

2000

Jennifer Melissa Thurston v. Ronald Thurston : Reply Brief

Utah Court of Appeals

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Andrew B. Berry, Jr.; Attorney for Appellant.

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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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FILED

MAJ 12 2001

~~COURT OF APPEALS~~

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF THE CASE

On January 8, 1999, Jennifer Thurston and her children returned to Sterling, Utah from the State of Oregon. R. 44.

On July 12, 1999, Jennifer Thurston filed her Verified Petition for Divorce in the Sixth Judicial District Court for Sanpete County within the State of Utah. R.1-7. On July 14, 1999, Jennifer Thurston filed her Motion for Order to Show Cause, Affidavit of Petitioner and thereupon the trial Court issued it's Order to Show Cause, requesting, *inter alia*, custody of the parties minor children. R.8-21.

On August 5, 1999, an Acceptance of Service of Process executed by Ronald Thurston was filed with the trial court. R.22.

On August 6, 1999, Ronald Thurston filed a pro se Answer to Verified Petition for Divorce. R.27-28. On August 6, 1999, Ronald Thurston filed a Response to the Order to Show Cause. R.24-25. Attached to the Response was an unauthenticated and uncertified copy of a Modification of Family Abuse Restraining Order of the Oregon court dated June 25, 1999. R.26. This order was never and has never been served upon Jennifer Tr. pp. 5-10.

On March 20, 2000, Ronald Thurston filed a Petition for Dissolution of Marriage in the Lincoln County Circuit Court for the State of Oregon which has not been served upon Jennifer Thurston. R. 117;

On January 19, 2001, a hearing was held upon Jennifer

Thurston's motion to quash service of process and challenge to the subject matter jurisdiction of the Oregon Court. Jennifer Thurston, Ronald Thurston and their respective witnesses testified and presented documentary evidence upon the issues of the Oregon Court's *in personam* and subject matter jurisdiction; Addendum A.

On February 7, 2001, the Honorable Charles P. Littlehales entered Findings of Fact and Conclusions of Law and an Order Upon Motion Re Service and Jurisdiction. Addendum A.

The Oregon trial court quashed Mr. Thruston's purported service of process of his Oregon Summons and Petition for Dissolution. The Oregon Court found that Uth was the "home state" of the children at the time Jennifer Thurston filed her Petition for Divorce in Utah. The Oregon Court found and ordered that it does not have *in personam* nor subject matter jurisdiction over Jennifer Thurston and her children. Addendum A.

The Oregon trial court declined jurisdiction and found and ordered that Utah is the most convenient forum, that the best interest of the children is that Oregon decline subject matter jurisdiction, and that Utah is the most appropriate forum for the determination of the issues of custody, visitation, child support and other issues regarding the dissolution of the marriage of Jennifer Thurston and Ronald Thurston, and the custody of their children. Addendum A.

The Oregon trial court vacated all orders and/or writs entered in it's case on behalf of Ronald Thurston and declared them void. Addendum A.

ARGUMENT

THE PROPER STANDARD OF REVIEW UPON A QUESTION OF JURISDICTION IS CORRECTION OF ERROR

The Appellee, Mr. Thurston, and his counsel, urge this Court to adopt an abuse of discretion standard for the determination of the issues upon this appeal. The Appellee cites no authority in support of his contention that an abuse of discretion standard should be adopted to resolve the issues before this Court. He makes no meritorious nor good faith argument for changing or reversing existing law nor does he argue that under the facts of this case that an abuse of discretion standard should apply. The argument is meritless. In order to apply an abuse of discretion standard upon review, the trial court would have had to take evidence and make findings of fact. It did not do so.

Utah Code Annotated, Section 78-45c-7(1), requires that a court may decline to exercise jurisdiction, "...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." (Emphasis added.) Additionally, in determining if Utah is an inconvenient forum the trial Court should have considered the factors delineated in 78-45c-7(3)(a)-(e).

The trial court failed to take evidence of, and make any findings of fact and conclusions of law, of the facts and circumstances of the case, the best interest of the children, the home state. The trial court failed to take evidence of, and make any findings of fact as to the connections of the child and his family with Utah or Oregon. The trial court failed to take evidence of, and make findings of fact as to the children's present or future care, protection, training, and personal relationships whether in Utah or Oregon. The trial court failed to take evidence upon whether the exercises of jurisdiction by Utah or Oregon would contravene any of the purposes stated in Section 78-45c-1, and the other facts and factors which should be considered in the determination of the appropriate forum as required by U.C.A. Section 78-45c-7.

The standard of review upon the determination of jurisdiction is a question of law and the appellate court does not defer to the district court but employs a correction of error standard. Liska v. Liska, 902 P.2d 644 (UT App. 1995); Holm v. Smilowitz, 840 P.2d 157 (UT App. 1992). The Appellant, Jennifer Thurston, raised both *in personam* and subject matter jurisdiction in the trial court to Oregon's jurisdiction as asserted by Mr. Thurston and his counsel.

A correction of error standard is applied to issues, such as those raised herein, as whether a person has been properly

served with process, Reed v. Reed, 806 P.2d 1182, 1184, n.3 (Utah 1991); and, whether a court has subject matter jurisdiction, Rimensburger v. Rimensburger, 841 P.2d 709, 710 (Utah App. 1992).

The Appellee has failed to make any meritorious and good faith argument that an abuse of discretion standard should apply to the determination of jurisdictional questions. The question of jurisdiction is one of law and this Honorable Court should continue to apply the long standing, "correction of error" standard.

The Appellant, Jennifer Thurston, should be awarded her costs and attorney fees pursuant to Utah Code Annotated, Section 78-45c-7(7), and sanctions pursuant to Rules 33, and 40, of the Utah Rules of Appellate Procedure. Schoney v. Memorial Estates, Inc., 863 P.2d 59, 62 (Utah App. 1993).

**THE APPELLEE HAS FAILED TO RESPOND TO APPELLANT'S
ARGUMENTS OR OTHERWISE PRESENT MERITFUL ARGUMENT
BELOW AND UPON APPEAL AND THE APPELLANT SHOULD BE
AWARDED SANCTIONS, COSTS AND ATTORNEY FEES**

The Appellee, Mr. Thurston, and his counsel, both at the trial court, and in their Appellee's Brief upon this appeal have failed to address any of the issues raised and arguments presented by the Appellant, Jennifer Thurston, in her brief and in the trial court. The Appellee fails to address the question of the jurisdiction of the Oregon Court. The Appellee fails to address the jurisdiction of the Utah Court. The Appellee fails to address

the trial court's failure, at the insistence of Mr. Thurston and his counsel, to give Jennifer Thurston due process and to permit her to present evidence upon the factors required to be considered by Utah Code Annotated, Section 78-45c-7.

Mr. Thurston and his counsel failed to address the trial court's failure to make a record of the purported conversation between the Oregon Court and the Utah Court. They failed to address the trial court's failure to make and enter findings of fact and conclusions of law in accordance with the evidence. The Appellee's Brief fails to address any of the issues before this Court, fails to cite to the record appropriately and fails to cite appropriate authority. The Appellee's Brief is frivolous and was interposed for needless delay. Certainly, counsel by his signature, does not certify that to the best of his knowledge, information and belief, formed after reasonable inquiry, that the Appellee meritoriously argued any of the issues upon this appeal.

The brief is not grounded in fact, not warranted by existing law, nor is it based upon a good faith argument to extend, modify, or reverse existing law. Jennifer Thurston is entitled to sanctions, costs and attorney fees pursuant to Rule 33, and Rule 40, of the Utah Rules of Appellate Procedure. Eames v. Eames, 735 P.2d 395 (Utah 1987); Hunt v. Hurst, 785 P.2d 414 (Utah 1990); Schoney v. Memorial Estates, Inc., 863 P.2d 59 (Utah Ct. App. 1993).

**THE OREGON COURT HAS DECLINED JURISDICTION AND
DECLARED UTAH THE MOST CONVENIENT FORUM FOR THE
DETERMINATION OF CUSTODY AND DIVORCE ISSUES**

On January 8, 1999, Jennifer Thurston and her children returned to Sterling, Utah from the State of Oregon. R. 44. Addendum A.

On July 12, 1999, Jennifer Thurston filed her Verified Petition for Divorce in the Sixth Judicial District Court for Sanpete County within the State of Utah. R.1-7. On July 14, 1999, Jennifer Thurston filed her Motion for Order to Show Cause, Affidavit of Petitioner and thereupon the trial Court issued it's Order to Show Cause, requesting, *inter alia*, custody of the parties minor children. R.8-21.

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On March 20, 2000, Ronald Thurston filed a Petition for Dissolution of Marriage in the Lincoln County Circuit Court for the

State of Oregon which has not been served upon Jennifer Thurston.
R. 117;

On January 19, 2001, a hearing was held before the Circuit Court of the State of Oregon for Lincoln County, in case number 001309, upon Jennifer Thurston's motion to quash service of process and challenge to the subject matter jurisdiction of the Oregon Court. Jennifer Thurston, Ronald Thurston and their respective witnesses testified and presented documentary evidence upon the issues of the Oregon Court's *in personam* and subject matter jurisdiction; Addendum A.

On February 7, 2001, the Honorable Charles P. Littlehales entered Findings of Fact and Conclusions of Law and an Order Upon Motion Re Service and Jurisdiction. Addendum A.

The Oregon trial court quashed Mr. Thruston's purported service of process of his Oregon Summons and Petition for Dissolution. The Oregon Court found that Uth was the "home state" of the children at the time Jennifer Thurston filed her Petition for Divorce in Utah. The Oregon Court found and ordered that it does not have *in personam* nor subject matter jurisdiction over Jennifer Thurston and her children. Addendum A.

The Oregon trial court declined jurisdiction and found and ordered that Utah is the most convenient forum, that the best interest of the children is that Oregon decline subject matter jurisdiction, and that Utah is the most appropriate forum for the

determination of the issues of custody, visitation, child support and other issues regarding the dissolution of the marriage of Jennifer Thurston and Ronald Thurston, and the custody of their children. Addendum A.

The Oregon trial court vacated all orders and/or writs entered in it's case on behalf of Ronald Thurston and declared them void. Addendum A.

The Circuit Court of the State of Oregon for the County of Lincoln has ruled on behalf of Jennifer Thurston in her assertion that she was not served any Oregon process, and that the State of Oregon does not have subject matter jurisdiction.

The Oregon Court has declined jurisdiction and opined that Utah is the most appropriate and convenient forum for resolution of the custody and divorce issues. The issue is moot. Rule 37, of the Utah Rules of Appellate Procedure. The trial court's order transferring jurisdiction to Oregon and dismissing Jennifer Thurston's action for divorce in Sanpete County should be reversed.

The Appellant, Jennifer Thurston, and her counsel arranged and paid for several witnesses to attend the evidentiary hearing upon the questions of *in personam* and subject matter jurisdiction in Newport, Oregon. The great expense of costs, attorney fees, and witness preparation, transportation and lodging for Utah witnesses to appear in the Oregon Court to challenge

jurisdiction would not have been necessary if Mr. Thurston and his counsel would have properly presented the evidence and issues to the trial court and to this Honorable Court of Appeals.

Utah Code Annotated, Section 78-45c-7(7), permits the trial court and this Honorable Court to require Mr. Thurston and his counsel to pay, in addition to the cost of the proceedings in this state, necessary travel and other expenses, including attorney fees, incurred by other parties and their witnesses. Jennifer Thurston, the Appellant, requests Mr. Thurston and his counsel be ordered to pay the costs and attorney fees incurred in Utah, and the necessary travel and other expenses incurred by she and her witnesses.

CONCLUSION

The Oregon court was without jurisdiction to enter a custody order. The correction of error standard should be applied upon this appeal because jurisdiction is a question of law and the trial court is afforded no deference. Mr. Thurston has made no meritorious argument in support of his contention that this court should apply an abuse of discretion standard. Jennifer Thruston should be awarded sanctions, costs and attorney fees.

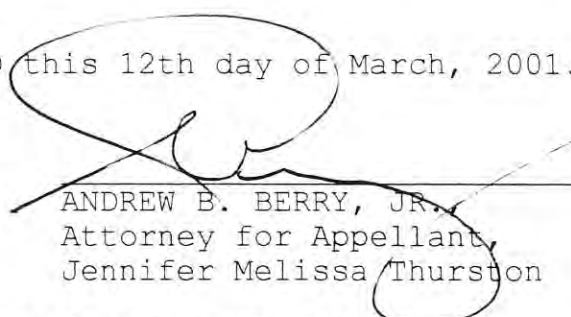
The Appellee's brief is not grounded in fact, not warranted by existing law, nor is it based upon a good faith argument to extend, modify, or reverse existing law. Jennifer Thurston is entitled to sanctions, costs and attorney fees pursuant

to Rule 33, and Rule 40, of the Utah Rules of Appellate Procedure. Eames v. Eames, 735 P.2d 395 (Utah 1987); Hunt v. Hurst, 785 P.2d 414 (Utah 1990); Schoney v. Memorial Estates, Inc., 863 P.2d 59 (Utah Ct. App. 1993).

The Oregon trial court has declined jurisdiction. The issue is moot. Jennifer Thurston should be awarded her costs, expenses, and attorney fees, together with necessary travel and other expenses for she and her witnesses.

This matter should be reversed and remanded to the trial court with instructions.

RESPECTFULLY SUBMITTED this 12th day of March, 2001.


ANDREW B. BERRY, JR.
Attorney for Appellant,
Jennifer Melissa Thurston

CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on this 12th day of March, 2001, I served upon and mailed, postage prepaid and by first class mail, two (2), true and correct copies of the foregoing Reply Brief Of Appellant to Gary H. Weight, Attorney for Ronald Thurston, at 43 East 200 North, P.O. Box L, Provo, Utah 84603.

ADDENDUM

A. ORDER UPON MOTION RE SERVICE AND JURISDICTION entered February 7, 2001, in Lincoln County Circuit Court of the State of Oregon, case number 001309, declining jurisdiction.

C. CIRCUIT COURT
FILED RECEIVED

FEB - 7 2001

AT 1:08 O'CLOCK P M
BY RB

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINCOLN

RONALD THURSTON,

Petitioner,

v.

JENNIFER THURSTON,

Respondent.

Case No. 001309

ORDER UPON MOTION RE
SERVICE AND JURISDICTION

This matter came on for a regularly scheduled evidentiary hearing upon Jennifer Thurston's motion to quash service of process and challenge to the jurisdiction of the Court on the 19th day of January, 2001, before the Honorable Charles P. Littlehales, Seventeenth Judicial Circuit Court Judge. The Petitioner, Ronald Thurston, and the Respondent, Jennifer Thurston, were present with their witnesses. Andrew B. Berry, Jr., Jennifer Thurston's Utah counsel, was associated with Alan D. Reynoldson, her Oregon counsel, for the purposes of Jennifer Thurston's matters before this Court. The Respondent and the Petitioner presented their witnesses and documentary evidence. **THE COURT**, upon the pleadings and affidavits on file herein, the witness

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1 testimony and documentary evidence of the parties, having made and entered Findings
2 of Fact and Conclusions of Law and with good cause appearing therefore, hereby

3 **ORDERS, ADJUDGES AND DECREES:**

4 1. Jennifer Thurston's Motion to Quash Service of Process is granted;

5 2. Jennifer Thurston was not and has not been served with Mr. Thurston's
6 Petition for Dissolution, motions, affidavits nor temporary orders;

7 3. Jennifer Thurston and her children have resided in Sanpete County,
8 Utah, since January 8, 1999. Jennifer Thurston filed her Petition for Divorce in Sanpete
9 County, Utah, on July 12, 1999. Utah was the home state of the children at the time
10 Jennifer Thurston filed her Petition for Divorce in Utah. Ronald Thurston filed this action
11 on March 20, 2000;

12 4. This Court does not have *in personam* jurisdiction nor subject matter
13 jurisdiction over Jennifer Thurston and her children;

14 5. This Court is of the strong opinion that Utah is the appropriate
15 jurisdiction for the determination of the issues of custody and visitation, child support and
16 the other issues regarding the dissolution of the marriage between Jennifer Thurston and
17 Ronald Thurston and custody of their children. It is in the best interest of the children
18 that Oregon decline jurisdiction of this matter and that Utah assert subject matter
19 jurisdiction. Utah is the most convenient forum for determination of the divorce and
20 custody issues between the parties; and


21 6. All orders and/or writs entered herein on behalf of Ronald Thurston in
22 this action are vacated and declared void.

23 //////////////

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ALAN D. REYNOLDSON
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Newport, Oregon 97365
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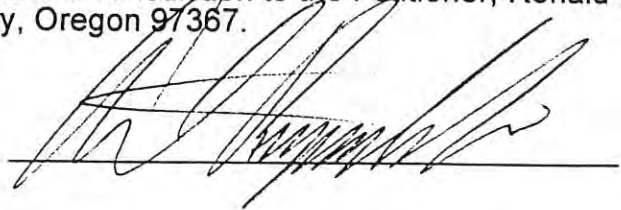
1 DATED this 7 day of ~~January~~ ^{February} 2001.

2
3 BY THE COURT:

4 
5 HONORABLE CHARLES P. LITTLEHAILES,
6 Judge of the Circuit Court for Lincoln County,
7 State of Oregon
8
9

10 CERTIFICATE OF SERVICE AND MAILING

11 I HEREBY CERTIFY that on this 5th day of ~~January~~ ^{February}, 2001, I served
12 upon and mailed, postage prepaid and by first class mail, a true and correct copy of the
13 foregoing Order Upon Motion Re Service and Jurisdiction to the Petitioner, Ronald R.
14 Thurston, at 1906 Galley Ct. Lincoln City, Oregon 97367.
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