2016

Brooke Robinson, Petitioner - Appellant, vs. Juan Pablo Matas-Vidal, Respondent - Appellee

Utah Court of Appeals

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

BROOKE ROBINSON, Petitioner - Appellant, vs. JUAN PABLO MATAS-VIDAL, Respondent - Appellee.	Case No. 20150418-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FINAL ORDER
OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
THE HONORABLE CHRISTINE S. JOHNSON

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I: THE FACTS ACKNOWLEDGED BY BOTH PARTIES ESTABLISH THERE WERE NO SIMULTANEOUS CUSTODY PROCEEDINGS IN MEXICO WHEN MOTHER FILED HER PETITION IN UTAH.

A. The Trial Court Failed to Identify the Factual and Legal Assumptions which Support its Dismissal of the Petition.

The lower court failed to cite any basis upon which it discarded, almost in their entirety, the allegations contained in the petition establishing that the mother and the parties' children had resided in Utah since December 2010 (thereby establishing home-state status), that there were no simultaneous custody proceedings in Mexico and accordingly, jurisdiction was appropriately cast in Utah under the provisions of the Utah Uniform Child Custody Jurisdiction Enforcement Act, Utah Code § 78B-13-101 *et seq.* (hereinafter UUCCJEA). (R. 1-58–Petition filed 11/18/13; R. 377, 853--Order of Dismissal for Lack of Jurisdiction dated 12/5/14; R. 916, 931--Order Overruling Petitioner's Objection to Commissioner's Recommendation dated 3/17/15; R. 1238-- Ruling and Order on Petitioner's Motion to Amend Order dated 4/30/15).

Contrary to the unsupported contention of father in his brief, the lower court did not "take judicial notice, admit[] into the record or rely[] upon the findings, conclusions, and orders of various custody and other relevant proceedings in which the parties had previously engaged" (Appellee's Brief, p. 7, fn. 1). Aside from a singular statement that the "federal court's ruling [was] valid except to the extent that it implies this Court has jurisdiction to conduct child custody proceedings," the lower court made no findings as to the specific proceedings in Mexico it concluded were in existence at the time the petition was filed. *Id.*

Instead of citing the specific orders in the Mexico courts on which it relied to conclude that there were simultaneous custody proceedings in Mexico, the lower court made non-specific and generalized statements regarding the subject. Commissioner Patton, in his recommendation, stated:

> The Court finds that Mexico had jurisdiction in October 2007 when child custody proceedings were initiated in the 36th Court of Family Matters in the Federal District of Mexico in case number 1427/2007 and the subsequent bifurcation in the 24th Court of Family Matters in the Federal District of Mexico in case number 1529/2010 further confirmed that jurisdiction and reserved the parties custodial rights as subject to further litigation therein in November 2010.

R. 853, 855.

Judge Johnson's March 17, 2015 Order upheld the recommendation of the Commissioner that Utah did not have jurisdiction to hear the case under the provisions of the UUCCJEA because there were

> . . . both civil and criminal proceedings pending in Mexico wherein the parties' minor children and the parties' parental rights remain at issue. This indicates to the Court that Mexico has not abandoned or otherwise continues to exercise jurisdiction over issues of child custody. . . .

R. 931.

The rulings and orders of the lower court did not refute mother's allegation that mother and the children had resided in Utah since December 2010 and that Utah was the home state of the minor children under the provisions of the UUCCJEA. *Id.*

With the home state issue resolved, the jurisdictional issue comes down to whether there was undisputed evidence of the existence of simultaneous custody proceedings in

Mexico when the Utah petition was filed. Instead of there being undisputed evidence of simultaneous proceedings in Mexico, however, the undisputed evidence establishes the absence of custody proceedings in Mexico when the petition was filed in Utah.

B. Father's Brief Establishes There Were no Simultaneous Custody Proceedings in Mexico.

The parties agree there were two divorce-custody related proceedings filed in Mexico before the petition was filed in this case. The issue becomes one of assessing whether there are custody related orders emanating from those proceedings that are still in effect and whether the actions or proceedings in Mexico were still open, thus constituting a simultaneous proceeding.

1. Main Mexico Divorce/Custody Action.

The parties agree that Father filed for divorce against Mother in Mexico City in early October 2007. The action was filed in the Superior Court for the Federal District, Domestic Affairs, Thirty-Six Court, File No. 1472/2007. That case produced multiple orders relating to the custody of the children including the orders of 10/17/2007, 12/11/2007, 6/30/2010 (Appellant's opening brief, Statement of Facts, ¶¶ 4-6, 10-16, Addendum A at 4-6; Appellee's Brief, at 7-14).

In the June 30, 2010 order, the court in Mexico entered a final custody order granting Mother sole custody or "custodia definitiva." *Id. See also,* Rec. 86, 88-89. In August 2010, both Mother and Father appealed the June 30, 2010 order entered in the divorce action. While the original divorce/custody case was on appeal, Father filed a no-fault divorce case. Because the original divorce/custody case had adjudicated or was in the process of resolving

all the other issues attendant to a divorce, Father sought only a decree of divorce in the no-fault proceedings. A decree of divorce was entered in that no-fault separate action on November 25, 2010. Rec. 1-7, Appellant's original brief, Addendum F; Appellees' brief at 10.

Both parties acknowledge that when the judge in the original divorce/custody action learned of the filing of the separate action for divorce under the newly adopted no-fault law, he entered the order of February 8, 2013. Appellant's Opening Brief, Addendum A, E; Appellee's Brief at p. 14. In that February 8, 2013 order, the court in the original divorce case rescinded and nullified all the previously entered custody orders in the case and dismissed the action with finality. Appellant's original brief at 8-9, 26-29, Addendum E; Appellee's Brief at 14.

Accordingly, after February 8, 2013, there were no enforceable court orders regarding custody and visitation in Mexico and there was no underlying action relating to custody or visitation. *Id.* Father's brief acknowledges that the February 8, 2013 order not only terminated the main divorce case but acted to rescind all orders previously issued by that court. Appellee's Brief at 14.

Accordingly, on November 18, 2013, when the petition was filed in this case, the main divorce action in Mexico had been dismissed and prior orders rescinded and vacated. Accordingly, there was no basis upon which the lower court in this case could have concluded that the main divorce action in Mexico constituted a simultaneous proceeding or that active enforceable orders from that action existed.

Although Father has implied throughout this litigation that the original divorce/custody action was a "simultaneous proceeding" under the UUCCJEA, his brief on appeal establishes clearly that he now concedes that the original divorce/custody action was dismissed and all orders therefrom recanted and nullified. *Id.*

2. No Fault Proceeding in Mexico.

As discussed above, while the original divorce/custody case in Mexico was on appeal, Father, trying to take advantage of newly enacted no-fault provisions in Mexico, filed a separate action for divorce in another court in Mexico and sought to obtain only a decree of divorce, reserving all other issues of property settlement, custody, visitation and support to be resolved by the court hearing the main divorce action. On November 25, 2010, the court signed a decree of divorce under the no-fault law and explicitly refused to deal with other issues in the divorce including custody of the children. Appellant's opening brief, Statement of Facts, ¶¶ 4-6, 10-16; Addendum A at 4-6; Addendum F; Rec. 1-7.

This separate action was filed by father only to get a no-fault divorce. No other issues relating to the divorce, including custody, were included because both parties knew that all such issues were presented in the original divorce/custody case. Father cites to and quotes from the decree entered in the action. Appellee's brief at 10. However, father's excerpts from the order are incomplete. In order to prevent any confusion, an English version of the order entered on November 25, 2010 is attached hereto as Addendum, Exhibit A, R. 595-600.

It should be noted that none of the orders from Mexico were admitted as evidence in the district court or otherwise authenticated under rules 901 and 902 of the Utah Rules of

Evidence. Further, the only motion requesting the court to take judicial notice was filed by Mother and related to the new action filed by father in Mexico 128 days after the petition was filed in this case (Appellant's opening brief, Statement of Facts No. 15; R. 895-897, 898-913).

A simple reading of the order in the no-fault case reveals that the court conducted a hearing at 11:30 a.m. on November 25, 2010. *Id.* The court proceeded to allow for the "authentication of the spouses" (R. 595). After the parties were authenticated, both mother and father "took the floor to declare irreconcilable differences. . . . " *Id.* The order then provides:

> . . . given the legal situation of their minor children named S_____ and R____, both with the last name Matas Libbey, is under judgment in the Thirty-Six Family Court of this City, for which reason they request that the present petition for divorce be continued. . . .

Id.

The only reasonable interpretation of the language in the order is that the court proceeded to allow the parties to put on evidence necessary to grant a divorce based upon irreconcilable differences, but deferred all other issues including those related to the minor children, to the court in the main divorce case described above. At the time the no-fault court entered its order, 11/25/2010, the main divorce case was active and proceeding.

With that background, the portion of the order recited by the father makes perfect sense. Appellee's brief at 10:

> the matrimonial bonds between [father] and [mother] are hereby dissolved. . . **With regard to the settlement proposal and**

> **counterproposal exhibited by the parties, their rights are safeguarded so that, if necessary, they may be upheld in the corresponding incidence.** (emphasis added).

Id.

The case to which the no-fault court was referring could only be the main divorce case described above because there were no other actions pending. It was to that main action, that the court in the no-fault order earlier referred. There can be no serious dispute as to the interpretation of the no-fault order. The court identified the main divorce case in the early part of the order and further recognized that because the court handling that case had undertaken the resolution of the issues attendant to a divorce, including those relevant to the minor children, the no-fault court was not going to take evidence or attempt to resolve those custody issues in that action. The no-fault court, in the excerpt set out above, restates the holding that the rights of the parties are at issue in the "corresponding incidence" (main divorce action) and could be pursued in the no-fault action.

There is nothing in the no-fault order that preserved jurisdiction in that case to hear custody or property issues at a later date. The court issuing the no-fault decree clearly identified the main divorce case as the case handling the other issues (including custody) and deferred their resolution to that court.

Accordingly, the court in the no-fault case never undertook to adjudicate custody and visitation and did not preserve any right to do so. Rather the court simply deferred to the court adjudicating the main divorce case. Therefore, when the main divorce case was dismissed on February 8, 2013, there was no other action pending that could have inherited

the task of adjudicating the ancillary divorce issues . Thus, after February 8, 2013, there was no pending action in Mexico between these parties adjudicating custody and visitation. Certainly, at the time the petition was filed on November 18, 2013, neither action in Mexico was active or the source of any enforceable orders relating to custody of the minor children.

3. New Action Filed by Father After the Utah Petition was Filed.

If either of the two actions in Mexico were still on-going or available forums to litigate custody and visitation, Father certainly would have resorted to those forums to obtain relief on his custody-visitation requests after the February 8, 2013 order dismissing the main divorce case. Instead, after the February 8, 2013 order and after the filing of the petition in this case on November 18, 2013, Father filed a new action in Mexico on March 27, 2014 (128 days after the filing of the Utah petition). Appellant's opening brief, Statement of Facts, ¶ 15.

Father would not have filed a new action post-petition if he could have resurrected either the original divorce or the no-fault ancillary proceeding. Father, in his brief, fails to give any explanation for the incongruity of his argument. Appellee's brief at 20.

Both Commissioner Patton and Judge Johnson, in their respective orders, referred to the two actions in Mexico as pending and on-going and actively asserting jurisdiction over the custody and visitation issue between the parties. The existence of the cases and alleged orders issued in those forums was the basis of the court's findings that Utah did not have jurisdiction. The fact that the main divorce case in Mexico had been dismissed and neither

case was active or on-going undercuts the factual and legal premise of the trial court's ruling, and the orders should be reversed and the matter remanded.

II: THE PROVISIONS OF THE UUCCJEA ESTABLISH UTAH'S JURISDICTION IN THIS CASE.

The UUCCJEA gives priority to the child's home state in determining whether a state has subject matter jurisdiction to make an initial child custody determination. *See* Utah Code § 78B-13-201(1). The state that "is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement" has subject matter jurisdiction over the child custody proceeding. Utah Code § 78B-13-102(7), Utah Code § 78B-13-201(1)(a). *See also Meyeres* v. Meyeres, 2008 UT App 364, 196 P.3d 604.

Father does not refute the proposition that as long as Utah is the home state of the minor children at the time the petition is filed, no other state or country's court will have subject matter jurisdiction to make an initial custody determination.[1] Appellee's brief at 28-31. The undisputed facts in this case establish that the mother and the children resided in the same location in Utah County, Utah from December 2010 to the present. Additionally,

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[1]*See* Utah Code § 78B-13-201(1)(b)-(d); *see also Arjona v. Torres*, 941 So. 2d 451, 455 (Fla. Dist. Ct. App. 2006); *In re Brown*, 203 S.W.3d 888, 891 (Tex. App. 2006) ("[H]ome-state jurisdiction trumps all other possible bases of jurisdiction in an initial child custody action . . . ."); *Hatch v. Hatch (In re Kalbes)*, 2007 WI App 136, ¶ 12, 302 Wis. 2d 215, 733 N.W.2d 648 ("Under the Uniform Act, home state jurisdiction always receives priority, and other jurisdictional bases are available only when there is no home state, or where the home state declines jurisdiction.").

as argued in Point I above, there were no simultaneous custody proceeding in Mexico at the time the petition was filed in this case. Utah Code § 78B-13-206.

Father, unable to dispute Utah's home-state jurisdiction under the UCCJEA, presents a flawed argument that is founded on an non-existent factual predicate. Father argues that mother has improperly relied upon the "initial child custody jurisdiction" provisions of the UCCJEA because Mexico already made "the relevant initial child custody determination" prior to the filing of the petition and Mexico retains exclusive, continuing jurisdiction over the matter. Appellee's brief at 28-31.

Father's argument does not identify the court in Mexico or the order issued therefrom that he maintains is the"initial child custody determination." *Id.* Because the court in Mexico that entered the no-fault divorce decree did not adjudicate any issues related to custody and visitation, the only possible action in Mexico that father could be referencing is the main divorce action. However, mother has demonstrated in Point I above that although that court entered numerous interim orders related to custody and jurisdiction, all those determinations and interim orders were vacated, nullified and rescinded by the order of February 8, 2013, which also dismissed the case. Appellant's original brief at 8-9, 26-29, Addendum E thereto.

Father's argument is inconsistent with his own factual recitation. Father concedes that "on February 8, 2013, the 36th Family Court revoked the prior temporary custody orders . . . . " Appellee's brief at 14. The law is clear that an order that is rescinded, revoked or nullified has no ongoing legal effect. *See* Utah R. Civ. P. 60(b); *Slay v. Nationstar Mortgage, L.L.C.,* 2010 Tex. App. LEXIS 1365, 2010 WL 670095 (Tex. App. Fort Worth Feb. 25,

2010) ("[a] judgment that has been vacated has no legal effect" and "the matter stands precisely as if there had been no judgment."). Accordingly all orders entered in the main divorce action in Mexico were nullified on February 8, 2013 and had no ongoing legal effect.

Additionally, although a rescinded or nullified order leaves the parties in the position they were in prior to the entry of the order, the underlying divorce action was also dismissed by the February 8, 2013 order. Therefore, there was no forum to exercise on-going jurisdiction.

Utah Code § 78B-13-102(3) defines a "child custody determination" as a judgment, decree, or other order of a court providing for the legal custody, physical custody, or parent-time with respect to a child. There is no question that the statute includes, within the term, "permanent, temporary, initial, and modification order[s]." *Id.* However, the facts of this case establish that there was no initial child custody determination in Mexico because all orders relating to custody were rescinded and nullified.

Additionally, because there was no initial child custody determination in Mexico because all orders were vacated and the underlying action dismissed, Mexico could not retain continuing jurisdiction over that determination as provided in the UCCJEA. Utah Code § 78B-13-202(1)(a)-(b), Appellee's brief at 28-30.

III: INCHOATE PARENTAL RIGHTS DO NOT PROVIDE AN ALTERNATE BASIS UPON WHICH MEXICO CAN ASSERT JURISDICTION.

Mother has established in Points I and II above that Utah has jurisdiction to adjudicate the petition filed in this case based upon home-state status, the lack of any enforceable order

of custody from a court in Mexico, and the absence of any on-going proceedings in Mexico that could be characterized as a "simultaneous proceeding." Utah Code § 78B-13-206. Father contends in response that his inherent or natural parental rights, as recognized by the law in Mexico, constitute an initial custody determination, an on-going order of custody and a manifestation of Mexico's continuing exercise of jurisdiction in this case. Appellee's brief at 31-38.

Before treating the legal argument, it is important to examine the factual assertions upon which father bases his analysis. Repeatedly, father argues that the orders entered in the main divorce case in Mexico between 2007, when the case was filed, to February 8, 2013, constitute a "child custody determination" as defined by Utah Code § 78B-13-102(3). Further, father argues that because the courts in Mexico asserted jurisdiction in the main divorce action during the same period of time, Mexico has an on-going claim to exclusive jurisdiction in the matter. *Id.* Father relies on references to the preservation of general or inherent parental rights by the courts as some kind of custody determination and on-going order and proceeding. *Id.* at 33-35.

The record is clear, however, that there was no court in Mexico that was asserting jurisdiction over the minor children of the parties when the petition in this case was filed. When the petition was filed in Utah, there was no open court case in Mexico to which an application could have been made by either party to assert jurisdiction over the custody of the children. Every order affecting the custody of the minor children originating in Mexico

was rescinded and vacated on February 8, 2013 and accordingly, there was no enforceable court order in place when mother filed her petition in the Utah courts.

The remaining legal issue is whether inchoate or natural parental rights as recognized in Mexico constitute a child custody proceeding or child custody determination as defined by the UCCJEA. The resolution of the issue is resolved by the wording of the statute itself. If a party to a custody action contends that there is a competing jurisdiction who has a superior right to jurisdiction because of a simultaneous proceeding, the statute provides the means that should be employed to resolve the matter.

Utah Code § 78B-13-206(1) provides that "a court of this state may not exercise its jurisdiction under this chapter if at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated . . . ."

Mother has previously cited this Court to the holding in *Meyeres v. Meyeres*, 2008 UT App 364, 196 P.3d 604, in conjunction with the issue of whether the criminal action against mother could be considered a simultaneous custody action. Appellant's opening brief at 40-41. The holding in *Meyeres* is likewise dispositive of the issue father now raises.

In *Meyeres*, this Court stated that the courts of Utah are not bound by the determination of another jurisdiction as to whether Utah does or does not have jurisdiction. A Utah court faced with the question of whether a simultaneous action exists must make the decision for itself as to whether another state's court has jurisdiction. *Id.* ¶ 6, *citing* Utah

Code § 78B-13-206(2). Simply, a claim by a court of another state of jurisdiction is not binding on a Utah court. *Id.*

This Court then cited cases where the challenging state did not have home state jurisdiction and therefore did not acquire jurisdiction in accordance with the UUCCJEA. *Id. See Welch-Doden v. Roberts,* 202 Ariz. 201, 42 P.3d 1166, 1176 (Ariz. Ct. App. 2002); *Arjona v. Torres*, 941 So. 2d 451, 455 (Fla. Dist. Ct. App. 2006; *In re Burk*, 252 S.W.3d 736, 741 (Tex. App. 2008); *Hatch v. Hatch (In re Kalbes)*, 2007 WI App 136, 733 N.W.2d 648 ("[T]he Idaho court did not have jurisdiction to make an initial determination of [the child's] custody because [the child's] 'home state' was Wisconsin. The Idaho court therefore did not have jurisdiction 'substantially in conformity with [the UCCJEA],' and the Wisconsin court was not prohibited from exercising jurisdiction under [the simultaneous proceeding statute]." (footnote omitted)).

Importantly, the court in *NB v. GA,* 133 Haw. 436, 329 P.3d 341 (Haw. Ct. App. 2014) noted that the comment to section 206 of the Uniform Act provides that "[u]nder this Act, the simultaneous proceedings problem will arise only when there is no home State, no State with exclusive, continuing jurisdiction and more than one significant connection State." *Id.* at 442, 329 P.3d at 347.

As applied to the facts of this case, a claim by a court in Mexico on November 18, 2013, when the petition was filed, that it had jurisdiction to adjudicate the custody of the parties' minor children, could not be made based upon home-state status, the existence of an actual pending court case in Mexico or the existence of an enforceable court order out of a

Mexico. Instead the claim of jurisdiction would have to be based upon some notion of natural or inchoate parental rights. Natural or inherent parental rights is not a basis of creating jurisdiction recognized under the UCCJEA. Utah Code § 78B-13-206(1).

Because inherent or natural parental rights are not a recognized basis for competing jurisdictional rights under the UCCJEA, father's argument that Mexico has jurisdiction based upon inchoate parental rights must be rejected.

IV: THE CRIMINAL ACTION WAS NOT A"SIMULTANEOUS PROCEEDING" REQUIRING UTAH COURTS TO DEFER JURISDICTION.

The trial court held that because the termination of mother's parental rights could conceivably be part of the sanction imposed if she was convicted of wrongfully taking the parties' children out of Mexico, the criminal proceeding constituted a "child custody proceeding" under the UCCJEA. U.C.A. 78B-13-102(4). R. 377, 853--Order of Dismissal for Lack of Jurisdiction dated 12/5/14.

Mother, in her opening brief, argued that contrary to the lower court's findings, the criminal case brought against her in Mexico is not a "simultaneous proceedings" under the UUCCJEA that can be used as a basis for Utah to defer jurisdiction. The basis of mother's argument is similar to that made in Point III above. Because the court in the criminal case did not acquire ". . . [] jurisdiction substantially in conformity with the [jurisdictional requirements of the UUCCJEA]," it is not a simultaneous proceedings that requires Utah to defer jurisdiction. Utah Code § 78B-13-206 (2008); Appellant's opening brief at 37-41, Statement of Facts, ¶¶ 32-33.

Father's responsive brief fails to engage Mother's argument and analysis. Father does not argue that the court in the criminal case acquired jurisdiction over mother based upon analysis of home-state status of the children. Of course the children have resided in Utah since December 2010, before the criminal case was commenced. Instead, father claims that because the alteration or termination of mother's parental rights is a *possible* component of a sentence that may be imposed if mother is found to be criminally responsible for the crime charged, that *possibility* qualifies the entire criminal proceeding (guilt phase and punishment phase), regardless of what actually happens in the case, as a "child custody proceeding." Appellee's brief at 39-42.

There are a myriad of reasons why the criminal case against mother cannot reasonably be construed as a competing child custody proceeding. First, the court in the criminal case only has jurisdiction over mother. The court does not have jurisdiction over father and importantly it has no jurisdiction over the children. Because the court hearing the criminal case does not have jurisdiction over both parents and the children, no comprehensive order adjudicating the custody of the parties and the children in one forum (which is the intent of the UCCJEA) can be put into place. All the criminal case can do is control the actions of mother with the children during the time the mother is subject to its jurisdiction.

Second, the fact that termination of parental rights is a potential sanction in a case does not make the entire case a "child custody proceeding." The Act states:

> (4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or parent-time with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity,

> termination of parental rights, and protection from domestic violence, in which the issue may appear. . . .

Utah Code § 78B-13-102(4).

The criminal case is not centered on mother's termination of parental rights as are the other types of proceedings detailed in the statute. The issues in the criminal case are exclusively centered on whether mother violated the specific elements of the law under which she was charged. That adjudication has nothing to do with the elements of a traditional action to terminate parental rights. **Only if** mother is convicted of the crime charged and not a lesser crime or degree thereof, does the issue of altering mother's parental rights even come into play. Therefore, the criminal action only becomes a "child custody determination" if mother is convicted of a crime that has, as a possible sentence, the alteration of her parental rights. Unless or until there is a conviction of the requisite crime that allows alteration of her parental rights, the proceeding is simply a criminal matter and not a child custody proceeding.

Third, the facts surrounding the criminal prosecution reveal that mother is charged only with unlawfully taking the parties' children out of Mexico. As detailed in the record, the children are extraordinary individuals and have been nurtured and parented in an impressive fashion by mother and their grandmother. Instead of proof that is typically seen in a normal case that establishes conduct that harms the children, the evidence in this case, as detailed in Judge Kimball's ruling in the Hague Convention case, demonstrates an exceptional effort on mother's part to shoulder all the responsibilities with the raising of the children. Appellant's opening brief, Addendum Exhibit A. Father, on the other hand, even

after learning of their whereabouts has paid nothing for their support and maintenance either to the mother or the children themselves. Rec. 458-470, 481-90. Accordingly mother does not believe that any effort will be taken to alter her custodial rights or take the children out of her case.

Fourth and most important, the criminal prosecution of Mother cannot be characterized as a "simultaneous proceeding" under the UUCCJEA (Utah Code § 78B-13-206), because the criminal court did not acquire jurisdiction over all the parties and children and because the criminal court's acquisition of jurisdiction over mother was not based upon the home-state status of the children. *Id.*

Again, the decision in *Meyeres v. Meyeres*, 2008 UT App 364, 196 P.3d 604, could not be clearer and the ruling more apposite to this case. Mother incorporates her analysis of the *Meyeres* decision and the underlying statute set out in Point III above. Based upon the law and facts laid out herein, the lower court's conclusion that the Mexico criminal case was a "simultaneous [custody] proceeding" should be reversed.

V: THE COURT FAILED TO CONDUCT THE NECESSARY PROCEEDINGS TO EVALUATE WHETHER MOTHER HAD ENGAGED IN UNJUSTIFIABLE CONDUCT THUS ALLOWING UTAH TO DECLINE JURISDICTION.

The court made a finding that Mother had engaged in unjustifiable conduct and that the misconduct justified Utah to decline jurisdiction. Appellant's opening brief, Findings of Fact, ¶¶ 32-33. The controlling statute is Utah Code § 78B-13-208 (2008). In relevant part, the statute states:

> Jurisdiction declined by reason of conduct. (1) Except as otherwise provided in Section 78B-13-204 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person invoking the jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless: (a) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction; (b) a court of the state otherwise having jurisdiction under Sections 78B-13-201 through 78B-13-203 determines that this state is a more appropriate forum under Section 78B-13-207; or (c) no other state would have jurisdiction under Sections 78B-13-201 through 78B-13-203.
>
> (2) If a court of this state declines to exercise its jurisdiction pursuant to Subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the wrongful conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Sections 78B-13-201 through 78B-13-203.

Id.

Mother alleged in her verified petition the facts and circumstances that prompted and justified her to move the children to Utah. Rec. 1, ¶¶ 11, 12, 458-470, 481-90. Mother contended in her opening brief that the finding of the court that mother had engaged in unjustifiable conduct in moving the children was an abuse of discretion. Mother argued that the court reached the conclusion without the benefit of a hearing or offering mother an equivalent opportunity to present her evidence. Mother argued that the review and adjudication of disputed facts as part of a rule 12(b)(1) motion to dismiss was improper and an abuse of discretion. Appellant's opening brief at 41-43. In response, father argues that the trial court did not actually weigh competing facts. Appellee's brief at 45. Father contends

that the court reviewed a number of undisputed court orders from Mexico as well as the federal district court case. *Id.*

The argument of father is without merit. The briefs filed with this court establish that the facts relating to mother's alleged misconduct are anything but "undisputed." Father and mother's rendition of the facts relating to their relationship (the existence of emotional and physical abuse), the conflicting findings of the two psychological reports conducted in Mexico, the basis of the earlier orders in Mexico allowing father only supervised visitation and other issues detailed in the parties respective statements of facts demonstrate that there is very little agreement on the facts that are relevant to a finding of misconduct.

Accordingly, the conclusion that mother engaged in unjustifiable conduct must be reversed because there is an abundance of evidence that mother acted appropriately. The court's entry of an order dismissing the case on a rule 12(b)(1) motion, where the material facts are disputed, constitutes error.

Additionally, even if there was serious misconduct on the part of the Petitioner, the exceptions contained in the statute would apply. As set out above, serious misconduct could be a basis to decline jurisdiction "unless: . . . (c) no other state would have jurisdiction under Sections 78B-13-201 through 78B-13-203." *Id.* As argued above, there is no basis in the UCCJEA for a finding that Mexico has jurisdiction in this matter. There was no prior custody order that remained in effect that could be modified. There was no proceeding in place when the Petition was filed. Crucially, Mexico is no longer the home state of the children and has not held that designation since 2010, six years ago.

The trial court's finding that Mother engaged in unjustifiable conduct was improper on a motion to dismiss. The judgment of the trial court should be reversed.

VI: THE LOWER COURT FAILED TO UNDERTAKE THE STATUTORILY REQUIRED INVESTIGATION AS TO THE EXISTENCE OF SIMULTANEOUS PROCEEDINGS.

In her opening brief, mother argued that lower court failed to take the steps set out in the UCCJEA to investigate, on its own, the existence of "simultaneous proceedings" claimed to exist by father. Appellant's opening brief at 30. *See* Utah Code § 78B-13-206(1).

Father argues first that mother did not raise the issue in the trial court. However, father then acknowledges that mother in fact, raised the issued in her rule 52 and 59 motion to amend judgment. Appellee's brief at 42; Appellant's opening brief at 1-2; R. 937, 944.

The inclusion of the argument in the rules 52 and 59 motion adequately raised the issue with the trial court. A trial court has the opportunity to rule if the following three requirements are met: (1) "the issue must be raised in a timely fashion;" (2) "the issue must be specifically raised;" and (3) a party must introduce "supporting evidence or relevant legal authority." *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 130 (Utah Ct. App. 1997) (citations and internal quotations omitted). The mother's rule 52 and 59 motion raised the issue explicitly and thereby satisfied the requirement of the case law. Appellant's opening brief at 1-2; R. 937, 944.

On the merits, father's response establishes that, as mother contends, the trial court did not undertake any statutorily allowed measured to determine the existence of a simultaneous proceeding in Mexico and the failure to do so constituted an abuse of

discretion. *State v. Montiel,* 2005 UT 48, ¶ 9, 122 P.3d 571, 575; *Snow, Christensen & Marteneau v. Lindberg,* 2013 UT 15, ¶ 17, 299 P.3d 1058, 1064 (citation, brackets, and internal quotation marks omitted). Accordingly if this Court does not hold that there are not, as mother contends, any simultaneous proceedings in Mexico at the time the petition was filed, the matter should be remanded with directions that the trial court communicate with the Mexico court in accordance with the statute.

VII: THE TRIAL COURT IMPROPERLY WEIGHED DISPUTED FACTS IN GRANTING THE MOTION TO DISMISS.

Mother's opening brief demonstrated that the lower court did not reveal the decisional method it used in finding the facts upon which the order dismissing the petition was based. Appellant's opening brief at 32-37. Father does not contest the argument but instead asserts that there are no disputed material facts in this case. Appellee's brief at 45-46.

Mother then contended that the actual findings, included in the lower court's orders, are legally insufficient in that they were not specifically detailed and did not include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. *Hall v. Hall*, 858 P.2d 1018, 1021 (Utah Ct. App. 1993) (citation and internal quotation marks omitted). Appellant's opening brief at 32-37. Father does not argue that the findings were legally sufficient and detailed to disclose the steps utilized by the court to reach its conclusions. Further father does not argue with the specific arguments made by mother that the individual findings are internally inconsistent, contrary to the evidence and lacking contrary to the applicable law.

Father also does not contest mother's argument the Utah appellate courts have been clear that in adjudicating a motion to dismiss based upon the lack of subject matter jurisdiction, the court is to accept the factual allegations in the petition as true and to make all reasonable inferences therefrom. *Oakwood Vill. LLC v. Albertson, Inc.*, 2004 UT 101, ¶¶ 8-9, 104 P.3d 1226. Appellee's brief at 42-43. Further father does not contest that all of the facts required to establish jurisdiction in Utah were included in the petition. Rec. 1, 8, 11, 17 and 53. Accordingly, mother respectfully asserts that the court should have denied the motion to dismiss based upon the presumptions afforded the verified petition and the failure to do so constitutes reversible error.

Father has limited his argument on the issue to an analysis of Rule 12(b)(1) adjudications on motions to dismiss. Father contends that the court may grant a motion to dismiss even when the material facts upon which the motion is based are disputed. Appellee's brief at 42-43.

In determining the method a court should employ in resolving factual disputes attendant to the adjudication of a motion to dismiss based upon lack of jurisdiction, mother contends that the process set out for rule 12(b)(6) motions should be reviewed. This portion of rule 12(b) provides that if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . ."

There is no question that rule 12(b)(1), which is the basis of father's motion in this case, does not provide a similar provision for the conversion to summary judgment when

outside material are relied upon by the court in its decision. This court has consistently prohibited the weighing of evidence in adjudicating a motion to dismiss under Rule 12(b)(1). To allow a court to enter findings on disputed material facts in the course of ruling on a motion to dismiss would deny to the parties ". . . an adequate opportunity to rebut materials outside the pleadings." *Spoons v. Lewis,* 1999 Ut 82, 987 P.2d 36; *see also Bekins Bar V Ranch v. Utah Farm Prod. Cred Ass'n,* 587 P.2d 151 (Utah 1978). The offering of affirmative evidence does not automatically convert a rule 12(b)(1) motion in to one for summary judgment, and "uncertainty as to the facts relevant to assessing the court's subject matter jurisdiction will make it inappropriate to grant a motion to dismiss under rule 12(b)(1). . . ." *Mallory v. Brigham Young Univ.*, 2012 UT App 242, 285 P.3d 1230; *rev. on other grounds, Mallory v. Brigham Young Univ.*, 2014 UT 27, 332 P.3d 922.

Father takes issue with mother's summary of the holding in *Spoons*. Appellee's brief at 42-43. Mother contends that she has accurately characterized the relevant findings of the court in that decision. The point is that the Utah appellate courts have placed a general prohibition against a court weighing evidence when considering motions to dismiss or for summary judgment. The law is clear that the trial court cannot weigh contradictory evidence or determine credibility when deciding whether dismissal or summary judgment is appropriate. *See IHC Health Servs., Inc. v. D & K Mgmt.,* 2008 UT 73, ¶ 18, 196 P.3d 588. It would be the a clear violation of that prohibition and a violation of basic due process for the court to sanction the lower court's weighing of conflicting evidence in the course of an adjudication of a motion to dismiss.

Mother submits that all the findings and conclusions of the court relating to jurisdiction must be rejected and reversed.

CONCLUSION

The order of the court dismissing this case based upon a lack of subject matter jurisdiction should be reversed and the matter remanded for further proceedings consistent with the UUCCJEA.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Utah R. App. P. 24(f)(1)(A). The brief contains 6,778 words.

DATED this 26th day of February, 2016.

DON R. PETERSEN and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN, P.C.
Attorneys for Petitioner-Appellant

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 26th day of February, 2016.

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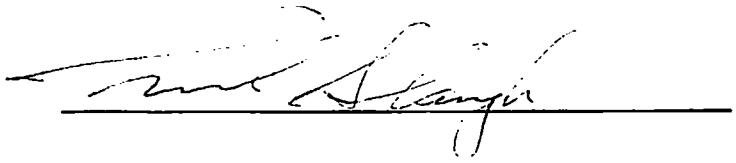

Addendum

Exhibit A

No Fault Divorce Decree 11/25/2010

Rec 595-600 (redacted)

In Mexico City, Federal District, at eleven thirty on the twenty fifth day of November of the year two thousand and ten, the indicated date and time verified by the hearing referred to in Article 272 B of the Civil Procedures Code, present in this courtroom before Atty. RODRIGO ALBERTO HACES RODRÍGUEZ, Twenty-Fourth Acting Judge of the Family Court, assisted by the Arbitrator of the Ministry of Law, Atty. XOCHITL AVIÑA RUIZ, who signs as a witness in the records of DIVORCE filed by MATAS VIDAL, JUAN PABLO against LIBBEY AGUILERA, SUSAN CONSUELO, case number 1529/2010, appearing BOTH PARTIES, identified respectively with voter registration card numbers 7849357 and 9643160, issued by the Federal Electoral Institute, identity documents that are affirmed to have been presented and returned to the interested parties. THE JUDGE OFFICIALLY DECLARED THE HEARING OPEN: The authentication of the spouses proceeded immediately thereafter, in which the petitioner was legally authenticated through his initial Divorce filing and as attested in the civil registry he presented, and the spouse being divorced, through the subpoena made by the District Server on the twentieth day of September of the current year, as well as with the response to it issued upon the petition made before this Court on the twelfth of October. Afterwards, the hearing proceeded to the conciliatory phase in relation to the inherent consequences of dissolution of the matrimonial bonds, both parties taking the floor to declare irreconcilable differences, given that the legal situation of their minor children, named S[redacted] and R[redacted] both with the last name MATAS LIBBEY, is under judgment in the Thirty-Sixth Family Court of this City, for which reason they request that the present petition for divorce be continued. THE JUDGE AGREES: The foregoing hearing is held and upon reviewing the status of the present records in accordance with the provisions of Article 287 of the Civil Code, the corresponding resolution is pronounced :

MEXICO, FEDERAL DISTRICT ON THE TWENTY-FIFTH OF NOVEMBER OF THE YEAR TWO THOUSAND AND TEN – HAVING REVIEWED the records and taking into consideration that this Court is competent to hear and rule on the present petition for Divorce filed by MATAS VIDAL, JUAN PABLO against LIBBEY AGUILERA, SUSAN CONSUELO, under case number 1529/2010, in accordance with the provisions of Articles 156 paragraph XII and 159 of the Civil Procedures Code for the Federal District, in concordance with Sections I, II, 48 paragraph III and 52 paragraph II of the Organic Law of the Supreme Court of Justice of the Federal District, added to

the fact that the existence of the matrimony and the authentication of the parties has been duly accredited by the certified copy of their marriage certificate, a public document whose evidentiary value is fully recognized, in accordance with the provisions of Articles 39 and 50 of the Civil Code in relation to Articles 327 paragraph IV and 403 of the abovementioned Code of legal regulations, and having updated the legal supposition established in Section 266 of the Civil Code for the Federal District, which which verbatim reads:

> *"Divorce dissolves the matrimonial bonds and leaves the spouses free to enter into another marriage. It may be requested by one or both spouses when either of them files it before the legal authority, declaring his or her will of not wishing to continue the matrimony, without any requirement to indicate the cause for which it is requested, whenever at least a year has passed since entering into the marriage."*

the matrimonial bonds between Mr. MATAS VIDAL, JUAN PABLO and Mrs. LIBBEY AGUILERA, SUSAN CONSUELO are hereby dissolved , which were entered into in Mexico City of the Federal District under the SEPARATE PROPERTY SYSTEM on the twenty-sixth day of June of nineteen ninety-nine under the following registry information: ENTITY 09, OFFICE 01, COURT 17, DOCUMENT NUMBER 436, YEAR 1999, CLASS MATRIMONY. Both parties recover their full capacity to enter into new marriages with no restrictions whatsoever. In this document, both parties express their complete agreement with the ruling made in this matter, for which, in this document, they declare that it is executable for all legal purposes that may arise. Consequently, let the Director of the Civil Registry of this City be notified in order to make the annotations referred to in Article 291 of the Civil Code. With regard to the settlement proposal and counterproposal exhibited by the parties, their rights are safeguarded so that, if necessary, they may be upheld in the corresponding incidence. Let a set of certified copies of the present proceeding be forwarded to each of the parties upon receipt of the corresponding payment and proof. With that, the present matter is concluded at twelve fifteen on the day, month and year in which it is enacted, signing those who appeared together with the undersigned Judge and Arbitration Secretary.

[Four signatures]

[In the margin is the seal of the Twenty-Fourth Family Court]

IN LEGAL BULLETIN No. 211 CORRESPONDING TO THE 29TH DAY OF NOV OF 2010, WHICH UPON ITS PUBLICATION IS LEGALLY RECORDED.

THE 30TH OF NOV OF 2010 AT TWELVE [ILLEGIBLE] ITS EFFECTS THE NOTIFICATION OF [ILLEGIBLE].

En la Ciudad de México, Distrito Federal siendo las once horas con treinta minutos del día veinticinco de noviembre del año dos mil diez, día y hora señalados para que tenga verificativo la audiencia a que se refiere el artículo 272 B del Código de Procedimientos Civiles, presentes en el local de este Juzgado ante el licenciado RODRIGO ALBERTO HACES RODRÍGUEZ, Juez Interino Vigésimo Cuarto de lo Familiar, que actúa asistido de su Secretaria Conciliadora por Ministerio de Ley, licenciada XOCHITL AVIÑA RUIZ, que da fe dentro de los autos del DIVORCIO promovido por MATAS VIDAL JUAN PABLO, en contra de LIBBEY AGUILERA SUSAN CONSUELO, expediente número 1529/2010, comparecen AMBAS PARTES quienes se identifican respectivamente, con credenciales para votar con números de folio 7849357 y 9643160, expedidas por el Instituto Federal Electoral, documentos de identidad que se da fe de tener a la vista y se devuelven a los interesados. EL C. JUEZ DECLARÓ FORMALMENTE ABIERTA LA AUDIENCIA: En seguida se procede a la legitimación de los cónyuges en la que el solicitante se encuentra legalmente legitimado mediante su escrito inicial de solicitud de Divorcio y atestados del registro civil que presentó y la cónyuge divorciante a través del emplazamiento realizado por la c. Notificadora de la adscripción el día veinte de septiembre del año en curso, así como con su contestación emitida a la solicitud presentada ante este Juzgado el doce de octubre de los actuales. A continuación se procedió a pasar a la etapa conciliatoria en relación a las consecuencias inherentes a la disolución del vínculo matrimonial, en uso de la palabra ambas partes manifiestan que no es posible llegar a ningún arreglo, dado que la situación jurídica de sus menores hijos de nombres S[redacted] y I[redacted] ambos de apellidos MATAS LIBBEY, se encuentra sub judice en el Juzgado Trigésimo Sexto de lo Familiar de esta Ciudad, por lo que solicitan se continúe con la presente solicitud de divorcio. EL C. JUEZ ACUERDA: Se tiene por celebrada la audiencia que antecede y visto el estado que guardan los presentes autos con fundamento en lo dispuesto en el artículos 287

del Código Civil se procede a dictar la resolución correspondiente:

MÉXICO, DISTRITO FEDERAL A VEINTICINCO DE NOVIEMBRE DEL AÑO DOS MIL DIEZ.- V I S T A S las constancias de autos y tomando en consideración que este Juzgado es competente para conocer y resolver la presente solicitud de Divorcio presentada por **MATAS VIDAL JUAN PABLO**, en contra de **LIEBEY AGUILERA SUSAN CONSUELO**, bajo el numero de expediente **1529/2010**, de conformidad con lo dispuesto en los artículos 156 fracción XII y 159 del Código de Procedimientos Civiles para el Distrito Federal, en concordancia con los numerales I, II, 48 fracción III y 52 fracción II de la Ley Orgánica del Tribunal Superior de Justicia del Distrito Federal, aunado a que la existencia del matrimonio y la legitimación de las partes se encuentra debidamente acreditada con la copia certificada de su acta de matrimonio, documental pública a la que se le reconoce pleno valor probatorio, conforme a lo dispuesto en los artículos 39 y 50 del Código Civil en relación al 327 fracción IV y 403 del Código ordenamiento legal antes invocado, y al haberse actualizado el presupuesto legal establecido en el numeral 266 del Código Civil para el Distrito Federal que a la letra señala:

> *"El divorcio disuelve el vínculo del matrimonio y deja a los cónyuges en aptitud de contraer otro. Podrá solicitarse por uno o ambos cónyuges cuando cualquiera de ellos lo reclame ante la autoridad judicial manifestando su voluntad de no querer continuar con el matrimonio, sin que se requiera señalar la causa por la cual se solicita, siempre que haya transcurrido cuando menos un año desde la celebración del mismo";*

se declara disuelto el vínculo matrimonial de los señores **MATAS VIDAL JUAN PABLO** y **LIEBEY AGUILERA SUSAN CONSUELO**, el cual contrajeron en esta Ciudad de México Distrito Federal bajo el Régimen Patrimonial de **SEPARACIÓN DE BIENES**, el día veintiséis de junio de mil novecientos noventa y nueve, bajo los siguientes datos de Inscripción: ENTIDAD 09, DELEGACIÓN 01, JUZGADO 17, ACTA NUMERO 436, AÑO 1999, CLASE MA. Ambas partes recuperan su

entera capacidad para contraer nuevas nupcias, sin taxativa alguna. En este acto ambas partes expresan su más entera conformidad con la sentencia dictada en este asunto, por lo que en este acto se declara que la misma causa ejecutoria, para todos los efectos legales a que haya lugar. Consecuentemente, gírese atento oficio al Director del Registro Civil de esta Ciudad para que se sirva realizar las anotaciones a que se refiere el artículo 291 del Código Civil. Respecto de la propuesta y contrapropuesta de convenio exhibidos por las partes, se dejan a salvo sus derechos para que, en su caso, se hagan valer en la vía incidental correspondiente. Expídanse un juego de copia certificada de la presente diligencia para cada una de las partes, previo el recibo de pago y razón correspondientes. Con lo que concluyó la presente siendo las doce horas con quince minutos del día, mes y año en que se actúa, firmando los que en ella intervinieron en unión del C. Juez y Secretaria Conciliadora, que da fe.-

JUZGADO VIGÉSIMO QUINTO DE LO FAMILIAR

EL BOLETIN JUDICIAL NO. 211 CORRESPONDIENTE
DIA 29 DE NOV DE 2010
PUBLICACIÓN DE LEY CONSTE.
30 DE NOV DE 2010 A LAS DOCE HORAS
SUS EFECTOS LA NOTIFICACIÓN