

2003

# Wendy Sullivan v. Mark Allen Sullivan : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert L. Neeley; Attorney for Appellee.

Thomas R. King; King, Burke and Schaap, P.C.

---

## Recommended Citation

Brief of Appellee, *Sullivan v. Sullivan*, No. 20030957 (Utah Court of Appeals, 2003).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/4660](https://digitalcommons.law.byu.edu/byu_ca2/4660)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

WENDY SULLIVAN,

)

Petitioner/Appellee

)

BRIEF OF APPELLEE

vs.

)

MARK ALLEN SULLIVAN,

)

Appellate Case No. 20030957-CA

Respondent/Appellant

)

---

APPEAL FROM THE SECOND DISTRICT COURT, DAVIS COUNTY

JUDGE DARWIN C. HANSEN

---

THOMAS R. KING #1823  
KING, BURKE & SCHAAP, P.C.  
648 East 100 South, #200  
Salt Lake City, Utah 84102  
Attorney for Respondent/Appellant

ROBERT L. NEELEY #2373  
Attorney at Law  
2485 Grant Ave. #200  
Ogden, Utah 84401  
Attorney for Petitioner/Appellee

FILED  
UTAH APPELLATE COURTS  
AUG 13 2004

---

IN THE UTAH COURT OF APPEALS

---

WENDY SULLIVAN, )

Petitioner/Appellee ) BRIEF OF APPELLEE

vs. )

MARK ALLEN SULLIVAN, ) Appellate Case No. 20030957-CA

Respondent/Appellant )

---

APPEAL FROM THE SECOND DISTRICT COURT, DAVIS COUNTY

JUDGE DARWIN C. HANSEN

---

THOMAS R. KING #1823  
KING, BURKE & SCHAAP, P.C.  
648 East 100 South, #200  
Salt Lake City, Utah 84102  
Attorney for Respondent/Appellant

ROBERT L. NEELEY #2373  
Attorney at Law  
2485 Grant Ave. #200  
Ogden, Utah 84401  
Attorney for Petitioner/Appellee

## TABLE OF CONTENTS

|   | Page |
|---|------|
| TABLE OF AUTHORITIES .....  | v    |
| STATEMENT OF JURISDICTION .....   | 1    |
| STATEMENT OF THE ISSUES .....   | 1    |
| PROVISIONS, STATUTES, ORDINANCES AND RULES .....  | 2    |
| STATEMENT OF THE CASE .....   | 2    |
| STATEMENT OF FACTS .....  | 4    |
| SUMMARY OF ARGUMENT. ....   | 7    |
| ARGUMENT .....  | 8    |
| I. The Trial Court did not err in dismissing Wendy Sullivan’s First Complaint<br>and in allowing her to proceed with her Second Complaint ..... | 8    |
| A. Utah has jurisdiction under the UCCJEA .....   | 9    |
| B. The Trial Court correctly ruled not to consolidate the two divorce<br>cases and dismissed the initial case .....                             | 11   |
| II. Mark Sullivan did not file his custody action in a timely manner .....  | 13   |
| A. Mark Sullivan’s delay in filing in Illinois confers jurisdiction upon<br>Utah .....  | 14   |
| B. Wendy Sullivan’s absence from Illinois should not have been included<br>in calculating the six-month period of residence .....               | 15   |

|  |      |
|--|------|
|  | Page |
| III. Wendy Sullivan did not take the children from Illinois under false<br>pretenses ..... | 16   |
| CONCLUSION .....   | 17   |
| CERTIFICATE OF SERVICE .....   | 18   |
| ADDENDUM .....   | vi   |

## TABLE OF AUTHORITIES

### CASES

|  | Page |
|--|------|
| <i>Gestl v. Frederick</i><br>754 A.2d 1087 (Maryland 2000) .....                         | 15   |
| <i>King v. Barron</i><br>770 P.2d 975 (Utah 1988) .....                                  | 12   |
| <i>Krause v. Bower</i><br>2001 Ut 28, 20 P.3rd 895, 897 (Utah 2001) .....                | 1    |
| <i>Osbourne v. Adoption Center of Choice</i><br>70 P.3rd 58 (Utah 2003) .....            | 14   |
| <i>Raggenbuck v. Suhrmann</i><br>325 P.2d 258 (Utah 1958) .....                          | 12   |
| <i>Smith Inn, Co. V. Sandy City</i><br>958 P.2d 245, 251 (Utah App. 1998) .....          | 1    |
| <i>State Ex. Rel. G.B.</i><br>2002 Ut App. 270, 53 P.3rd 963, 966 (Utah App. 2002) ..... | 1    |

### STATUTES

|   |                   |
|---|-------------------|
| Utah Code Annotated §78-2a-3(2)(h) .....  | 1                 |
| Uniform Child Custody Jurisdiction and Enforcement Act U.C.A.<br>§78-45c-102, 110, 201(1)(a), 206, 208, and 209 ..... | 8, 10, 11, 14, 15 |

### RULES

|   |   |
|---|---|
| Rules 41(1)(21)(ii) Utah Rules of Civil Procedure ..... | 9 |
|---|---|

## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this case pursuant to Utah Code Annotated §78-2a-3(2)(h).

## STATEMENT OF THE ISSUES

1. Whether the trial court erred in dismissing Ms. Sullivan's First Complaint and allowing her to proceed under her Second 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 vs. Bower*, 2001 UT 28, 20 P.3D 895, 897 (Utah 2001).

**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. Whether Mark Sullivan filed his Illinois action in a timely manner?

**Standard 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 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. Whether the trial court erred in finding that Wendy Sullivan did not act surreptitiously or wrongfully by taking the parties' children from Illinois 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. *State Ex. Rel. G.B.*, 2002 UT App 270, 53 P.3d 963, 966.

**Issue Preserved:** Record, p. 188, Interior 8 and 9; Record p. 256 and 257.

## **PROVISIONS, STATUTES, ORDINANCES AND RULES**

1. Rules 41(a)(2)(ii), Utah Rules of Civil Procedure.
2. Utah Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), §§78-45c-102(7), 110, 201(1)(a) through (d), 110, 206(1)(a), 208 and 209; Uniform Child Custody Jurisdiction and Enforcement Act (IUCCJA), Illinois Revised Statutes, 750-5/601, *et seq.*, and 850-35/1, *et seq.*

## **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 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, Wendy Sullivan took the children with her to Utah to visit her family, and according to Mark notified him on July 2, 2002 that she was not returning to Illinois and intended to terminate the parties marriage. She filed in Utah her First Complaint for divorce on September 26, 2002. Mark 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 Wendy Sullivan left the state. Wendy Sullivan filed her 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. Mark Sullivan was personally served the Second Complaint on March 19, 2003. Mark Sullivan thereafter filed a custody proceeding in Illinois on April 7, 2003. When Mark Sullivan moved to consolidate the two divorce proceedings under the earlier filed case, Wendy Sullivan objected and moved to dismiss her First Complaint. The Utah trial court mistakenly dismissed the Wendy Sullivan's First Complaint on May 15, 2003 before the briefing time had elapsed. Following a hearing, however, the Court allowed the dismissal to stand, found that Mark Sullivan had waited too long to file his complaint in Illinois, and found the Utah had jurisdiction over the matter. Mark Sullivan appeals from the dismissal of Wendy 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 June 2002. Record, pp. 201 and 202, paragraphs 2 and 5.

2. In June, 2002, Wendy Sullivan left Illinois with the children to visit family in Utah. On July 2, 2002, Wendy notified Mark she was not returning to Illinois and intended to terminate the parties marriage. Record at 186 pg. 5; Illinois Rule 23 Order p.1.

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

4. Mark 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, McLeansboro, Illinois, Record, p. 223-226.

5. Wendy Sullivan filed her Second Complaint in Utah on January 28, 2003, Civil No. 034700173. Record, pp. 1-5. The Second Complaint was served on Mark Sullivan, March 19, 2003. Record, p.9.

6. Mark 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.

7. Mark 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 dismiss the later-filed complaint. Record, pp. 232-233.

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

9. On or about May 2, 2003, Wendy Sullivan filed an Answer to Mark's Petition for Child Custody in Hamilton County, Illinois, case number 03-F-5. Record, P. 194.

10. On May 15, 2003, the Utah trial court prematurely entered an order dismissing Wendy 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.

11. On May 28, 2003, Mark Sullivan filed a motion to set aside the Dismissal Order with a supporting memorandum. Record,. Pp. 259-267.

12. A hearing was held on August 7, 2003, before the Honorable Darwin C. Hansen on Mark Sullivan's motion to set aside the Dismissal Order and motion to consolidate Wendy

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 Mark Sullivan had not filed a custody proceeding in Illinois within six months of Wendy Sullivan leaving Illinois. Judge Hansen concluded that the Utah court had jurisdiction of the custody issues relating to the parties' minor children. Record, page 146, paragraphs 1, 2, and 3; Record p. 188, interior page 19.

13. 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. Mark 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.

14. On December 30, 2003, Mark 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 Wendy Sullivan's divorce action filed September 26, 2002 and that the Utah court had erred in not staying its proceeding. The Illinois court awarded Mark 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, p.p. 172-174.

15. 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 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 Mark Sullivan's appeal.

## **SUMMARY OF ARGUMENT**

The trial court properly dismissed Wendy Sullivan's First Complaint and allowed her to proceed with her Second Complaint. Wendy Sullivan's Second Complaint alleges additional claims against Mark Sullivan in that Utah is now the home state of the children and Mark failed to file a child custody proceeding in Illinois.

Mark Sullivan failed to invoke the jurisdiction of the State of Illinois to determine the custody of the children by not filing a child custody proceeding within six (6) months of the children moving to Utah in June, 2002.

By the time Mark Sullivan finally filed for custody in the State of Illinois on April 7, 2003, he knew (a) it had been more than six months since his wife had notified him of her intent to remain in Utah; (b) the children had been living with his wife in the State of Utah in excess of six months; and (c) more importantly, that a proceeding for child custody was pending in the

State of Utah.

Utah Code Annotated, §78-45c-206(1) as well as UCCJEA adopted by the State of Illinois, precludes Illinois from exercising jurisdiction because at the time of the commencement of the Illinois proceeding filed on April 7, 2003, a proceeding concerning custody of the children had been previously filed on January 28, 2003 in the State of Utah in a court having jurisdiction substantially in conformity with the UCCJEA and because Utah was the home state of the children.

## **ARGUMENT**

### **I THE TRIAL COURT DID NOT ERR IN DISMISSING WENDY SULLIVAN'S FIRST COMPLAINT AND IN ALLOWING HER TO PROCEED WITH HER SECOND COMPLAINT**

Wendy Sullivan filed her First Complaint for divorce and for custody of the children in Utah on September 26, 2002. Under the First Complaint it is clear Utah did not have jurisdiction to determine custody under the UCCJEA because the children had not resided in the state of Utah for at least six (6) months prior to the commencement of the action. §78-45c-201(1) U.C.A.

On the other hand, it is clear under the Second Complaint Utah does have jurisdiction to determine custody. Under the UCCJEA, Utah has become the home state of the children. Wendy, in her Second Complaint, alleged Utah was the home state of the children and that no child custody proceedings had been filed in Illinois, Record at pg. 2.

Pursuant to Rule 41(a)(2), Utah Rules of Civil Procedure, Wendy Sullivan, moved the trial court to dismiss her First Complaint. Record, p. 236. Mark Sullivan had filed an Answer but no counterclaim. Record, p. 223. In his Answer filed December 27, 2002, Mark asked the First Complaint be dismissed and that all custody proceedings be referred to Illinois. However, by December 27, 2002, Mark had not filed any child custody proceeding in Illinois permitting an Illinois court to invoke jurisdiction. The trial court granted Wendy Sullivan's motion to dismiss her First Complaint as Mark Sullivan had only answered and had not filed a counterclaim.

Wendy Sullivan's Second Complaint alleges additional claims against Mark Sullivan not found in the First Complaint as more than six months had elapsed since the children had resided in Utah with their mother and Mark had failed to file a child custody proceeding in Illinois.

Under Mark's interpretation of the UCCJEA, Wendy would be forever time barred from filing for custody in Utah because her First Complaint was filed within six months of relocating to Utah with the children. Because more than six months had elapsed since Wendy moved to Utah and Mark had failed to invoke the jurisdiction of Illinois Wendy was entitled to file a Second Complaint to assert additional rights given to her under the UCCJEA. However, Mark should only be given six months from when Wendy and the children moved to Utah to protect his rights under the UCCJEA.

**A. UTAH HAS JURISDICTION UNDER THE UCCJEA.**

Utah is the proper state to assert jurisdiction concerning custody of the children in this

case pursuant to §78-45c-206(1) U.C.A. Illinois should be prohibited from exercising jurisdiction concerning custody because a child custody proceeding had already been commenced by Wendy Sullivan on January 28, 2003 after the children had resided with her for more than six months in the State of Utah. Mark filed a Petition for Child Custody on April 7, 2003 in Illinois and referred only to the First Complaint filed by Wendy on September 26, 2002 and failed to advise the Illinois Court of the Second Complaint filed on January 28, 2003 contrary to the requirements of §78-45c-209(1). Specifically Mark failed to advise the Illinois Court in his Petition filed on April 7, 2003 of Wendy's Second Complaint filed on January 28, 2003 and that Mark had been served with the Second Complaint on March 19, 2003. Record, p. 112. This important fact was clarified with the Illinois Court during the telephone conference between Judge Hansen and Judge Vaughn on January 8, 2004.

Utah Code Annotated, §78-45c-206 concerned with simultaneous proceedings, states:

- (1) Except as otherwise provided in §78-45c-204, a court of this state may not exercise its jurisdiction under this chapter if at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under §78-45c-207.
- (2) Except as otherwise provided in §78-45c-204, a court of this state, before hearing a child custody proceeding shall examine the court documents and other information supplied



by the parties pursuant to §78-45c-209. If the court determines that a child custody proceeding was previously commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(a) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(b) enjoin the parties from continuing with the proceeding for enforcement; or

(c) proceed with the modification under conditions it considers appropriate;

Wendy having filed a child custody proceeding in Utah on January 28, 2003 after residing in Utah with the children for more than six months and serving Mark with the Second Complaint before he filed in Illinois should prevent the State of Illinois from exercising jurisdiction pursuant to §206 of the UCCJEA.

**B. THE TRIAL COURT CORRECTLY RULED NOT TO CONSOLIDATE THE TWO DIVORCE CASES AND DISMISSED THE INITIAL CASE.**

The trial court correctly ruled it would not consolidate the two cases and properly granted

Ms. Sullivan's Motion to Dismiss her First Complaint. The First and Second Complaint should not be consolidated because they involve a different interpretation and application of the UCCJEA.

Under the First Complaint, Utah would not have jurisdiction to determine custody as it was not the home state of the children. However, it is clear under the Second Complaint, Utah has jurisdiction to determine custody as it has become the home state of the children and also because Mark Sullivan had failed to file in Illinois invoking the jurisdiction of the Illinois Court.

Mark argues for consolidation of the two cases but cites no authority prohibiting Wendy Sullivan from filing a second proceeding in Utah especially when by the lapse of time Wendy acquires greater rights under the UCCJEA. Consolidation is not a proper remedy if it violates statutory provisions or would be prejudicial to a party. See Raggenbuck vs. Suhrmann, 7 Utah 2d 327, 325 P.2d 258 (1958). In this case consolidating the two cases would violate statutory interpretation of the UCCJEA and be prejudicial to Wendy Sullivan regarding which state has jurisdiction to determine custody as between the filing of the First Complaint and the Second Complaint. Consolidation would be improper and prejudicial to Wendy Sullivan because there is a distinct difference in application of the UCCJEA in determining jurisdiction. Severance is within the sound discretion of the trial court and absence abuse of such discretion will not be upset on appeal. King vs. Barron, 770 P.2d 975 (Utah 1988).

## **II MARK SULLIVAN DID NOT FILE HIS CUSTODY ACTION IN A TIMELY MANNER**

Mark Sullivan filed a Petition for Child Custody on April 7, 2003 in Hamilton County, Illinois. Mark was served on March 19, 2003 with Wendy's Second Complaint. It is submitted that Mark only filed his action for custody on April 7, 2003 as he knew Utah would undoubtedly assume jurisdiction to determine custody unless he filed an action in the State of Illinois. Mark had demonstrated no interest in obtaining custody of the children until he was forced to choose between relinquishing custody or filing for custody in Illinois. It is further submitted Mark had failed to support his children in any respect after they moved to Utah and was content to maintain the status quo until he was served with the Second Complaint.

In this case, Mark forfeited any right he may have had under the UCCJEA that the State of Illinois be considered to have exclusive jurisdiction to determine custody of the children. Utah became the home state of the children on December 26, 2002, six months after Wendy moved to Utah because Mark failed to file a child custody proceeding in Illinois.

Was Mark prejudiced by Wendy filing a Second Complaint and moving to dismiss her First Complaint? No, just the opposite. The initial filing by Wendy gave notice to Mark of her intent to obtain a divorce and that she was seeking custody of the children. It gave Mark notice that he should do what he knew he must do if he wanted custody of his children; i.e., file for custody in Illinois before the six month period lapsed. Mark was not precluded from filing in Illinois after he was served with the First Complaint but he chose not to exercise his remedies under the UCCJEA adopted in Utah and Illinois.

**A. MARK SULLIVAN'S DELAY IN FILING IN ILLINOIS  
CONFERS JURISDICTION UPON UTAH.**

Mark's filing his Petition for Child Custody in Illinois on April 7, 2004 is untimely under §78-45c-206(1) concerned with simultaneous proceedings in different states. Illinois should be prohibited from exercising jurisdiction as there was a child custody proceeding already filed by Wendy in Utah on January 28, 2003.

In Osborne v. Adoption Center of Choice, 70 P.3rd 58, 68 (Utah 2003), a North Carolina father challenged the adoption of his son in adoption proceedings held in Utah. In this case, Supreme Court Justice Christine Durham discussed the UCCJEA and especially §78-45c-206 as to conflicts between North Carolina and Utah over the adoption proceeding.

Citing §78-45c-201(1) Justice Durham stated,

The UCCJEA gives a Utah Court jurisdiction to make an initial child custody determination only if (1) Utah is the child's home state on the date the proceeding begins, (2) a court of another state does not have jurisdiction or is not a more appropriate forum, (3) all other courts that might have jurisdiction under the proceeding provision have declined to exercise it, or (4) no state would otherwise have jurisdiction.

As to simultaneous proceedings involving child custody proceedings, Justice Durham elaborated:

The UCCJEA has a provision that explicitly governs a situation where two courts in different states have initiated potentially conflicting proceedings regarding a birth parent's parental rights and the custody of a child. See Utah Code Ann. §78-45c-206. See 70 P.3rd at 69.

In this case, Utah is the appropriate state to exercise child custody jurisdiction because (1) Utah is the home state of the children; (2) Illinois is no longer the home state because Mark Sullivan failed to file a child custody proceeding with six months of the children moving to Utah; (3) the children and Wendy Sullivan have a significant connection with the State of Utah; (4) there is substantial evidence in the state of Utah concerning the children's care, protection, training, and personal relationships; (5) Illinois has not asserted jurisdiction because of inconvenient forum or because of unjustifiable conduct; and (6) Wendy was the first to file after Utah became the home state.

Similarly in Gestl v. Frederick, 754 A.2d 1087, (Maryland 2000) the Maryland Court of Appeals held if a child custody proceeding is pending in another jurisdiction, a Maryland Court must usually decline to exercise its jurisdiction under the UCCJEA.

**B. WENDY SULLIVAN'S ABSENCE FROM ILLINOIS SHOULD NOT HAVE BEEN INCLUDED IN CALCULATING THE SIX MONTH PERIOD OF RESIDENCE.**

Mark claims Wendy told him repeatedly that she was only visiting Utah temporarily and that she was planning to return with the children to Illinois. However, that allegation is not supported by reference to any reliable record. Mark's Statement of Facts refers to allegations set forth in his Answer, not to any sworn testimony. The only other reference cited by Mark was during proffer to the trial court at the August 7, 2003 hearing.

It should be noted that on page 1 of the Illinois Rule 23 Order, attached as an Addendum to Mark's brief, the Appellate Court of Illinois Fifth District recited that in June, 2002 Wendy took the children to Utah to visit her family, and according to Mark, she notified him on July 2,

2002 that she was not returning to Illinois, and intended to terminate the parties' marriage.

The record should reflect on August 7, 2003, hearing before District Judge Darwin C. Hansen, R at 188, p.13, and found on interior page 13, Wendy's counsel offered to have Wendy sworn and testify under what circumstances she left the state of Illinois, and about communication between she and Mark. Mark's counsel declined to have her testify even though Judge Hansen ruled he would leave it up to Mark's counsel to have her testify.

### **III. WENDY SULLIVAN DID NOT TAKE THE CHILDREN FROM ILLINOIS UNDER FALSE PRETENSES.**

One again, this issue raised by Mark should be stricken as Mark claims Wendy repeatedly represented to him she would be returning with the children to Illinois but there is no reference to any reliable record as to that alleged fact. Mark's Answer does not constitute a reliable record to support his self serving position.

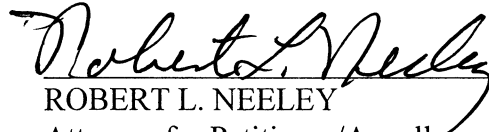
At the hearing of August 7, 2003 before District Court Judge, Darwin C. Hansen, Record at 188, p. 5-6, Judge Hansen asked Mark's counsel when did Wendy advise Mark she was going to stay in Utah and not go back to Illinois. Mark's attorney responded "sometime in July". (pg. 5, 6).

This response by Mark's counsel is consistent with the Illinois Rule 23 Order stating Wendy told Mark on July 2 that she was not returning to Illinois and intended to terminate the marriage.

### CONCLUSION

Wendy Sullivan's filing of her Second Complaint for divorce and custody was appropriate considering the First Complaint was dismissed by the trial court and because Utah became the home state of the children permitting it to exercise jurisdiction over custody of the children. Utah, not Illinois, is the home state of the children and the correct state to exercise jurisdiction over custody pursuant to §78-45c-206 U.C.A. as there was commenced in Utah a child custody proceeding before one was filed in the state of Illinois. The Court should not consider Mark Sullivan's claim that Wendy Sullivan's absence from Illinois was temporary or she left Illinois under false pretenses as not supported by a reliable record.

DATED this 12 day of August, 2004.

  
ROBERT L. NEELEY  
Attorney for Petitioner/Appellee

---

IN THE UTAH COURT OF APPEALS

---

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

---

APPEAL FROM THE SECOND DISTRICT COURT, DAVIS COUNTY

JUDGE DARWIN C. HANSEN

---

I, Robert L. Neeley, certify that on August 12, 2004, I served two copies of the attached Brief of Appellee by mailing to Thomas R. King, Attorney at Law, 648 East 100 South, Suite 200, Salt Lake City, Utah 84102 by first class mail.





## **ADDENDUM**

**Rule 40. Assignment of cases for trial; continuance.**

(a) *Order and precedence.* The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) *Postponement of the trial.* Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) *Taking testimony of witnesses present.* If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(3)(A) and (B).

**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 of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the 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.

**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 avoid unnecessary costs or delay.

(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.

**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.

**Rule 44. Proof of official record.**

(a) *Authentication of copy.* An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and in the absence of judicial knowledge or competent evidence, accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate

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 “par-

ent-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

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 § 42 makes the act effective on July 1, 2000.  
**L. 2000, ch. 247, § 9.** **Effective Dates.** — Laws 2000, ch. 247,  
 § 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

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

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.

(3) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the law of this state as in child custody proceedings between residents of this state.

**History:** C. 1953, 78-45c-205, enacted by L. 2000, ch. 247, § 17. **Effective Dates.** — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

### **78-45c-206. Simultaneous proceedings.**

(1) Except as otherwise provided in Section 78-45c-204, a court of this state may not exercise its jurisdiction under this chapter if at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 78-45c-207.

(2) Except as otherwise provided in Section 78-45c-204, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 78-45c-209. If the court determines that a child custody proceeding was previously commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(a) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(b) enjoin the parties from continuing with the proceeding for enforcement; or

(c) proceed with the modification under conditions it considers appropriate.

**History:** C. 1953, 78-45c-206, enacted by L. 2000, ch. 247, § 18. **Effective Dates.** — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

#### NOTES TO DECISIONS

##### ANALYSIS

Exercise of jurisdiction.  
—Hearing.  
Pending foreign proceeding.  
—Stay of Utah action.  
Proceedings elsewhere.  
—Due process.

##### Exercise of jurisdiction.

##### —Hearing.

When a mother and child living in Utah sought relief in Utah from an Ohio custody order being enforced in Utah by her husband, the district court erred in refusing to hold a hearing to examine whether, under §§ 78-45c-



14 and 78-45c-6, jurisdiction should be exercised by the Utah court. Given the policy considerations behind this chapter, the district court, at the very least, should have stayed its determination until after it held a hearing to determine whether jurisdiction should have been exercised. *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992).

#### **Pending foreign proceeding.**

##### **—Stay of Utah action.**

Utah district court, after learning of prior guardianship proceedings in Oregon, was required to stay a Utah action seeking to determine child custody and to communicate with the Oregon court to determine the propriety of further proceedings in Oregon, so that the issues could be litigated in the more appropriate forum, where the child resided in Oregon at the time and the Oregon court had appointed

the child's grandparents as guardians. *Coppedge v. Harding*, 714 P.2d 1121 (Utah 1985).

##### **Proceedings elsewhere.**

Where grandparents in Oregon, with whom child was visiting, had won custody in Oregon court, Utah district court was required to stay parents' proceeding seeking custody determination and to communicate with Oregon court to determine the propriety of further proceedings in Oregon. *Coppedge v. Harding*, 714 P.2d 1121 (Utah 1985).

##### **—Due process.**

A mother was denied her due process rights by the trial court's enforcement of a foreign-custody modification judgment which had questionable jurisdictional validity without giving the mother reasonable notice and opportunity to be heard. *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992).

#### **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.

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.

Pending proceeding in another state as ground for declining jurisdiction under § 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(g), 20 A.L.R.5th 700.

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 Jurisdiction 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.

### **78-45c-207. Inconvenient forum.**

(1) A court of this state that has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon the court's own motion, request of another court, or motion of a party.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate that a court of another state exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (a) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) the length of time the child has resided outside this state;

- (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.

**History:** C. 1953, 78-45c-208, enacted by L. 2000, ch. 247, § 20. **Effective Dates.** — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

### **78-45c-209. Information to be submitted to court.**

(1) In a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit shall state whether the party:

(a) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or parent-time with the child and, if so, identify the court, the case number of the proceeding, and the date of the child custody determination, if any;

(b) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court and the case number and the nature of the proceeding; and

(c) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or parent-time with, the child and, if so, the names and addresses of those persons.

(2) If the information required by Subsection (1) is not furnished, the court, upon its own motion or that of a party, may stay the proceeding until the information is furnished.

(3) If the declaration as to any of the items described in Subsection (1) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(5) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be put at risk by the disclosure of identifying information, that information shall be sealed and not disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

**History:** C. 1953, 78-45c-209, enacted by L. 2000, ch. 247, § 21; 2001, ch. 255, § 37. **ent-time" for "visitation" in Subsections (1)(a) and (c).**

**Amendment Notes.** — The 2001 amendment, effective April 30, 2001, substituted "parent-time" for "visitation" in Subsections (1)(a) and (c). **Effective Dates.** — Laws 2000, ch. 247, § 42 makes the act effective on July 1, 2000.

### **78-45c-210. Appearance of parties and child.**

(1) A court of this state may order a party to a child custody proceeding who is in this state to appear before the court personally with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear physically with the child.

**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).<sup>1</sup>

---

<sup>1</sup>The 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], 2<sup>nd</sup> 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.**