

2003

Wendy Sullivan v. Mark Allen Sullivan : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WENDY SULLIVAN,)	
)	BRIEF OF APPELLANT
Petitioner/Appellee)	
)	
vs.)	
)	
MARK ALLEN SULLIVAN,)	Appellate Case No. 20030957-CA
)	
Respondent/Appellant)	
)	

APPEAL FROM THE SECOND DISTRICT COURT, DAVIS COUNTY
JUDGE DARWIN C. HANSEN

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UTAH APPELLATE COURTS
JUN 15 2004

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STATEMENT OF JURISDICTION

This appeal is from a final order of the Second District Court denying Mr. Sullivan's motion to set aside an order dismissing Ms. Sullivan's divorce complaint filed on September 26, 2002 (Case No. 024701693 DA) (hereinafter the "First Complaint"), refusing to consolidate the case with Ms. Sullivan's later-filed divorce action (Case No. 034700173 DA)(hereinafter the "Second Complaint"), and finding that the Court had jurisdiction pursuant to the Utah Uniform Child Custody Jurisdiction and Enforcement Act in Case No. 034700173 DA to determine custody issues. The original order was entered on September 22, 2003, and an amended order was entered on October 28, 2003. This court has jurisdiction pursuant to Utah Code Ann. Sec. 78-2a-3(2)(h) and Rule 3(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Did the trial court err in dismissing Ms. Sullivan's First Complaint and allowing her to proceed under her Second Complaint when the jurisdiction under the UCCJEA was determined at the time of filing of the First Complaint?

Standard of Review: The propriety of a motion to dismiss is a question of law and is reviewed for correctness, giving no deference to the decision of the trial

court. *Krouse v. Bower*, 2001 UT 28, ¶ 2, 20 P.3d 895.

Issue Preserved: Record p.118, interior pages 3 (lines 9 through 21), 4 (lines 2 through 7), 6 (lines 6 through 22), 7 (lines 8 through 12), 9 (lines 20 through 25), and 10 (lines 1 through 9).

2. Did Mr. Sullivan file his action in Illinois in a timely manner?

Standard of Review: The appellate court gives no deference to the trial court's legal conclusions and reviews them for correctness. *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 251 (Utah Ct. App. 1998).

Issue Preserved: Record, p. 188, interior page 4 (lines 2 through 24) and interior page 15 (lines 15 through 20); Record pages 257 and 258.

3. Did the trial court err in finding that Ms. Sullivan did not act surreptitiously or wrongfully by taking the parties' children from the State of Illinois under false pretenses, and in not declining jurisdiction by reason of her conduct?

Standard of Review: Issues which involve application of statutory law to the facts present mixed questions of fact and law. Factual findings are reviewed for clear error and conclusions of law are reviewed for correctness, giving the trial court some discretion in applying the law to the facts. *In re G.B.*, 2002 UT App

270, ¶11, 53 P.3d 963.

Issue Preserved: Record, p. 188, interior pages 8 and 9; Record, p. 256 and 257.

PROVISIONS, STATUTES, ORDINANCES AND RULES

1. Rules 41(a)(2)(ii) and 42, Utah Rules of Civil Procedure; U.C.A. § 78-45c-208.

2. Utah Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), §§ 78-45c-102(7), 201(1)(a through (d), and other applicable sections; Uniform Child Custody Jurisdiction Act (IUCCJA), Illinois Revised Statutes, 750-5/601, *et seq.*, and 750-35/1, *et seq.*; Parental Kidnaping Prevention Act (PKPA), 11 U.S.C. § 1738A (c).

3. U.C.A. § 78-45c-110(1).

4. U.C.A. § 78-45c-208.

STATEMENT OF THE CASE

The parties were married in August 1995 in Albuquerque, New Mexico, and have a son, Brett, born on April 2, 1996, and a daughter, Sydney, born on July 18, 1997. The parties moved to Illinois in December 1999 and were living in Thompsonville, Illinois, in June, 2002. On or about June 26, 2002, Ms. Sullivan

took the children with her to Idaho on the pretext that she was going to visit her family. She then took the children to Utah and filed her First Complaint for divorce on September 26, 2002. Mr. Sullivan was served with the First Complaint on or about November 27, 2002, and filed an answer on December 27, 2002, contesting the Utah court's jurisdiction and asserting that Illinois had jurisdiction as the home state pursuant to the UCCJEA, since the children had lived in Illinois for more than six months before Ms. Sullivan left the State. Mr. Sullivan thereafter filed a custody proceeding in Illinois on April 7, 2003. In the interim, Ms. Sullivan filed the Second Complaint in Utah on January 28, 2003, claiming that she had been in Utah for six months and that Utah now qualified as the home state. When Mr. Sullivan moved to consolidate the two divorce proceedings under the earlier filed case, Ms. Sullivan objected and moved to dismiss her first complaint. The Utah trial court mistakenly dismissed the Ms. Sullivan's first complaint before the time for briefing had elapsed. Following a hearing, however, the Court allowed the dismissal to stand, found that Mr. Sullivan had waited too long to file his complaint in Illinois, and found the Utah had jurisdiction over the matter. Mr. Sullivan appeals from the dismissal of Ms. Sullivan's First Complaint and the trial court's holding that Utah had jurisdiction under the UCCJEA.

STATEMENT OF FACTS

1. The parties were married on August 26, 1995, in New Mexico, and have two minor children, Brett Sullivan, age 8, and Sydney Sullivan, age 6. The parties and their minor children resided in Illinois between December 1999 and July 2002. Record, pp. 201 and 202, paragraphs 2 and 5;

2. On or about June 20, 2002, Ms. Sullivan surreptitiously left Illinois with the children, claiming that she was going to Idaho to attend a family reunion and that she would return to Illinois. She thereafter went to Utah. Record. pp. 119.

3. Ms. Sullivan claimed repeatedly that she was only visiting Utah temporarily. Mr. Sullivan thought her stay in Utah was temporary and that she would return to Illinois. Mr. Sullivan Record, p. 224; p. 119, p. 188, interior page 6, lines 12 through 15.

4. Ms. Sullivan filed her First Complaint for divorce in the Second District Court, Farmington Department, on September 26, 2002, Civil No. 024701693 DA. Record, p. 201-212.

5. Mr. Sullivan was served with the First Complaint in Illinois on November 27, 2002. Record, p. 222. He filed an answer on December 27, 2002 (hereinafter the “First Answer”) disputing the Utah court’s jurisdiction and

requesting that all proceedings relating to custody of the minor children be referred to the Circuit Court of Hamilton County, Illinois, in McLeansboro, Illinois. Record, p. 223-226.

6. Ms. Sullivan filed her Second Complaint on January 28, 2003, Civil No. 034700173. Record, pp. 1-5. The Second Complaint was served on Mr. Sullivan on March 19, 2003. Record, p. 9.

7. Mr. Sullivan filed a Petition for Child Custody on April 7, 2003, in the Second Judicial Circuit Court for Hamilton County, Illinois, case number 03-F-5. Record, pp. 112-116; pp. 245-252.

8. Mr. Sullivan filed an Answer to the Petitioner's Second Complaint on April 22, 2003 (hereinafter "the Second Answer"). Record, pp. 117-120. At the same time, he also filed a Motion to Consolidate the two divorce actions under the earlier-filed civil number pursuant to Rule 42 of the Utah Rules of Civil Procedure and Rule 4-107 of the Utah Rules of Judicial Administration (now part of Rule 42), or in the alternative to dismiss the later-filed complaint. Record, pp. 232-233.

9. On or about April 29, 2003, Ms. Sullivan filed a motion to dismiss the First Complaint and her objection to Mr. Sullivan's motion to consolidate. Record, pp 234-237.

10. On or about May 2, 2003, Ms. Sullivan submitted to the jurisdiction of the Illinois court by filing her general appearance and answer in case number 03-F-5. Record, p. 194.

11. On May 15, 2003, the Utah trial court prematurely entered an order dismissing Ms. Sullivan's First Complaint (hereinafter "the Dismissal Order"). Record, p. 253. The trial court later concluded that the Dismissal Order was untimely. *See* Amended Order Denying Respondent's Motion to Set Aside Order Dismissing Petitioner's Complaint (hereinafter "the Amended Order of Denial"). Record, p. 146, paragraph 3.

12. On May 28, 2003, Mr. Sullivan filed a motion to set aside the Dismissal Order with a supporting memorandum. Record, pp. 259-267.

13. A hearing was held on August 7, 2003, before the Honorable Darwin C. Hansen on Mr. Sullivan's motion to set aside the Dismissal Order and motion to consolidate Ms. Sullivan's two divorce cases. Record, p. 273 and p. 188 (transcript). At the conclusion of the hearing, Judge Hansen declined to set aside the Dismissal Order because he found that Mr. Sullivan had not taken steps to proceed in Illinois within six months of Ms. Sullivan leaving Illinois. Judge Hansen found that the Utah court had jurisdiction of the custody issues relating to

the parties' minor children. Record, page 146, paragraphs 1, 2, and 3; p. 188, interior page 19.

14. The Utah court entered its Order Denying Respondent's Motion to Set Aside Order Dismissing Petitioner's Complaint on September 22, 2003. Record, p. 277. Mr. Sullivan's Notice of Appeal was filed on October 22, 2003. Record, p. 148. An Amended Order Denying Respondent's Motion to Set Aside Order Dismissing Petitioner's Complaint was entered on October 28, 2003. Record, p. 145.

15. On December 30, 2003, Mr. Sullivan filed an Emergency Petition for Temporary Child Custody in Hamilton County, Illinois. Record, p. 163. On December 31, 2003, The Illinois court, Honorable Barry L. Vaughan presiding, issued an Order for Temporary Child Custody finding that Illinois was the home state of the parties' minor children at the commencement of Ms. Sullivan's divorce action in September 2002, and that the Utah court had erred in not staying its proceeding and in not communicating with the Illinois court upon learning that Mr. Sullivan had a pending Illinois custody action. The Illinois court awarded Mr. Sullivan temporary custody pending further proceedings. Record, pp. 170 and 171. The Illinois court entered a preliminary injunction on January 5, 2004, but

changed its position after a telephone conference with Judge Hansen on January 8, 2004, and entered an order vacating the preliminary injunction. Record, pp. 172-174.

16. Certain Illinois court documents are not part of the Utah court file, but may be important for the Court to consider in this action and are therefore filed with the Addendum to this Brief. They include the Partial Transcript of Videotaped Telephone Conference of Judge Hansen's and Judge Vaughan's conversation on January 8, 2004, and the Rule 23 Order of the Appellate Court of Illinois, Fifth District, entered on May 21, 2004, affirming Judge Vaughan's order setting aside the preliminary injunction. The Illinois Appellate Court held that the Illinois action was effectively stayed pending this Court's decision on Mr. Sullivan's appeal.

SUMMARY OF ARGUMENT

The trial court erred in allowing Ms. Sullivan to proceed with her Second Complaint when her First Complaint did not establish home state jurisdiction under the UCCJEA. She was not entitled to commence her case again to cure the jurisdictional deficiency. The trial court should have consolidated the First Complaint and Second Complaint or dismissed the Second Complaint as a

duplication of the first. Mr. Sullivan actively contested jurisdiction in the Utah court and requested that jurisdictional issues be referred to the Illinois court. The Utah court made no determination about jurisdiction until after the Illinois proceeding was filed.

ARGUMENT

I. The Trial Court Erred in Dismissing Ms. Sullivan’s First Complaint and in Allowing Her to Proceed With Her Second Complaint.

A. Utah Does Not Have Jurisdiction Under the UCCJEA.

When Ms. Sullivan filed her First Complaint on September 26, 2002, she and the parties’ children had been in Utah for less than three months. Pursuant to U.C.A. § 78-45c-201(1)(a), “a court of this state has jurisdiction to make an initial child custody determination only if this state is the home state of the child on the date of the commencement of the proceeding. . . .” [Emphasis added]. “Home state” is defined in § 78-45c-102(7) as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.” Both Ms. Sullivan and the Utah trial court acknowledged that the Utah court did not have jurisdiction of the First Complaint under the UCCJEA. Illinois, where the parties and their children had lived for almost three years, where Mr. Sullivan continued

to reside, where the children had a significant connection, and where there was substantial evidence about the children's care, schooling and relationships, was the children's home state.

Rather than defer to the jurisdiction of Illinois, Ms. Sullivan attempted to bootstrap jurisdiction by filing a Second Complaint on January 28, 2003, purportedly beyond the six-month time period, and by then moving to dismiss the First Complaint. The Utah court committed error in dismissing the First Complaint and by allowing Ms. Sullivan to have a second bite at the apple. The Court should have consolidated the two actions under the earlier-filed pleading, or **dismissed** the Second Complaint as duplicative. Section 78-45c-201(1)(a) very clearly **allows** a Utah court to make an initial custody determination **only if** Utah is the home state **when the proceeding is commenced**.

B. The Trial Court Should Have Consolidated the Two Divorce Cases or Dismissed the Duplicative Second Complaint.

Mr. Sullivan filed a timely motion under Rule 42 of the Utah Rules of Judicial Administration and then Rule 4-107 of the Code of Judicial Administration to consolidate Ms. Sullivan's two divorce cases under the earlier-filed case number, or in the alternative to dismiss the Second Complaint. Ms. Sullivan objected to consolidation or dismissal of the Second Complaint, claiming

that she would be prejudiced by such action. However, Mr. Sullivan is the party prejudiced by the trial court's failure to consolidate the two cases. Clearly Ms. Sullivan was attempting to manipulate jurisdiction under the UCCJEA by trying to commence her action again, after failing to meet UCCJEA jurisdictional requirements with her First Complaint. She was not in a position to object to consolidation. In *Raggenbuck v. Suhrmann*, 325 P.2d 258 (Utah 1958), the court upheld a trial court's order to consolidate eleven food poisoning cases, finding that the order "did not violate any constitutional or statutory provision," and was not prejudicial to the defendants. *Id.* at 259-260. In the present situation, Ms. Sullivan prejudiced herself by filing her First Complaint when Utah was not the children's home state. The Second Complaint does not remedy Ms. Sullivan's failure to establish jurisdiction under the UCCJEA because the trial court must look to the date the proceeding was originally commenced by the First Complaint.

II. Mr. Sullivan Filed His Custody Action in a Timely Manner.

A. Mr. Sullivan's Delay in Filing in Illinois Does Not Give Utah Jurisdiction or Deprive Illinois of Jurisdiction.

Mr. Sullivan filed his custody action in Illinois on April 7, 2003. He had previously contested jurisdiction of Ms. Sullivan's First and Second Complaints and had asserted that Illinois was the children's home state. At the time the Utah

court held its August 7, 2003, hearing on Mr. Sullivan's motion to set aside the dismissal of Ms. Sullivan's First Complaint, the Utah court had been made aware of Mr. Sullivan's pending Illinois action. Even if the Utah court believed Mr. Sullivan filed beyond the 6-month period under U.C.A. § 78-45c-201(1)(a), it should have found under § 78-45c-201(1)(b) that Utah was not the home state and that Illinois was the more appropriate forum because the children had a significant connection with Illinois and substantial evidence was available in Illinois regarding the children's care, protection, training, and personal relationships.

In *In re Custody of Bozarth*, 538 N.E.2d 785 (Ill. App.2 Dist. 1989), the Illinois Appellate Court considered a situation where an Illinois resident failed to object to a Washington court's exercise of jurisdiction under the UCCJA. The Illinois appellate court overturned the lower court's deferral to the Washington court and held as follows:

"A contestant's failure to act does not vest an inappropriate court with jurisdiction, nor does the fact that one court has succeeded in issuing a custody order sooner than another court endow it with jurisdiction if it does not meet the requirements of the Act. In short, McKerr's failure to object to the paternity action in Washington and that court's haste in issuing an unsupported custody order sooner than another court endow it with jurisdiction if it does not meet the requirements of the Act." *Id.* at 792.

In the present case, even if Mr. Sullivan were considered slow to act in filing his

custody action in Illinois, the Illinois court has a superior claim to jurisdiction because Utah did not have jurisdiction when Ms. Sullivan filed her First Complaint and the children's established residence was in Illinois. If neither state could be considered the home state, the other factors under § 78-45c-201(1)(b) favored Illinois as the state with the closest ties to the children.

B. Ms. Sullivan's Temporary Absence from Illinois Should Have Been Included in Calculating the Six-Month Period of Residence in Illinois.

Ms. Sullivan told Mr. Sullivan repeatedly that she was only visiting Utah temporarily and that she was planning to return with the children to Illinois. Under the UCCJEA, § 78-45c-102(7), a period of temporary absence is part of the six-month period. Therefore, any periods of time during which the children were temporarily absent from Illinois, based on representations that Ms. Sullivan was planning to return with them to Illinois, are added to and extend the six-month period of time. In the case *In re Marriage of Richardson*, 625 N.E.2d 1122 (Ill. App. 3 Dist. 1993), the Third District Appellate Court of Illinois considered a situation where a mother who had lived in Illinois with her child for almost a year claimed that she met the 6-month requirement of the Illinois UCCJA. The Court found that the mother's stay with the child in Illinois had been temporary and that

California remained the home state of the child. The Illinois appeals court stated that “‘temporary absence’ does not connote a particular length of time. Under appropriate circumstances, the term can apply to a period of many months.” *Id.* at 1124, citing *Lidonnici v. Davis*, 16 F.2d 532, 534 (D.C.Cir. 1926). Likewise, because of her repeated representations to Mr. Sullivan that she was planning to return to Illinois, Ms. Sullivan’s stay in Utah should be considered temporary, at least up to the time she filed her First Complaint in Utah. For this reason, even her Second Complaint did not establish home state jurisdiction under the UCCJEA, since it was filed four months after the First Complaint.

III Ms. Sullivan Took the Children From Illinois Under False Pretenses.

Under § 78-45c-208(1), the court is required to decline jurisdiction if the party asserting jurisdiction has engaged in unjustifiable conduct. In this case, Ms. Sullivan took the children with her to Idaho on the pretext of attending a family reunion. She repeatedly represented to Mr. Sullivan that she would be returning with the children to Illinois. Ms. Sullivan’s conduct was a factor in Mr. Sullivan’s delay in filing his action in Illinois, since he thought she would be returning with the children to Illinois. The court considered evidence in the pleadings and proffers made by Ms. Sullivan, which is marshaled as follows: Ms.

Sullivan made Mr. Sullivan aware of her location in Utah and did not secrete the children (Record, p. 188, interior page 12, lines 9-11); Ms. Sullivan had allowed recent telephone contacts with the children (Record, p. 188, interior page 12, lines 3 through 8); Ms. Sullivan received cards from Mr. Sullivan's mother acknowledging receipt of cards from the children (Record, p. 188, interior page 11, lines 23-25 and page 12, lines 1-3); and Ms. Sullivan talked with Mr. Sullivan (Record p. 188, interior page 12, lines 11-12).

Despite this marshaled evidence, the trial court erred in finding that Ms. Sullivan did not act unjustifiably. She did not deny that she left Illinois with the children under false pretenses or that she repeatedly assured Mr. Sullivan that she planned to return to Illinois with the children. She should not be allowed to benefit from her misrepresentations, which were among the reasons Mr. Sullivan held off filing in Illinois. Ms. Sullivan's conduct was unjustifiable and the trial court should have declined jurisdiction for that reason.

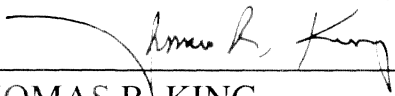
CONCLUSION

Ms. Sullivan should not be allowed to circumvent the clear language of the UCCJEA by filing the same complaint twice. She should be held to the commencement date created by filing her First Complaint on September 26, 2002.

Since Utah was not the home state at that time, the Utah court should have deferred to the jurisdiction of the Illinois court. Mr. Sullivan's April 7, 2003, filing in Illinois was timely under the UCCJEA. Ms. Sullivan made repeated representations that her absence from Illinois was temporary, which extended the six-month period for Illinois to be considered the home state to the time of Mr. Sullivan's filing. In addition, the Utah court should have declined jurisdiction because of Ms. Sullivan's unjustifiable conduct in removing the children from Illinois under false pretenses and keeping them in Utah. This court should reverse the trial court's dismissal of Ms. Sullivan's First Complaint, should consolidate the First and Second Complaints under the earlier number, should decline to exercise jurisdiction under the UCCJEA, and should defer to the jurisdiction of the Illinois court.

DATED this 15 day of June, 2004.

KING, BURKE & SCHAAP, P.C.



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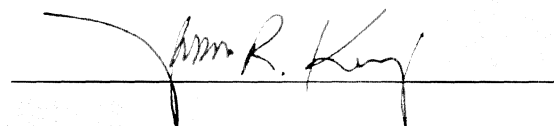
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APPEAL FROM THE SECOND DISTRICT COURT, DAVIS COUNTY
JUDGE DARWIN C. HANSEN

I, Thomas R. King, certify that on June 15, 2004 I served a copy of the attached Brief of Appellant by mailing it to Robert L. Neeley, Attorney at Law, 2485 Grant Ave., #200, Ogden, Utah 84401 by first class mail.



ADDENDUM

Rules 41(a)(2)(ii) and 42, Utah Rules of Civil Procedure	1
Rule 4-107, Utah Rules of Judicial Administration	6
Uniform Child Custody Jurisdiction Act U.C.A. § 78-45c-102, 110, 201(1)(a), and 208	7
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v. Smith, 36 Utah 462, 105 P. 914 (1909).

Refusal to grant continuance in personal injury case was an abuse of discretion where plaintiff was not able to attend the trial because of his physical condition, there was no evidence of malingering by the plaintiff, and the plaintiff's testimony was essential to his case. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

Defendant was not prejudiced by court's refusal to grant a continuance after defendant herself had stated that her illness probably would not impair her ability to function at the trial other than by causing her some discomfort and the trial court made provisions to accommodate defendant in case the illness forced her to leave suddenly. *Godfrey v. Godfrey*, 854 P.2d 585 (Utah Ct. App. 1993).

—Discretion of court.

Denial of motion for continuance was within discretion of trial court. *Sharp v. Canakis Gianoulakis*, 63 Utah 249, 225 P. 337 (1924).

Trial courts have substantial discretion in deciding whether to grant continuances. *Christenson v. Jewkes*, 761 P.2d 1375 (Utah 1988).

—Inability of counsel to attend trial.

The inability of counsel to be present at the time set for trial does not necessarily entitle his client to a continuance. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

—Unavoidable absence.

When counsel has made timely objections, given necessary notice, and has made a reasonable effort to have the trial date changed for good cause, it would be an abuse of discretion not to grant a continuance. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

—New theory of case.

Continuance could be obtained to develop a theory of the case suggested after issue joined and before trial. *Tiernan v. Trewick*, 2 Utah 393 (1877).

—Procedural delays.

Court properly denied motion for continuance in action based on credit card obligation which had been procedurally delayed for two and a half years by interrogatories and by various motions of the defendant; and although

trial date had been set for four months, motion for continuance was not filed until nine days before trial. *First Sec. Bank v. Johnson*, 540 P.2d 521 (Utah 1975).

—Supporting affidavits.

Subdivision (b) does not require affidavits to accompany a motion for continuance. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

—Unavailable witness.

—Lack of diligence.

Where subpoena for absent witness was not placed in hands of an officer for service until the morning the case was called for trial, though it had been set for several weeks, and the witness had testified at a former trial, continuance was denied. *Corporation of Members of Church of Jesus Christ of Latter-Day Saints v. Watson*, 30 Utah 126, 83 P. 731 (1906).

In malpractice action, motion for continuance based on plaintiff's inability to serve subpoena on vacationing medical witness was properly denied, where plaintiff had made no effort to depose witness and had never contacted witness for the purpose of testifying. *Maxfield v. Fishler*, 538 P.2d 1323 (Utah 1975).

After plaintiff had been granted one continuance because of unavailability of her preferred expert witness, and her second request for a continuance several months later was solely due to her own failure to retain and designate a new expert witness in a timely manner, there was no abuse in the district court's denial of plaintiff's second motion. *Hill v. Dickerson*, 839 P.2d 309 (Utah Ct. App. 1992).

—Need.

Where the defendant's counsel had three weeks to prepare for trial, and where two of the witnesses, purportedly important to his case, were actually present at trial and thus subject to cross-examination, the purely speculative need for a third witness did not entitle the defendant to the granting of a motion for continuance. *State v. Humpherys*, 707 P.2d 109 (Utah 1985).

Cited in *Thorley v. Thorley*, 579 P.2d 927 (Utah 1978); *Holbrook v. Master Protection Corp.*, 883 P.2d 295 (Utah Ct. App. 1994); *Rohan v. Boseman*, 2002 UT App 109, 46 P.3d 753, cert. denied, — UT —, 59 P.3d 603.

COLLATERAL REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d Continuance 1 et seq.; 75 Am. Jur. 2d Trial §§ 76, 80, 83, 1.

C.J.S. — 17 C.J.S. Continuances § 1 et seq.; 1 C.J.S. Trial §§ 18 to 35.

A.L.R. — Admissions to prevent continuance

sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*

(a)(1) *By plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and any applicable statute, an action may be dismissed by the plaintiff without

adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(a)(2) *By order of court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or

(a)(2)(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously-dismissed action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) *Bond or undertaking to be delivered to adverse party.* Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

(Amended effective November 1, 1997.)

—**Second dismissal.**

By its express terms, the two-dismissal rule provided in this rule applies only when the notice of dismissal is filed twice by the plaintiff in the action. *Pilcher v. State, Dep't of Social Servs.*, 663 P.2d 450 (Utah 1983).

—**Quashing of previous summons.**

Where a summons is quashed pursuant to Rule 4(b) and plaintiff is subsequently granted a motion to dismiss pursuant to Subdivision (a)(1) of this rule, the two-dismissal rule of Subdivision (a)(1) of this rule is not applicable. *Brimhall v. Seagull Inv. Co.*, 25 Utah 2d 201, 479 P.2d 468 (1970).

Cited in *Alvarado v. Tucker*, 2 Utah 2d 16, 268 P.2d 986 (1954); *Bunting Tractor Co. v.*

Emmett D. Ford Contractors, 2 Utah 2d 275, 272 P.2d 191 (1954); *K.L.C. Inc. v. McLean*, 656 P.2d 986 (Utah 1982); *Pitman v. Bonham*, 677 P.2d 1126 (Utah 1984); *State v. Poteet*, 692 P.2d 760 (Utah 1984); *Burton v. Youngblood*, 711 P.2d 245 (Utah 1985); *Meadow Fresh Farms v. Utah State Univ. Dept. of Agric. & Applied Science*, 813 P.2d 1216 (Utah Ct. App. 1991); *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1141 (Utah Ct. App. 1994); *C&Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47 (Utah Ct. App. 1995); *Career Serv. Review Bd. v. Utah Dep't of Cors.*, 942 P.2d 933 (Utah 1997); *Beaver County v. Qwest, Inc.*, 2001 UT 81, 31 P.3d 1147; *Albrecht v. Bennett*, 2002 UT App 64, 44 P.3d 838; *Patterson v. Am. Fork City*, 2003 UT 7, 469 Utah Adv. Rep. 25, 67 P.3d 466.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Civil Procedure, 2001 Utah L. Rev. 1026.

Am. Jur. 2d. — 20 Am. Jur. 2d Costs § 22; 24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit § 1 et seq.

C.J.S. — 27 C.J.S. Dismissal and Nonsuit §§ 6 to 86.

A.L.R. — Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before “trial,” “commencement of trial,” “trial of the facts,” or the like, 1 A.L.R.3d 711.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 A.L.R.3d 545.

Dismissal, nonsuit, judgment, or direction of verdict on opening statement of counsel in civil action, 5 A.L.R.3d 1405.

Dismissal of action because of party's perjury or suppression of evidence, 11 A.L.R.3d 1153.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

Right of one spouse, over objection, to voluntarily dismiss claim for divorce, annulment, or similar marital relief, 16 A.L.R.3d 283.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 6 A.L.R.3d 452.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 24 A.L.R.3d 768.

What amounts to “final submission” or “re-removal of jury” within statute permitting plaintiff to take voluntary dismissal or nonsuit without prejudice before submission or retire-

ment of jury, 31 A.L.R.3d 449.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as “prevailing party” or “successful party,” 66 A.L.R.3d 1087.

Propriety of termination of properly initiated derivative action by “independent committee” appointed by board of directors whose actions (or inaction) are under attack, 22 A.L.R.4th 1206.

Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution, 30 A.L.R.4th 572.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 A.L.R.4th 840.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper, 34 A.L.R.4th 778.

Propriety of dismissal under Federal Civil Procedure Rule 41(a) of action against less than all of several defendants, 3 A.L.R. Fed. 569.

Judicial qualification of provision of Rule 41(b) of Federal Rules of Civil Procedure that dismissal for failure to prosecute or to comply with federal rules or court order, certain other dismissals, operates as adjudication upon merits, 5 A.L.R. Fed. 897.

Propriety of dismissal for failure of prosecution under Rule 41(b) of Federal Rules of Civil Procedure, 20 A.L.R. Fed. 488.

Rule 42. Consolidation; separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to

(a)(1) A motion to consolidate cases shall be heard by the judge assigned to the first case filed. Notice of a motion to consolidate cases shall be given to all parties in each case. The order denying or granting the motion shall be filed in each case.

(a)(2) If a motion to consolidate is granted, the case number of the first case filed shall be used for all subsequent papers and the case shall be heard by the judge assigned to the first case. The presiding judge may assign the case to another judge for good cause.

(b) *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.
(Amended effective November 1, 2003.)

Amendment Notes. — The 2003 amendment added Subdivisions (a)(1) and (2).

Compiler's Notes. — This rule is similar to Rule 42, F.R.C.P.

Cross-References. — Separate trials authorized, U.R.C.P. 20(b).

NOTES TO DECISIONS

Condemnation proceedings.

— Separate parcels of land.

Consolidation.

— Adoption proceedings.

— Issue of liability.

— Multiple insurers.

— Unlawful detainer and action to try title.

Divorce.

— Bifurcation.

Separate trials.

— Appeals.

— Court's discretion.

— Separate issues.

Cited.

Condemnation proceedings.

— Separate parcels of land.

Where condemnation proceedings involved three separate parcels of land belonging to three separate interests, it was within discretion of trial court to combine cases for trial or to grant separate trials. Porcupine Reservoir Co. v. Lloyd W. Keller Corp., 15 Utah 2d 318, 392 P.2d 620 (1964).

Consolidation.

— Adoption proceedings.

The trial court properly consolidated two adoption petitions regarding the same children into one adoption proceeding. L.S.C. v. State, 1999 UT App 315, 991 P.2d 70.

— Issue of liability.

It was within discretion of trial court to order a consolidation, for trial of issue of liability, of eleven actions involving nineteen plaintiffs where the order did not violate any constitutional or statutory provision nor was likely to be prejudicial to defendants. Raggenbuck v. Suhrmann, 7 Utah 2d 327, 325 P.2d 258 (1958).

— Multiple insurers.

Actions by plaintiff against five different insurance companies to recover loss and damage

idated since the several policies were separate contracts, and actions were not between same parties; but consolidation was not prejudicial error where no substantial right of any defendant was affected. New York Jobbing House v. Sterling Fire Ins. Co., 54 Utah 394, 182 P. 361 (1919).

— Unlawful detainer and action to try title.

Plaintiff's motion in unlawful detainer proceeding that such proceeding and equitable action to try title brought by defendant be joined was properly overruled, since defendant had right to have issues in unlawful detainer proceeding tried by jury, which might not have been the case if actions were tried together. Williams v. Nelson, 65 Utah 304, 237 P. 217 (1925).

Divorce.

— Bifurcation.

Bifurcation did not prejudice a husband where, although the initial decree gave wife sole access to funds in eight bank accounts that she controlled, at the time of distribution the court could still equitably divide all assets owned by the parties at the time the initial decree was entered. Parker v. Parker, 996 P.2d 565 (Utah Ct. App. 2000).

Separate trials.

— Appeals.

The final judgment rule, R.Civ.P. 54(b), applies when the trial court orders a separate trial of the claim, cross-claim, counterclaim, or third-party claim, and failure to have the case certified as final by the trial court, leaving issues and parties before that court, will deprive the appellate court of jurisdiction over an appeal. First Sec. Bank v. Conlin, 217 P.2d 800 (Utah 1951).

— Court's discretion.

the trial court and, absent abuse of such discretion, will not be upset on appeal *King v Barron*, 770 P2d 975 (Utah 1988)

— **Separate issues.**

When a court considers it convenient or desirable in the interest of justice, any separate issue may be tried separately *Page v Utah*

Home Fire Ins Co, 15 Utah 2d 257, 391 P2d 290 (1964)

Cited in *Lignell v Berg*, 593 P2d 800 (Utah 1979), *Olympus Hills Shopping Ctr, Ltd v Smith's Food & Drug Ctrs, Inc*, 889 P2d 445 (Utah Ct App 1994), *Stevensen v Goodson*, 924 P2d 339 (Utah 1996)

COLLATERAL REFERENCES

Brigham Young Law Review. — Multiple Jury Formats and Civil Litigation *Arnold v Eastern Airlines*, 1991 BYU L Rev 1005

Am. Jur. 2d. — 1 Am Jur 2d Actions § 110 et seq, 75 Am Jur 2d Trial § 115 et seq

C.J.S. — 1 C J S Actions §§ 109, 117 to 122, 88 C J S Trial §§ 6 to 10

A.L.R. — Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A L R 3d 456

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving personal injury, death, or property damage, 78 A L R Fed 890

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in civil rights actions, 79 A L R Fed 220

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving patents and copyrights, 79 A L R Fed 532

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in contract actions, 79 A L R Fed 812

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in civil rights actions, 81 A L R Fed 732

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving patents, copyrights, or trademarks, 82 A L R Fed 719

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving securities, 83 A L R Fed 367

Rule 43. Evidence.

(a) *Form.* In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.

(b) *Evidence on motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions
(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 43(a) and (e), F R C P

Cross-References. — *Evidence generally*, § 78-25-2 et seq

Relevancy and its limits, U R E 401 to 411
Witnesses, U R E 601 to 615

NOTES TO DECISIONS

Form

— Open court

— Judge's request for investigation

Motions

— Evidentiary hearing

Witnesses

Cited

Form.

— Open court.

— Judge's request for investigation.

Failure of judge in divorce action to notify

ment of Subdivision (a), that all testimony be in open court, to such a degree as to warrant a retrial *Austad v Austad*, 2 Utah 2d 49, 269 P2d 284 (1954)

Motions.

— **Evidentiary hearing.**

Although a court can grant or deny a motion on the sole or combined bases of affidavits, depositions or oral testimony, when no depositions have been taken and disputed material facts are alleged in opposing affidavits, there should be an evidentiary hearing to aid in the

Statement of the Rule:

(1) In civil law and motion matters, except orders to show cause and bench warrants, matters may be continued upon stipulation of the parties and notice to the clerk of the judge to whom the case is assigned, except that when a matter has been placed upon the official law and motion calendar, the matter may be continued only upon approval of the court.

(2) In sexual abuse cases involving minor victims, continuances may be granted upon a written finding by the court, or written minute entry which shall include the reason(s) for the continuance.

(3) A motion to continue made on or within 10 days prior to the date of a hearing may be granted by the court upon a showing of good cause and upon such conditions as the court determines to be just, including but not limited to the payment of costs and attorney fees.

(4) If the hearing is an "important criminal justice hearing" or an "important juvenile justice hearing" as defined by § 77-38-2 of which the victim has requested notification, the court should consider the impact of the continuance upon the victim.

(Amended effective November 15, 1995.)

Rule 4-106. Electronic conferencing.**Intent:**

To authorize the use of electronic conferencing in lieu of personal appearances in appropriate cases.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

(1) In the judge's discretion, any hearing may be conducted using telephone or video conferencing.

(2) Any proceeding in which a person appears by telephone or video conferencing shall proceed as required in any other hearing including keeping a verbatim record.

(Amended effective November 1, 1997.)

Rule 4-107. Consolidation of cases.**Intent:**

To provide a procedure for hearing motions to consolidate cases and for the consolidation of cases.

Applicability:

This rule shall apply to civil and criminal proceedings in all courts of record.

Statement of the Rule:

(1) Motions to consolidate cases shall be heard by the judge assigned to either the lowest numbered or the first filed case.

(2) Notice of a motion to consolidate shall be given to all parties in each action involved, and a copy shall be filed in each case involved. The order denying or granting the motion shall also be filed in each file involved.

(3) In the event a motion to consolidate is granted, the order shall specify the case number under which all future papers shall be filed, which shall be the lowest of the case numbers involved. Thereafter, that number shall be used exclusively for all papers filed, and such papers shall be filed only in the designated case file.

(4) If a motion to consolidate is granted, the case shall be heard by the judge who was assigned to the lowest numbered of the cases involved, except that for good cause shown the presiding judge may assign the case to another judge.

(Amended effective November 1, 1997.)

ping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 A.L.R.5th 1.

Significant connection jurisdiction of court to modify foreign child custody decree under §§ 3(a)(2) and 14(b) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §§ 1738A(c)(2)(b) and 1738A(f)(1), 67 A.L.R.5th 1.

Home state jurisdiction of court to modify foreign child custody decree under §§ 3(a)(1) and 14(a)(2) of Uniform Child Custody Juris-

diction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §§ 1738A(c)(2)(A) and 1738A(f)(1), 72 A.L.R.5th 249.

Declining jurisdiction to modify prior child custody decree under § 14(a)(1) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A(f)(2), 73 A.L.R.5th 185.

Appealability of interlocutory or pendente lite order for temporary child custody, 82 A.L.R.5th 389.

78-45c-102. Definitions.

As used in this chapter:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual under 18 years of age and not married.

(3) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or parent-time with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(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. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3, Enforcement.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this chapter.

(10) "Issuing state" means the state in which a child custody determination is made.

(11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" includes government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(a) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(b) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe, or band, or Alaskan Native village which is recognized by federal law or formally acknowledged by a state.

(17) "Writ of assistance" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

History: C. 1953, 78-45c-102, enacted by L. 2000, ch. 247, § 2; 2001, ch. 255, § 36.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, substituted "parent-time" for "visitation" in Subsections (3) and (4).

Effective Dates. — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

NOTES TO DECISIONS

Custody proceeding.

Voluntary termination of adoptive father's parental rights in, and obligations to, child was

not custody issue under this chapter. T.B. v. M.M.J., 908 P.2d 345 (Utah Ct. App. 1995).

COLLATERAL REFERENCES

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

78-45c-103. Proceedings governed by other law.

This chapter does not govern:

- (1) an adoption proceeding; or
- (2) a proceeding pertaining to the authorization of emergency medical care for a child.

History: C. 1953, 78-45c-103, enacted by L. 2000, ch. 247, § 3.

Effective Dates. — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

78-45c-104. Application to Indian tribes.

(1) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. 1901 et seq., is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act.

(2) A court of this state shall treat a tribe as a state of the United States for purposes of Part 1, General Provisions, and Part 2, Jurisdiction.

(3) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this

electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

History: C. 1953, 78-45c-110, enacted by L. 2000, ch. 247, § 10. **Effective Dates.** — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

78-45c-111. Taking testimony in another state.

(1) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(2) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

History: C. 1953, 78-45c-111, enacted by L. 2000, ch. 247, § 11. **Effective Dates.** — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

78-45c-112. Cooperation between courts — Preservation of records.

(1) A court of this state may request the appropriate court of another state to:

- (a) hold an evidentiary hearing;
- (b) order a person to produce or give evidence under procedures of that state;
- (c) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
- (d) forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and
- (e) order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(2) Upon request of a court of another state, a court of this state may:

- (a) hold a hearing or enter an order described in Subsection (1); or
- (b) order a person in this state to appear alone or with the child in a custody proceeding in another state.

(3) A court of this state may condition compliance with a request under Subsection (2)(b) upon assurance by the other state that travel and other necessary expenses will be advanced or reimbursed. If the person who has physical custody of the child cannot be served or fails to obey the order, or it

shall be given in a manner reasonably calculated to give actual notice, but may be by publication if other means are not effective.

(2) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

History: C. 1953, 78-45c-108, enacted by § 42 makes the act effective on July 1, 2000.
L. 2000, ch. 247, § 8. **Cross-References.** — Service of process,
Effective Dates. — Laws 2000, ch. 247, Rule 4, U.R.C.P.

78-45c-109. Appearance and limited immunity.

(1) A party to a child custody proceeding who is not subject to personal jurisdiction in this state and is a responding party under Part 2, Jurisdiction, a party in a proceeding to modify a child custody determination under Part 2, Jurisdiction, or a petitioner in a proceeding to enforce or register a child custody determination under Part 3, Enforcement, may appear and participate in the proceeding without submitting to personal jurisdiction over the party for another proceeding or purpose.

(2) A party is not subject to personal jurisdiction in this state solely by being physically present for the purpose of participating in a proceeding under this chapter. If a party is subject to personal jurisdiction in this state on a basis other than physical presence, the party may be served with process in this state. If a party present in this state is subject to the jurisdiction of another state, service of process allowable under the laws of that state may be accomplished in this state.

(3) The immunity granted by this section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this chapter committed by an individual while present in this state.

History: C. 1953, 78-45c-109, enacted by **Effective Dates.** — Laws 2000, ch. 247,
L. 2000, ch. 247, § 9. § 42 makes the act effective on July 1, 2000.

78-45c-110. Communication between courts.

(1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, the parties shall be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(3) A communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of that communication.

(4) Except as provided in Subsection (3), a record shall be made of the communication. The parties shall be informed promptly of the communication and granted access to the record.

(5) For the purposes of this section, “record” means information that is inscribed on a tangible medium or that which is stored in an electronic or other medium and is retrievable in perceivable form. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an

appears the order will be ineffective, the court may issue a warrant of arrest against the person to secure his appearance with the child in the other state.

(4) Travel and other necessary and reasonable expenses incurred under Subsections (1) and (2) may be assessed against the parties according to the law of this state.

(5) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of these records.

History: C. 1953, 78-45c-112, enacted by L. 2000, ch. 247, § 12. **Effective Dates.** — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

PART 2

JURISDICTION

78-45c-201. Initial child custody jurisdiction.

(1) Except as otherwise provided in Section 78-45c-204, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) this state 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 of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) a court of another state does not have jurisdiction under Subsection (1)(a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 78-45c-207 or 78-45c-208; and

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent have a significant connection with this state other than mere physical presence; and

(ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) all courts having jurisdiction under Subsection (1)(a) or (b) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 78-45c-207 or 78-45c-208; or

(d) no state would have jurisdiction under Subsection (1)(a), (b), or (c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child custody determination.

History: C. 1953, 78-45c-201, enacted by L. 2000, ch. 247, § 13. **Effective Dates.** — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

NOTES TO DECISIONS

ANALYSIS

Appropriate forum.
Concurrent jurisdiction.
Preferred forum.

Appropriate forum.

Utah district court appropriately retained jurisdiction under the Utah Uniform Child Custody Jurisdiction Act to make any determinations regarding custody, visitation or other matters relevant to the children, where the parents were divorced in Utah and, although the mother had taken the children to Washington, that state specifically declined to exercise jurisdiction because of Utah's past and present involvement with the matter. *Rawlings v. Weiner*, 752 P.2d 1327 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988).

This chapter does not give a preference to the "home state." The significant connection or substantial connection basis comes into play either when the home state test cannot be met or as an alternative to that test. In *re W.D. v. Drake*, 770 P.2d 1011 (Utah Ct. App.), cert. denied, 789 P.2d 33 (Utah 1989).

Even though a certain state may be the "home state," if the child and his family have equal or stronger ties with another state that other state also has jurisdiction. In *re W.D. v. Drake*, 770 P.2d 1011 (Utah Ct. App.), cert. denied, 789 P.2d 33 (Utah 1989).

Judge did not abuse his discretion in deciding that California was the more appropriate and convenient forum to litigate custody and in granting the state's motion to dismiss the nat-

ural parents' petition, where substantial information concerning the parents' abilities and past history was in California, the mother had only recently come to Utah but had lived for years in California, and the parents' purpose in coming to Utah was to shop for jurisdiction. In *re W.D. v. Drake*, 770 P.2d 1011 (Utah Ct. App.), cert. denied, 789 P.2d 33 (Utah 1989).

The state that made the original custody determination has exclusive continuing jurisdiction over the custody issue until that state loses or declines to exercise its jurisdiction. *Crump v. Crump*, 821 P.2d 1172 (Utah Ct. App. 1991), cert. granted, 843 P.2d 516 (Utah 1992).

Concurrent jurisdiction.

Utah had concurrent jurisdiction to modify a child custody order from another state when it was in the best interest of the child for Utah to assume jurisdiction because the child and at least one parent had a significant connection with Utah and there was substantive evidence in Utah pertaining to the child's care, protection, training, and personal relationships. *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992).

Preferred forum.

In child custody matters, continuing jurisdiction of court in which divorce decree originated is intended to remain exclusive, even if other states have come to satisfy one or more of the criteria of this section, unless the decree state decides not to exercise it. *Liska v. Liska*, 902 P.2d 644 (Utah Ct. App. 1995).

COLLATERAL REFERENCES

A.L.R. — Significant connection jurisdiction of court under § 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(B), 5 A.L.R.5th 550.

Abandonment and emergency jurisdiction of court under § 3(a)(3) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738(c)(2)(C), 5 A.L.R.5th 788.

Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 A.L.R.5th 1.

Default jurisdiction of court under § (a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(D), 6 A.L.R.5th 69.

78-45c-202. Exclusive, continuing jurisdiction.

(1) Except as otherwise provided in Section 78-45c-204, a court of this state that has made a child custody determination consistent with Section 78-45c-201 or 78-45c-203 has exclusive, continuing jurisdiction over the determination until:

(a) a court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant

- (c) the distance between the court in this state and the court in the state that would assume jurisdiction;
- (d) the relative financial circumstances of the parties;
- (e) any agreement of the parties as to which state should assume jurisdiction;
- (f) the nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;
- (g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (h) the familiarity of the court of each state with the facts and issues of the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

History: C. 1953, 78-45c-207, enacted by L. 2000, ch. 247, § 19.

Effective Dates. — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

78-45c-208. Jurisdiction declined by reason of conduct.

(1) Except as otherwise provided in Section 78-45c-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 78-45c-201 through 78-45c-203 determines that this state is a more appropriate forum under Section 78-45c-207; or
- (c) no other state would have jurisdiction under Sections 78-45c-201 through 78-45c-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 78-45c-201 through 78-45c-203.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to Subsection (1), it shall charge the party invoking the jurisdiction of the court with necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the award would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state except as otherwise provided by law other than this chapter.

LEXSTAT 28 U.S.C. 1738A

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*** CURRENT THROUGH P.L. 302, APPROVED 11/26/02 ***
*** WITH A GAP OF P.L. 107-296 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART V. PROCEDURE

CHAPTER 115. EVIDENCE; DOCUMENTARY

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 1738A (2002)

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

HISTORY: (Added Dec. 28, 1980, P.L. 96-611, § 8(a), 94 Stat. 3569.)

(As amended Nov. 12, 1998, P.L. 105-374, § 1, 112 Stat. 3383; Oct. 28, 2000, P.L. 106-386, Div B, Title III, § 1303(d), 114 Stat. 1512.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

WENDY SULLIVAN,)	Case No. 034700173
)	
Plaintiff,)	
)	<u>PARTIAL TRANSCRIPT OF</u>
vs.)	
)	<u>VIDEOTAPED TELEPHONE CONFERENCE</u>
MARK ALLEN SULLIVAN,)	
)	
Defendant.)	Judge Darwin C. Hansen

January 8, 2004

Location:
Second District Court
800 West State Street
Farmington, Utah 84025

Parties present: Hon. Darwin C. Hansen
Hon. Barry Vaughn (by telephone)
Glenda Pittman

Reporter: Lisa Collman, CSR, RPR, and
Notary Public in and for the State of Utah



GARCIA & LOVE
COURT REPORTING AND VIDEOGRAPHY

P R O C E E D I N G S

1
2 JUDGE HANSEN: Case of Wendy Sullivan against Mark
3 Allen Sullivan, an action has been filed both in Judge Vaughn's
4 court and in my court, and that's the purpose of our phone call.
5 And Judge Vaughn, as I understand it, you have entered an order of
6 temporary custody which was filed December 31st of 2003.

7 JUDGE VAUGHN: Right.

8 JUDGE HANSEN: And this court --

9 JUDGE VAUGHN: There are actually two orders here.
10 The petitioner here, who would be the respondent in your court,
11 Mark Sullivan, appeared here for an ex parte emergency hearing on
12 December the 30th, and that order was entered. And because it was
13 an ex parte order, we set a new hearing, which is required under
14 Illinois law to be set within 10 days of an ex parte hearing.

15 JUDGE HANSEN: Right.

16 JUDGE VAUGHN: With notice to the other party. We
17 held a hearing then on January the 5th. After giving notice to
18 Wendy Sullivan, she signed for a notice as petitioner here, sent
19 her a notice by Federal Express that indicates that she signed for
20 it on January the 2nd at 9:34 a.m. She received her notice of the
21 second hearing here, and I issued a second order granting
22 temporary custody to Mark Sullivan here on January the 5th. That
23 order was filed today.

24 JUDGE HANSEN: Okay. So -- and what's happened in our
25 court is that -- in fact, let me -- let me indicate to you the

1 history, and maybe you'll understand --

2 JUDGE VAUGHN: I have it. I think the petitioner here,
3 attached copies of transcripts from an August...

4 JUDGE HANSEN: Hearing.

5 JUDGE VAUGHN: Hearing, and November the 13th hearing.

6 JUDGE HANSEN: And the November 13th hearing was
7 before the commissioner, and the August hearing I think was before
8 me.

9 JUDGE VAUGHN: Correct.

10 JUDGE HANSEN: Now, as I understand it, complaint --
11 as I understand it, Miss Sullivan left Illinois on June the 20th
12 of the year 2002. She came to Utah.

13 JUDGE VAUGHN: Yes.

14 JUDGE HANSEN: When she came to Utah, she then filed a
15 complaint in Utah on July the 26th of this year. That was within
16 the six months, and clearly the home state at that point would
17 have been Illinois. I think there's no question.

18 JUDGE VAUGHN: (Inaudible.)

19 JUDGE HANSEN: That complaint sat, and nothing
20 happened to it. Then on July 28th, '03, this would have been
21 approximately seven months later, she, with a different lawyer,
22 filed a second complaint. That's outside the six months. And in
23 that particular matter an answer was filed by Mr. King here in
24 Utah on behalf of Mr. Sullivan, and he raised the jurisdiction
25 issue. And he also raised the jurisdiction issue in the first

1 complaint to which he filed an answer.

2 JUDGE VAUGHN: (Unintelligible.)

3 JUDGE HANSEN: After that happened, then it's my
4 understanding, and maybe you can help me, on April the 7th of '03,
5 Mr. Sullivan for the first time filed an action in Illinois.

6 JUDGE VAUGHN: Correct.

7 JUDGE HANSEN: Which would have been approximately 10
8 months.

9 JUDGE VAUGHN: Yes.

10 JUDGE HANSEN: After she came to Utah.

11 JUDGE VAUGHN: Yes.

12 JUDGE HANSEN: Then new counsel, who filed the second
13 complaint, made a motion.

14 JUDGE VAUGHN: She filed an answer here and the
15 general appearance here.

16 JUDGE HANSEN: Okay.

17 JUDGE VAUGHN: (Unintelligible.) -- 16th. Wendy
18 Sullivan did.

19 JUDGE HANSEN: Okay. So Wendy has filed an answer
20 there and he's filed an answer out here.

21 JUDGE VAUGHN: Yes. His answer there contested
22 jurisdiction, her answer here was a general appearance and did
23 not --

24 JUDGE HANSEN: Uh-huh.

25 JUDGE VAUGHN: -- did not contest jurisdiction per se,

1 but she did make reference that she had a case pending out there
2 as well.

3 JUDGE HANSEN: Okay.

4 JUDGE VAUGHN: She filed her answer here May the 7th
5 without counsel. She filed it pro se.

6 JUDGE HANSEN: Okay. I was not aware of that. The
7 matter came before me in August on a motion to consolidate the two
8 Utah cases; that's what the dad wanted, Mr. Sullivan. The wife
9 wanted to dismiss the July case because jurisdiction was
10 inappropriate. And that was granted, leaving the complaint filed
11 July 28th, '03 here, which would be outside the six months and, as
12 I understand the statute, then Utah would be the home state. That
13 order was issued by the Court. I -- the hearing was August,
14 you're correct. And then this matter proceeded before our
15 domestic relations commissioner, and a temporary order then I
16 think was entered on November the 13th of this year.

17 That's where we are, and I was just -- what I was
18 wondering is if you were aware of the fact that the first finding
19 in Illinois was April the 7th, '03, which is some 10 months after
20 she left Illinois?

21 JUDGE VAUGHN: I wasn't. And wish I had the
22 transcripts of our hearing. We kept a record of both hearings
23 here.

24 JUDGE HANSEN: Yeah.

25 JUDGE VAUGHN: I expressed concern about that, that he

1 didn't do anything for 10 months. We had evidence presented here,
2 I'm not sure if you had evidence presented there or just had
3 arguments of counsel, but he took the stand here and testified
4 that his wife kept telling him that she would be home, then she
5 didn't come home. Then he went out there and was not allowed to
6 see her. And her family told him he'd be arrested if he didn't
7 leave. Then he testified that she told him she'd be home by
8 Christmas; she didn't come home at Christmas. He then sought
9 counsel, who recommended he file an action here. And although
10 that troubled me that he waited 10 months, allowed the other state
11 to gain home state status, under the UCCJA. He also argued, and
12 what I hung my order on was that while the issue was still pending
13 and still had jurisdiction, he filed here, he filed here and she
14 filed a general appearance; jurisdiction had never been decided
15 out there.

16 JUDGE HANSEN: Yeah.

17 JUDGE VAUGHN: His attorney argued that since Illinois
18 was the home state till some other state took over jurisdiction or
19 Illinois declined jurisdiction, that Illinois was still the home
20 state. I took the position that she had filed a general
21 appearance here and an answer here in May, before your August
22 hearing; she agreed by that that Illinois was the home state and
23 Illinois had jurisdiction until we declined.

24 JUDGE HANSEN: Uh-huh. Well, I can see -- I can see
25 the problem, and I was not aware of the answer that she filed pro

1 se. When I -- when I heard the case in August, I offered for the
2 attorney for Mr. Sullivan to put Mrs. Sullivan on the stand for
3 purpose of some testimony. He indicated he didn't feel that was
4 necessary because Mr. Sullivan was not here to listen. So I
5 received from her lawyer a proffer, which in effect said that when
6 she went to Utah, he knew where she was going, and that in fact he
7 knew how to get in touch with her, and that she was not trying to
8 keep the children from him in any regard. But you know, that's a
9 factual issue, and I don't think we can resolve it at this point,
10 but I wondered if we could talk about the jurisdiction issue and
11 maybe come to some arrangement. And if we can, then I guess the
12 attorneys will just have to work it out, frankly. I don't know
13 what the options are, but they'll have to figure it out.

14 I took the position, because the second complaint was
15 filed in January of '03, which was seven to eight months after she
16 came to Utah, and he filed an answer in Utah to all aspects of the
17 complaint, although he based in his affirmative defense the
18 jurisdiction issue, and dad didn't file anything in Illinois until
19 April the 7th, '03, that Utah then would be the home state, and
20 therefore jurisdiction was proffered to proceed with the case.
21 And indeed it has proceeded here with a temporary order to include
22 a temporary custody. I suspect under any circumstance Utah will
23 have jurisdiction over all aspects of the divorce, perhaps with
24 the exception of custody.

25 JUDGE VAUGHN: In your state you only have to live

1 there three months to get jurisdiction for divorce; is that right?

2 JUDGE HANSEN: That's right, but --

3 JUDGE VAUGHN: Here you have to live here 90 days,
4 which is true, but you also have to have been separated six months
5 before you can get a no fault divorce here.

6 JUDGE HANSEN: Yeah.

7 JUDGE VAUGHN: Ninety days jurisdictional --

8 JUDGE HANSEN: Well, it's jurisdictional here too in
9 terms of the 90 days, but we don't have the requirement that they
10 have to be separated for six months. But what I was going by was
11 not that, but it was the six months under the Uniform Act to
12 determine whether or not it was the home state or whether she had
13 been gone for six months and in another state for six months or
14 more, and therefore that state would become the home state. I
15 could see --

16 JUDGE VAUGHN: -- argue two things. I'm trying to
17 look at the statute here. The first was that he had -- he had
18 challenged jurisdiction there, and that had never been ruled on,
19 so he was not aware he had to file something here until -- I don't
20 know if that's right or not, but he was not aware he had to file
21 something here until Utah dismissed her case for lack of
22 jurisdiction on the custody issue; and second, that she had misled
23 him, although he knew where she was. She first told him she was
24 going to a family reunion, she didn't return, and told him because
25 his family was there, another family had come in, and then she

1 told him she was going to come home for Christmas.

2 JUDGE HANSEN: Yeah.

3 JUDGE VAUGHN: And based on her misleading him, she
4 should not be awarded. There's a -- I can't find a --

5 JUDGE HANSEN: Yeah, I don't know if the word
6 "surreptitious" is used or not, but at least that's what was
7 talked about in that case. And I think if indeed there's a
8 surreptitious leaving from one state to go to the other state,
9 whatever the definition of that word is in terms of the factual
10 predicate to support that finding of fact and conclusion. Like I
11 say, out here I had a proffer from her, and his lawyer did not
12 want to do any cross-examination of her on that issue. And so my
13 only alternative was to accept that proffer. And because of the
14 fact that he hadn't filed until 10 months after she left the
15 state, then I ruled that Utah had jurisdiction under the Act
16 because it was more than six months.

17 Now, it may be that he could say well, you know, I
18 didn't know I should have filed. But on the other hand, if under
19 the circumstances he had counsel back there -- and I don't know if
20 he had counsel or not -- the six months becomes particularly
21 critical, and you would assume that he would have seen fit to
22 issue -- to file, because if he didn't, and Utah is deemed to have
23 jurisdiction, that's to his disadvantage, apparently.

24 JUDGE VAUGHN: Right.

25 JUDGE HANSEN: If he does file within the six months,

1 it's clear that Utah does not have jurisdiction, because for that
2 six-month period of time Illinois would be the home state. So
3 anyway, we -- we -- I -- it looks like we have a tiger by the
4 tail.

5 JUDGE VAUGHN: Yes.

6 JUDGE HANSEN: And I wanted to call and --

7 JUDGE VAUGHN: A special setting right before
8 Christmas to hear this.

9 JUDGE HANSEN: I know, yeah. And --

10 JUDGE VAUGHN: Let me ask you two other questions.

11 JUDGE HANSEN: Sure.

12 JUDGE VAUGHN: In our statute, under our statute,
13 which is 750, Illinois Compiled Statutes Act 35, Section 4, talks
14 about jurisdiction.

15 JUDGE HANSEN: Right.

16 JUDGE VAUGHN: Section 4, section 4(d) talks about a
17 court, having once attained jurisdiction, retains it until it
18 concedes it to another state. He was arguing that Illinois had
19 jurisdiction at the time she filed her first one. He had
20 pleadings on file attacking that. The plaintiff, she filed a
21 second one after the six months, but before any rulings had been
22 made about who had jurisdiction. He's arguing that Illinois still
23 had jurisdiction because we hadn't conceded it to some other
24 state.

25 JUDGE HANSEN: Yeah.

1 JUDGE VAUGHN: And while we still had jurisdiction
2 before your ruling in August, she filed her general appearance
3 here, which confirms jurisdiction here.

4 JUDGE HANSEN: Yeah.

5 JUDGE VAUGHN: But as the first question. Second, our
6 statute says that no matter which state has jurisdiction, another
7 state can decline jurisdiction if a different state is the more
8 appropriate to hear it. And I was wondering, with him having
9 lived here and having attended school here initially, if the
10 witnesses who -- in Illinois a major factor in who gets custody is
11 who was the primary caretaker, who took them to school, attended
12 meetings, took them to the doctor, that kind of stuff. Would
13 Illinois be the more appropriate forum to hear that evidence about
14 who was the primary caretaker when they were still together.

15 JUDGE HANSEN: In answer to your first question -- I'm
16 not sure I know the answer, but let me just make an observation.
17 I think within the first six months there's no question Illinois
18 has jurisdiction, if it's invoked. But if there's no filing in
19 the home state during the period of the six months under the
20 statute, and it isn't invoked, and then you're living somewhere
21 else for six months-plus in another state, but the father does not
22 invoke the jurisdiction of Illinois, then I'm not sure that one
23 could conclude that Illinois had jurisdiction and that Utah
24 attempted to usurp it. One may have jurisdiction, but unless the
25 party invokes it, and that's why that the filing of April 7, '03

1 by him seems to be the critical day. But I understand exactly
2 where I thought Illinois was coming from. My thought when I made
3 the order was, as I've indicated, that I think he had an
4 obligation to invoke the jurisdiction. And by not invoking it, it
5 seems to me that you can't file then in April and say Illinois
6 then had jurisdiction, because it wasn't invoked initially by the
7 party.

8 With regard to the other key question you raised, the
9 other issue, and I think it's a good issue, and I think for you
10 and me it's probably the most important, aside from the
11 jurisdiction issue, we got a dad, and I guess his family, that
12 lives in your area, we got a mother and her family that lives in
13 Utah. We've got a situation where there are two children. And I
14 can't -- and you know, frankly, I don't remember if they've been
15 in school or not. Do you recall that?

16 JUDGE VAUGHN: They were attending school here in
17 Thompsonville, which was outside the county.

18 JUDGE HANSEN: Were they in school in Utah, so that
19 now when they went back for the Christmas vacation they had to
20 change schools?

21 JUDGE VAUGHN: Yes, they had to re-enroll in
22 Thompsonville School here again.

23 JUDGE HANSEN: Well, and I think they lived there -- I
24 don't know how long they lived in your county, in Hamilton County,
25 but I think it was for a couple of years, maybe more, and she's

1 been out here for about -- about 18 months, and we got the kids i
2 school out here. So, you know, it's hard to say which is the mos
3 appropriate forum non conveniens. One might be guided by the
4 Child Custody Jurisdiction Act when they say that jurisdiction fo
5 the home state purposes is for a period of six months. If indeed
6 it's outside the six months, then they say no, then you look at --
7 you look at the circumstances that existed. If six months is the
8 guideline, then back in Illinois we're talking about two-plus
9 years ago, whereas in Utah you're talking about the last 18
10 months, except for, you know, I think the kids went back to see
11 him for Christmas, but I don't remember the details about that.
12 So the forum non conveniens issue is a hard one for me to
13 evaluate. What do you think?

14 JUDGE VAUGHN: Well, I'm not sure I -- I don't
15 particularly want the case; I'd like it to be your case. But I
16 also think, even if the case is here, I frankly cannot imagine him
17 getting custody because -- and I haven't heard the evidence, but
18 what little I did hear the other day was he has children from a
19 previous marriage that he does not have custody of.

20 JUDGE HANSEN: That's what I understand.

21 JUDGE VAUGHN: And so I can't imagine he was ever the
22 primary caretaker even of these new children. But when they were
23 together as husband and wife -- and wife here in Illinois, I would
24 expect the (unintelligible) to be that she was the primary
25 caretaker and she will still get custody, even here.

1 JUDGE HANSEN: Right.

2 JUDGE VAUGHN: But since they've been -- since they've
3 been out there, I don't think he's going to have a fairer shot to
4 even say -- he obviously wasn't the primary caretaker, because she
5 took the children and left -- left the state and went to stay
6 someplace else, so he obviously wasn't the primary caretaker
7 there.

8 JUDGE HANSEN: One thing -- one thing is clear. If
9 indeed we were -- if indeed we're unable to resolve it cost-wise,
10 attorneys' fees and otherwise, and if indeed both parties are
11 intent on custody, then at least in Utah there would be a custody
12 evaluation. I then -- I've presided over cases where that happens
13 and the parties are from two different states, and sometimes you
14 have to get an evaluator in both states and have that evaluator in
15 each state interview the parties in that state to include the
16 parties and/or the children, and maybe third parties if it's
17 appropriate. And then have the two custodial evaluators confer
18 with one another, and maybe they can come up with a joint
19 recommendation, and maybe they can't, but that doubles the cost
20 appreciably. I think you and I would both agree if these parties
21 could just kind of put the emotion behind them and let these
22 lawyers guide and direct them, and if they could find some common
23 ground, with the thought in mind of what's the best interests of
24 the children, both of these parties are better off.

25 One thing clear is that whoever has custody, there

1 needs to be some sort of visitation arrangement, with the costs of
2 travel allocated in an appropriate kind of way so that these
3 children have contact and relationship with both mom and dad.
4 And...

5 JUDGE VAUGHN: Let me raise one other issue. As I
6 understand it, he has appealed rulings of Utah --

7 JUDGE HANSEN: He has, that's true. He has
8 appealed --

9 JUDGE VAUGHN: If Illinois declines to exercise
10 jurisdiction or concede the point at this time while an appeal is
11 pending, the Utah court may very well move to a higher tribunal
12 out there at the appellate court level to determine -- they may
13 send it back out here or may determine it should stay out there
14 and --

15 JUDGE HANSEN: And I don't know what they'll do, but
16 they have appealed. And at this point it goes to the intermediate
17 court of appeals, it's not the Supreme Court. I'm told, and I
18 can't verify this, but I understand that the notice of appeal's
19 been filed and the gathering documents and getting the necessary
20 transcripts. The appellate brief has not yet been filed, but soon
21 will be, I'm told, and then you got the response for brief, and
22 then it will be set for hearing, and then we'll get an argument.
23 I don't know how long that will take. It could be months. Who
24 knows?

25 JUDGE VAUGHN: We have three competing --

1 JUDGE HANSEN: I know.

2 JUDGE VAUGHN: -- policy questions here, like here,
3 that's the cases that are supposed to take priority and be heard
4 on an expedited basis and that type of thing, but when you have
5 something on appeal, even an expedited appeal takes several
6 months.

7 JUDGE HANSEN: Right, right.

8 JUDGE VAUGHN: You used the phrase coming into it, he
9 didn't invoke his Illinois jurisdiction here, and I felt the same
10 thing when we had our ex parte hearing here. His attorney,
11 however, argued that language of the statute is -- does not
12 require him to invoke anything; that Illinois has jurisdiction
13 until another state determines it has jurisdiction or Illinois
14 cedes jurisdiction. You were saying he didn't have to do anything
15 here until Utah decided that -- Utah had not decided until August
16 the 7th, and he filed it here. That sort of confirms the
17 jurisdiction Illinois already had, that argument.

18 JUDGE HANSEN: Well, I understand, I understand that
19 argument. My only thought would be that the fact of the matter is
20 if nothing's filed in the first six months in Illinois, then on
21 the seven months, during the seventh month or the eighth month,
22 and she files in Utah, given the language of the Uniform Child
23 Custody Jurisdiction Act, it's outside the six months. And under
24 that Act, as I understand it, Utah would have -- would presume
25 would have jurisdiction. And I don't know how counsel could argue

1 that by Utah filing in January of '01, and him filing in Illinois
 2 on April the 7th, '03, that Utah then in August of '03 would not
 3 be in a position to rule on the jurisdiction issue. Because
 4 clearly the complaint, the second complaint filed in Utah was
 5 outside the six months. And if counsel was saying, well,
 6 notwithstanding that, Illinois had jurisdiction, even though it's
 7 outside the six months, theoretically, if it's outside the six
 8 months, another state could never take jurisdiction until that
 9 state conferred with Illinois. And at that time who do you confer
 10 with if there's no claim filed?

11 JUDGE VAUGHN: Right.

12 JUDGE HANSEN: In other words, up until April the 7th
 13 of '03, who does counsel call or who does the Court call to see if
 14 Illinois is going to waive jurisdiction or assume jurisdiction?
 15 It isn't even filed in the court there. That's why I'm saying I
 16 think invoking the jurisdiction becomes a critical issue.

17 JUDGE VAUGHN: He filed when Utah did not have
 18 jurisdiction, so Illinois is still the home state. And the
 19 statute says the home state maintains jurisdiction until something
 20 else happens. But there had never been any ruling on her first
 21 petition, so that's still pending.

22 JUDGE HANSEN: Oh, okay, let me -- let me -- maybe --
 23 maybe this isn't clear. Let me -- let me give you the scenario
 24 that had occurred here. The first complaint in Utah was filed
 25 July 26th, '02. No question, Utah did not have jurisdiction at

1 that time, because it's only a month after she got here. An
2 answer was filed to that complaint December the 27th, '02. Okay?

3 JUDGE VAUGHN: Okay. I have a copy of that.

4 JUDGE HANSEN: Okay. Then a second complaint was
5 filed July 28th, '03, and that's the one I've been talking about.

6 JUDGE VAUGHN: Yes.

7 JUDGE HANSEN: An answer was filed --

8 JUDGE VAUGHN: January 28th, '03.

9 JUDGE HANSEN: Yeah, January 28th, '03, and then an
10 answer was filed for that one. Then he filed a petition in
11 Illinois April 7th, '03. Then --

12 JUDGE VAUGHN: When was he served with the second
13 complaint?

14 JUDGE HANSEN: Well --

15 JUDGE VAUGHN: Do you know that?

16 JUDGE HANSEN: -- I could look that up. Let me see.
17 I've got the file right here. He had counsel, and it may be that
18 counsel accepted the service.

19 JUDGE VAUGHN: I don't think they did. That was one
20 of his arguments here, that although he had counsel, they didn't
21 serve counsel, they had him re-served all over again.

22 JUDGE HANSEN: They may have done. I can tell you
23 that that -- if he was re-served all over again, that service
24 would have been after January 28th, '03. They're not challenging
25 service -- jurisdiction based on service at all.

1 JUDGE VAUGHN: I'm saying that if he wasn't served and
2 didn't know there was a new case pending at the time he filed his
3 case here, and actually he would have still thought he was
4 operating under her first Utah filing that did not have
5 jurisdiction.

6 JUDGE HANSEN: Well.

7 JUDGE VAUGHN: I don't know if it matters what he
8 thought.

9 JUDGE HANSEN: Well, that's -- that's a fair question,
10 does it matter what he thought. The answer was filed...

11 JUDGE VAUGHN: April 28th, I think.

12 JUDGE HANSEN: No, no. Well, wait a minute. I got a
13 copy of the answer. The answer was filed April the 18th. Well --

14 JUDGE VAUGHN: After he had filed here.

15 JUDGE HANSEN: It was signed by counsel April the
16 18th.

17 JUDGE VAUGHN: Okay.

18 JUDGE HANSEN: And he filed there April the 7th.

19 JUDGE VAUGHN: Yes.

20 JUDGE HANSEN: Correct. Now, when was he served? I
21 don't see that. When was -- when was he served with the second
22 complaint? I cannot answer that. And it may be the return is not
23 in the file. But I don't think that local counsel, Mr. King, who
24 represents Mr. Sullivan, has made an issue of that; at least
25 before me he hasn't. So I wish I could give that date to you, but

1 I can't. I'm sorry.

2 So about what happened was, I think -- I don't know
3 who filed it for the defendant on April 7th; probably Illinois
4 counsel. I don't know if you folks have reciprocity or not, and I
5 don't know if Mr. King is the one here in Utah that filed it or if
6 it was Illinois counsel who filed the emergency petition during
7 the Christmastime.

8 JUDGE VAUGHN: That was his counsel here.

9 JUDGE HANSEN: Okay. Well, all right. And I don't
10 know when that counsel was retained or I don't know when --
11 whether or not that counsel ever talked to Utah counsel, I'm not
12 sure. I don't -- I'm not privy to that --

13 JUDGE VAUGHN: I think counsel here must be talking to
14 his -- Mr. Sullivan's counsel in Utah, because when they filed
15 their emergency pleading here, they had attached to it an appendix
16 with Exhibits A through K.

17 JUDGE HANSEN: Probably so.

18 JUDGE VAUGHN: Of all of your pleadings, transcripts,
19 and orders out there.

20 JUDGE HANSEN: Okay, well, I'm sure there's contact
21 then. And counsel -- and there's no question Mr. King out here
22 believes the Court committed error when I dismissed the first case
23 and didn't simply consolidate the two cases. And the reason that
24 Mr. King was concerned is because of the implication that it had,
25 I think, on jurisdiction.

1 The reason I did what I did is because as of this
2 filing of the second complaint, it was outside the six months, in
3 fact, it was approaching seven, maybe beyond seven, and nothing
4 was filed in Illinois until April the 7th. And -- and I thought
5 the case back then -- because clearly the second case is outside
6 the six months --

7 JUDGE VAUGHN: Yes.

8 JUDGE HANSEN: -- turned on the issue of whether or
9 not she was improperly removing the children from the jurisdiction
10 and away from her husband. I received the proffer, and that's why
11 I said to Mr. King, "Do you wish to cross-examine or examine Mrs.
12 Sullivan?" And he said, "No, because Mr. Sullivan is not here to
13 listen." And I said, "Well, then all I can do is make a decision
14 based on the proffer from her lawyer in Utah," and that was she
15 came here with him knowing it, she moved in with her parents, and
16 he knew how to get in touch with her, and she decided to stay
17 here, and let him know about it, and there was nothing
18 surreptitious or under the table to try to get one up on the other
19 parent in the case. At least based on the proffer, that's what it
20 appeared to me. And under the circumstances, that I felt like
21 Utah had jurisdiction and there was no need to contact the
22 Illinois court. I probably would have been well advised to have
23 done that, because in April it had been filed in your court, and I
24 should have called you.

25 JUDGE VAUGHN: It looks to me like -- do you have an

1 April the 11th, 2003 filing in the second case? It looks like the
2 summons was filed April the 11th, and he was served March the
3 19th, before his filing here.

4 JUDGE HANSEN: He may have been, he may have been.
5 See, out here, one of the -- the summons was signed January the
6 27th of '03 on the second case. In terms of the filing, the way
7 we do it out here, frankly, we have what we call a domestic
8 relations commissioner, and they handle most of the cases in the
9 domestic matter. The only time it's going to get to the judge is
10 if there is not a settlement and it's got to be tried, or if there
11 is a legal issue that has to be decided. And that legal issue is
12 the one that brought the case before me for the first time in
13 August, the two motions, one to consolidate, and the other to
14 dismiss the first case. I'm looking through the file to see if I
15 can see a March 11th case or filing. What do you think that March
16 11th filing was?

17 JUDGE VAUGHN: April the 11th.

18 JUDGE HANSEN: April 11? What do you think the --

19 JUDGE VAUGHN: It was filed April 11, was a notation
20 at the (unintelligible) bottom that says --

21 JUDGE HANSEN: Oh, the summons indeed was filed April
22 11th.

23 JUDGE VAUGHN: And at the bottom of yours, numbers
24 843 --

25 JUDGE HANSEN: Yeah.

1 JUDGE VAUGHN: -- 1903, 5:20 p.m.

2 JUDGE HANSEN: That's right, I got it.

3 JUDGE VAUGHN: I suspect that's when he was served.

4 JUDGE HANSEN: You're probably right. I do have that,
5 the original copy.

6 JUDGE VAUGHN: Right.

7 JUDGE HANSEN: Which --

8 JUDGE VAUGHN: Served with even the second case before
9 he filed here.

10 JUDGE HANSEN: That -- yes, if it -- if he was served
11 in March, that's true, he was served with the second case.

12 JUDGE VAUGHN: So I guess the bottom line is where do
13 we go from here?

14 JUDGE HANSEN: I know, and I've thought about that,
15 Judge Vaughn. I just don't know. I think there are two general
16 alternatives. This is what I've come up with: It -- it -- I
17 guess one option is that the Illinois orders stand and the Utah
18 orders stand, and it just reverts back to the lawyers to decide
19 how to untangle the problem.

20 JUDGE VAUGHN: I -- I did --

21 JUDGE HANSEN: Or maybe based on not the jurisdiction
22 issue but the non -- but the forum conveniens issue, you and I
23 agree that it ought to be venued in your court or in my court, and
24 let the parties proceed. I don't know how you feel about that.

25 JUDGE VAUGHN: I did have one other thing that I did

1 in my case, because she wasn't here and I knew there was a Utah
2 case, I set this for a status -- although I granted him temporary
3 custody, I set this for a status February 23rd.

4 JUDGE HANSEN: Uh-huh.

5 JUDGE VAUGHN: One, to allow her more time to make an
6 argument here as to what should happen next.

7 JUDGE HANSEN: Right.

8 JUDGE VAUGHN: I guess that's a possibility too, to
9 leave it as is, with both orders pending, until the 23rd and
10 maybe --

11 JUDGE HANSEN: And you and I talk --

12 JUDGE VAUGHN: -- it out by that time. If not, then
13 one of us could -- we could call each other again and determine
14 how to proceed. And the other thing would be for the Illinois
15 court to back off and say, Utah, this has been litigated in Utah.
16 The trial I want is now at the appellate level, and that's a
17 better forum of all to determine who has jurisdiction.

18 JUDGE HANSEN: What do you recommend?

19 JUDGE VAUGHN: I wish she -- did he have counsel out
20 there? He has Mr. King representing him and she has counsel
21 there?

22 JUDGE HANSEN: Right.

23 JUDGE VAUGHN: She doesn't have counsel here.

24 JUDGE HANSEN: That's true.

25 JUDGE VAUGHN: I'm a little reluctant to force her to

1 come out here and be pro se.

2 JUDGE HANSEN: Well, if indeed she needs to come -- or,
3 if indeed that hearing in February occurs, probably, it's up to
4 her and up to her lawyer out here, I think she'd be well advised
5 to have local counsel in Illinois. I don't know whether or not
6 she would do that, I just don't -- I don't know. There are two
7 counsel in the case, knowing the case, in Utah.

8 JUDGE VAUGHN: Yes.

9 JUDGE HANSEN: Now, it may be that the case will say
10 Judge Hansen, you made a mistake, you should not have accepted
11 jurisdiction. And even if -- even if Illinois were to waive
12 jurisdiction and let Utah proceed in a forum non conveniens
13 theory, in terms of the electio issue, the Utah appeal could still
14 go forward, and see what the Court says. If the Court says that I
15 was wrong in the decision, but Illinois acquiesced to Utah for
16 reasons we've talked about, at least on this particular issue,
17 which is quite unique, we would know in Utah what argument that
18 Court believes.

19 JUDGE VAUGHN: Okay.

20 JUDGE HANSEN: But nevertheless, I think Utah would
21 still have jurisdiction to proceed and bring everything to an
22 ultimate conclusion based upon simply the agreement of counsel
23 between -- or the agreement of the judges between the two states.

24 JUDGE VAUGHN: I think I'm inclined to stay Illinois'
25 proceedings until the Utah appellate court makes a decision,

1 because if I proceed here or even if you transferred it here, and
2 agreed that Illinois had jurisdiction or forum non conveniens
3 issues or for whatever reason, she may appeal it here, then we'll
4 have not only two trial courts --

5 JUDGE HANSEN: I know, you're --

6 JUDGE VAUGHN: -- two appellate courts.

7 JUDGE HANSEN: You'll have two appeals.

8 JUDGE VAUGHN: (Unintelligible.)

9 JUDGE HANSEN: If you stay it in Illinois, is that
10 stay subject to Utah proceeding with the case jurisdictionally, or
11 would that -- would that stay create a situation where there's not
12 a jurisdictional resolution, and therefore Utah would be limited
13 in proceeding the case on the custody and visitation issue?
14 That's my question.

15 JUDGE VAUGHN: I'm not sure I understand that. Run
16 that by me again.

17 JUDGE HANSEN: Well...

18 JUDGE VAUGHN: We stay our proceedings and Utah
19 determines that they have jurisdiction, what happens to our case
20 here; is that what you're saying?

21 JUDGE HANSEN: Well, I'm talking about the interim.
22 If you stay the case there, and maybe that's okay, then does that,
23 by implication, or does the nature of the stay maybe specifically
24 indicate that you stay the issue there -- or stay the order there?

25 JUDGE VAUGHN: During the pendency of the stay, Utah

1 remains in effect.

2 JUDGE HANSEN: Yeah, can --

3 JUDGE VAUGHN: -- previously entered remains in
4 effect.

5 JUDGE HANSEN: Sure. Can Utah continue then with
6 litigation to try to find resolution in this case? In other
7 words, litigate the --

8 JUDGE VAUGHN: Temporary issues.

9 JUDGE HANSEN: Sure.

10 JUDGE VAUGHN: I think so.

11 JUDGE HANSEN: Your -- your stay probably needs to say
12 that then.

13 JUDGE VAUGHN: Yes.

14 JUDGE HANSEN: Would you agree?

15 JUDGE VAUGHN: Yes.

16 JUDGE HANSEN: If you made a stay, if you've stayed
17 the order for temporary child custody, and that order provides
18 that Utah may continue with the litigation in Utah, and that order
19 is -- and we got a copy of it here -- then probably Utah could go
20 forward with the domestic case and resolve the issues and see what
21 the outcome is. Now --

22 JUDGE VAUGHN: No question Utah is going to have some
23 jurisdiction, because you have jurisdiction over the dissolution
24 case no matter what.

25 JUDGE HANSEN: Exactly, we have -- we have custody

1 over everything except custody. Now, would the children then stay
2 in Illinois or would they come back to Utah?

3 JUDGE VAUGHN: I think they would come back to Utah,
4 because I would be staying our proceedings here and vacating my
5 previous temporary order.

6 JUDGE HANSEN: Right. And then there's a temporary
7 order here. And I don't know exactly what the visitation
8 provisions are. Did you get that in the documents that were
9 submitted to you?

10 JUDGE VAUGHN: I'm not sure if I do or not.

11 JUDGE HANSEN: I could...

12 JUDGE VAUGHN: I think I probably do. They were --
13 they were pretty thorough about what all they attached.

14 JUDGE HANSEN: Were they?

15 JUDGE VAUGHN: I do not have the order. I have...

16 JUDGE HANSEN: Do you have the minute entry dated
17 November 13, '03? Commissioner David Dillon? That's the minute
18 entry of the order to show cause for temporary matters. Then a
19 notice of appeal was filed immediately thereafter, I think.

20 JUDGE VAUGHN: Yes. I have an order that says order
21 to show cause, Commissioner Dillon, Darwin Hansen, filed December
22 the 5th, if that's the order you're talking --

23 JUDGE HANSEN: Yeah, that's probably the one. And I
24 would have signed that because the commissioner recommended it and
25 there was no objection to it.

1 JUDGE VAUGHN: I have one that has a slash and an
2 asterisk signature in your name.

3 JUDGE HANSEN: Is that the order --

4 JUDGE VAUGHN: By David Dillon.

5 JUDGE HANSEN: Yeah, that's probably the one. Is
6 that --

7 JUDGE VAUGHN: Dated November the 4th, and then mine
8 only has --

9 JUDGE HANSEN: Yeah, that's right. Okay, I found it
10 in the file. That's the order. What does it say about
11 visitation? Does the commissioner work this out? Paragraph
12 number 8.

13 JUDGE VAUGHN: Telephonic visitation each Tuesday,
14 Thursday, and Sunday, visitation during Thanksgiving, in paragraph
15 10.

16 JUDGE HANSEN: Yeah.

17 JUDGE VAUGHN: Christmas, half of Christmas vacation,
18 in paragraph 11.

19 JUDGE HANSEN: Right. And --

20 JUDGE VAUGHN: That doesn't cover what happens after
21 that though, I don't think. There is no order for what happens
22 after Christmas, other than the telephonic.

23 JUDGE HANSEN: Yeah. I... I suspect that Mr. King,
24 who represents her in -- or him in Utah, could talk with Mr.
25 Neeley, and if indeed visitation could occur, normally what

1 will -- what would happen is any time the kids are not in school,
2 spring vacation and that sort of thing, where you've got a delay
3 of more than just a weekend.

4 JUDGE VAUGHN: Yes.

5 JUDGE HANSEN: You know, the kids could go back and be
6 with dad, and then they'd have to share the costs of
7 transportation. Or, since she moved out here, maybe she ought to
8 pay it all, but I don't know enough about the facts to make that
9 judgment. But without question, these little children should have
10 as much association with mom and dad as they can, given the
11 geographical distance between them. And if he were to come to
12 Utah, any of them would spend as much time with him here in Utah,
13 because he's here, in my judgment.

14 Now, the fact that the case is on appeal, I don't...
15 I'm not sure the Utah court can go forward on the issue of custody
16 until that's resolved, unless --

17 JUDGE VAUGHN: On temporary matters?

18 JUDGE HANSEN: Well, I think on temporary matters it
19 can. Don't you?

20 JUDGE VAUGHN: You could reach an ultimate -- I think
21 you could on temporary matters, but I don't think you could on
22 ultimate.

23 JUDGE HANSEN: Not unless --

24 JUDGE VAUGHN: The jurisdictional issue is determined
25 by the appellate court.

1 JUDGE HANSEN: Yeah, not unless both parties agreed
2 and counsel decided not to pursue the appeal.

3 JUDGE VAUGHN: The only thing out of this whole
4 procedure that troubles me, I guess, is the evidentiary issues on
5 custody. I said before, if they went to school here for two years
6 and lived here for two years, physical custody here in Harris, one
7 parent or the other, (unintelligible) teachers and daycare workers
8 to say who was the primary caretaker for the child, and I don't
9 know how that could happen out there, because out there he's not
10 been -- I mean, here she would call the school people or daycare
11 people or baby-sitters or somebody to say Wendy always came to
12 parent-teacher conferences or Wendy came to the Christmas program,
13 or whoever the parent was. It seems like most of the witnesses
14 that would be available for a custody hearing would be here.

15 JUDGE HANSEN: It -- it may be that if custody is an
16 issue that both parties wish to pursue to ultimate conclusion,
17 that very little can be done until our court of appeals rules.

18 JUDGE VAUGHN: Yes.

19 JUDGE HANSEN: But if -- if the order in Illinois is
20 stayed, specifically allowing the children to come back and
21 allowing the case to go forward on temporary matters of custody
22 and visitation, and then maybe on the merits with respect to other
23 issues in the divorce, it may be that counsel ought to hear it and
24 find a resolution on many of those issues, such that if our court
25 says that my ruling is in error, then -- then custody would have

1 to be determined in Illinois. If the court says no, you were not,
2 then I suspect custody could be determined here in Utah.

3 JUDGE VAUGHN: Okay.

4 JUDGE HANSEN: If all other issues were resolved and
5 the only thing unresolved was custody, that might be helpful. And
6 moreover, if the parties, with the benefit of counsel, can make
7 their way through the emotion, and obviously the anger and
8 mistrust that is existing between them, and they resolve some of
9 these other issues, it may create a situation where they can
10 resolve custody. I don't know. You hope that, but you and I both
11 know that doesn't always happen.

12 JUDGE VAUGHN: I will then -- let me ask you a final
13 question on how this will all take place.

14 JUDGE HANSEN: Okay.

15 JUDGE VAUGHN: The time frame for if I -- it's 5:00
16 here, it's 5:20 here.

17 JUDGE HANSEN: Yeah, I'm sorry to keep you after work.

18 JUDGE VAUGHN: Okay. And we have a quarterly circuit-
19 wide judges meeting tomorrow. I'm not sure when I can do it. I
20 will be here tomorrow afternoon. If I do an order tomorrow day in
21 the proceeding here and vacating the temporary order that I've
22 entered here, pending the resolution of the Utah appeal, a time
23 frame for her to -- for the Utah order would be in effect then,
24 temporary custody order, when would she be coming to get the
25 children, or when would I make this effective, this weekend or

1 next weekend or?

2 JUDGE HANSEN: It's hard to say. I -- I would think
3 this as a general proposition: I think it's important that the
4 kids get back in school as soon as they can. And if you were to
5 take those steps, I think you're going to want to probably say in
6 the next week to 10 days, and probably seven, date certain. And
7 if your order is that she needs to go to Illinois to pick up the
8 kids, I'd go down the road maybe a week or 10 days max and say
9 she's to appear at that time, pick up the kids, and she can bring
10 them back to Utah. I mean, that's -- seems reasonable to me. But
11 on the other hand, if -- if it's done within a day or two, the air
12 fares are going to be the most expensive. If she's gone a week or
13 so, maybe that will work out, but if it's much longer, then --

14 JUDGE VAUGHN: The other thing --

15 JUDGE HANSEN: -- you're getting the kids --

16 JUDGE VAUGHN: -- Mr. Sullivan's attorney here --

17 JUDGE HANSEN: I know.

18 JUDGE VAUGHN: -- is a very effective and aggressive
19 domestic relations lawyer, and if I wait 10 days he may very well
20 have an appeal filed here. That will complicate the matter.

21 JUDGE HANSEN: Well, then do it as soon as you wish,
22 do it as soon as you wish, call --

23 JUDGE VAUGHN: That would make it effective
24 immediately, and I don't know how she'll get word of that or know
25 to come here to --

1 JUDGE HANSEN: Well, what I will -- this is what
2 happened, for me. I received a pleading filed by her lawyer here
3 asking me to give you a call.

4 JUDGE VAUGHN: Yes, I have a copy of that, the order
5 here, from Mr. Sullivan's lawyer here, faxed me that this
6 morning.

7 JUDGE HANSEN: Okay. And when I got that, I then got
8 both lawyers on the telephone, Mr. Neeley and Mr. King here in
9 Utah, and I said I -- I have this request, and I'm willing to call
10 Judge Vaughn and talk with him, but I want both lawyers to know
11 and to feel comfortable with my doing that. And Mr. King said
12 that's okay, and so did Mr. Neeley. And I told them that I would
13 file a minute -- prepare a minute entry, and I would send them a
14 copy of the minute entry. They said, well, in addition to that, I
15 think both of them agree, based upon a couple of cases in Utah,
16 asking if I could, you know, put this on the record and have a
17 verbatim record. And I said I can do that, but I think those
18 cases simply require that I take notes and keep the notes. But on
19 the other hand, if Judge Vaughn has no objection, I'm willing to
20 put it on the record.

21 JUDGE VAUGHN: Do you have an electronic recording
22 record or do you have a court reporter there taking --

23 JUDGE HANSEN: No, no court reporter; it's a video
24 electronic record. I do have my clerk here because I need her to
25 do a minute entry, and she's very good at it.

1 JUDGE VAUGHN: I will tomorrow -- I won't do it
2 tonight, and I have a meeting in the morning from 8:00 until noon,
3 I have to come back here at 1:30 to take a plea on a drug case, so
4 I will be here at 1:30, and I will make an entry at 1:30, or as
5 soon as the plea is taken, staying these proceedings here pending
6 the outcome of the Utah appeal, and vacating our previous
7 temporary order and deferring to Utah for it.

8 JUDGE HANSEN: Could you fax that --

9 JUDGE VAUGHN: Yeah, I think I'll put in my order that
10 (unintelligible) completing jurisdiction pending the outcome of
11 the Utah appeal.

12 JUDGE HANSEN: Okay. Let's -- then let me give you my
13 fax number, and I would appreciate it if you would fax that to me.

14 JUDGE VAUGHN: All right.

15 JUDGE HANSEN: Then what I will do is prepare a minute
16 entry for our conversation, and then I will attach your order
17 vacating -- staying and vacating, and then I will send to both
18 counsel here in Utah my minute entry and your order, and I'll send
19 you a copy of my minute entry. Does that make sense?

20 JUDGE VAUGHN: Yes.

21 JUDGE HANSEN: And my fax number is area code
22 (801) 447-3880.

23 JUDGE VAUGHN: What is your regular phone number?

24 JUDGE HANSEN: My regular phone number, area code
25 (801) 447-3840. And you'll get my clerk when you call that

1 number. If in fact I am not here -- or she is not here and you
2 want to call me directly, it's 447-384...

3 THE CLERK: Three.

4 JUDGE HANSEN: Three. That will -- that rings the
5 phone on my desk.

6 JUDGE VAUGHN: Okay.

7 JUDGE HANSEN: Now, let me tell you, I -- next week
8 I'm going to be out of town, we have a vacation for next week, so
9 I'll be gone as of tomorrow night, but I'll be back a week from
10 Monday.

11 JUDGE VAUGHN: All right. I travel, I'm -- this is my
12 home county, but I'm only here two days a week. We have a
13 12-county circuit that I travel.

14 JUDGE HANSEN: Oh, I see.

15 JUDGE VAUGHN: And I am in other counties two days a
16 week.

17 JUDGE HANSEN: Okay.

18 JUDGE VAUGHN: The number you call, we have an
19 answering machine here with that number, but I carry a cell phone
20 with me, I almost sleep with it, but that number is (618)
21 925-1162.

22 JUDGE HANSEN: (618) 925?

23 JUDGE VAUGHN: 1162.

24 JUDGE HANSEN: 1162.

25 JUDGE VAUGHN: Yes.

1 JUDGE HANSEN: All right. Judge Vaughn, thank you
2 very much.

3 JUDGE VAUGHN: Thank you.

4 JUDGE HANSEN: It's been great --

5 JUDGE VAUGHN: How far are you from Salt Lake City?

6 JUDGE HANSEN: Well, we're a bedroom community. We're
7 probably maybe 15 to 18 miles.

8 JUDGE VAUGHN: Okay.

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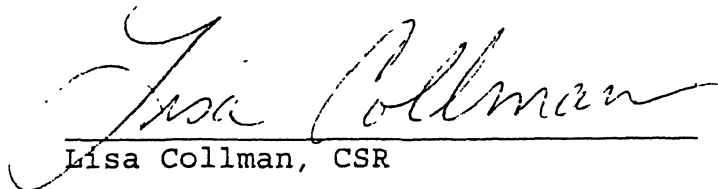
STATE OF UTAH)
:
COUNTY OF DAVIS)

I, Lisa Collman, Certified Shorthand Reporter and Notary
Public within and for the County of Davis and the State of Utah,
do hereby certify:

That the foregoing proceedings were taken before me at the
time and place herein set forth, and were taken down by me in
shorthand and thereafter transcribed into typewriting under my
direction and supervision.

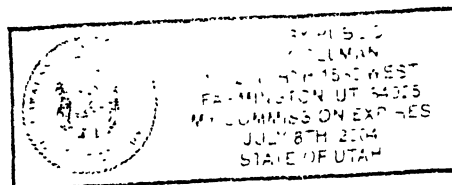
That the foregoing 36 pages contain a true and correct
transcription of my shorthand notes so taken.

In witness thereof, I have hereunto transcribed my name and
affixed my seal this 22nd day of January, 2004.


Lisa Collman, CSR

My Commission Expires:

8 July 2004



NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

NO. 5-04-0068

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FILED

MAY 27 2004

LOUIS E. COSTA
CLERK, APPELLATE COURT, 5TH DIST

MARK ALLEN SULLIVAN,

Petitioner-Appellant,

v.

WENDY SULLIVAN,

Respondent-Appellee.

) Appeal from the
) Circuit Court of
) Hamilton County.

) No. 03-F-5

) Honorable
) Barry L. Vaughan,
) Judge, presiding.

RULE 23 ORDER

Petitioner, Mark Sullivan, appeals the denial of his motion to reconsider the order entered by the circuit court of Hamilton County setting aside a preliminary injunction that gave him temporary custody of the parties' children. The appeal is pursuant to Illinois Supreme Court Rule 307(a)(1) (188 Ill. 2d R. 307(a)(1)). We affirm.

Mark Sullivan and Wendy Sullivan, respondent, were married on August 26, 1995, in Albuquerque, New Mexico. During the course of their marriage, two children were born of the parties, namely: Brett Vernon Sullivan, born April 2, 1996, and Sydney June Sullivan, born July 18, 1997. The parties became residents of Illinois in December 1999 and resided in West Frankfort, Franklin County, Illinois. In June 2001, they moved to Thompsonville, Hamilton County, Illinois. In June 2002, Wendy took the children to Utah to visit her family, and according to Mark, she notified him on July 2 that she was not returning to Illinois and intended to terminate the parties' marriage.

On September 26, 2002, Wendy filed in Utah a complaint for the dissolution of the parties' marriage and for the custody of the children. On December 26, 2002, Mark entered

his appearance and moved to dismiss the Utah proceedings. On January 28, 2003, Wendy opened a new file in Utah and, for a second time, filed for the dissolution of the parties' marriage and for the custody of the children. On April 7, 2003, Mark filed a petition for the custody of the children in Hamilton County, Illinois, and on April 22, he filed an answer and objection to jurisdiction in the second dissolution proceeding initiated by Wendy in Utah. On May 5, 2003, Wendy entered her *pro se* appearance in the Illinois action filed by Mark. Wendy also filed an answer in which she stated that she had previously filed a complaint for the dissolution of the marriage and for the custody of the children in Davis County, Utah, in January 2003. On May 15, 2003, Utah judge Honorable Darwin C. Hansen granted Wendy's motion to dismiss her original complaint. On August 7, 2003, Judge Hansen denied Mark's request to reinstate Wendy's original complaint and to consolidate it with her second complaint for dissolution. Judge Hansen also found that Utah had jurisdiction to decide the dissolution and custody issues presented and referred the case to a commissioner for further proceedings. Judge Hansen's decision determining that Utah had jurisdiction over this matter is currently pending before the Utah Court of Appeals (*Sullivan v. Sullivan*, No. 20030957 (docketed November 26, 2003)).

On November 13, 2003, a hearing was conducted before Commissioner David S. Dillion pertaining to the custody of the parties' children, child support, and visitation. Wendy was present and was represented by counsel. Mark was not present but was represented by counsel. On December 5, 2003, the Utah court entered an order granting Wendy temporary custody of the minor children and granting Mark visitation during the Christmas season. Mark exercised his right to visitation pursuant to the Utah order and returned the children to Illinois. While the children were still in Illinois, Mark filed an *ex parte* emergency petition for temporary custody in the State of Illinois. Judge Barry Vaughan found that Utah's temporary custody order was not entitled to full faith and credit,

because Utah did not have proper jurisdiction over the child custody issue in the case. As a result, the court granted the *ex parte* request and scheduled the hearing on the preliminary injunction for January 5, 2004. On January 2, 2004, Wendy was served with the petition and a notice of the hearing. On January 5, 2004, Wendy was found in default, and a preliminary injunction was entered granting Mark temporary custody of the children.

On January 8, 2004, counsel in Utah for Wendy and Mark arranged for a telephone conference between Judge Hansen and Judge Vaughan pursuant to section 7(c) of the Uniform Child Custody Jurisdiction Act (Act):

"If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction[,] it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Sections 20 through 23 of this Act. If a court of this State has made a custody judgment before being informed of a pending proceeding in a court of another state[,] it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction[,] it shall likewise inform the other court to the end that the issues may be litigated in the most appropriate forum." 750 ILCS 35/7(c) (West 2002).¹

¹The Uniform Child Custody Jurisdiction Act has since been repealed and replaced, effective January 1, 2004, by the Uniform Child-Custody Jurisdiction and Enforcement Act (Pub. Act 93-108, art. 1, §§101, 404, eff. January 1, 2004 (repealing 750 ILCS 35/1 *et seq.* and adding 750 ILCS 36/101 *et seq.*)). Motions or other requests for relief made in child-custody proceedings or to enforce child-custody determinations that had been commenced before the effective date of the new act are governed by the law in effect at the time the

After the telephone conference, Judge Vaughan made the following entry in the case record sheet:

"Court receives telephone call @ 4:30 p.m. from Judge Darwin C. Hanson [sic], 2nd Judicial District, Utah; a record of the proceedings was made by Judge Hansen; judges discuss jurisdictional issues & fact of two contrary temp[orary] cust[ody] orders; teleconference per 75 [sic] ILCS 35/§§ 7 & 8; judges agree that Illinois court will stay per § 7 its proceedings pending decision from Utah Appellate Court. Preliminary injunction entered granting temporary custody to father is vacated effective 1-12-04 at noon per § 7(c). In staying these proceedings, the IL & UT courts agree that the appeal pending in Utah is controlling; the IL court is not declining jurisdiction nor [sic] conceding jurisdiction but deferring to the Utah Appellate Court; there is no question Utah has jurisdiction over the dissolution proceedings; Utah had a temporary custody order in place at the time the IL temp[orary] custody was entered; the court is also troubled by [the] fact Mark [(Husband)] did not file a custody action in IL until 4-7-03, 9 months after wife left, 6 months after wife filed proceedings in Utah, & 4 month[s] after husband filed an answer in Utah; had husband filed custody in IL sooner, there is no question IL would be the home state; at this point in the proceedings Judge Vaughan & Judge Hansen agree this is a matter best left to the Utah court of appeals."

The Act was adopted in both Illinois and Utah. 750 ILCS 35/1 *et seq.* (West 2002); Utah Code Ann. §78-45c-101 *et seq.* (2002). The Act seeks to avoid jurisdictional competitions and conflicts between states, to protect children's best interests, and to discourage forum shopping. *In re Marriage of Rizza*, 237 Ill. App. 3d 83, 87, 603 N.E.2d 134, 138 (1992). Accordingly, the Act achieves certainty by providing that the first state to

motions or other requests were made.

exercise jurisdiction has the exclusive right to proceed. *In re Marriage of Kneitz*, 341 Ill. App. 3d 299, 304, 793 N.E.2d 988, 993 (2003); see also *In re Marriage of Ludwinski*, 329 Ill. App. 3d 1149, 1154, 769 N.E.2d 1094, 1099 (2002). Specifically, section 7(a) of the Act provides as follows:

"A court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons." 750 ILCS 35/7(a) (West 2002).

Similarly, section 14 states:

"The courts of this State shall recognize and enforce an initial or modification judgment of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this judgment has not been modified in accordance with jurisdictional standards substantially similar to those of this Act." 750 ILCS 35/14 (West 2002).

Before resolving this matter, it is important to identify what is and what is not before the court. The limited issue raised in this appeal is whether the trial court erred in dissolving the preliminary injunction it had previously entered. Controverted facts or the merits of the case are not decided where, as here, an interlocutory appeal is brought pursuant to Supreme Court Rule 307(a)(1) (188 Ill. 2d R. 307(a)(1)). *Yates v. Doctor's Associates, Inc.*, 193 Ill. App. 3d 431, 437, 549 N.E.2d 1010, 1014 (1990). The only issue in such an appeal is "whether there was a sufficient showing to sustain the order of the trial court granting or denying the relief sought." *Yates*, 193 Ill. App. 3d at 437, 549 N.E.2d at 1014; see also *Caudle v. Sears, Roebuck & Co.*, 245 Ill. App. 3d 959, 962, 614 N.E.2d 1312, 1315-16

(1993).

Mark frames the issue as follows: "Whether the Illinois circuit court erred in deferring subject matter jurisdiction to the State of Utah?" The court did not decline subject matter jurisdiction in the case. If it had, Mark's petition would have been dismissed. The court specifically found that Illinois was "not declining jurisdiction nor [*sic*] conceding jurisdiction" to Utah. Judge Vaughan decided to wait until the Utah appellate court decided Mark's appeal of the Utah trial judge's decision regarding jurisdiction. We believe that Judge Vaughan's actions were consistent with the general purpose of the Act:

"to avoid jurisdictional competition and conflict with courts of other States in child custody matters; [to] promote cooperation with the courts of other States; [to] assure that child custody litigation occurs in the State where the child and his or her family has the closest connection, and where evidence of the child's care, protection, training[,] and personal relationships is most readily available; to discourage controversies over child custody matters; to deter abductions; and to avoid relitigation of child custody decisions of other States." *Richardson v. Richardson*, 255 Ill. App. 3d 1099, 1100-01, 625 N.E.2d 1122, 1123 (1993).

Mark wisely appealed the Utah trial judge's ruling on jurisdiction. If he had failed to appeal the Utah decision, he would not be able to argue in Illinois that the Utah trial court had erred on the jurisdictional issue. See *In re Marriage of Arulpragasam & Eisele*, 304 Ill. App. 3d 139, 146, 709 N.E.2d 725, 731 (1999); *In re Marriage of Mauro*, 187 Ill. App. 3d 794, 797, 543 N.E.2d 856, 858 (1989). We also find that the Illinois trial judge in this case made a sound decision in vacating the preliminary injunction and effectively staying the Illinois action until the Utah appellate court renders a decision on Mark's appeal. We agree that this was the most effective and efficient way to fulfill the purpose of the Act.

Affirmed.

DONOVAN, J., with HOPKINS and WELCH, JJ., concurring.