1982

Bruce Michael Larner v. Mary Lynn Hill : Brief of Respondent

Utah Supreme Court

John W> Porter; Brian M. Barnard; Attorney for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE MICHAEL LARNER,

Plaintiff and Respondent,

vs. Case No. 18065

MARY LYNN HILL, formerly,
MARY LYNN LARNER,

Defendant and Appellant.

RESPONDENT'S BRIEF

Interlocutory Appeal from Orders of the
Third Judicial District Court, Salt Lake County
The Hon. Ernest F. Baldwin, Jr., Judge Presiding

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I.

NATURE OF THE CASE

In the action below the Third Judicial District Court in and for Salt Lake County was requested to grant full faith and credit to a Colorado court decree of dissolution of marriage and to then modify that decree, and grant custody of three minor children to the Plaintiff. The Defendant-Appellant objected to the jurisdiction of the Salt Lake County District Court; the Court overruled that objection.

The Defendant-Appellant petitioned this Court for an interlocutory appeal. That petition was granted to

consider whether the Third Judicial District Court has jurisdiction to modify the Colorado decree with regard to child custody.

II.

DISPOSITION IN LOWER COURT

The Third Judicial District Court in and for Salt Lake County, the Hon. Ernest F. Baldwin, Jr., judge presiding, overruled the Defendant-Appellant's Motion to Object to Jurisdiction, granted full faith and credit to the Colorado Decree of Dissolution, granted temporary custody of two of the three minor children to the Plaintiff and ruled that the Utah Court had the jurisdiction to modify the Colorado decree with regard to the custody of only the two minor children who had been residing in Utah for more than one year.

III.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Respondent requests this Court to affirm the decision of the Court below taking jurisdiction over two of the minor children and remand the case for a

hearing on the merits of Plaintiff's petition to modify the Colorado Decree.

IV.

STATEMENT OF THE CASE

The Plaintiff and the Defendant were divorced in Colorado in March 1980 with joint custody of three minor children being granted the parties. Originally under the decree, physical custody of two of the chilren, Stephen Michael and Joseph Scott was granted to the Defendant, living in Colorado, and physical custody of the daughter, Julianne Michelle was granted to the Plaintiff living in Utah. By oral agreement of the parties, the child Stephen moved to Utah from Colorado in 1980 and lived in the Plaintiff's home for approximately one year prior to the filing of the Plaintiff's complaint to modify the Colorado decree.

In July 1981 the Plaintiff filed a Complaint in the Third Judicial District Court seeking a Modification of the Colorado decree to grant full custody of all three minor children to him. The Defendant was served with that Complaint in Colorado, and through Salt Lake counsel filed a Special Appearance and a Motion to Object to Jurisdiction contesting

the jurisdiction of the Utah court to modify the decree.

Plaintiff's counsel filed a Motion for Temporary Order asking for an Order granting temporary custody of the three minor children to the Plaintiff pending a full hearing and resolution of the case on its merits. That motion, and notice of the hearing, was served upon the Defendant's Utah counsel by mail and was heard by the Court, the Hon. Ernest F. Baldwin, Jr., presiding, on August 25, 1981. An Order was entered October 1, 1981 granting full faith and credit to the Colorado decree and granting temporary full custody of two of the minor children, Stephen Michael and Julianne Michelle, to the Plaintiff and ruling that "in all other respects the Colorado Decree shall remain in full force and effect. . ." The third child was left in the custody of the mother and returned to Colorado.

On October 1, 1981, at the request of the Plaintiff's counsel, the Motion of the Defendant to Object to Jurisdiction was heard by the Court, the Hon. Ernest F. Baldwin, Jr. presiding. The Court overruled that Motion and entered an Order on October 16, 1981 to that effect and directing that a custody evaluation be performed.

The Defendant appeals from the Orders of the Court temporarily granting full custody of two of the minor children

to the Plaintiff and denying the Defendant's objection to jurisdiction.

V.

STATEMENT OF FACTS

No oral evidence was presented to the Court at either of the hearings on August 25, 1981 or October 1, 1981. Prior to the Court's ruling, the Defendant submitted no evidence as to the facts of the case or facts regarding the Defendant's objection to jurisdiction. The only evidence before the Court was that presented by the verified Complaint of the Plaintiff dated July 1, 1981 with the attached Colorado Decree (T.R. pp 2-17). Based upon that verified Complaint the following are the uncontroverted facts upon which the Court entered its Orders.

The Plaintiff, Bruce Larner, is a resident of Salt Lake County and the State of Utah. The Defendant, Mary Lynn Hill formerly Mary Lynn Larner, is a resident of the State of Colorado. (T.R. p. 2)

The Plaintiff and the Defendant were formerly husband and wife. The parties were divorced pursuant to a Decree of Dissolution of Marriage entered on March 17, 1980

by the District Court in and for the County of Jefferson and the State of Colorado, Civil Action No. 79 DR 2067. (T.R. p. 2)

The Plaintiff and the Defendant are the parents of three minor children: Stephen Michael Larner, born March 13, 1968; Julianne Michelle Larner, born May 10, 1969; and Joseph Scott Larner, born May 29, 1972. (T.R. p. 2)

Pursuant to the Decree of Dissolution, the parties exercised joint custody over their minor children since the entry of the Decree. The parties initially agreed that physical care, custody and control of Stephen Michael Larner and Joseph Scott Larner was to be granted to the Defendant herein, and that physical care, custody and control of Julianne Michelle Larner was to be granted to the Plaintiff herein. (T.R. pp. 2-3)

The parties agreed in July, 1980 that physical care, custody and control of the minor child Stephen Michael Larner would be transferred to the Plaintiff. Since July, 1980 said minor child has resided with the Plaintiff in Salt Lake City, Utah.

All three minor children were, in July 1981, residing with the Plaintiff Bruce Michael Larner in Salt Lake City, Utah. (T.R. p. 3) The child Joseph Scott was

then domiciled in Colorado; the other two were domiciled in Utah.

The Defendant Mary Lynn Hill was in the near future going to move from Colorado to the mid-West, and therefore there would be problems resulting from the separation of the children and problems with regard to visitation between the parties and the minor children. (T.R. p. 3)

Since the divorce of the parties, the Plaintiff herein had re-married and had established a home and residence in Salt Lake City, Utah such that he could adequately and fully care for all three minor children of the parties. The Plaintiff's current spouse was willing, able and anxious to assist the Plaintiff in caring for and assuming full custody of the three minor children of the Plaintiff. (T.R. p. 3)

Plaintiff alleged that in order for the three minor children to grow and develop as a family unit and to relate and interact with each other, it was in the best interest of the children that they not be separated and reside in far distant different states, but that physical custody of all three children be placed with the Plaintiff. He alleged it was reasonable that visitation as set forth in the Decree of Dissolution be maintained and continued such that the children could maintain an appropriate relationship

with their mother. (T.R. p. 3)

In order to stabilize the situation during the pendency of the action, the Plaintiff alleged it was reasonable that the Court enter a temporary order granting full temporary custody of all three minor children to the Plaintiff until such time as the trial Court could hear and rule upon the Complaint and petition for modification. (T.R. p. 4)

There had been a substantial change of circumstances such that it was appropriate at that time that the Colorado Decree of Dissolution of Marriage should be modified to grant full custody, care and control of the minor children to the Plaintiff, terminating any obligation of the Plaintiff to pay child support and granting the Defendant visitation rights as set forth in the original Decree. (T.R. p. 4)

The Colorado Decree of Dissolution contained the following pertinent provisions with regard to child custody and visitation:

> Due to the state discrepancies of the residences of the parties, the Husband residing and domiciling in Utah, and the Wife residing and domiciling in Colorado, and because of the current desires of the minor children of the parties, and the desire of the parents to alleviate the emotional trauma of divorce with the children, the parents agree to exercise joint custody over said minor children. Provided, however, that until such time as the parties should agree otherwise, or until further

order of this Court, the Wife shall have the physical care, custody and control of Stephen Michael Larner and Joseph Scott Larner, and the Husband shall have the physical care, custody and control of Julianne Michelle Larner. (T.R. pp. 7-8)

Each non-custodial parent of the children of the parties shall be entitled to a minimum of twelve (12) non-specified days each month visitation privileges. Provided, however, that all costs of transportation to and from the non-custodial parent shall be borne by that parent. And provided further, however, that the non-custodial parent notify the custodial parent forty-eight (48) hours prior to the exercise of visitation as to the intent of the visitation. The parties further agree and recognize that the minor children would benefit greatly from each other's presence and the parents agree to make all reasonable efforts to insure that all three (3) minor children are together on their respective birthdays, on major holidays, and during periods of school vacation periods (including the summer months). The non-custodial parent shall have the right to take the minor children out of state, or out of the country during visitation periods, so long as the custodial parent has been properly notified, and a basic itinerary of said trip has been furnished the custodial parent. At no time shall either parent exercise visitation which shall hinder the education of the minor children of the parties. (T.R. p. 8)

ARGUMENT

POINT I

ANY DEFECTS IN NOTICE DID NOT DEPRIVE THE COURT OF JURISDICTION

The Defendant alleges that the hearing upon the

Plaintiff's Motion for a Temporary order was improper in that there was not ten days notice given under the Uniform Child Custody Jurisdiction Act (U.C.A. §78-45c-5, 1953), and there was not eight days notice given under the Utah Rules of Civil Procedure (Rule 6(d) & 6(e)). The Defendant further objects that a motion seeking a temporary order should have been on the trial calendar and not on the order to show cause calendar pursuant to Local Rule 4(h) of the Third Judicial District Court.

These objections do not go to the jurisdiction of the Court, but are minor procedural matters.

On July 13, 1981 the Defendant, Mary Lynn Hill formerly Larner, was personally served with the Plaintiff's Complaint and Summons. (T.R. p. 22) That Complaint in part requested that the Third Judicial District Court "issue a temporary order granting full custody of the three minor children to the Plaintiff during the pendency of this action, subject to the reasonable visitation rights of the Defendant as provided in the original Decree." (T.R. p. 4)

On July 13, 1981 the Defendant was personally served with an Order to Show Cause (T.R. p. 20) directing her to appear before the Third District Court on July 23, 1981 to consider the Plaintiff's request for an order granting

temporary custody of the three minor children to the Plaintiff during the pendency of the action.

The Plaintiff's Order to Show Cause was dismissed on July 23, 1981 at the insistence of the Defendant's counsel because the Defendant had not received ten (10) days notice of that hearing pursuant to U.C.A. §78-45c-5 (1953 as amended). (T.R. pp. 27-28).

Defendant's counsel was mailed notice on August 3, 1981 that a hearing was to be held on August 25, 1981 on the Plaintiff's Order to Show Cause seeking temporary custody. (T.R. p. 29) That notice was also mailed to the Defendant in Colorado on August 3, 1981. (T.R. p. 29)

On August 19, 1981 the Plaintiff filed a Motion for Temporary Order seeking custody of the three minor children. (T.R. pp. 30-31) That Motion sought the same temporary relief as Plaintiff sought in the Complaint and in the Order to Show Cause. Notice of the hearing on the Motion for Temporary Custody was also mailed to Defendant's Counsel on August 19, 1981. (T.R. pp. 30-31) Defendant and her counsel appeared on August 25, 1981. (T.R. p. 98) Clearly the Defendant and her counsel had actual notice of the matter of temporary custody being brought before the Court on August 25, 1981 in compliance with U.C.A., §78-

45c-5(1) 1953. The focus of that section is on notice in a manner reasonably calculated to give actual notice.

This Court has previously ruled that the time limits of Rule 6(d) of the Utah Rules of Civil Procedure are not cast in stone but may be dispensed with in appropriate cases.

> Plaintiff was entitled to a fair notice and an effective opportunity to controvert any facts adduced in support of defendant's motion. The five-day provision of Rule 6(d), U.R.C.P. is not a hard and fast rule, and the trial court may dispense with technical compliance thereof if there be satisfactory proof that a party had actual notice and time to prepare to meet the questions raised by the motion of an adversary.
> Jensen v. Eames, 519 P.2d 236, 238, citing Marshal Durbin Farms, Inc. v. National Farmers Organization, Inc. (CA 5th, 1971), 445 F.2d 353, 358.

See also, Herron v. Herron, 255 F.2d 589, 593 (5th Cir. 1958).

The Appellant makes no claim that she was in any way prejudiced by the inadequacy of time to prepare. Any such prejudice is not apparent from the record which indicates that the Appellant knew for six and a half weeks prior to the hearing that the Respondent sought an order granting him temporary custody.

Matters of child custody to be heard under the Utah Uniform Child Custody Jurisdiction Act (U.C.A. §78-45c-

24, 1953) are to be given calendar priority and handled expeditiously.

The Appellant cites Rule 4 of the Local Rules of the Third Judicial District Court, effective July 1, 1981 for the proposition that the Order to Show Cause calendar may be used only for enforcement purposes, and claims that a motion seeking a temporary custody order should have been on the trial calendar.

The Appellant is in error as to the usage of Orders to Show Cause on the Domestic Relations calendar of the Salt Lake County Third Judicial District Court. Orders to Show Cause are routinely used to secure temporary orders in domestic relations matters for temporary custody, temporary child support and alimony, restraining orders, etc. Those are not enforcement matters, but prospective temporary relief. The Order to Show Cause calendar is the domestic relations law and motion calendar. Under the Appellant's interpretation of Local Rule 4, litigants would be precluded from using the Order to Show Cause calendar to secure temporary relief in pending divorce actions.

The Plaintiff had set a trial date on the Complaint for a full hearing on its merits for December 9, 1981 but sought temporary relief by way of a custody order pending

that hearing and trial. The only available forum was the Domestic Relations Law and Motion and Order to Show Cause calendar.[1]

Any errors of the Court below with regard to the notice given or the court calendar are minor procedural matters which do not go to the question of jurisdiction. Those are harmless errors and are not errors that this Court should review unless prejudice resulted. This Court granted Appellant's petition for an interlocutory appeal to consider a question regarding jurisdiction, not minor technical proedural errors.

The Appellant had sufficient notice of the proceedings and the temporary relief sought by the Plaintiff such that the Appellant cannot claim any prejudice or denial of due process.

The Utah Rules of Civil Procedure provide:

> No error. . .or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a

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[1]The Utah Rules of Civil Procedure make no provision for orders to show cause; although used thoughcut the state court system, orders to show cause appear to have developed and are used differently in each judicial district. Local Rule 4 of the Third District Court is an attempt to give some direction and regulate the use of orders to show cause in domestic relations matters in that district. Respondent's counsel would urge this Court to consider adopting uniform state rules for the use and issuance of orders to show cause.

> new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (Rule 61)

The Appellant makes no claim that the conduct of the Court below in hearing the matter when and how it did was "inconsistent with substantial justice" nor that it affected "the substantial rights of the parties."

The burden is on the Appellant to show that the error was prejudicial to her case. Burton v. Z.C.M.I., 249 P.2d 514, 518 (1952); see also, Bell vs. Swift & Co., 283 F.2d 407, 408 (5th Cir. 1960).

The Fifth Circuit Court of Appeals stated in considering the question of harmless error:

> A lawsuit is not so rule-bound that one side wins whenever the other side breaks a rule. To succeed in an appeal based on an infraction of the rules, the appellant must show that the infraction was a substantial error prejudicing the appellant's case.
> Bell v. Swift & Co., 283 F.2d 407, 408 (1960)

The Appellant has neither alleged nor shown any prejudice resulting from the notice or calendar problem, and both claims should be dismissed as harmless error.

POINT II

APPELLANT PRESENTED NO FACTS OR EVIDENCE TO THE COURT BELOW

The Appellant alleges that the Court below acted based "on minimal facts" making a "precipitous decision." When the Court ruled upon the Plaintiff's Motion for Temporary Custody and upon the Defendant's Motion to Object to Jurisdiction the only evidence before the Court was the Verified Complaint of the Plaintiff.

The Appellant had been personally served with a copy of the verified Complaint on July 13, 1981 and had ample opportunity prior to the August 25th and October 1st hearings to respond with evidence but chose not to do so.

After the Court made its oral ruling during the hearing of October 1, 1981 counsel for the Appellant then requested that the Court withhold a ruling and allow him to submit evidence by way of an affidavit. At the time the Appellant's Motion to Object to Jurisdiction had been pending more than two months (T.R. p. 25); the court declined to allow the submission of additional evidence after it had already made its ruling. (T.R. p. 125)

The Appellant claims that the Court below acted precipitously and on minimal facts in deciding that the Utah

court had jurisdiction over the two older minor children. That same decision included a determination that the Utah court did not have jurisdiction over the youngest child, Joseph Scott. The facts were obviously sufficient and the decision non-precipitous with regard to that child for we d not hear the Appellant complain about the decision to decline jurisdiction.

The Utah Uniform Child Custody Jurisdiction Act provides for expedited hearings when there is a question of jurisdiction (U.C.A. §78-45c-24, 1953 as amended). Rather than expediting matters and resolving the issue of jurisdiction, however, the Appellant did not request a hearing in the Court below on her Motion to Object to Jurisdiction. The matter was heard only upon the insistence of the Plaintiff's counsel. (T.R. p. 33)

The Appellant objected to jurisdiction but failed to present any evidence with regard to jurisdiction and failed to notice her objection for hearing before the Court. It appears that the Motion to Object to Jurisdiction was interposed for the purpose of delaying the filing of an answer to allow the appellant to commence a second action in Colorado and not to seriously challenge the jurisdiction of the Court.

POINT III

THE LOWER COURT ACTED WITHIN THE PURPOSE AND POLICY, LETTER AND SPIRIT OF THE UTAH UNIFORM CHILD CUSTODY JURISDICTION ACT

The Utah Uniform Child Custody Jurisdiction Act, (hereinafter called the "UUCCJA" or the "Act"), U.C.A. §78-45c-14, (1953) provides as follows:

> "(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." (Emphasis supplied.)

The threshold question is, "Did it appear to the Court below that the Colorado court did not have jurisdiction under the jurisdictional prerequisites substantially in accordance with the UUCCJA?" If it appeared Colorado had jurisdiction, then the mandatory language of U.C.A. §78-45c-14 (1953) applies; but if it appeared that Colorado did not have jurisdiction under those jurisdictional prerequisites, then the Third Judicial District Court was proper and correct in taking jurisdiction.

What are the "jurisdictional prerequisites substantially in accordance with this act" such that Colorado no longer

has jurisdiction and Utah has jurisdiction? We must look to the applicable sections of the act:

> (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. . .
>
> (b) If 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 concering the child's present or future care, protection, training, and personal relationships.
>
> U.C.A. §78-45c-3 (1953)

The term "home state" as used in the foregoing section is defined 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. . . U.C.A. §78-45c-2(5) 1953.

Did the Colorado court in July or August 1981 have the jurisdictional prerequisites substantially in accordance with the Utah Statute? The evidence presented to the trial court clearly shows that Judge Baldwin properly ruled that Colorado did not retain jurisdiction.

Utah was the "home state" for Stephen Michael and Julianne Michelle; they had lived in Utah for more than the

required six months, actually more than one year. (T.R. pp. 2-3) Colorado was not their "home state". Thus, Colorado did not have jurisdiction over the two oldest children under Subsection (a) of U.C.A. 78-45c-3 (1) (1953).

Neither did Colorado have jurisdiction over the two older children under Subsection (b) of that statute. In their comments to the equivalent provision in the Uniform Act, the Uniform Law Commissioners stated:

> [This provision] perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in section 1.
> 9 U.L.A. §3, Commissioners' Notes, at 124 (1979)

Section 1 was enacted in Utah as U.C.A. §78-45c-1 (1953). That section states, in part, that the express purpose of the UUCCJA is to

> 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. . . .
> U.C.A. §78-45c-1(c) (1953 as amended) (emphasis supplied)

The Commissioners further commented as follows:

> Jurisdiction exists only if it is in the child's interest, not merely the interest of convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. The submission of the parties to a forum, perhaps for the

> purposes of divorce, is not sufficient without additional factors establishing closer ties with the state. 9 U.L.A. §3, Commissioners' Notes, at 124 (1979).

The facts and evidence presented to the trial court amply demonstrated that the two children over whom the court asserted jurisdiction had maximum contact with Utah and minimum contact with Colorado at the time of the hearing.

The Plaintiff and the two children had been living in Utah for a significant period of time, over one year. The children were enrolled in school in Utah. The Plaintiff's Complaint established that he had a new wife and home in Salt Lake City and that his wife was willing, able and anxious to help care for the minor children. (T.R. p. 3) The Plaintiff's Complaint established that there had been a substantial change of circumstances of the parties. (T.R. p. 4) Those changes or a substantial number of them occurred in Utah. Obviously, substantial evidence concerning the present and future care, protection, training and personal relationships of the children was most readily available in Utah.

The Court below ordered that a custody evaluation be performed in Utah (T.R. p. 42). Inherent in such a ruling is a finding that there is substantial evidence

available in Utah with regard to the best interest of the minor children. Indeed, counsel for the Appellant asked the Court below to order that this Utah performed evaluation be used in a proceeding in Colorado regarding custody. (T.R. pp. 123-124) Counsel for the Appellant thus conceded that there was significant evidence available in Utah which was necessary for the proper determination of custody and the best interest of the minor children in conformance with the jurisdictional prerequisites of U.C.A. §78-45c-3(1)(b)(ii) (1953 as amended).

Since the children and their father had not resided in Colorado for over one year, it follows that they had a less significant connection with that state and that there was far less evidence concerning the children available in that state. There was no evidence countering this compelling inference. Indeed, the uncontrovered evidence showed that the Defendant intended to leave Colorado soon, thus eliminating any significant connection or ties with that state.

The Appellant argues in her brief that the exercise of jurisdiction by the Utah court violated a policy of favoring the court that issued the initial decree. Under the UUCCJA, however, it is clear that to the extent such a policy exists, it applies only where the foreign court still

retains jurisdiction as defined in the Act. Further, such a policy is always superceded by and must yield to the Act's pervasive policy of assuring that adjudications regarding child custody take place where the best interests of the child may most readily be ascertained. U.C.A. §78-45c-1(c) (1953); 9 U.L.A. §3, Commissioner's Notes at 124, (1979).

In other jurisdictions that have enacted the Uniform Act the cases are numerous in which courts have asserted jurisdiction to modify foreign child custody decrees. In Settle vs. Settle, 559 P.2d 962 (Ore. 1976), the court modified a foreign decree, changing custody of the children to their mother stating:

> the requirement of the availablity of "substantial evidence" should be understood to require optimum access to relevant evidence. It appears that at the time of the commencment of the proceeding in Oregon, Indiana, the state from which the children had been absent for 18 months, no longer had optimum access to relevant evidence. Id. at 966.

Similarly, in Slidell vs. Valentine, 298 N.W. 2d 599 (Iowa 1980), where the child and his mother had been absent for three years from the state that granted custody to the father, the court in the "new" state modified the foreign decree, and granted custody to the mother.

> Whether an Iowa court has jurisdiction to modify an earlier out of state decree turns first

> upon whether that court has lost or declined its pre-existing jurisdiction.
> * * *
> One purpose of the jurisdictional provisions of the act is to emphasize "maximum, rather than minimum contact with the state."
> * * *
> William had not lived in Florida for three years, and the nexus between him and the state of Florida falls short of the "significant connection" required for the Florida court to assume jurisdiction under that alternative. Id. at 602-604.

See also, Grubs vs. Ross, 614 P.2d 1225 (Ore. 1980); Smith vs. Smith, 594 P.2d 1292 (Ore. 1979); Ellis vs. Nickerson, 604 P.2d 518 (Wash. 1979). Indeed, many courts have declined to exercise jurisdiction to modify their own child custody decrees in favor of other states with which the children or the parties have established new ties. See e.g., Schlumpf vs. Superior Court, County of Trinity, 145 Cal. Rptr. 190 (1978) Clark vs. Superior Court, County of Mendocino, 140 Cal. Rptr. 709 (1977).

Thus, the facts and evidence before the court below indicate that Colorado did not retain jurisdiction over the two older children under U.C.A 78-45c-3 (1953) to modify its decree. Conversely, since Utah was the "home state" of these two children and they had maximum contact with the state of Utah, the court properly asserted its jurisdiction over them. There had been a substantial change

in circumstances and passage of time since the issuance of the Colorado decree. With the Defendant's own acquiescence and approval, the two older children severed their ties with the state of Colorado and established a significant connection with the state of Utah.

Using the same jurisdictional prerequisites of the UUCCJA the court below determined that Colorado did have jurisdiction over the youngest minor child, Joseph Scott. Colorado was the home state where that child had been domiciled for several years; the child had been residing and attending school in Colorado; there was a significant connection between Colorado and the child; there was substantial evidence concerning the child's custody and care available in Colorado. Therefore, under U.C.A. §78-45c-3 and §78-45c-14 (1953 as amended) the Utah court declined jurisdiction. Neither party to this action has appealed that decision of the Court.

Appellant makes mention in her brief of a proceeding pending in Colorado to modify the Decree of Dissolution and grant custody of all three minor children to the Appellant. (Appellant's Brief, p. 10) That proceeding was instituted by the Appellant in Colorado after the Plaintiff instituted this action in Utah. (T.R. pp. 101-102, p. 117) Such

action by the Appellant is exactly what the UUCCJA seeks to prevent--forum shopping, multiple litigation, jurisdictional competition, etc. (U.C.A. §78-45c-1, 1953 as amended) Instead of noticing for hearing her objection to jurisdiction in the Court below and resolving the matter, the Appellant interposed the motion, delayed filing an answer and proceeded in Colorado.

The UUCCJA seeks to avoid competition in matters of child custody jurisdiction, but the act does not countenance a court retaining jurisdiction when there are no longer any significant ties or contacts with that state. The act directs that the Court before assuming jurisdiction must examine certain factors such as where the child has lived, where the custodial parent has lived, where evidence is available regarding the child and whether there is significant connection between the child, the parents and that state. The Court below examined all of those relevant factors as presented by the evidence and determined that jurisdiction was proper in Utah; that action was in compliance with the letter and the spirit of the Utah Uniform Child Custody Jurisdiction Act.

Significant purposes of the Uniform Act are to promote cooperation with the court 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 (U.C.A. §78-45c-1(b), 1953) and to assure that litigation concerning a child takes place in the state in which the child and his family have the closest connection and where significant evidence concerning the child is most readily available. (U.C.A. §78-45c-1(c), 1953) Those puposes were clearly met by the decision and finding of the court below that jurisdiction over the two oldest children was in Utah.

CONCLUSION

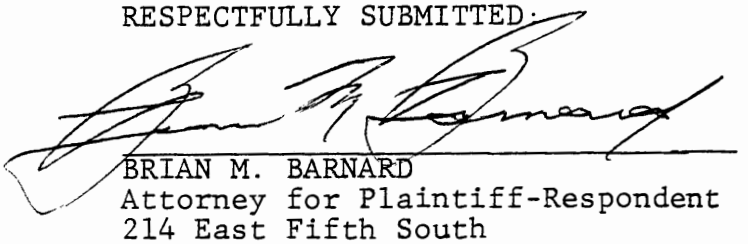
Based upon the evidence presented to the Court below, the Court was correct in determining that it had jurisdiction under the Utah Uniform Child Custody Jurisdiction Act because the two minor children involved and their father the Plaintiff had a closer connection to the state of Utah, than to the state of Colorado, and because significant evidence concerning the children and their welfare was more readily available in Utah. Under the act there were jurisdictional prerequisites existant in Utah which no longer existed in the state of Colorado.

The case should be remanded to the Court below to

proceed on its merits at a full trial and hearing on the Plaintiff's Complaint to modify the Colorado Decree of Dissolution.

DATED this 8th day of April, 1982.

RESPECTFULLY SUBMITTED:



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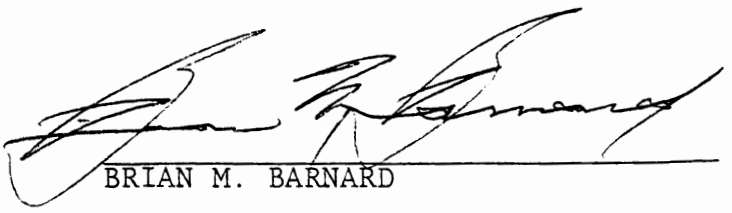
CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Respondent's Brief to Joel Allred, 500 American Savings Building, 61 South Main Street, Salt Lake City, Utah 84111 postage prepaid in the U.S. Postal Service on this 8th day of April, 1982.



BRIAN M. BARNARD