

2003

Wendy Sullivan v. Mark Allen Sullivan : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Wendy Sullivan v. Mark Allen Sullivan*, No. 20030957 (Utah Court of Appeals, 2003).
https://digitalcommons.law.byu.edu/byu_ca2/4661

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IN THE UTAH COURT OF APPEALS

WENDY SULLIVAN,)	
)	REPLY 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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FILED
UTAH APPELLATE COURTS
OCT 15 2004

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ARGUMENT

I. Illinois was the Children's Home State When Ms. Sullivan Filed her First Complaint. Utah Therefore Cannot be Considered the Home State.

The UCCJEA clearly specifies that Utah may make an initial custody determination only if Utah was the home state of the children when the proceeding was commenced or certain other factors are considered by the court. Pursuant to U.C.A. § 78-45c-201(1)(a), Illinois was the children's home state when Ms. Sullivan filed her First Complaint, not Utah, because the children had lived in Illinois for six consecutive months within six months before Ms. Sullivan filed her First Complaint.

Ms. Sullivan attempted to circumvent the requirements of the Act by filing her Second Complaint while the First Complaint was still pending. The Act makes no allowance for a party to file a subsequent complaint in order to claim "home state" status which did not exist when the initial complaint was filed. The Act clearly states that "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" U.C.A. § 78-45c-201(1)(a) [emphasis added]. Ms. Sullivan elected to commence her proceeding on

September 26, 2002. She cannot then choose a different commencement date by filing again at a later time. The commencement date for purposes of the UCCJEA must be the date Ms. Sullivan filed her First Complaint.

This position is buttressed by the fact that the UCCJEA places a priority on home state jurisdiction, as does the related federal statute, the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A. The Court of Appeals of Arizona in *Welch-Doden v. Roberts*, 42 P.3d 1166 (Ariz.App.Div. 1 2002), gives a thorough discussion of the UCCJEA and analyzes the differences between the UCCJEA and its predecessor, the UCCJA. As the Arizona court pointed out:

“The drafters [of the UCCJEA] made it clear that the new act was to give priority to a finding of home state jurisdiction over any other jurisdictional provisions.

Furthermore, the UCCJEA completely eliminates a determination of ‘best interests’ of a child from the jurisdictional inquiry. 9 U.L.A. 649-52. These changes advance a more efficient and ‘bright line’ jurisdictional rule consistent with the UCCJEA’s purpose.” *Id.* at 1173.

In *Welch-Doden*, the Arizona court rejected a mother’s claim that Arizona had home state jurisdiction. The mother had filed for custody four months after moving with the child from Oklahoma to Arizona. *Id.* at 1171 and 1174. The Court found that Oklahoma had home state jurisdiction because the child’s father had filed there in compliance with the Act. *Id.* at 1174.

Mr. Sullivan answered the First Complaint and disputed the jurisdiction of the Utah court well before Ms. Sullivan filed her Second Complaint. In addition, after Mr. Sullivan was served with the Second Complaint in March, 2003, Mr. Sullivan moved under Rule 42 to consolidate the Second Complaint with the First Complaint. Mr. Sullivan moved in the alternative to dismiss the Second Complaint as duplicative.

After Mr. Sullivan filed his motion to consolidate or dismiss, Ms. Sullivan moved to dismiss her First Complaint. The Utah court prematurely granted Ms. Sullivan's motion to dismiss, before the time had expired for Mr. Sullivan to file his objection to the motion and before considering Mr. Sullivan's motion to consolidate. The trial court acknowledged this error at the August 2003 hearing on Mr. Sullivan's motion to set aside the dismissal. However, rather than set aside the order of dismissal, the trial court left it in place because it found that Mr. Sullivan had not moved quickly enough to file his action in Illinois. The Utah trial court committed error by allowing Ms. Sullivan to dismiss her First Complaint and by finding that home state jurisdiction could be established by filing of her Second Complaint. The trial court should have consolidated the Second Complaint with the First Complaint, or dismissed the Second Complaint as a duplication of the

first. In no event should the court have found that Ms. Sullivan's Second Complaint gave her a new "commencement date" or gave Utah "home state" status under the UCCJEA.

II. If Neither State Can Be Considered the Home State, the UCCJEA Requires Consideration of Other Factors.

Since Ms. Sullivan cannot claim that Utah was the children's home state when she filed her First Complaint, the Utah court did not have jurisdiction to make an initial custody determination without complying with other requirements of the UCCJEA. U.C.A. § 78-45c-201(1)(b) provides that the court's evaluation shifts to whether Illinois can be considered the home state. Mr. Sullivan filed his action in a timely manner in April, 2003, because the children's absence from Illinois should be considered temporary up to the point Ms. Sullivan filed her First Complaint. As referenced in Mr. Sullivan's initial brief, Ms. Sullivan made repeated representations to him that she would be returning to Illinois with the children. Contrary to statements in Appellee's Brief, the record contains several competent references to Ms. Sullivan's representations to Mr. Sullivan. However, if for any reason Illinois cannot be considered the children's home state, then neither Utah nor Illinois is the children's home state. In that event, § 78-45c-201(1) requires the court to consider other factors:

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

...

(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 [emphasis added]

(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 [emphasis added]

(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).

The evaluation required by these provisions of the UCCJEA was never conducted by the trial court.

The court in *Welch-Doden, supra*, supported application of the foregoing sections in a situation where Arizona could not be considered the home state:

“Subsection A, paragraph (1) provides for Arizona to have jurisdiction when Arizona qualifies as a home state. A.R.S § 25-1031(A)(1). If a state is the ‘home state’ under this paragraph [the Arizona

equivalent of § 78-45c-201(1)(a)], it has jurisdiction. *Id.* There is no further factual inquiry on the *jurisdictional* issue. Paragraphs (2)-(4) of subsection A [the Arizona equivalent of § 78-45c-201(1)(b) through (d)] provide the circumstances whereby Arizona may have jurisdiction when it does *not* qualify as the home state. *Id.* Paragraph 2, in particular, requires the court to consider whether the child has a significant connection to the state (as well as other factors) before jurisdiction may be found. *Id.*” *Id.* at 1170.

The Arizona court emphasized that if no state qualifies as the home state, these same factors are also to be considered by the court. *Id.* 1173.

Since Utah cannot be considered the children’s home state, the Utah court should have deferred to the jurisdiction of Illinois, which can be considered the home state. Even if Illinois were found not to have home state status, the Utah court should have taken evidence and made findings in compliance with the requirements of § 78-45c-201(1)(b)-(d). The trial court committed error by not doing so.

III. Mr. Sullivan’s Delay in Filing Does Not Confer Home State Jurisdiction on Utah

Ms. Sullivan relies on the dissenting opinion of Chief Justice Durham in *Osborne v. Adoption Center of Choice*, 70 P.3d 58 (Utah 2003) in support of her claim that Illinois should be prohibited from exercising jurisdiction. In fact, the *Osborne* case does not support Ms. Sullivan’s position. In that matter, the Utah

Supreme Court held 4-1 that Utah had jurisdiction to terminate parental rights of a North Carolina father even though an action concerning the child was also pending in North Carolina. *Id.* at 60, 65.

In this case, it is true that Ms. Sullivan filed her First Complaint before Mr. Sullivan filed his complaint in Illinois. The Illinois court has stayed any proceedings there pending the outcome of this appeal, consistent with the requirements of U.C.A. § 78-45c-206. However, the Utah court does not have home state jurisdiction and has not considered the factors required by § 78-45c-201(1)(b)-(d). If Illinois has home state jurisdiction, it is entitled to jurisdiction under the UCCJEA, even if Ms. Sullivan filed her action first. If Illinois is found not to have home state jurisdiction, other substantive factors must be considered, as previously discussed. Only then can a determination be made as to whether Illinois or Utah has jurisdiction.


On page 13 of her brief, Ms. Sullivan makes the unsubstantiated and untrue claim that Mr. Sullivan did not support the children after Ms. Sullivan brought them to Utah. This statement has no support in the record and should be stricken.

CONCLUSION

Utah cannot be considered the children's home state because Ms. Sullivan commenced her divorce action approximately three months after arriving in Utah with the children. The UCCJEA does not contemplate repeated filings to gain the benefit of home state jurisdiction. The original commencement date of the action is clearly the determining point for jurisdictional purposes, not the date Ms. Sullivan her Second Complaint. Such maneuvering, if allowed, would eviscerate the bright line jurisdictional requirements of the UCCJEA. Jurisdiction should be deferred to Illinois, which qualifies that the children's home state. Even if Illinois is not considered to have home state status, the Utah trial court must evaluate the other factors under § 78-45c-201(1)(b)-(d) before deciding whether to assume jurisdiction or to defer to Illinois.

DATED this 15 day of October, 2004.

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JUDGE DARWIN C. HANSEN

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

