISTRICT COURT FOR THE COUNTY  
OF SANPETE WITHIN THE STATE OF UTAH.  
THE HONORABLE LOUIS G. TERVORT PRESIDING

---

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COURT OF APPEALS

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**BRIEF OF RESPONDENT AND APPELLEE**

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**STATEMENT OF JURISDICTION**

This Court has jurisdiction to review the discretionary ruling of the trial court as provided by Utah Code Ann., § 78-2a-3(2)(h), and by Rules 3 and 4 of the Utah Rules of Appellate Procedure.

**ISSUES PRESENTED FOR REVIEW**

A precursory issue to be reviewed by this court is whether the trial court was correct in determining that Oregon shared jurisdiction with Utah over the parties. Tr. 5-10. This issue pertains to a conclusion of law. Therefore the standard of review for this issue is legal error-- the Appellant must show legal error by the trial court in its use of fixed principles and rules of law, demonstrating the trial court incorrectly selected, interpreted, or applied the law. See *State v. Pena*, 869 P.2d 932 at 936 (Utah 1994). However, the main issue for

this court to review should be whether the lower court abused its discretion by ruling that Oregon was the best forum for determining matters of child custody. Tr. pp. 5-10.

The standard of review governing this issue is the abuse-of-discretion standard of review.

The abuse-of-discretion standard flows from the trial court's significant role in pre-appellate litigation. The trial court has "a great deal of latitude in determining the most fair and efficient manner to conduct business." *Morton v. Continental Banking Co.*, 938 P.2d 271, 275 (Utah 1997). This is because "[t]he trial judge is in the best position to evaluate the status of his cases, as well as the attitudes, motives, and credibility of the parties." *Id.*

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and to make that determination. See *State v. Pena*, 869 P.2d at 939-40 (Utah 1994). A trial court abuses its discretion if there is "no reasonable basis for the decision." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). A trial judge's determination should be reversed if the ruling "is so unreasonable that it can be classified as arbitrary and

capricious or a clear abuse of discretion." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937,938 (Utah 1993).

Because the lower court exercised its discretion in determining that Oregon was the best forum for this matter, the abuse-of-discretion standard of review is the proper standard of review for this issue.

#### **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES ETC.**

The applicable statutes determinative of the propriety of the lower court's ruling are; Sections 78-45c-6 and 78-45c-7 of the Uniform Child Custody Jurisdiction Act, which can be found in Appellant's addendum (§ 78-45c-6 and 78-45c-7 were repealed after the lower court's ruling, and were replaced by § 78-45c-206 and 78-45c-207).

#### **STATEMENT OF THE CASE**

On December 10, 1999, in light of months of court proceedings occurring both in Utah and Oregon, and after conferring by telephone with Judge Fredrick L. Bennett, the Oregon circuit court judge presiding over the Oregon proceedings, Utah Sixth Judicial District Court Judge Louis G. Tervort exercised the discretion given him in § 78-45c-7 of the UCCJA by ruling Oregon as the best forum to determine the custody issue and other issues pending in the Oregon case. Tr.



pp 5-10, R. 89-90. In response to the trial court's ruling Appellant appeals.

#### **STATEMENT OF THE FACTS**

1. Though the record does not capture exactly how long Appellant resided in Oregon, the record does reflect that Appellant resided in Oregon in 1997 and 1998. R. 43-44. While living in Oregon, Appellant frequented several physicians who treated her medical conditions. R. 61-66.

2. On or about January 6, 1999, Jennifer Thurston moved with the couple's three children to live with her parents in Sterling, Utah. R. 44.

3. Statements regarding abusive behavior of Appellee presented as facts by Appellant's brief are contested as to their truthfulness. R. 58-59.

4. On June 24, 1999, Appellant and Appellee appeared in person in the Lincoln County, Oregon Circuit Court to contest a modification of a Family Abuse Restraining Order. Appellant was accompanied by counsel. R. 26.

5. On June 25, 1999, Judge Fredrick L. Bennett, of the Lincoln County Circuit of Oregon granted Appellee custody of the parties' minor children.

6. On July 12, 1999, Appellant filed a Verified Petition

for Divorce in the Sixth Judicial District Court of Utah. R. 1-10.

7. On July 14, 1999, Appellant filed a Motion to Show Cause in the Sixth Judicial District Court of Utah. R. 15-17.

8. On August 5, 1999 Appellee accepted Service of Process in the Sixth Judicial District Court of Utah. R. 22.

9. On November 30, 1999, Appellant filed a motion for Declaration of Jurisdiction in the Sanpete County Sixth Judicial District Court of Utah. R. 39.

10. The record reflects that the Lincoln County Circuit Court of Oregon moved on its own initiative for consolidation. An Order of Consolidation was prepared on November 12, 1999, by Attorney Mark Obert, acting as counsel for Appellee, and was submitted to the court for signature. The order calls for the Lincoln courts to have jurisdiction over the minor children of the parties. The order in this record is not signed. R. 83.

11. On December 10, 1999, in light of the months of court proceedings occurring both in Utah and Oregon, and after conferring by telephone with Judge Fredrick L. Bennett, the Oregon circuit court judge presiding over the Oregon proceedings, Utah Sixth Judicial District Court Judge Louis G. Tervort ruled Oregon as the best forum for resolution of the

issues of the case. Judge Tervort announced this decision at the outset of the hearing to determine jurisdiction. Tr. pp 5-10, R. 89-90.

12. Appellant now appeals the ruling of the trial court.

#### **SUMMARY OF THE ARGUMENT**

Judge Tervort was correct in his determination that Oregon has jurisdiction over the parties. Both Appellant and Appellee have sustained sufficient minimum contacts with Oregon to establish jurisdiction in Oregon.

Furthermore, Judge Tervort did not abuse his discretion in determining that Oregon was the better forum to hear these matters. Judge Tervort acted in accordance to the discretion given him by Section 78-45c-7 of the UCCJA.

#### **ARGUMENT**

##### **POINT I**

##### **THE TRIAL COURT DID NOT ERR IN DETERMINING OREGON HELD JURISDICTION OVER THE PARTIES**

Appellant argues that Oregon has no jurisdiction over Appellant for three reasons; (1) because Appellant and the minor children are physically present in Utah, (2) because Appellant asserts that she was not properly served, and (3), because the Oregon Court did not communicate with the Utah

courts. None of these reasons can nullify the fact that Appellant has established and sustained minimum contacts with the state of Oregon sufficient to have purposefully availed herself of the State's jurisdiction.

The Supreme Court of the United States has held that "[i]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, invoking the benefits and protections of its law..." *Hanson v. Denckla*, 357 U.S. 235 (1958).

The record reflects that Appellant lived in Oregon for at least two years, from 1997 to 1999. R. 43-44. During that time she frequented physicians for treatment of serious medical problems. R. 61-66. The record shows that as late as December 3, 1998, Appellant was receiving medical treatment from Oregon physicians. If she were in the near future to experience medical complications in connection with the treatment she obtained two years ago, she would rely on the protections of Oregon's laws and statutes. Because Appellant availed herself of the protections of Oregon's laws, she must become subject to the jurisdiction of Oregon's courts.

Furthermore, Appellant has continued to travel back to

Oregon of her own volition since leaving the State in January of 1999. R. 24, 58. She has sought remedy in the Oregon Courts as recently as June 24, 1999. R. 24. Appellant's minimum contacts with the State simply leave no question that she has availed herself of the State's jurisdiction.

Thus, no error of law exists in Judge Tervort's decision permitting Oregon to exercise jurisdiction over Appellant.

## **POINT II**

### **JUDGE TERVORT DID NOT ABUSE HIS DISCRETION IN DETERMINING THAT OREGON IS THE APPROPRIATE FORUM**

At the time of his decision, Sections 78-45c-1 to 78-45c-26 of the UCCJA had not yet been repealed (These sections have been replaced with similarly worded statutes), thus Judge Tervort was operating under the rules dictated in UCCJA Section 78-45c-7. This section sets the guidelines for declining jurisdiction on a finding of inconvenient forum.

UCCJA Section 78-45c-7(1) states:

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.

This section granted Judge Trevort the discretion to decline jurisdiction and to surrender that jurisdiction to the Oregon

Courts. The Utah Appellate Courts grant great deference to trial courts in matters related to the exercise of discretion. "Where the trial court may exercise broad discretion, we presume the correctness of the court's decision absent 'manifest injustice or inequity that indicates a clear abuse of... discretion.'" *Childs v. Childs*, 967 P.2d 942, 944 (Utah Ct. App. 1998).

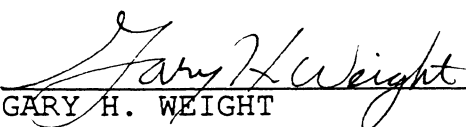
No manifest injustice or clear abuse of discretion exists in Judge Trevort's decision to decline jurisdiction. The Appellant has failed to meet this standard of review.

#### CONCLUSION

Judge Trevort did not err in determining that Oregon had jurisdiction, nether did he abuse his discretion in surrendering jurisdiction to the Oregon court. Therefore, the actions of the trial court should be upheld and the proper forum for further proceedings should be in the Oregon courts.

Dated this 10th day of January, 2001.

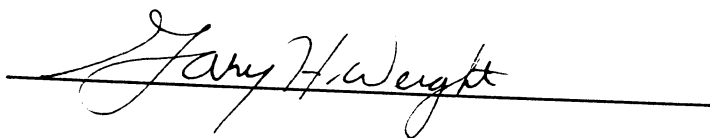
ALDRICH, NELSON, WEIGHT & ESPLIN

  
GARY H. WEIGHT  
Attorney for the Petitioner

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, this 10<sup>th</sup> day of January, 2001, two copies of the foregoing Brief of Respondent-Appellee to the following:

Andrew B. Berry, Jr.  
Attorney for Petitioner and Appellant  
62 West Main Street  
Moroni, UT 84646-0600

A handwritten signature in cursive script, reading "Gary H. Wright", is written over a solid horizontal line.

ADDENDUM

Uniform Child Custody Jurisdiction Act,  
    §§ 78-45c-6 to 78-45c-7  
Utah Code Annotated., § 78-2a-3(2) (h)  
Utah Rules of Appellate Procedure, Rules 3-4



The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

History: C. 1953, 78-2a-2, enacted by L. 1986, ch. 47, § 45; 1988, ch. 248, § 7.

#### NOTES TO DECISIONS

##### Stare decisis.

A rule of law pronounced by a panel of the Court of Appeals governs all later cases involving the same legal issues decided by other

panels of that court and all courts of lower rank. *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677 (Utah 1995).

### 78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

- (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
- (ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence,

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History: C. 1986, ch. 47, § ch. 73, § 1; 1986, ch. 248, § 8; 1990, 1991, ch. 268, § ch. 13, § 45; 1991, ch. 159, § 19; 1994

Amendment ment, effective tion (2)(h) and r (2)(h) through (k).

The 1994 ame substituted "Boa "Board of Pard inserted "Admin Subsection (4).

The 1995 ame substituted "Sci

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except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

**History:** C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49.

**Amendment Notes.** — The 1992 amendment, effective April 27, 1992, added Subsection (2)(h) and redesignated former Subsections (2)(i) through (j) as Subsections (2)(i) through (k).

The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsection (2)(h) and inserted "Administrative Procedures Act" in Subsection (4).

The 1995 amendment, effective May 1, 1995, substituted "School and Institutional Trust

Lands Board of Trustees, Division of Sovereign Lands and Forestry actions reviewed by the executive director of the Department of Natural Resources" for "Board of State Lands" in Subsection (2)(a).

The 1996 amendment by ch. 159, effective July 1, 1996, substituted "Division of Forestry, Fire and State Lands" for "Division of Sovereign Lands and Forestry" in Subsection (2)(a).

The 1996 amendment by ch. 198, effective July 1, 1996, deleted former Subsection (2)(d), listing appeals from circuit courts, and redesignated former Subsections (2)(e) to (2)(k) as (2)(d) to (2)(j).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

**Cross-References.** — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.

## NOTES TO DECISIONS

### ANALYSIS

Decisions of Board of Pardons.

Extraordinary writs.

Final order.

Habeas corpus proceedings.

Post-conviction review.

Scope.

— Sentence reduction.

Cited.

### Decisions of Board of Pardons.

The Court of Appeals hears appeals from orders on petitions for extraordinary writs challenging decisions of the Board of Pardons, except when the petition additionally challenges the conviction of or sentence for a first degree felony or a capital felony. Then the appeal is to be heard by the Supreme Court. *Preece v. House*, 886 P.2d 508 (Utah 1994).

### Extraordinary writs.

The Court of Appeals had jurisdiction over a petition for a writ of mandamus directed against a judge of the district court based on its authority under this section to enforce compliance with a prior order and to issue writs in aid of its appellate jurisdiction. *Barnard v. Murphy*, 882 P.2d 679 (Utah Ct. App. 1994).

The term "original" in § 78-2-2(2) adds nothing to the Supreme Court's writ jurisdiction — and its absence in Subsection (1) takes nothing from the jurisdiction of the Court of Appeals — because jurisdiction over petitions for extraordinary writs necessarily invokes a court's jurisdiction to consider a petition originally filed with it as opposed to its appellate jurisdiction over cases that originated elsewhere. *Barnard v. Murphy*, 882 P.2d 679 (Utah Ct. App. 1994).

Because, under this section, the Court

History: L. 1980, ch. 41, § 5.

Cross-References. — Service of process.  
Rule 4, U.R.C.P.

### **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.

History: L. 1980, ch. 41, § 6.

Meaning of "this act." — See note following same catchline in notes to § 78-45c-1.

#### **NOTES TO DECISIONS**

##### **ANALYSIS**

Exercise of jurisdiction.

— Hearing.

Pending foreign proceeding.

— Stay of Utah action.

Proceedings elsewhere.

— Due process.

Exercise of jurisdiction.

— Hearing.

When a mother and child living in Utah sought relief in Utah from an Ohio custody order being enforced in Utah by her husband, the district court erred in refusing to hold a hearing to examine whether, under §§ 78-45c-

14 and 78-45c-6, jurisdiction should be exercised by the Utah court. Given the policy considerations behind this chapter, the district court, at the very least, should have stayed its determination until after it held a hearing to determine whether jurisdiction should have been exercised. *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992).

Pending foreign proceeding.

— Stay of Utah action.

Utah district court, after learning of prior guardianship proceedings in Oregon, was required to stay a Utah action seeking to determine child custody and to communicate with the Oregon court to determine the propriety of

further proceedings in Oregon, so that the issues could be litigated in the more appropriate forum, where the child resided in Oregon at the time and the Oregon court had appointed the child's grandparents as guardians. *Coppedge v. Harding*, 714 P.2d 1121 (Utah 1985).

#### Proceedings elsewhere.

Where grandparents in Oregon, with whom child was visiting, had won custody in Oregon court, Utah district court was required to stay parents' proceeding seeking custody determina-

tion and to communicate with Oregon court to determine the propriety of further proceedings in Oregon. *Coppedge v. Harding*, 714 P.2d 1121 (Utah 1985).

#### — Due process.

A mother was denied her due process rights by the trial court's enforcement of a foreign-custody modification judgment which had questionable jurisdictional validity without giving the mother reasonable notice and opportunity to be heard. *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992).

### COLLATERAL REFERENCES

**A.L.R.** — What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 78 A.L.R.4th 1028.

Default jurisdiction of court under § (a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Preven-

tion Act (PKPA), 28 USCS § 1738A (c)(2)(D), 6 A.L.R.5th 69.

Pending proceeding in another state as ground for declining jurisdiction under § 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(g), 20 A.L.R.5th 700.

### 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.

(4) 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.

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(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.

**History:** L. 1980, ch. 41, § 7.

**Meaning of "this act."** — See note following same catchline in notes to § 78-45c-1.

#### NOTES TO DECISIONS

##### ANALYSIS

Appropriate forum elsewhere.  
Communication with other court.  
— Written record.  
Cited.

##### Appropriate forum elsewhere.

Judge did not abuse his discretion in deciding that California was the more appropriate and convenient forum to litigate custody and in granting the state's motion to dismiss the natural parents' petition, where 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, and the parents' purpose in coming to Utah was to shop for jurisdiction. In re W.D. v. Drake, 770 P.2d 1011 (Utah Ct. App.), cert. denied, 789 P.2d 33 (Utah 1990).

Although court commissioner erred in failing to make any record of her communication with the Colorado court, and the error prevented Utah court from assessing the effect that the communication had on her recommendation to defer jurisdiction over child custody matter to

Colorado court, error was harmless and commissioner's recommendation to defer jurisdiction was proper as Colorado had been home state of children for over 5 years; records and witnesses regarding the children's care, education, and treatment were more readily available in Colorado; noncustodial parent, who resided in Utah, had exercised limited jurisdiction during children's residence in Colorado; Colorado court had undertaken visitation evaluation by a court-appointed psychologist; and evidence available to Colorado court regarding children's schooling, medical care, psychological evaluation, and family and peer relationships was not available to Utah court. Liska v. Liska, 902 P.2d 644 (Utah Ct. App. 1995).

##### Communication with other court.

##### — Written record.

When judges communicate by telephone, they should make a prompt written record of their conclusions and the basis for any agreement should be set forth clearly in the record. In re D.S.K., 792 P.2d 115 (Utah Ct. App. 1990).

# UTAH RULES OF APPELLATE PROCEDURE

## Title I. Applicability of Rules

### Rule

1. Scope of rules.
2. Suspension of rules.

## Title II. Appeals from Judgments and Orders of Trial Courts

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4. Appeal as of right: when taken.
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19. Extraordinary writs.
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## Title V. General Provisions

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26. Filing and service of briefs.
27. Form of briefs.
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- 28A. Appellate Mediation Office.
29. Oral argument.
30. Decision of the court: dismissal; notice of decision.
31. Expedited appeals decided after oral argument without written opinion.
32. Interest on judgment.
33. Damages for delay or frivolous appeal; recovery of attorney's fees.
34. Award of costs.
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36. Issuance of remittitur.
37. Suggestion of mootness; voluntary dismissal.
38. Substitution of parties.
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39. Duties of the clerk.
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## Title VI. Certification and Transfer Between Courts

### Rule

41. Certification of questions of law by United States courts.
42. Transfer of case from Supreme Court to Court of Appeals.
43. Certification by the Court of Appeals to the Supreme Court.
44. Transfer of improperly pursued appeals.

## Title VII. Jurisdiction on Writ of Certiorari to Court of Appeals

45. Review of judgments, orders, and decrees of court of appeals.
46. Considerations governing review of certiorari.
47. Certification and transmission of record; joint and separate petitions; cross-petitions; parties.
48. Time for petitioning.
49. Petition for writ of certiorari.
50. Brief in opposition; reply brief; brief of amicus curiae.
51. Disposition of petition for writ of certiorari.

### Forms

## TITLE I. APPLICABILITY OF RULES

### Rule 1. Scope of rules.

(a) *Applicability of rules.* These rules govern the procedure before the Supreme Court and the Court of Appeals of Utah in all cases. Applicability of these rules to the review of decisions or orders of administrative agencies is governed by Rule 18. When these rules provide for a motion or application to be made in a trial court or an administrative agency, commission, or board, the procedure for making such motion or application shall be governed by the Utah Rules of Civil Procedure, Utah Rules of Criminal Procedure, and the rules of practice of the trial court, administrative agency, commission, or board.

(b) *Reference to "court."* Except as provided in Rule 43, when these rules refer to a decision or action by the court, the reference shall include a panel of the court. The term "trial court" means the court or administrative agency, commission, or board from which the appeal is taken. The term "appellate court" means the court to which the appeal is taken.

(c) *Procedure established by statute.* If a procedure is provided by state statute as to the appeal or review of an order of an administrative agency, commission, board, or officer of the state which is inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall apply to such appeals or reviews.

(d) *Rules not to affect jurisdiction.* These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court or Court of Appeals as established by law.

(e) *Title.* These rules shall be known as the Utah Rules of Appellate Procedure and abbreviated Utah R. App. P.

### Rule 2. Suspension of rules.

In the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, except as to the provisions of Rules 4(a), 4(b), 4(e), 5(a), and 48, suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.

## TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

### Rule 3. Appeal as of right: how taken.

(a) *Filing appeal from final orders and judgments.* An