

2003

# Gerald D. Lundahl v. Ruth M. Lundahl : Brief of Appellee

Utah Court of Appeals

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Marlene Telford (Lundahl).

David Drake.

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IN THE UTAH COURT OF APPEALS

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GERALD D LUNDAHL,	)	CASE NO. 20030800 CA
	)	
Petitioner/Appellee,	)	
	)	
vs.	)	
	)	
RUTH M LUNDAHL,	)	
	)	
Respondent/Appellant	)	

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BRIEF OF APPELLEE

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APPEAL FROM AN ORDER GRANTING RESPONDENT/APPELLEE'S  
MOTION TO STRIKE APPELLANT/RESPONDENT'S ORDER TO  
SHOW CAUSE ENTERED IN THE FOURTH DISTRICT COURT FOR  
UTAH COUNTY, THE STATE OF UTAH, THE HONORABLE CLAUDIA  
LAYCOCK, PRESIDING

---

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4139 North Devonshire Circle  
Provo, Utah 84606

**UTAH COURT OF APPEALS  
BRIEF**

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**IN THE UTAH COURT OF APPEALS**

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	)	
Respondent/Appellant.	)	

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**BRIEF OF APPELLEE**

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**INTRODUCTION**

Appellant ("Marlene") filed two opening briefs, one on December 1, 2003 and another on February 6, 2004. The cover of the first opening brief is gray, only allowed for an appellant reply brief, in violation of Rule 27(d), Utah Rules Appellant Procedure ("U.R.App.P.") It appears that throughout this appeal, Marlene has ignored the rules of appellant procedure. Rule 24, U.R.App.P., implies that Marlene is allowed only one opening brief. Consequently, her December 1, 2003 brief and all supplements thereto should be rejected by this Court. This appellee brief shall only deal with the appellant opening brief filed February 6, 2004. Since this brief is also not in compliance with the applicable rules of appellant procedure, specifically the totality of Rules 24(a), including all subparts, the Order of the trial court should be affirmed and Marlene's brief should be rejected.<sup>1</sup> This

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<sup>1</sup>*See State v. Lucero*, 2002 UT APP 135, 47 P.2d 107, 109 [Because defendant failed to make a statement of the issues presented for review with citations to the record, failed to



Court has the power to sua sponte reject Marlene's brief for her failure to comply with this rule. Additionally, appellee ("Gerald") is filing a motion to have this Honorable Court reject appellant's brief and affirm the judgment of the trial court. However, out of an abundance of caution and in light of the forthcoming motion to reject Marlene's opening brief, Gerald's is filing his brief in accordance with the briefing schedule and order enlarging the time for the filing of this brief.

Additionally, Marlene's brief, as it is, fails to comply with Rule 24(a)(8) and (9). This non-compliance made it extremely difficult for Gerald to respond to the points Marlene attempted to make. For example, Marlene lacks adequate cites to the record as required by Rule 24(a)(9). She makes blanket statements without any support such as "the Plaintiff acquiesced to Utah Jurisdiction by submitting a complaint along with the registration in Utah of the California 1977 Dissolution Order . . . ." She cites no part of the record or any authority for this statement. Consequently, Gerald will submit a brief based upon what he submitted in the trial court to demonstrate that the Fourth District Court lacked the subject matter jurisdiction to modify the 1977 California Dissolution Order, that the decision of the trial court to grant his Motion to Strike was correct and should be affirmed by this Court.

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set forth the proper standard of review, and failed to include any relevant citations, authority, or "meaningful analysis that would support his allegations that the evidence was insufficient", the court determined that his briefing was inadequate and affirmed the trial court decision.]; and *Randle v. Randle*, 2002 UT APP 197 [The appellant was appearing pro se and failed to comply with Rule 24 – the standard of appellant review and made no citations to the record showing that the issue was preserved in the trial court, the Court of Appeals rejected his brief and affirmed the decision of the trial court.]

## **JURISDICTION**

The February 6, 2004 opening brief of appellant ("brief") fails to provide any statements showing the jurisdiction of the appellant court as required by Rule 24(a)(4), U.R.App.P. Accordingly, her brief should be rejected and the lower court decision affirmed. Ruth M. Lundahl appeals from an order of the Fourth District Court determining that the Fourth District Court lacked subject matter jurisdiction to modify the California Decree of Divorce involving the parties. Hence, all orders of the Fourth District Court purporting to modify the California Decree as to spousal support are void for lack of jurisdiction. This Court has jurisdiction pursuant to § 78-2a-3(2)(h) and (j).

## **ISSUES PRESENTED AND STANDARD OF REVIEW**

1. Whether the trial court correctly granted appellee's Motion to Strike Respondent's Order to Show Cause upon the grounds that the court lacked the subject matter jurisdiction to enforce the April 13, 1995 Order entered by Judge Guy Burningham purporting to modify the California Judgment concerning spousal support.

Standard of Review: A determination of whether a court has subject matter jurisdiction is a question of law. *Rimensburger v. Rimensburger*, 841 P.2d 709, 710 (Utah App.1992). This court accords no deference to the trial court's determination but reviews it for correctness. *Burns Chiropractic Clinic v. Allstate Ins. Co.*, 851 P.2d 1209, 1211 (Utah App.1993). If a court lacks jurisdiction "it has not power to entertain the suit." *Crump v. Crump*, 821 P.2d 1172, 1173 (Utah App.1991).

2. Whether the trial court correctly ruled that the Fourth District Court lacked the

subject matter jurisdiction to enter its April 13, 1995 Order purporting to modify the Superior Court of the State of California, the County of Los Angeles, Judgment Determining Property and Support Issue [sic] ("Judgment") in the case of *Lundahl v. Lundahl*, Case No. SE D 36650, on the 14<sup>th</sup> day of September, 1977; therefore, the Fourth District Court April 13, 1995 order is void and unenforceable.

Standard of Review: A determination of whether a court has subject matter jurisdiction is a question of law. *Rimensburger v. Rimensburger*, 841 P.2d 709, 710 (Utah App.1992). This court accords no deference to the trial court's determination but reviews it for correctness. *Burns Chiropractic Clinic v. Allstate Ins. Co.*, 851 P.2d 1209, 1211 (Utah App.1993).

3. Whether the trial court correctly ruled that the Superior Court of the State of California, the County of Los Angeles, the issuing court that entered the Judgment on the 14<sup>th</sup> day of September, 1997, had continuing, exclusive jurisdiction over the parties and the subject matter of spousal support.

Standard of Review: A determination of whether a court has subject matter jurisdiction is a question of law. *Rimensburger v. Rimensburger*, 841 P.2d 709, 710 (Utah App.1992). This court accords no deference to the trial court's determination but reviews it for correctness. *Burns Chiropractic Clinic v. Allstate Ins. Co.*, 851 P.2d 1209, 1211 (Utah App.1993).

4. Whether the trial court correctly ruled that the Uniform Interstate Family Support Act ("UIFSA") applied retroactively to this case.

Standard of Review: Trial court may exercise broad discretion in adjusting the financial interests of the parties, so long as the decision is within the confines of legal precedence. *Crocket v. Crocket*, 836 P.2d 818, 819-820 (Utah App.1992). Where a trial court may exercise broad discretion, the court of appeals presume the correctness of the court's decision absent 'manifest injustice or inequity that indicates a clear abuse of . . . discretion.' *Hansen v. Hansen*, 736 P.2d 1055 (Utah App.1987).

### **DETERMINATIVE STATUTES AND RULES**

Utah Code Ann. §§ 78-22a-1, et. seq. and 78-45f-100, et. seq.

### **STATEMENT TO THE CASE**

On September 14, 1977, the parties were divorced pursuant to a California divorce decree. (R. 10-23) The California court, in the decree, specifically retained jurisdiction over the parties and subject matter of the decree. (R. 24) At the time, both parties resided in California. (R. 14, 20-21) Shortly thereafter, appellant moved to Utah, taking the parties' minor children with her. (R. 2) Throughout this protracted litigation, Gerald has always been a resident of California, he has never resided in Utah. (R. 599) When appellant interfered with appellee's visitation, he brought the California decree to Utah and had it domesticated pursuant to the Utah Foreign Judgment Act *solely* for the purpose of enforcing its provisions against Marlene. (R. 2-6, 28) Subsequently, Marlene attempted to have the California decree modified, even though appellee brought domesticated it in Utah solely for enforcement purposes. (R. 29-31) Never once in any of her Fourth District Court petitions

to modify the California decree did Marlene cite any references to URESA, RURESAs, or USIFSA as authority for her petitions to modify. All she mentioned were substantial and material changes of circumstances. In these petitions, she did not allege anything such as lack of due process or subject matter jurisdiction that would be considered a defense to the enforcement of the Judgment. (R. 30-31, 198-201, 577-580).

Upon the advice of counsel, Gerald stipulated to have the California decree modified by the Fourth District Court. (R. 62) Subsequently, at least three orders were issued by the Utah court purporting to modify the spousal support award in the California decree. (R. 126-127 [1983 order], 221-223 [April 24, 1991 order], R. 473-476 [April 13, 1995 order]) These orders substantially modified the amount of support decreed by the California court.

At the same time, Marlene submitted herself to the jurisdiction of the originating decree state – California Superior Court in various attempts to modify spousal support during the same or similar periods she was doing the same in the Fourth District Court of the State of Utah. The California Superior Court entered several orders modifying Gerald's spousal support and custody of the minor children. (R. 209-214, 305-310, 715-720 [August 24, 1987 order], 547-548 [November 16, 1994], 721-722 [March 3, 1989], and 723-724 [May 5, 1993]. With the entry of the May 5, 1993 California Order, Marlene lost custody of her last and youngest child to Gerald. (R 723-724, 11) Consequently, California became the home state for the child custody aspect of the originating decree.

Finally, on May 28, 2002 (R. 589), Marlene filed a Motion for Order to Show Cause and on May 29, 2002, an Order to Show Cause was issued (R. 589), commanding Gerald to

appear and show cause regarding his contempt. In response, Gerald filed a Motion to Strike Marlene's Order to Show Cause (R. 640-641) and memorandum (R. 644-677) arguing that the Fourth District Court did not have the jurisdiction to modify a California Support Decree when Gerald continued to reside in California since the entry of the decree and only initially brought the California decree to Utah for enforcement purposes only.

On May 29, 2003 (R. 789, 712), the trial court heard arguments on Gerald's Motion to Strike and Marlene's Order to Show Cause. At the conclusion of the arguments, the trial court asked for additional briefing. Consequently, on June 11, 2003 (R. 715-739), Gerald filed a Supplemental Brief. On June 13, 2003, two days after the deadline for filing supplemental briefs, Marlene filed one. (R. 740-758) On July 21, 2003, the trial court issued its Ruling granting Gerald's Motion to Strike, in essence ruling that the Fourth District Court lacked the subject matter jurisdiction to modify or amend the California decree. (R. 781-789) On September 22, 2004, the trial court entered its Findings of Fact, Conclusions of Law, and Order in conformity with its decision. (R. 1037-1045) On September 28, 2003, Marlene filed a Notice of Appeal, which did not comply with Rule 3(d), Utah Rules of Appellate Procedure. (R. 1048-1101) (Gerald is filing a Motion to Strike this Notice for its non-compliance.)

### **STATEMENT OF FACTS**

1. A Judgment Determining Property and Support Issue [sic] ("Judgment") in the case of *Lundahl v. Lundahl* was issued in the Superior Court of the State of California for the County of Los Angeles, Case No. SE D 36650, on the 14<sup>th</sup> day of September, 1977. (R.

10-23) The California Superior Court ("Decree State") specifically retained jurisdiction over the parties and subject matter. (R. 24)

2. Paragraph 6 of the Judgment deals with Spousal Support. Marlene was granted \$600 per month in alimony. (R. 13) At the end of the paragraph, the Court "retains jurisdiction to reduce or increase said support as needs occur". (R. 24)

3. At the time of the issuance of the Judgment, Appellee ("Gerald") and Appellant ("Marlene") resided in California. (R. 14, 20-21)

4. Shortly after the issuance of the Judgment, Marlene moved with the children to Utah. (R. 2)

5. Throughout this very protracted litigation, Gerald has always been a resident of California. He did not reside in Utah. (R. 599)

6. After moving to Utah, Marlene interfered with Gerald's visitation. Consequently, he domesticated the Judgment in Utah pursuant to the Utah Foreign Judgment Act to enforce the Judgment. (R. 2-6, 28)

7. Even though Gerald brought the Judgment to Utah for enforcement purposes only, Marlene attempted to modify the California Judgment in a Utah court. (R. 29-31.) Her first attempt at such occurred June 23, 1978. (R. 29-31.) Her second attempt to modify the Judgment occurred on January 3, 1991. (R. 198-201.) In any petition to modify filed in the Fourth District Court, Marlene never alleged URESA, RURES, or USIFSA as authority for the modification. The modification attempts were based solely upon substantial and material changes of circumstance. (R. 30-31, 198-201, 577-580.) More importantly, the record is

devoid of Marlene claiming that the Judgment was obtained by fraud or lack of jurisdiction or lack of due process in the rendering state. Such allegations appear nowhere in her two petitions to modify the California Judgment. (R. 30-31, 198-201, 577-580.)

8. Apparently, when Marlene did not get what she wanted from the Fourth District Court, she expressed her total disdain for the court and showed no desire to comply with the order as is evident from her letter to Gerald. (R. 25-26.)

9. After Gerald attempted to enforce the Judgment and upon the advice of counsel, on June 30, 1980, he (in addition to his counsel, Marlene, and Marlene's counsel) entered into a stipulation attempting to modify the Judgment in a Utah court. This attempt resulted in alimony being assessed Gerald in the amount of \$1.00 per year. (R. 62.)

10. Since the entry of the Judgment, the jurisdiction of the California Superior Court was not meritoriously challenged by Marlene. She personally appeared, and at one time was represented by several California attorneys. (R. 715-722)

11. After Marlene moved to Utah, a "bi-state filing war" commenced, fought in California and Utah. Marlene submitted herself to California jurisdiction in this "filing war". (R. 728, 720-729)

12. It appears that Marlene was judge and court-shopping, that when a court in one state ruled against her, she would go to the court in another state. Consequently, inconsistent judgments were obtained. (R. 725-729)

13. At least three orders were issued by the Fourth District Court purporting to modify the spousal support award in the California decree. (R. 126-127 [1983 order], 221-



223 [April 24, 1991 order], R. 473-476 [April 13, 1995 order].) These orders substantially modified the amount of support decreed by the California court. The first order did not affect alimony. (R. 126-127.) The second Fourth District Court modification order modified the \$600 alimony award of the California Judgment, increasing "temporary family support for the support of the plaintiff and minor children of the parties . . . ." to \$3,000 per month. (R. 221, 221-223.) The third order increased Gerald's alimony obligation to \$2,235 per month. (R. 473-476.) None of these Utah modification orders even mentions the California courts, California jurisdiction, California orders in existence, or that Utah is specifically modifying the California support order(s). (R. 126-127 [1983 order], 221-223 [April 24, 1991 order], R. 473-476 [April 13, 1995 order].)

14. At the same time, Marlene submitted herself to the jurisdiction of the originating decree state – California Superior Court in various attempts to modify spousal support during the same or similar periods she was doing the same in the Fourth District Court of the State of Utah. The California Superior Court entered several orders modifying Gerald's spousal support and custody of the minor children. (R. 209-214, 305-310, 715-720 [August 24, 1987 order], 547-548 [November 16, 1994 order], 721-722 [March 3, 1989], and 723-724 [May 5, 1993]. The order of August 24, 1987 modified the alimony award in the Judgment to \$1,000 per month. (R. 718.) The order of November 16, 1994 modified the alimony award to \$500 per month. (R. 548.) During the time period of 1987 through 1994, the California Superior Court entered orders modifying Gerald's alimony obligation. The other two orders dealt with Marlene being dispossessed of custody of her two youngest

children. (R. 721-722, 723-724.)

15. On November 5, 1992, in order to obtain an Order to Show Cause, Marlene is accused by Gerald of conspiring with the process server to have Gerald served at 55 East 1230 North, Provo, Utah, as his residence. (R. 612) Since prior to the entry of the Judgment, Gerald has not resided in Utah. (R. 599.) The Order to Show Cause was heard without the presence of Gerald, all in violation of his 14<sup>th</sup> Amendment rights. (R. 599-613.)

16. Evidently, on or about January 19, 1993, Marlene again mislead the Fourth District Court into believing that Gerald was residing at 415 Bearcat Drive, Salt Lake City, Utah in order to serve him with another Order to Show Cause. (R. 608.) According to Gerald, this false service and misrepresentation that he was a resident of Utah influenced the trial court's decision that it had continuing and concurrent jurisdiction because of his Utah address and residence. (R. 605.)

17. The action brought by Gerald to enforce his rights of visitation occurred while the parties had minor children. (R. 2-4.) With the entry of the May 5, 1993 California Order, Marlene lost custody of her last and youngest child to Gerald. (R 723-724, 11) Consequently, California became the home state for the child custody (since Gerald was a continuing resident there) aspect of the originating decree. The California court, in its May 5, 1993 order specifically stated in ¶ 1: "The court finds that California has jurisdiction." (R. 724.) This loss of Utah home state concerning child custody occurred prior to Judge Guy Burningham's April 13, 1995 Modification Order. (R. 473-476.)

18. The Record is devoid of evidence that the parties entered into an express

written consent to divest California of its jurisdiction. This never occurred. California always has been and is the decree state with continuing jurisdiction. California has always retained continuing jurisdiction over the issue of alimony (as well as child support). (R. 724, 723-724, 24, 10-24.)

19. Respondent has always had rights and remedies in the California dissolution court. However, rather than avail herself of these California remedies, she has engaged in forum shopping in an attempt to find a sympathetic court and obtain a favorable result, something she did not receive in the latest modification action in California. (R. 724, 723-724, 24, 10-24, 725-729, and the whole record.)

20. During 1997, respondent filed an appeal with the California Court of Appeals challenging whether the California Superior Court had the jurisdiction to enter a reduction of spousal support order (spousal support was reduced to \$500). The California Court of Appeals reaffirmed that the court issuing the decree of divorce and the dissolution judgment, "maintained jurisdiction over the parties and spousal support. Indeed, Ruth *participated in spousal support hearings in California after the judgment* was entered and *prior to August 1994.*" [Emphasis in the original.] The California Court of Appeals correctly referred to the filings of the parties in California and Utah as a "bi-state filing war". (R. 725-729.)

### **SUMMARY OF ARGUMENT**

The trial court properly granted Gerald's Motion to Strike Marlene's Order to Show Cause, finding that the Fourth District Court lacked the jurisdiction to modify the Judgment granting Marlene's petitions to modify the Judgment's spousal support award. In the

Judgment, the California Superior Court retained jurisdiction over the parties and the subject matter and, over the years, continued to exercise it. Throughout all of the proceedings in the Fourth District Court, Gerald always remained a resident of California. Under these circumstances, the Fourth District Court lacked the subject matter jurisdiction to modify the California Judgment when it was domesticated by Gerald in Utah for enforcement purposes only. If Marlene wished to modify the Judgment, she should have applied to the California court to do so. Rather, she judge and forum shopped. In Utah, a court may only modify a spousal support order issued by another state if the Utah court has "continuing, exclusive jurisdiction over the spousal support order". Consequently, any spousal support modification orders entered by the Fourth District Court are void for lack of subject matter jurisdiction and cannot be enforced.

Additionally, it appears Marlene failed to comply with Rule 3(d), 9(c), and 24(a), Utah Rules of Appellate Procedure. As such, her brief should be stricken and the judgment of the trial court affirmed. She also attempted to unlawfully place documents into the record of the Fourth District Court after Judge Laycock's ruling was entered. These documents should also be stricken. This will be the subject of Gerald's Motion to Strike the Appellant Brief and Affirm the Trial Court's decision.

## **ARGUMENT**

### **I. THE TRIAL COURT PROPERLY GRANTED GERALD'S MOTION TO STRIKE MARLENE'S ORDER TO SHOW CAUSE ON THE GROUNDS THAT THE FOURTH DISTRICT COURT HAD NO SUBJECT MATTER JURISDICTION TO MODIFY THE**

## CALIFORNIA JUDGMENT ON APRIL 13, 1995

As can be ascertained from Marlene's brief, she appears to be claiming that the trial court erred in granting Gerald's Motion to Strike her Order to Show Cause. However, Utah case law is contrary to that position. The trial court decision should be affirmed. In *State of Utah Dept. of Human Services v. Jacoby*, 1999 UT App 52; 975 P.2d 939, the Court of Appeals decided the very issue present in the instant case and is directly on point. The issue there concerned a Virginia spousal support order attempted to be modified by a Utah court. The *Jacoby* Court stated:

In Utah, *a court may only modify a spousal support order issued by another state if the Utah court has 'continuing, exclusive jurisdiction over the spousal support order.* Utah Code Ann. § 78-45f-206(2). The method by which a Utah court obtains 'continuing exclusive jurisdiction' over a spouse support order is by 'issuing a support order consistent with the law of this state . . . .' *Id.* § 78-45f-205(6). Thus, *a Utah court cannot obtain 'continuing exclusive jurisdiction' unless it issues the spousal support order.* In this case, a Virginia court issued the spousal support order and therefore, the order could not be modified by the court in Utah. Accordingly, we affirm the trial court's decision on this issue. [Emphasis added.]

In the instant case, California originally issued the spousal support order. (R. 10-23.) Accordingly, the Fourth District Court could not modify the California spousal support order as it attempted to do prior to September 22, 2003. (R. 1037-1045, 221-223, 473-476.)

An analysis of § 78-45f-205 is clear that the Fourth District Court lacked the jurisdiction to hear the pending Order to Show Cause and lacked the jurisdiction to modify the California decree; consequently, the 1983 Order (R. 126-127), the April 24, 1991 Order (R. 221-223), and the April 13, 1995 Order (R. 473-476) are all void due to lack of subject

matter jurisdiction. Utah Code Ann. § 78-45f-205(6) states that "[a] tribunal of this state may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state." Utah Code Ann. § 78-45f-206(3) states that "[a] tribunal of this state which lacks continuing, exclusive jurisdiction over a spousal support order may not serve as a responding tribunal to modify a spousal support order of another state."

In the Judgment, the California court made it clear that it retained jurisdiction over the parties and subject matter. (R. 24.) Subsequent California modification orders also stated that it had the jurisdiction to enter the order. (R. 724.) Additionally, Gerald has continually resided in California since the issuance of the Judgment. (R. 599.)

Gerald initially brought the Judgment to Utah pursuant to the Utah Foreign Judgment Act solely to enforce it against Marlene. (R. 2-6, 28.) Thereafter, in the Fourth District Court, Marlene filed a petition to modify the Judgment. (R. 29-31.) Again, she did not assert any statutory authority to do so other than allege that a substantial and material change of circumstances had occurred.<sup>2</sup> (R. 30-31, 198-201, 577-580.) One of the clearest Utah cases explaining the inability of a Utah court to modify a California decree when an action is initiated to enforce such is *Bankler v. Bankler*, (Utah Ct.App.1998) 963 P.2d 797. In that case, a California decree which "specifically 'maintained jurisdiction over spousal support

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<sup>2</sup>As set forth in the statement of facts, on June 23, 1978 when she initially filed the petition to modify, Marlene did not allege URESA. (R. 29-31.) Ditto for her January 3, 1991 second petition to modify. In fact, at that time, she did not allege that the modification action was being brought to RURES. (R. 198-201.)

. . ." (at p.798), was domesticated in Utah. Once domesticated, the husband sought to modify the same in the Utah court. The trial court "dismissed the petition to modify, holding it had 'no jurisdiction to modify the decree of divorce arising in a sister state, and the matter is best handled in the sister state.'" (*Id.*). The husband asserted "that by domesticating the California decree and all subsequent orders entered by the California court, [wife] subjected herself and the case in its entirety, to the Utah court's jurisdiction." (*Id.*) The wife argued "that notwithstanding language in the Utah Foreign Judgment Act, the Utah court lacks subject matter jurisdiction to modify a California divorce decree." She further argued "that Utah statutes confer exclusive continuing jurisdiction upon the original court" . . . and domesticating [same] does "not abrogate the California court's exclusive jurisdiction." *Id.* at pp.798-799. The Court of Appeal ruled in favor of the wife. The Court of Appeal noted the Utah Supreme Court's discussion of the *limited ability* of Utah courts to address issues decided in a foreign judgment. *Id.* at p. 799. [Emphasis added.]

The *Bankler* court declared that the Utah Supreme Court "held that neither Rule 60(b) nor our Utah Foreign Judgment Act allows our Utah courts to reopen, reexamine, or alter a foreign judgment duly filed in this state, absent a showing of fraud or the lack of jurisdiction or the lack of due process in the rendering state." Since the husband did not assert "fraud or lack of jurisdiction or due process by the California court, as required by [our Supreme Court]", he could not seek to modify and the Utah court could not modify the California decree. *Id.* at p. 800. The record is devoid of Marlene claiming that the Judgment was obtained by fraud or lack of jurisdiction or lack of due process in the rendering state.

The *Bankler* Court continued:

***Actions to modify a divorce decree should 'properly be brought in the forum which issued the decree.'*** *Angell v. Sixth Dist. Court*, 656 P.2d 405, 406-07 (Utah 1982) (per curium). In *Rimensburger v. Rimensburger*, 841 P.2d 709, 710, 711 (Utah Ct.App.1992), a wife petitioned the Third District Court in Salt Lake County for modification of a Fifth District Washington County divorce decree. On appeal, this court held that 'the court issuing the original decree retains *exclusive jurisdiction* to modify its decrees. ***Parties wishing to modify a decree must do so in the original forum.***

Although *Rimensburger* concerned subject matter jurisdiction of two Utah courts, other Utah cases have discussed the question of subject matter jurisdiction when the courts concerned are the courts of sister states. For example, in *Oglesby v. Oglesby*, 29 Utah 2d 419, 510 P.2d 1106 (Utah 1973), our supreme court addressed the question of whether a Washington state court could modify a Utah divorce decree. Although the Washington court had reduced the husband's support obligation, our supreme court held that the decree could not be considered properly 'modified' by the Washington court because the decree could only be 'changed by a duly constituted Utah court.' *Id.* 510 P.2d at 1107. ***The court noted that constitutional problems would arise if a 'responding state had the power to destroy the legitimate judgments of sister states.'***

Similarly, in *Scott v. Scott*, 19 Utah 2d 267, 430 P.2d 580 (1967), the Utah Supreme Court addressed the question of whether a Utah court could modify a Nevada divorce decree. When the wife sued to enforce the judgment in Utah, the husband counterclaimed, asserting that he had undergone such a material change of circumstances that the decree should be modified to excuse him from making future alimony payments. Our supreme court held 'the lower court was correct in its holding that it had no power or authority to change or modify the Nevada judgment.' *Id.* at 272, 430 P.2d 580. Therefore, ***Utah courts may not consider a petition to modify*** terms of a divorce decree entered by a foreign jurisdiction and domesticated in Utah for enforcement purposes. The fact that Ms. Bankler domesticated and filed all the California orders pertaining to the divorce does not change that conclusion.

## CONCLUSION

The Utah Foreign Judgment Act does not confer jurisdiction on a Utah court to prospectively modify an order issued by a foreign state court in a divorce



action, nor does it permit reopening a judgment absent allegations of fraud, lack of jurisdiction, or lack of due process. We therefore affirm the trial court's judgment." [Emphasis added.]

*Id.* at pp. 800-801.

The *Bankler* court meticulously reviewed Utah Supreme Court cases and other authorities in concluding that Utah courts cannot modify an out-of-state decree such as was done in the instant case. In accord, *Rimensburger v. Rimensburger*, 841 P.2d 709, 710 (Utah App. 1992) ["The question of whether a court has subject matter jurisdiction 'goes to the very power of a court to entertain an action.'" The *Rimensburger* court also held that modification of a decree from the District Court of another county in Utah or from another state should "properly be brought in the forum which issued the decree .... To hold otherwise would do great mischief to orderly judicial process and would encourage forum shopping."]

This forum shopping by Marlene and insistence that the Fourth District Court hear her petitions and/or orders to show cause to modify the California divorce decree have resulted in inconsistent judgments and have created judicial chaos, in addition to the damage done to Gerald, as a result of these inconsistent judgments. (R. 221, 221-223, 473-476.) For instance, in August, 1987, Gerald was ordered by the California court to pay \$1,000 per month as alimony. (R. 718.) Then Fourth District Court Commissioner Maetani entered a temporary order obliging him to pay \$3,000 spousal and child per month, "until this court hears the matter on its merits." (R. 221.) Subsequently, Gerald was then ordered on November 16, 1994 to pay alimony in an amount of \$500 per month. (R. 548.) At this time, if Gerald did not pay \$500 per month, he would have been in contempt of the California

court. If he did not pay \$3,000 per month without any distinction as to what portion would be alimony, he would be in contempt of the Fourth District Court.

If ever there were a case that made the *Bankler* statement that "constitutional problems would arise if a 'responding state had the power to destroy the legitimate judgments of sister states", this certainly is one. This madness should stop and this Court should affirm the decision of the trial court which granted Gerald's Motion to Strike the Order to Show Cause of Marlene. Marlene's first petition clearly demonstrates that the Utah Court never had the requisite subject matter jurisdiction to modify the Originating Court's Dissolution Decree. This case also demonstrates the prophetic insight of the *Rimensburger* court that held that modification of a decree from the District Court of another county in Utah or from another state should "properly be brought in the forum which issued the decree .... To hold otherwise would do great mischief to orderly judicial process and would encourage forum shopping."

Additionally, *Rimensburger, supra*, is directly on point. The Fifth District Court in Washington County, Utah entered a decree of divorce in January, 1981. More than ten years later, the wife petitioned the Third District Court in Salt Lake County for modification. The Salt Lake County Court, over the objections of the husband, assumed jurisdiction of the modification action. The Utah Court of Appeals reversed this assumption of modification and held that the Third District Court lacked the subject matter jurisdiction to hear the modification action. In so holding, it stated:

Thus, the court issuing the original decree retains exclusive jurisdiction to modify its decrees. Parties wishing to modify a decree must do so in the original forum. See *Angell v. Sixth District Court*, 656 P.2d 405, 406-07 (Utah

1982) (per curium) (actions to modify divorce decree should 'properly be brought in the forum which issued the decree'). *A party can no more ask a different court to modify a divorce decree already entered than it can ask a different court for a new trial in a case otherwise concluded.* To hold otherwise would do great mischief to orderly judicial process and would encourage forum shopping. [Emphasis added.]

*Id.* at 710.

This is exactly what Marlene has done in this case. She has (albeit successfully) asked the Fourth District Court to modify a California divorce decree (where the California court expressly retained jurisdiction) in order to do great mischief to orderly judicial process and has forum shopped to do so. This should stop here. "The question of whether a court has subject matter jurisdiction 'goes to the very power of a court to entertain an action.'" *Rimensburger*, at 710 (citing with approval *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah App.1990)). Since the Fourth District Court lacked the subject matter jurisdiction, it lacks the power to entertain action below. Consequently, the decision of the trial court should be affirmed.

**A. The April 4, 1991, Temporary Order  
Rendered By Commissioner Maetani Is Also  
Void For Lack Of Subject Matter Jurisdiction**

For the same reasons set forth hereinabove, the April 4, 1991 Temporary Order is void for lack of subject matter jurisdiction. First, the order by its terms is only temporary. (R. 221-223.) Second, this April 4, 1991 order, also by its terms, merged into the April 13, 1995 order. This order ended with "until this court hears the matter on its merits." (R. 221.) The only time the case was alleged heard on its merits was at the hearing from which

the April 13, 1995 came. (R. 473-476.) Additionally, the Commissioner is not a judge; yet, the Commissioner entered an order rather than a recommendation. Finally, the Temporary Order fails to specify what portion of the \$3,000 is alimony and what portion is child support. (R. 221-223.) Since the entry of this Temporary Order is derivative of Gerald's initial attempt to domesticate the Judgment, it should be rendered void for lack of subject matter jurisdiction. (R. 2-6, 28.)

**II. THE TRIAL COURT PROPERLY GRANTED GERALD'S MOTION TO STRIKE BASED UPON THE FACT THAT CALIFORNIA HAS EXCLUSIVE, CONTINUING JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION**

In *State of Utah, Dept. of Human Services v. Jacoby, supra*, the Utah Court of Appeals made it perfectly clear that the originating state had exclusive and continuing jurisdiction over the decrees entered by it. This is especially so in this case where the California court issuing the Judgment expressly affirmed that it had continuing jurisdiction over the parties and the issue of spousal support. (R. 24.) Even assuming otherwise, another state cannot purport to dictate to this state whether Utah has subject matter jurisdiction. This determination is in the exclusive province of Utah.

It is the Utah Court of Appeals desire to eliminate the erroneous assumption of concurrent jurisdiction. This is exactly the case here. We have judicial chaos as a result of Utah attempting to exercise concurrent jurisdiction with California. We have inconsistent

judgments. *Crump v. Crump*, 821 P.2d 1172, 1176, 1177 (Utah Ct.App.1991).<sup>3</sup> The continuing jurisdiction of the issuing court (California) is exclusive. Other states do not have jurisdiction to modify the decree. They must respect and defer to the prior state's continuing jurisdiction. "Although the new state becomes a child's home state,<sup>4</sup> significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists where one parent or another contestant continues to reside." *Id.* at 1177. The *Crump* court cited *State in Interest of D.S.K.*, 792 P.2d 118, 124 (Utah App.1990), which held "[a]s long as the decree state retains jurisdiction there is no concurrent jurisdiction to modify a decree under the UCCJA." California undeniably retained continuing jurisdiction and exercised the same subsequent to rendering the Judgment. (R. 24, 209-214, 305-310, 715-720 [August 24, 1987 order], 547-548 [November 16, 1994 order], 721-722 [March 3, 1989], and 723-724 [May 5, 1993].)

In 2000, the decision in *State of Utah, in the interest of A.M.S. and A.S., person under*

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<sup>3</sup>*Crump* did an analysis under the PKPA and UCCJA. Under the PKPA analysis, Utah "must decline to exercise jurisdiction unless the court of the other State no longer has jurisdiction, or has declined to exercise such . . . ." In the instant case, California has continued to exercise jurisdiction over Gerald and Marlene and has entered orders modifying custody and support.

Under the UCCJA analysis of this case, California also has exclusive continuing jurisdiction because it has continued to exercise such even when the Fourth District Court has also done so. "Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required."

<sup>4</sup>At the time of the April 13, 1995 Order, California was the home state for Gerald since he, the year previous, had gained custody of the youngest child of the parties. No more minor children were present in Utah. (R. 721-722, 723-724.) According to Gerald, the children either ran away from home to avoid Marlene's abusive and intolerable conduct or moved to California to be with Gerald. (R. 301-304.)

*eighteen years of age, K.P.S. v. State of Utah*, 2000 UT App. 182, 4 P.3d 95, 98, was issued.

This case dealt directly with the state issuing the support decree of Judgment had exclusive, continuing jurisdiction over that support decree and Judgment:

Under the UCCJA, because the Arizona court made the initial custody determination when all parties resided in Arizona and *Father continues to so reside*, a Utah court generally may not modify that determination. See Utah Code Ann. § 78-45c-14(1) (1996); *Liska v. Liska*, 902 P.2d 644, 647 (Utah Ct.App. 1995) [stating that the decree state continues to have jurisdiction when Father continues to reside there and have visitation contact with children and 'the continuing jurisdiction of the court in which the decree originated is intended to remain exclusive']; *Crump v. Crump*, 821 P.2d 1172, 1177 (Utah Ct.App. 1991) [holding that jurisdiction did not shift to Utah from Montana when mother and children moved to there because Father remained in Montana]; *In re D.S.K.*, 792 P.2d at 124 ['The jurisdiction of state A continues and is exclusive as long as the husband lives in state A . . . .'] (Citation omitted; emphasis omitted). Hence, Father is correct that ordinarily the maternal grandparents should have brought their request for custody and the evidence of abuse on which it was based to the Arizona court. [Emphasis added.]

As can be seen from the foregoing, since Gerald has always resided in California and the California court retained jurisdiction to modify the Judgment and, has in fact, modified the Judgment several times (R. 209-214, 305-310, 715-720, 547-548, 721-722, and 723-724), the California court has exclusive, continuing jurisdiction over the issue of spousal support. Therefore, the decision of the trial court was proper in holding that the Fourth District Court lacked the subject matter jurisdiction to hear Marlene's pending Order to Show Cause since it is based on a void judgment, void because the Utah court purporting to modify the Judgment lacked the jurisdiction to do so.

### **III. THE TRIAL COURT CORRECTLY CONCLUDED THAT SINCE THE UTAH COURT LACKED THE**

**SUBJECT MATTER JURISDICTION TO MODIFY THE  
CALIFORNIA JUDGMENT, NO ACTIONS OF GERALD  
HAVE ANY EFFECT ON THE LACK OF  
JURISDICTION**

*Crump, supra*, at pp. 1173 and 1174, discussed at length the issue of jurisdiction. In so doing, it stated:

... If a court lacks jurisdiction 'it has not power to entertain the suit.' *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah App. 1990) (Citation omitted). Not only can a court not entertain the suit, the parties cannot cure the jurisdictional defect by a waiver or consent. Mrs. Crump's argument, and the dissent's assertion that because 'Mr.. Crump voluntarily and affirmatively engaged the Utah courts ... he waived any question regarding the authority of the Utah courts to decide the issue ... and has thus waived any objection to the district court's authority to exercise its jurisdiction,' it is without merit. We held that while defects in personal jurisdiction can be waived, subject matter jurisdiction goes to the very power of a court to entertain an action. A lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. A lack of subject matter jurisdiction can be raised at any time and when subject matter jurisdiction does not exist, neither the parties nor the court can do any thing to fill that void.

*Id.* (citations omitted) (emphasis added). The issue of waiver has been addressed by this court, see *id.*, by our supreme court, and by the federal courts of appeal. See, e.g., *McDougald v. Jenson*, 786 F.2d 1465, 1484-85 (11<sup>th</sup> Cir.); cert. denied by *Jenson v. McDougald*, 479 U.S. 860, 93 L. Ed.2d 13, 107 S.Ct. 207 (1986) [No waiver of jurisdictional defect in modification of child custody case even where father had consented to jurisdiction of Washington court, which court did not have jurisdiction]; *A.J. Mackay Co. v. Okland Constr. Co., Inc.*, 817 P.2d 323,325 (Utah 1991) ['Acquiescence of the parties is insufficient to confer jurisdiction on the court, and a lack of jurisdiction can be raised by the court or either party at any time.']; see also Annotation, Child Custody: When Does State That Issued Previous Custody Determination Have Continuing Jurisdiction Under Uniform Child Custody Jurisdiction Act (UCCJA) Or Parental Kidnapping Prevention Act (PKPA). 28 USCS § 1738A, 83 ALR 4<sup>th</sup> 742, 748 (1991) hereinafter Annotation (Citation omitted) ['Subject matter jurisdiction under the relevant child custody statutes cannot be vested by agreement of the parties, even though all of the parties desire an adjudication on the merits, and such jurisdiction cannot be

conferred on the court by a party's failure to interpose a timely objection to the court's assumption of jurisdiction.'].]

The *Crump* court went on to hold that "[u]nlike the UCCJA, the PKPA 'anchors *exclusive* continuing jurisdiction to modify a previous custody decree in the original home state as long as the child or one of the contestants remains in that state.'" [Emphasis in original.] The court further stated that a state "*must* decline to exercise that jurisdiction *unless* 'the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.'" [Emphasis in original.] In the instant case, California has definitely demonstrated it has not declined to exercise jurisdiction. The modification orders set forth in the Statement of Facts demonstrates this. (R. 209-214, 305-310, 715-720 [August 24, 1987 order], 547-548 [November 16, 1994], 721-722 [March 3, 1989], and 723-724 [May 5, 1993].

In accord, *Barton v. Barton*, 2001 UT App 199, 29 P.3d 13, 16 ["Lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. A lack of subject matter jurisdiction can be raised at anytime and when subject matter jurisdiction does not exist, neither the parties nor the court can do anything to fill that void." The Utah (the decree state) continuing jurisdiction issue of this case pivoted on whether the Father was still a resident of the State of Utah. If he were, then the Utah court had continuing exclusive jurisdiction. If not, then California did.] California in the present case is the decree state. Since Gerald continues to reside there, California has continuing jurisdiction.

As stated hereinabove, the *Crump* court went on to hold that because the husband



resided in Montana, the state that issued the original decree of divorce, the Utah court was without jurisdiction to modify that Montana support decree. Gerald has always resided in California. Therefore, the decision of the trial court to grant his Motion to Strike based upon a lack of subject matter jurisdiction was proper.

The June 30, 1980 stipulation of Gerald purporting to modify the Judgment in Utah did not confer jurisdiction on the Fourth District Court. (R. 62.) The question of jurisdiction can be raised at any time by either the court or a party. Based upon the foregoing, clearly the trial court's conclusion was correct – that the Fourth District Court was without jurisdiction to hear the Order to Show Cause or to give any regard to any past Utah court orders upon which it was based.

#### **IV. THE TRIAL COURT CORRECTLY RULED THAT THE UNIFORM INTERSTATE FAMILY SUPPORT ACT ("UIFSA") APPLIED RETROACTIVELY**

The Utah Legislature passed the Uniform Interstate Family Support Act ("UIFSA") during 1996. *See* § 78-45f-100, *History*.

Even though not controlling, the case of *Child Support Enforcement Division of Alaska v. Brenckle*, 675 N.E.2d 390, 392 (Mass. 1997) is instructive on this issue:

*UIFSA aims to cure the problem of conflicting support orders entered by multiple courts and provides for the exercise of continuing, exclusive jurisdiction by one tribunal over support orders. . . . Under UIFSA, once one court enters a support order, no other court may modify that order for so long as the obligee, obligor, or child for whose benefit the order is entered continues to reside within the jurisdiction of that court unless each party consents in writing to another jurisdiction.*

Also,

This is consistent with the fundamental purpose of UIFSA: to 'create a uniform basis for jurisdiction so that . . . *only one support order is in effect at any one time*,' and to ' limit the number of tribunals having jurisdiction to modify a child support order.

. . . .


It was the *express intention of the Legislature that UIFSA be applied retrospectively; its provisions govern any URESA action that is 'pending or was previously adjudicated.'* It is also clear that UIFSA, like its predecessor URESA, does not create a duty of support, but rather provides the procedural framework for enforcing one State's support order in another jurisdiction. . . . It is proper that UIFSA should be applied retroactively. [Emphasis added.] *Brenckle, supra*, at p. 393.

## CONCLUSION

The Trial Court's decision granting Gerald's Motion to Strike Marlene's Order to Show Cause should be affirmed. The Utah case law appears to be unanimous that as long as Gerald continues to reside in California and the California courts continue to exercise jurisdiction, this state cannot modify a California Judgment. Additionally, a Judgment brought to this state for enforcement purposes only cannot be subsequently modified. Any subsequent modification is void for lack of subject matter jurisdiction.

This Court should award sanctions, attorney fees and costs to Gerald as a result of Marlene's non-compliant Notice of Appeal, Docketing Statement, briefs, and attempting to supplement the record without consent of the trial court.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of April, 2004.

  
\_\_\_\_\_  
David Drake  
Attorney for Petitioner/Appellee  
Gerald D. Lundahl

## **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on April 27, 2004, I mailed two copies of the RESPONDENT/APPELLEE'S BRIEF, first class postage prepaid, addressed as follows:

Marlene Telford (Lundahl)  
4139 North Devonshire Circle  
Provo, Utah 84606

By: David Quake