

1994

Luetta K. Liska v. Michael A. Liska : Brief of Appellant

Utah Court of Appeals

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**IN THE COURT OF APPEALS
OF THE STATE OF UTAH**

LUETTA K. LISKKA,	*	
	*	BRIEF OF APPELLANT
Plaintiff/Appellee,	*	
	*	
v.	*	
MICHAEL A. LISKKA,	*	Case No. 940180 - CA
	*	
Defendant/Appellant.	*	Priority No. 15

**DEFENDANT'S APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT THE HONORABLE GLENN IWASAKI**

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Utah Court of Appeals

940180

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**IN THE COURT OF APPEALS
OF THE STATE OF UTAH**

LUETTA K. LISKA,	*	
	*	
Plaintiff/Appellee,	*	
	*	
v.	*	Case No. 940180 - CA
	*	
MICHAEL A. LISKA,	*	
	*	
Defendant/Appellant.	*	

JURISDICTION

This Court has jurisdiction to hear and determine this matter pursuant to Utah Code Annotated § 78-2a-3(2)(k).

STATEMENT OF ISSUES

1. Whether the District Court should have sustained the Commissioner's recommendation to decline jurisdiction based upon findings which are not supported by any record or evidence. This issue is a mixed question of fact and law. The standards of review are "substantial evidence" for the question of fact and "correction of error" for the question of law. *See George v. Peterson*, 671 P.2d 208 (Utah 1983) (factual issues); *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987) (legal issues).
2. Whether the District Court's adoption of the Commissioner's recommendation to decline jurisdiction which was based solely upon communication with another state's trial court magistrate of which no record was kept and in which Defendant did not participate violates

the notice and opportunity to be heard provision of the Utah Uniform Child Custody Jurisdiction Act. This issue is strictly a question of law and is reviewable under the "correction of error" standard. See *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987); *In re D.S.K.*, 792 P.2d 118 (Utah Ct. App. 1990).

3. Whether the process used by the District Court in which a Commissioner conducts a conference call with another state's trial court magistrate deprives the appellant of this right to due process of law. This issue is strictly a question of law and is reviewable under the "correction of error" standard. See *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987); *In re D.S.K.*, 792 P.2d 118 (Utah Ct. App. 1990).

4. Whether the process used by the District Court in which a Commissioner conducts a conference call with another state's trial court magistrate violates the Open Courts provision of Utah's Constitution. This issue is strictly a question of law and is reviewable under the "correction of error" standard. See *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987); *In re D.S.K.*, 792 P.2d 118 (Utah Ct. App. 1990).

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 7, Utah Constitution.

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 11, Utah Constitution.

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Section 78-45c-4, Utah Code Annotated.

Before making a decree under this act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside the state, notice and opportunity to be heard shall be given pursuant to Section 78-45c-5.

Section 78-45c-7, Utah Code Annotated.

(1) A court which has jurisdiction under this act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

- (a) If another state is or recently was the child's home state;
- (b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;
- (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- (d) If the parties have agreed on another forum which is no less appropriate; and
- (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 78-45c-1.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the

jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorney's fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

STATEMENT OF THE CASE

Nature of the Case

This appeal is from a final order of the Third District Court sustaining the recommendation of the Commissioner to defer jurisdiction to Colorado under the Utah Uniform Child Custody Jurisdiction Act.

Statement of Facts

1. Plaintiff/Appellee Luetta Liska and Defendant/Appellant Mike Liska resided in Salt Lake County before January 1989 as husband and wife. Mike Liska currently resides in Utah. (R00307, R00371).
2. Luetta Liska moved with the parties' two minor children to Loveland, Colorado, early in 1989. (R00044).

3. Luetta Liska filed for divorce in the Third District Court of Utah on or about January 26, 1989. (R00002-11).
4. A number of orders and recommendations were entered by the Utah court and a final decree of divorce was made and entered in October 1990. (R00060-62, R00079, R00106, R00120-22, R00123-24, R000126, R00177, R00181, R00192, R00196, R00199, R00318-24).
5. The divorce decree provided for Mike Liska's visitation with his children. (R00319).
6. Beginning in November 1990, Mike Liska experienced difficulty in exercising normal court ordered visitation with his children. (R00371-80).
7. Luetta Liska filed an action in Colorado seeking orders to prevent Mike Liska from exercising his scheduled visitation in June 1992. (R00400-02). Ultimately, the orders were dissolved. (R00441-45).¹
8. Mike Liska filed an Order to Show Cause to enforce his visitation rights in the Third District Court on March 18, 1993. (R00476-77).
9. A hearing was set for Mike Liska's Order to Show Cause. However, upon hearing that an emergency order had been filed in Colorado and before any arguments had been made, the Commissioner declined to rule on Mike Liska's Order to Show Cause and indicated that she was going to confer with the Colorado court. (R00446).
10. The Commissioner entered a minute entry May 11, 1993 deferring jurisdiction. The minute entry indicated that communication with the Colorado court had occurred. (R00472-73).

¹ The record contains an apparently misfiled separate order in the middle of the dissolution order at R00442.

11. Mike Liska objected to the Commissioner's recommendation on May 24, 1993. (R00478-84).
12. The trial court stayed the Commissioner's recommendation on June 1, 1993 based upon Mike Liska's objection. (R00485-86).
13. On August 16, 1993, the trial court referred the case to the Commissioner for findings of fact in support of the recommendation to decline jurisdiction. The minute entry reflecting this order did not appear in the official court file. Therefore, the trial court entered an order on November 15, 1993 reflecting the action taken on August 16. (R00515-16).
14. On December 14, 1993, the Commissioner made findings concerning her recommendation to decline the exercise of Utah jurisdiction. (R00524-25).
15. Over Mike Liska's objection, the trial court adopted the Commissioner's recommendation on February 7, 1994 (minute entry dated January 18, 1994), and stayed all Utah proceedings. The trial court's stated that its order constituted a Rule 54(b) judgment. (R00529, R00530-31).

SUMMARY OF ARGUMENTS

I

The Commissioner made a recommendation that the Utah courts defer jurisdiction to Colorado. This recommendation was accompanied by findings that were not supported by evidence. The trial court sustained the Commissioner's recommendation without reviewing the basis for it. Commissioners are empowered to "recommend" not "decide." Therefore, the trial court should have undertaken an independent review of the findings. Absent such review, the trial court's sustaining of the Commissioner's recommendation was improper.

II.

The procedure used by the Commissioner violated the notice and opportunity to be heard provision of the Utah Uniform Child Custody Jurisdiction Act. The Commissioner communicated with the Colorado courts without maintaining a record or giving Mike Liska an opportunity to be present. As a quasi-judicial officer, the Commissioner is required to follow certain procedures to protect Mike Liska's rights. Because the procedure used by the Commissioner violated the notice and opportunity to be heard requirement of the Utah Uniform Child Custody Jurisdiction Act, the trial court's sustaining of the Commissioner's recommendation to defer jurisdiction was improper.

III.

Mike Liska has certain interests that are protected by the Due Process clause of the Utah Constitution. These interests include the right to his relationship with his children and the right of access to Utah courts. By recommending deferral of jurisdiction to Colorado, the Commissioner determined that Utah would not offer Mike Liska a forum to protect these rights. Since Mike Liska was not afforded any opportunity to participate in the Commissioner's proceedings to determine if deferral of jurisdiction should be recommended, his protected rights were denied without due process of law. Therefore, the acceptance of the recommendation by the trial court was unconstitutional.

IV.

Mike Liska also has constitutional claims under the Open Courts provision. By refusing to enforce a Utah order for visitation, Mike Liska has been denied a remedy of an injury to his "person, property, or reputation." The nature of this denial merits heightened

scrutiny of his claims because his rights have been completely impaired and his relationship with his children (a constitutionally protected interest) is affected. The statute which allowed deferral of jurisdiction over his request for enforcement of visitation under a Utah divorce decree deprives him of access to Utah courts. The legislature has provided no effective and reasonable alternative for vindication of his rights. Further, deferral of jurisdiction in this case is arbitrary and unreasonable means of pursuing the statutory objectives.

Mike Liska has a second claim under the Open Courts provision. The Commissioner's proceedings to determine whether to recommend deferral of jurisdiction were made without affording Mike Liska access. Therefore, the procedure used by the Commissioner violated the constitutional mandate that "All courts shall be open."

ARGUMENT²

I. THE RECORD AND EVIDENCE SUPPORTING THE COMMISSIONER'S RECOMMENDATION ARE INADEQUATE AND THEREFORE THE TRIAL COURT'S ADOPTION OF THE RECOMMENDATION WAS IN ERROR.

The Commissioner made her recommendation based upon the Utah Uniform Child Custody Jurisdiction Act (UCCJA or Act). UTAH CODE ANN. §§ 78-45c-1 to 26 (1992 & Supp. 1993). Section 7 of the UCCJA allows a court to decline to exercise jurisdiction in favor of another court with jurisdiction. *Id.* § 78-45c-7 (1992). Based upon the Commissioner's recommendation, the trial judge entered an order deferring jurisdiction over Mike Liska's request for enforcement of visitation.

² Plaintiff/Appellee has not participated in these proceedings previously. If she does not file a brief, Defendant/Appellant's counsel plans to file a list of cases, in the form prescribed in UTAH R. APP. P. 24(j), contrary to some of Defendant/Appellant's arguments. This list is intended to help the Court to evaluate Defendant/Appellant's argument.

Although Utah courts have not addressed the issue directly, other jurisdictions have held that a decision to decline jurisdiction under the Uniform Child Custody Jurisdiction Act is within the trial court's discretion. *See e.g. Brown v. Brown*, 486 A.2d 1116 (Conn. 1985); *In re. Bolton*, 690 P.2d 401 (Mont. 1984). Assuming that Utah would reach a similar conclusion, the trial court is still required to make adequate findings of fact based upon the evidence to support its exercise of discretion. This Court has addressed the necessity of the trial court establishing an adequate record in a similar area of trial court discretion, child custody determinations. *Smith v. Smith*, 726 P.2d 423 (Utah 1986).

Proper findings of fact ensure that the ultimate custody award follows logically from, and is supported by, the evidence and the controlling legal principles. Adequate findings are also necessary for this Court to perform its assigned review function.

Id. at 426. Without a proper foundation in record and evidence, the findings made by the Commissioner and adopted by the trial court when it sustained the Commissioner's recommendation are inadequate.³

Appellant suggests that it is appropriate to require an evidentiary hearing concerning issues of deferral. The Supreme Court of Hawaii found that a trial court order stating that Hawaii was an inconvenient forum was unfounded because no evidentiary hearing was conducted. *Allen v. Allen*, 645 P.2d 300, 307 (Hawaii 1982) (dicta).⁴ The nature of domestic

³ Mike Liska recognizes that generally a party challenging a trial court's findings of fact is required to marshal all the evidence supporting the findings and demonstrate the evidence's insufficiency. *Scharf v. BMG Corporation*, 700 P.2d 1068, 1069-70 (Utah 1985). However, the lack of a record of the Commissioner's fact finding makes this support impossible.

⁴ The court's discussion of the forum non conveniens provision of the Uniform Child Custody Jurisdiction Act was unnecessary because the court determined that Hawaii did

relations commissioners' authority requires that the recommendations made be subject to de novo review when a party objects. Commissioners are empowered to "*recommend*" in areas prescribed by the Judicial Council and may not enter final orders unless provided by law or the Judicial Council. UTAH CODE ANN. § 78-3-31(6)(b)(i) & (9) (1992). Commissioners may make "*recommendations*" in domestic relations matters but may not make final adjudications except in default or uncontested divorces.⁵ UTAH CODE OF JUDICIAL ADMIN. R. 6-401(2)(D) & (6)(A). The Utah Supreme Court has found commissioners to be "analogous" to masters appointed pursuant to Utah Rule of Civil Procedure 53. *Plumb v. State*, 809 P.2d 734, 743 (Utah 1990). The court's potential responses to a master's report in a non-jury action are as follows:

The court *after hearing* may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

UTAH R. CIV. P. 53(e)(2) (emphasis added). Rule 53 outlines an appropriate proceeding for a court's review of non-binding recommendations. In contrast, an adoption of the Commissioner's recommendation without an independent evidentiary hearing on Mike Liska's objection is equivalent of rubber stamping the Commissioner's recommendation and allowing the Commissioner to make the final order.

not have jurisdiction over the custody dispute.

⁵ One judge of this Court has opined that allowing commissioners to issue any orders may be an unconstitutional vesting of judicial power. *Holm v. Smilowitz*, 840 P.2d 157, 167 n.5 (Russon, J.).

II. THE TRIAL COURT'S ADOPTION OF THE COMMISSIONER'S RECOMMENDATION VIOLATED THE NOTICE AND OPPORTUNITY TO BE HEARD PROVISIONS OF THE UTAH UNIFORM CHILD CUSTODY JURISDICTION ACT.

All decrees under the UCCJA must give parents "reasonable notice and opportunity to be heard" to be valid. *Id.* § 78-45c-4 (1992). Mike Liska and his attorney were not present at the only information gathering phase of the proceedings surrounding Mike Liska's Order to Show Cause, i.e. communication with the Colorado magistrate. Further, contrary to this Court's admonition concerning communication with other states pursuant to Section 7, the Commissioner failed to "make a prompt written record of [her] conclusions and . . . [set forth] the basis for any agreement . . . clearly in the record." *In re. D.S.K.*, 792 P.2d 118, 127-28 n.9 (Utah Ct. App. 1990); *Allen*, 645 P.2d at 307 (substance of conversation of Hawaiian court with New Jersey court should have been made a matter of record).

Other jurisdictions have considered the process required by Section 4 of the Uniform Act. Maintenance of a record is essential, even in the sensitive area of questioning children. *See Shapiro v. Shapiro*, 458 A.2d 1257 (Md Ct. App. 1983) (interview of child without consent or presence of parent proper if record kept). Evidentiary hearings are required to give the parties an opportunity to be heard. *See Swartsell v. Swartsell*, 615 So. 2d 825 (Fla. Dist. Ct. App. 1993) (per curiam) (temporary custody order); *Vogt v. Altman*, 428 So. 2d 267 (Fla. Dist. Ct. App. 1982) (order after interviewing daughter and psychiatrist without allowing father to put on rebuttal evidence improper); *Moran v. Moran*, 612 A.2d 1075 (Penn. Super. 1992) (trial court erred by not holding hearing before adopting conciliator's agreement).

Domestic Relations Commissioners are quasi-judicial officers of the court. UTAH CODE ANN. §78-3-31 (1992); UTAH CODE OF JUDICIAL ADMIN. R. 3-201. The Supreme Court has

addressed the record keeping requirements of quasi-judicial officers. *Plumb v. State*, 809 P.2d 734 (Utah 1990). The trial court in *Plumb* appointed a special master pursuant to Utah Rule of Civil Procedure 53 (the scope of the master's appointment was strongly contested). The master recommended to the trial court that the fees awarded to the class counsel under a class action settlement be reduced. One of the bases of the class counsel's objections to the recommendation was the nature of the proceedings conducted by the master. The class counsel was never given notice of the reassessment of the fee award by the master. Also, the class counsel was not given an opportunity to present any evidence on the issue until after the recommendation to the judge. The Supreme Court found that the trial court abused its discretion⁶ by adopting the findings of the master after being informed of the lack of notice and insufficient opportunity to be heard. *Id.* at 743.

Another aspect of *Plumb* is relevant in this case. The Supreme Court indicated that evidence presented by the class counsel demonstrated that the special master had engaged in *ex parte* communication with the trial judge and other people not parties to the case. The court suggested that such conduct, if substantiated, would be "clearly improper." *Id.* at 742. The special master was subject to the ethical obligations of other judicial officers. *Id.* at 743. However, the court did not base its decision on the possible *ex parte* communications; instead, it relied upon the lack of notice and opportunity to be heard discussed above. *Id.*

Plumb is highly persuasive in the case before the Court. The Supreme Court noted

⁶ The court noted that the procedures used by the master may have violated due process. *Plumb*, 809 P.2d at 743 ("Regardless of whether the procedures in this case are so extreme as to deny class counsel the due process guaranteed under article I, section 7, we find that, *at a minimum*, the trial court abused its discretion") (footnote omitted; emphasis added).

that the special master is "most analogous" to a commissioner. *Id.* Much of the conduct censured by the court in *Plumb* has occurred in this case. The trial court, by accepting the Commissioner's recommendation, decided to deny Mike Liska recourse in Utah courts without a hearing. This decision violated the requirements of the UCCJA that notice and opportunity to be heard be granted before any decree is entered. Also, the Commissioner conferred with the Colorado court *ex parte* and failed to record the conversation. Mike Liska suggest that the flaws in the procedure used by the Commissioner so tainted her recommendation that acceptance of the recommendation was error as a matter of law.

III. THE PROCEDURE USED BY THE COMMISSIONER TO DETERMINE THAT UTAH COURTS WOULD NOT EXERCISE JURISDICTION VIOLATED APPELLANT'S RIGHT TO DUE PROCESS UNDER THE UTAH CONSTITUTION.

A. Appellant possesses rights protected by the Due Process clause of the Utah Constitution.

The Utah Constitution ensures that "No person shall be deprived of life, liberty or property, without due process of law." UTAH CONST. art. I, sec. 7. The issues in this case involve procedural due process. "Most due process cases concern *procedural* requirements, notably notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property." *Wells v. Children's Aid Society of Utah*, 681 P.2d 199, 204 (Utah 1984) (emphasis in original; citations omitted). The procedure necessary varies depending upon the case and the parties involved. *Rupp v. Grantsville City*, 610 P.2d 338, 341 (Utah 1980) ("The demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved.").

The due process clause of the Utah Constitution is implicated any time the government

makes factual determinations affecting a person's fundamental interests. *Concerned Parents of Stepchildren v. Mitchell*, 645 P.2d 629, 636 (Utah 1982). In this case, two fundamental interests of Mike Liska are implicated. The first fundamental interest held by Mike Liska is the right to visitation with his children. The Supreme Court has recognized that the parent-child relationship is fundamental right. *In re J.P.*, 648 P.2d 1364 (Utah 1982). As the noncustodial parent, Mike Liska's relationship with his children is sustained by visitation ordered by the Utah court in the 1990 divorce decree. This right to visitation is fundamental and should not be abrogated without due process. *See Barron v. Barron*, 834 P.2d 685, 688 (Wyo. 1992) ("Husband had a legitimate liberty interest in these visitation rights which was protected by the Constitution of the United States, and by the Constitution of the State of Wyoming.") (footnotes omitted).⁷

The second protected interest possessed by Mike Liska is the right to access to the courts protected by the Open Courts provision of the Utah Constitution. UTAH CONST. art. I, sec. 11.⁸ The recognition of the right to access to court in the Constitution elevates the right to one of "life, liberty or property" protected by the due process clause. *See McGrew v. Industrial Comm'n*, 85 P.2d 608, 610 (Utah 1938) *quoting Campbell v. Holt*, 115 U.S. 620 (1885) ("The words 'life,' 'liberty,' and 'property' are constitutional terms, and are to be taken

⁷ Wyoming's due process clause is identical to Utah's.

⁸ The Open Courts provision states

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

in their broadest sense.") (emphasis deleted). The due process and access to courts clauses in the Utah Constitution are complementary but not duplicative. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985).

B. Appellant's fundamental rights have been deprived without due process of law.

The Commissioner in this case decided that the Utah courts would not hear Mike Liska's motion to enforce visitation set out in a previous order by a Utah court. This decision was based upon a conference with the Colorado court to which Mike Liska was not a party and of which no record was kept. In another case before this court concerning the UCCJA, the court held that due process required a hearing before a undomesticated foreign order could be enforced. *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992).

Holm involved Section 6 of the Act that requires a court to stay a proceeding if a custody proceeding is pending in another jurisdiction. UTAH CODE ANN. § 78-45c-6 (1992). The parties were divorced in Ohio but both had moved from that state. The mother moved to Utah with the parties' child and filed the Ohio divorce decree under the Utah Foreign Judgment Act. The father (a North Carolina resident) had filed a petition for change of custody in Ohio. Although the mother had not been properly served, the Ohio court granted the father's petition. The father entered Utah with the Ohio order (not filed under the Utah Foreign Judgment Act) and demanded that custody be relinquished to him. The mother's attorney contacted the Commissioner who said that Utah would not assume jurisdiction. A later conversation between the mother's attorney and the Commissioner indicated that the commissioner had discussed the case with the judge and that the Ohio order would be enforced. The father assumed custody of the child and left the state. This court determined

that the mother's due process rights had been violated. Since full faith and credit is only afforded to orders issued with jurisdiction, the mother was entitled to a hearing on the jurisdiction of the Ohio court. *Holm*, 840 P.2d at 164-65.

The Supreme Court of Delaware decided a case similar to this one in 1991. *Yost v. Johnson*, 591 A.2d 178 (Del. 1991) (copy attached). The parties were divorced in Pennsylvania, and the mother was granted custody of the children. The mother moved to Virginia; the father moved to Delaware. A Virginia court modified the visitation schedule. Subsequent to the modification, the mother moved to Italy. During one visit, the father sought a modification of the Virginia decree in Delaware and did not return the children to the mother. After denying the mother's motion to dismiss for lack of subject matter jurisdiction, the Delaware court awarded the father custody. The Delaware court accepted jurisdiction based upon a conversation with the Virginia court in which the Virginia judge deferred to Delaware.⁹ The mother claimed that the trial court violated her due process rights by contacting the Virginia court without notifying her, by failing to allow the parties to participate in the telephone call, and by not creating a record of the call. The court determined that due process was violated by the judge's contact with the Virginia court. *Id.* at 182.

[T]he trial judge had a fundamental duty to notify the parties of the intended communication in advance, and to permit them to meaningfully participate in the discussion. Anything less does not comport with basic principles of due process.

⁹ Unlike this case, *Yost* involved Section 3(4) of the Uniform Child Custody Jurisdiction Act. Section 3(4) allows a court to assume jurisdiction if no other state has jurisdiction or a court with jurisdiction declines to exercise jurisdiction.

Id. The court noted that even if an emergency situation requiring the *ex parte* contact existed the judge should have maintained a record of the communication and allow the parties to be heard on the issues later. *Id.* Because the trial court failed to provide the mother with adequate notice and opportunity to be heard, the court's actions were unconstitutional. *Id.*

The violation of Mike Liska's right to due process of law is not cured by the availability of the Colorado forum. While the Utah Constitution does not require "due process of law" to be provided by judicial action, it requires that the protection be provided by the State of Utah. *See e.g. Lindon City v. Engineers Construction Co.*, 636 P.2d 1070, 1074-75 (Utah 1981) (due process provided by Arbitration Act and therefore contract agreeing to binding arbitration was constitutionally permissible). The State of Utah has no ability to affect the remedies provided by another jurisdiction including Colorado. Therefore, the state can not rely upon another jurisdiction to afford "due process of law."

Mike Liska was entitled to due process of law before he was deprived of his rights of access to the courts and enforcement of his relationship with his children. The procedure involved in the decision to defer to Colorado jurisdiction was not sufficient to protect Mike Liska. Therefore, the trial court's acceptance of the Commissioner's recommendation was unconstitutional.

IV. THE PROCEDURE USED BY THE COMMISSIONER TO DETERMINE THAT UTAH COURTS WOULD NOT EXERCISE JURISDICTION VIOLATED THE OPEN COURTS PROVISION OF THE UTAH CONSTITUTION.

Utah's Constitution contains the following Open Courts provision:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CONST. art. I, sec. 11. This provision "guarantees access to the courts and a judicial procedure that is based on fairness and equality." *Berry*, 717 P.2d at 675. Under Section 11, persons are entitled to a remedy by "due course of law" for injuries to "person, property, or reputation." *Id.* Mike Liska makes two related claims under the Open Courts provision. The first is that the section of the UCCJA allowing Utah courts to defer its jurisdiction in favor of another state with jurisdiction violates the Constitution. The second is that the process by which the trial court and Commissioner declined jurisdiction in this case is unconstitutional.

Mike Liska has suffered injury to his "person, property, or reputation." Section 11 is concerned with "the availability of legal remedies for vindicating the great interest that individuals in a civilized society have in the integrity of their person, property, and reputations." *Id.* at 677 n.4. Appellant has encountered repeated difficulty in enforcing his visitation rights with his children as ordered by a Utah court. As discussed above in the due process analysis, Mike Liska's constitutionally protected relationship with his children is sustained through visitation. The important nature of the parent-child relationship should compel consideration of an impairment of it to be an injury to Mike Liska's "person." Even if the injury is not considered one to Mike Liska's "person," it certainly is encompassed in "injury . . . in his . . . property." "Property" under the Open Courts provision "denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Celebrity Club Inc. v. Liquor Control Comm'n*, 657 P.2d 1293, 1297 (Utah 1982) *quoting Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

The Open Courts provision restricts the power of the courts and the judiciary. *Berry*, 717 P.2d at 675. *The focus of recent Utah appellate cases has been upon legislative*

enactments. *E.g. Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989) (statute of repose); *Celebrity Club*, 657 P.2d 1293 (Utah 1982) (statute allowing deprivation of liquor store lease without notice, hearing or judicial review). However, judicial actions are equally constrained. *See Kish v. Wright*, 562 P.2d 625 (Utah 1977) (dismissing a civil rights case with prejudice on the basis of forum non conveniens contrary to state constitution); see also Note, "Utah's Emerging Constitutional Weapon -- The Open Courts Provision: *Condemarin v. University Hospital*," 1990 B.Y.U.L.R. 1107, 1109 n.20 (the history of open courts provisions indicates that they were intended as a "uniquely judicial guarantee") (emphasis deleted).

A. The Court should apply heightened scrutiny to Mike Liska's claims under the Open Courts provision.

The Utah appellate jurisprudence on the Open Courts provision has been active recently. This Court has viewed Supreme Court precedent as implicating heightened scrutiny for cases under the Open Courts provision. *Currier v. Holden*, 862 P.2d 1357, 1362-63 (Utah Ct. App. 1993). Generally, legislative enactments are entitled to a strong presumption of validity. *Id.* at 1362 citing *City of Monticello v. Christensen*, 788 P.2d 513, 516 (Utah 1990).¹⁰ However, the level of scrutiny is raised when protected interests are implicated. *Id.* at 1362.¹¹ The level of review is determined by a study of two factors: the degree of

¹⁰ Justice Zimmerman has expressed the opinion that the burden shifts to the proponent to justify limitation of access to the state courts. *Currier*, 862 P.2d at 1366 n.14. In a case decided approximately two months after *Currier*, Justice Zimmerman, joined by Chief Justice Hall, repeated the assertion that statutes challenged under the Open Courts provision are presumptively unconstitutional. *Lee v. Gaufin*, 867 P.2d 572, 591 (Utah 1993) (Zimmerman, J. concurring in result).

¹¹ Analysis under the Open Courts provision has been reinvigorated since the 1985 decision of *Berry v. Beech Aircraft*. No post-*Berry* cases was found discussing levels of scrutiny of judicial (as distinct from legislative) action. This Court has implied that an abuse of

impairment of remedy and the nature of the right impaired. *Id.* at 1363.

A Utah court has the jurisdiction to enforce visitation ordered in a Utah divorce decree. By deferring to the Colorado court, Mike Liska's right to have the Utah decree enforced in Utah courts has been completely impaired. Therefore, the first criteria set out in *Currier* supports review under a higher level of scrutiny.

As discussed above, Mike Liska's right to visitation emanates from the parent-child relationship. By refusing to allow him enforcement of that right in Utah, a constitutionally protected right is impaired. Thus, the second criteria in *Currier* also supports heightened scrutiny.

B. Section 7's empowerment of courts to defer its jurisdiction to another state's courts violates the Open Courts provision.

Mike Liska's first claim under the Open Courts provisions that allowing the trial court to defer jurisdiction to the Colorado court denied Mike Liska "remedy by due course of law."¹² In *Berry*, the Utah Supreme Court established a two prong test for analyzing claims under the Open Courts provision. First, the court must determine if the law provides an effective and reasonable alternative remedy "by due course of law" for vindication of the constitutional interest. *Berry*, 717 P.2d at 680. Second, if no substitute or alternative remedy is provided, abrogation of the remedy is justified only if a clear social or economic evil is to

discretion standard of review applies to decisions under Section 7 of the UCCJA. *Trent v. Trent*, 735 P.2d 382, 383 (Utah 1987) (upholding decision not to defer jurisdiction stating that the court did not abuse its authority). The rationale that dictates a higher level of scrutiny for statutes impairing significant interest applies to judicial actions. Therefore, Appellant assumes that heightened scrutiny of judicial actions is appropriate.

¹² This claim actually has narrow and broad aspect. This Court can invalidate Section 7 entirely or it can find that the deferral in this case was invalid.

be eliminated and elimination of the existing legal remedy is not an arbitrary or unreasonable means of achieving the objective. *Id.*

Under *Berry* the Court must first determine if the law has provided Mike Liska with an effective and reasonable alternative remedy safeguarding his constitutionally protected relationship with his children by due course of law. The fact that the Colorado court is exercising jurisdiction over Mike Liska's children does not cure the constitutional defects in the process used by the trial court. *See Coman v. Thomas Manufacturing Co.*, 381 S.E.2d 445, 446 (N.C. 1989) (although an individual may have additional remedy in federal courts, under open courts constitutional provision state courts can not fail to provide a forum).

The difference between the remedy provided in Utah and remedy provided in Colorado has been recognized by the Supreme Court. The court in discussed the difference between transferring a case within the state and dismissing under forum non conveniens. *Summa Corp. v. Lancer Indus., Inc.*, 559 P.2d 544 (Utah 1977).

In [a transfer situation], the defendant's motion is at least offering the plaintiff the opportunity of a trial in another court. But, the granting of a motion to dismiss on the ground of forum non conveniens defeats the instant action entirely. It turns the plaintiff out of court, and leaves him without remedy except if he chooses to go to Florida, or some other state where the defendant does business, and go through the process of instituting another lawsuit.

Id. at 546. Admittedly, Mike Liska will not have to institute another lawsuit to attempt to enforce the Utah decree in Colorado. However, he will need to go to a different jurisdiction and file the necessary motions to enforce his visitation, a process tantamount to filing a new action.

Utah courts can utilize forum non conveniens in appropriate cases. However, under policy emanating from, among other sources, the Open Courts provision, the court's discretion

is limited to "compelling circumstances." *Id.* at 546. These circumstances are where it appears plaintiff has selected the forum to annoy or harass the defendant or factors of inconvenience so preponderate against the case in Utah in favor of courts elsewhere. *Id.* However, this case requires of an even more conservative approach. Unlike the contract dispute at issue in *Summa*, the protection of Mike Liska's visitations has substantial constitutional dimensions.

Although Utah courts have not ruled on this issue, the first prong of the *Berry* inquiry should be limited to the jurisdiction of Utah. The Utah Constitution governs the activity of this state's legislature and judiciary. The fact that an individual may be able to be heard in another jurisdiction's court should be deemed insufficient to satisfy the requirement for an effective and reasonable alternative.

Because no reasonable and adequate substitute remedy exists for Mike Liska, the Court must make an inquiry into the second prong of the *Berry* analysis. The objective of failing to provide Mike Liska a Utah forum for the continuing enforcement of the Utah divorce decree must serve to eliminate a clear social or economic evil. If a clear social or economic evil can be identified, the Court must determine if the elimination of the remedy is not an arbitrary or unreasonable means for achieving the social or economic objective.

The UCCJA was enacted, among other reasons, to avoid jurisdictional competition and conflict. UTAH CODE ANN. § 78-45c-1(1)(a) (1992). Accepting this as a clear social evil to be addressed by the legislature, allowing deferral of jurisdiction was an arbitrary and unreasonable means of achieving the objective. At the very least, the trial court's action under Section 7 in this case was an arbitrary and unreasonable. The issue surrounding

visitation could have been easily resolved in Utah. *Trent v. Trent*, 735 P.2d 382 (Utah 1987) (Utah court did not abuse discretion by entering order concerning visitation pursuant to a Utah divorce decree even though children were with custodial parent in Idaho and had never lived in Utah). The Utah courts entered the divorce decree that set out the visitation at issue here. Any factors that may weigh in favor of Colorado jurisdiction are not sufficient to relieve the Utah courts of the duty to allow Mike Liska remedies related to a Utah divorce decree.

C. The procedure used by the Commissioner violates the Open Courts provision.

Mike Liska's second claim under Section 11 of the Utah Constitution does not address the nature of the remedy afforded. Instead, the claim focuses upon the first clause of the provision, "All courts shall be open." The Commissioner conducted the only fact finding related to Mike Liska's Order to Show Cause, communication with the Colorado magistrate. This conversation occurred without the presences of Mike Liska or his counsel and without maintaining a record. This procedure violates the spirit and the letter of Section 11.

This portion of Mike Liska's Open Courts claim is similar to the notice and opportunity to be heard under the state's due process clause. This claim is also cognizable under Section 11. The Supreme Court has held, "By allowing plaintiff to be deprived of its liquor store without notice, hearing or any judicial review, [the statute] offends against both the Article I, Section 7 guarantee of due process and the Article I, Section 11 guarantee of access to the courts." *Celebrity Club*, 657 P.2d at 1296. The *Berry* case states that Section 11 does not only guarantee access but also ensures a fair and equitable judicial procedure. *Berry*, 717 P.2d at 675.

The Commissioner's communications with the Colorado magistrate should be

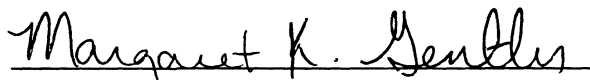
considered a "court" for purposes of the Open Courts provision. The Commissioner was acting under the direction of the trial court in its communication with Colorado. UTAH CODE ANN. § 78-3-31(7)(b) (1992) (the presiding judge in the district in which a commissioner serves is responsible for the day to day supervision of that commissioner). By not affording Mike Liska or his attorney notice or opportunity to be heard at the only fact finding stage of the proceeding surrounding Mike Liska's Order to Show Cause, Mike Liska was denied his constitutionally guaranteed right to a court that is "open."

CONCLUSION

Based on the foregoing, Defendant/Appellant requests that the order of the Third District Court be reversed and the case be remanded to the District Court with instructions for further proceedings consistent with this Court's decision.

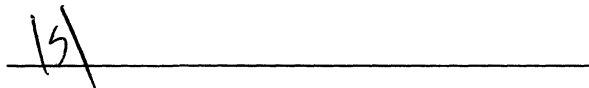
DATED this 11th day of July, 1994.


James A. McIntyre
Attorney for the Appellant


Margaret K. Gentles
Attorney for the Appellant

MAILING CERTIFICATE

The undersigned certifies that two copies of the foregoing Appellant's Brief were sent to Luetta K. Liska, Pro Se, 5632 Janna Drive, Loveland, Colorado 80538 this 11th day of July, 1994.



Vickers Energy Corp., Del.Supr., 429 A.2d 497 (1981).

Given the unusual history and circumstances of this case, we conclude that it was error for the trial court to foreclose equitable relief to any shareholder who surrendered his or her shares for payment of the merger price by exclusion from the class of minority shareholders entitled to share in the quasi-appraisal remedy. All class members who did not vote in favor of the merger should receive the increased valuation of \$7.27 per share fixed by the court.

* * * * *

The judgment of the Court of Chancery is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for further proceedings consistent herewith.



Cathy S. YOST, Respondent
Below, Appellant,

v.

Loral JOHNSON, Petitioner
Below, Appellee.

Supreme Court of Delaware.

Submitted: Dec. 18, 1990.

Decided: April 12, 1991.

Rehearing Denied May 10, 1991.

Father sought modification of custody decree in order to obtain custody of children. The Family Court, Sussex County, awarded custody to father, and mother appealed. The Supreme Court, Moore, J., held that trial court was without jurisdiction to determine custody dispute.

Reversed.

1. Constitutional Law ⇨274(5)

Divorce ⇨402(8)

Family court's ex parte communication with judge in state which had issued custody decree, from which court determined that it had jurisdiction over custody dispute because other state had deferred adjudication to family court, violated due process rights of parents; absent emergency, court had duty to notify parties of intended communication in advance, so as to permit them to meaningfully participate in discussion. U.S.C.A. Const.Amends. 5, 14; Del.C. Ann. Const. Art. 1, § 9; 13 Del.C. § 1903(4).

2. Trial ⇨21

Judge should not engage in substantive ex parte communication concerning merits of issue pending before court; if emergency requires such communication, judge must at least maintain proper written record and thereafter provide parties opportunity to be heard on issues relating to, or arising from, such communication. U.S.C.A. Const.Amends. 5, 14; Del.C. Ann. Const. Art. 1, § 9.

3. Divorce ⇨402(8)

Children's visitation with father in state over period of several years did not establish "significant connection" with state, as required for exercise of jurisdiction over custody dispute; children had continuously lived with custodial parent in another jurisdiction, with their only prolonged contact in state occurring after non-custodial parent refused to return children to custodial parent. 13 Del.C. § 1903(2).

4. Divorce ⇨402(8)

Father's affidavit, stating that he had contacted "intake officers" in Virginia, where custody decree had been entered, and been advised to file his petition for modification of custody in Delaware, where he resided, because wife no longer resided in Virginia, did not establish that Virginia had deferred jurisdiction over custody dispute to Delaware, for purpose of establishing Delaware family court's jurisdiction over dispute; "intake officers" had no judicial authority, and thus their opinions were not entitled to any preclusive or conclusive

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Cite as, Del.Sup., 591 A.2d 178 (1991)

effect in Delaware court. 13 Del.C. § 1903(4).

Upon appeal from the Family Court.
REVERSED AND VACATED.

Aida Wasserstein, Wasserstein & Demsey,
Wilmington, for appellant.

Robert G. Gibbs, Wilson, Halbrook & Bayard,
Georgetown, for appellee.

Before CHRISTIE, C.J., HORSEY and
MOORE, JJ.

MOORE, Justice.

This case arises out of a custody dispute in Family Court between Loral R. Johnson, a resident of Delaware, and Cathy S. Yost, a resident of Vicenza, Italy. Two decisions of that court are at issue. In the first case, the Family Court held that it had subject matter jurisdiction over the custody dispute pursuant to the Uniform Child Custody Act ("UCCJA") as enacted in Delaware. In its second decision, the court awarded custody of the parties' two children, Mark and Ian, to their natural father, Loral R. Johnson.

We find that the Family Court never had subject matter jurisdiction over this case. The court deprived Yost of her due process rights when it exclusively relied on an *ex parte* communication to determine that Delaware was a proper forum under 13 Del.C. § 1903(4). We also conclude that the trial court had no jurisdiction in this case under the UCCJA. Accordingly, we reverse the judgments below in their entirety.

I.

Loral R. Johnson and Cathy S. Yost were divorced in Pennsylvania on October 31, 1981. The original divorce decree contained a custody and visitation agreement giving Yost custody of her two children. Yost later moved to Virginia with the children, and Johnson moved to Delaware in August, 1983.

On April 27, 1982, the Juvenile and Domestic Relations Court of Fairfax County, Virginia, entered a new order which only affected the visitation provisions of the original Pennsylvania decree. Pursuant to

the new Virginia visitation schedule, Johnson was entitled to visit his children one weekend per month, the first three weeks of July, and alternating Christmas and Thanksgiving holidays. Johnson regularly visited his children between April, 1982 and September, 1988.

Yost married an Air Force sergeant while she was living in Virginia. The family moved to Italy in July, 1988, after Yost's husband voluntarily accepted a four-year military assignment. There was no evidence in the record that Yost's move surprised Johnson. There also was no evidence in the record that Johnson objected to the move. The children next visited Johnson in Delaware between June 5 and July 25, 1989. At the end of the visit, Johnson did not return the children to Italy and attempted to modify the Virginia decree in Delaware.

A.

Johnson filed a petition in the Family Court seeking emergency temporary custody of the children. The Family Court denied the motion, but scheduled the matter for a hearing and issued an order prohibiting Johnson from removing the children from Delaware. Yost arrived from Italy and filed her own petition seeking the court's permission to take the children to Virginia pending the outcome of the Delaware proceedings. The court granted Yost's petition. *In re Johnson*, Del.Fam., No. 89-7-119CV, Millman, J. (July 27, 1989) (ORDER). At the initial hearing, the court issued a briefing schedule to address Yost's challenge to the Family Court's jurisdiction. *In re Johnson*, Del.Fam., No. 89-7-119CV, Conner, J. (Aug. 7, 1989) (EMERGENCY ORDER). The trial judge permitted Yost to return to Italy with the children while the matter was pending. *Id.*

Finally, on November 3, 1989, the trial court issued its decision denying Yost's motion to dismiss for lack of subject matter jurisdiction. *See In re Johnson*, Del.Fam., No. 89-7-119CV, Millman, J. (Nov. 3, 1989) (ORDER). The court held a trial on the merits of Johnson's custody petition on

April 25, 1990. The court rendered an oral opinion awarding custody of both children to Johnson on May 4, 1990. The court memorialized its oral opinion in a written order dated May 15, 1990. See *In re Johnson*, Del.Fam., No. 89-7-119CV, Millman, J. (May 15, 1990) (ORDER).

Yost appeals to this Court, contesting both: (1) the Family Court's Order dated November 3, 1990, finding jurisdiction; and (2) its decisions on the merits of the custody claim rendered in the Spring of 1990. We heard oral argument on December 18, 1990, and immediately issued an order returning custody of Mark and Ian Johnson to their mother. See *Yost v. Johnson*, Del. Supr., No. 179, 1990, Moore, J. (Dec. 19, 1990) (ORDER). We stated in our order that this opinion more fully explicating our views would follow.

We conclude that it is unnecessary to reach the merits of the Family Court's decision to award custody of Mark and Ian to their natural father. We find that the Family Court committed legal error, and violated Yost's due process rights when it ruled, on the basis of an *ex parte* communication with a Virginia court, that it had subject matter jurisdiction to decide this case under the UCCJA as enacted in Delaware. See 13 Del.C. §§ 1901-1925.

B.

The Family Court held that it had subject matter jurisdiction to consider Johnson's custody petition pursuant to Section Three of the UCCJA. *In re Johnson*, Del.Fam., No. 89-7-119CV, Millman, J. (Nov. 3, 1989) (ORDER) ("ORDER"); 13 Del.C. § 1903. Section Three of the UCCJA, as enacted in Delaware, provides four distinct "tests" to determine whether a court has subject matter jurisdiction:

(1) This State:

- a. Is the home state of the child at the time of the commencement of the proceeding; or
- b. Had been the child's home state within 6 months before commencement of the proceedings and the child is

absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interests of the child that a court of this State assume jurisdiction because:

a. The child and his parents, or the child and at least 1 contestant, have a significant connection with this State; and

b. There is available in this State substantial evidence concerning the child's present or future care, protection, training and personal relationships; or

(3) The child is physically present in this State and:

a. The child has been abandoned; or

b. It is necessary in an emergency to protect the child because he has been subjected or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) It appears that *no other state* would have jurisdiction under prerequisites substantially in accordance with subdivisions (1), (2) and (3) of this section, or another *state* has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and it is in the best interests of the child that this court assume jurisdiction. . . .

13 Del.C. § 1903 (emphasis added).

The trial court specifically rejected Johnson's arguments that it could accept jurisdiction under 13 Del.C. §§ 1903(1) & (2).¹ See *In re Johnson*, Order at 3-4. The court ruled that the "children did not have a significant connection" to Delaware. *Id.* at 4. However, the Family Court found jurisdiction under 13 Del.C. § 1903(4), ruling that the Virginia Family Court had effectively deferred adjudication of the custody issue to Delaware. See 13 Del.C. § 1903(4); *In re Johnson*, Order at 4.

The trial judge reached this conclusion after consulting with Judge James W. Fourqurean of the Virginia Juvenile and case.

1. 13 Del.C. § 1903(3) was not at issue in this

Domestic Relations District Court, Nineteenth Judicial District in an *ex parte* telephone call. The Family Court Judge acknowledged:

I contacted the Honorable James W. Fourqurean of the Juvenile and Domestic Relations Court of Fairfax County, Virginia. Judge Fourqurean deferred to this Court the decision on the issue of custody of these children. His decision was based on the fact that the respondent and the children have not lived in Virginia since July 15, 1988. It was Judge Fourqurean's belief that the issue of domicile was not significant. It was Judge Fourqurean's belief that the physical residence of the children was of more importance than domicile since in deciding the issue of custody, consideration of housing, schooling, neighborhood environment, friends, family and medical needs, among other things, needed to be examined and it was his belief these issues could only be properly addressed by the courts of Delaware or Italy. *In re Johnson*, Order at 3 n. 1 (emphasis added).

Even though there was no other record of the trial judge's conversation with Judge Fourqurean, and no written decision to memorialize Judge Fourqurean's conclusions, the Family Court decided that Virginia had effectively "declined jurisdiction." *Id.* at 4. See also *In re Johnson*, Del.Fam., No. 89-7-119CV, Millman, J. (May 15, 1990) (ORDER) (Family Court can consider merits of custody petition because "Virginia relinquished jurisdiction to this Court.").

C.

Yost argues on appeal that the trial court's reliance on 13 *Del.C.* § 1903(4) was totally misplaced. She claims that the Family Court violated her rights to procedural due process when it: (1) contacted the Virginia court without notifying the parties; (2) failed to permit the parties to participate in the telephone conversation; and (3) failed to create or produce a written record of the call. Yost also argues that the trial court erred by not considering

Italy as a more proper forum to hear the case under the UCCJA.

Johnson contends that the UCCJA authorized the trial judge to contact the Virginia Court on an *ex parte* basis. He thus argues the Family Court did not violate Yost's due process rights. Johnson also claims that Virginia had effectively declined subject matter jurisdiction in this case. He refutes Yost's argument that Italy is the proper forum to consider this case and maintains that Yost cannot raise the issue of Italian jurisdiction for the first time on appeal. Johnson finally argues that the UCCJA prohibits the court from considering Italy a proper forum even if Yost could contest the Family Court's jurisdiction.

II.

We start with the relevant standard of review. Yost contends that the trial court violated her due process rights guaranteed under the United States and Delaware Constitutions. She also claims that the Family Court misapplied the UCCJA. This Court will review questions of law *de novo* to determine whether the trial court committed legal errors. See *Ruggles v. Riggs*, Del.Sup., 477 A.2d 697, 703-04 (1984); *Fiduciary Trust Co. N.Y. v. Fiduciary Trust Co. N.Y.*, Del.Sup., 445 A.2d 927, 930 (1982).

A.

Turning to the merits of the appeal, we find that the trial court's *ex parte* communication with the Virginia judge resulted in a serious violation of Yost's constitutional rights to procedural due process. See U.S. CONST. amend. XIV, § 1. DEL. CONST. art. I, § 9; cf. *State v. Rose*, Del.Super., 132 A. 864, 868-69 (1926) (meaning of "due process" substantively same under United States and Delaware Constitutions).

This Court has previously stated in *Ruggles v. Riggs*, Del.Sup., 477 A.2d 697 (1984) that:

In the courts of Delaware persons are to be accorded the *most scrupulous adherence* to the constitutional mandate of due

process ... *The Family Court is no exception to that unalterable rule.* 477 A.2d at 703 (citations omitted) (emphasis added).

The hallmark of due process in a civil proceeding before a Delaware court is notice and an opportunity to be heard. *See Perrine v. Pennroad Corp.*, Del.Super., 47 A.2d 479, 486, *cert. denied*, 329 U.S. 808, 67 S.Ct. 620, 91 L.Ed. 690 (1946); *Aprile v. State*, Del.Super., 143 A.2d 739, 744, *aff'd*, 146 A.2d 180 (1958). As the Superior Court stated in *Aprile*:

Due Process in judicial proceedings implies action in conformity with the general law based upon evidence, and after a full hearing upon notice to the party or parties affected and an opportunity to be heard. 143 A.2d at 744 (emphasis added).

[1, 2] The trial judge impermissibly contacted Judge Fourqurean without notifying either Johnson or Yost. He then relied upon this *ex parte* communication to reach the conclusion that Virginia had effectively surrendered jurisdiction over Johnson's custody petition to the Delaware Family Court. There is no evidence that the Family Court kept a written record of the conversation. There was neither notice nor an opportunity for the parties to be heard on this significant issue.

The trial judge's action in this case represents a departure from acceptable notions of due process guaranteed under the Delaware Constitution. A judge should not engage in a substantive *ex parte* communication concerning the merits of an issue pending before the court. *See, e.g., Ruggles*, 477 A.2d at 702 ("ex parte consultation by a trial judge with experts has no place in the judicial process."); *Phillips v. Del. Power & Light Co.*, Del.Super., 216 A.2d 281, 285 (1966); *Barks v. Herzberg*, Del.Super., 206 A.2d 507, 509 (1965).

This case did not present an emergency situation which might necessitate an *ex*

parte communication. Furthermore, even in emergency situations, the trial judge must at least maintain a proper written record of the *ex parte* communication and thereafter provide the parties the opportunity to be heard on the issues relating to, or arising from, the communication. Absent an emergency, the trial judge had a fundamental duty to notify the parties of the intended communication in advance, and to permit them to meaningfully participate in the discussion. Anything less does not comport with basic principles of due process. *Eberly v. Eberly*, Del.Super., 489 A.2d 433, 440-43 (1985); *Abdel G.S. v. Badrban H.K.*, Del.Super., 453 A.2d 94, 96 (1982).

Johnson also argues that the due process issue is not dispositive because the UCCJA encourages judges to communicate directly with each other. He specifically claims that the Family Court was authorized to communicate directly with Judge Fourqurean under the *forum non conveniens* section of the UCCJA. *See* 13 Del.C. § 1907(d).² On closer inspection, Johnson's claim is meritless.

Johnson clearly confuses subject matter jurisdiction with the doctrine of *forum non conveniens*. Delaware has long recognized *forum non conveniens* as a common law remedy enabling a court to transfer a case to a venue more convenient to the parties. *See Miller v. Phillips Petroleum Co. Norway*, Del.Super., 537 A.2d 190, 201-02 (1988); *Parvin v. Kaufman*, Del.Super., 236 A.2d 425, 427 (1967); *Dietrich v. Texas Nat'l Petroleum Co.*, Del.Super., 193 A.2d 579, 584-88 (1963); *Winsor v. United Airlines Inc.*, Del.Super., 154 A.2d 561, 563 (1958). An underlying assumption of the *forum non conveniens* doctrine is that both the original court and the proposed new venue have subject matter jurisdiction to consider the case. As the Supreme Court of the United States ruled many years ago, "*forum non conveniens* can never apply if there is absence of jurisdiction..." *Gulf Oil Corp. v. Gilbert*, 330

2. 13 Del.C. § 1907(d) provides:

Before determining whether to decline or retain jurisdiction, the court may communicate with a court of another state and exchange information pertinent to the assumption of

jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

U.S. 501, 504, 67 S.Ct. 839, 841, 91 L.Ed. 1055 (1947) (emphasis added); *Dietrich*, 193 A.2d at 586.

The Delaware UCCJA does not modify the common law doctrine of *forum non conveniens*. Section 1907(a) clearly provides that only "[a] court which has jurisdiction under this chapter" is authorized to consider whether to apply the doctrine. 13 Del.C. § 1907(a). The official commentary to the UCCJA confirms that the *forum non conveniens* section was intended only as a secondary inquiry once a court had already established primary subject matter jurisdiction. See Comment UCCJA Section Seven, reprinted in 1 J. McCAHEY, M. KAUFMAN, C. KRAUT & J. ZETT, CHILD CUSTODY VISITATION AND LAW PRACTICE 3A-60 (1990) (Section Seven "serves as a second check on jurisdiction once the test of sections 3 [13 Del.C. § 1903] or 14 has been met.")

B.

[3] Johnson also argues that resolution of Yost's due process claim is not dispositive because the Family Court had an independent basis to establish subject matter jurisdiction. Johnson relies on an affidavit he submitted to the trial court as conclusive proof that Virginia had declined jurisdiction. He therefore concludes that the trial court properly considered his petition under 13 Del.C. § 1903(4).³

[4] According to his affidavit, Johnson contacted a Fairfax, Virginia "intake officer" on July 24, 1989, and asked whether he should file a custody modification petition in Virginia. This was almost at the end of the children's visit in Delaware.

3. Johnson also argues that the Family Court could have found subject matter jurisdiction under 13 Del.C. § 1903(2) even if the court improperly assessed the Virginia jurisdiction question under 13 Del.C. § 1903(4). Johnson claims that he and the children established the statutorily mandated "significant connection" with Delaware through "a period of six years of visitation." 13 Del.C. § 1903(2).

Johnson's claim is untenable given the Family Court's reluctance to assume jurisdiction pursuant to 13 Del.C. § 1903(2) when there is short physical contact with Delaware and the bulk of the treatment and care of the children is clearly in another state. See *Fielder v. Thorn*, Del.Fam., 525 A.2d 576, 579 (1987), *Grayson v. Grayson*,

The affidavit recites that the "intake officer" told Johnson to file his petition in Delaware because "Mrs. Yost no longer had residence or ties" in Virginia. The affidavit also mentions that Johnson contacted a second Virginia "intake officer" on July 28, 1989. This second "intake officer" also advised Johnson to file a petition in Delaware. Johnson's counsel admitted at oral argument that Johnson never sought the independent legal advice of Virginia counsel either before or after his discussions with the two Virginia "intake officers."

We note that the trial court did not explicitly consider Johnson's affidavit when it decided that it had subject matter jurisdiction. Nonetheless, we find that Johnson's affidavit cannot serve as conclusive proof that Virginia declined jurisdiction in this case.

Article Four, Section One of the United States Constitution provides that a state court must give "Full Faith and Credit" to the "judicial proceedings of every other State." U.S. CONST. Art. 4, § 1. The Delaware courts have long recognized that the Full Faith and Credit clause is only applicable where a foreign jurisdiction has both subject matter and personal jurisdiction over the defendant and renders a "duly authenticated" final decision. See, e.g., *Iowa-Wisconsin Bridge Co. v. Phoenix Finance Corp.*, Del.Sup., 25 A.2d 383, 391, cert. denied, 317 U.S. 671, 63 S.Ct. 79, 87 L.Ed. 539 (1942); *Bata v. Hill*, Del.Ch., 139 A.2d 159, 165 (1958); *Brown v. Ins. Equities Corp.*, Del.Ch., 21 Del.Ch. 273, 187 A. 18, 19 (1936); *Severson v. Severson*, Del.Super., 396 A.2d 178, 181-82 (1978).

Del Fam., 454 A.2d 1297, 1300 (1982) ("[t]he term 'significant connection' is authoritatively defined as *maximum* rather than *minimum* contact with the state and is intended to *limit jurisdiction* rather than to proliferate it.") (emphasis in original). The bulk of contacts in this case is clearly not in Delaware. Especially in view of *Grayson*, this Court cannot authorize the Family Court to assume jurisdiction in a case where the children continuously lived with their mother in Italy for many years and the only prolonged contact that Johnson and the children shared with Delaware occurred after Johnson refused to return his children to their mother. See, e.g., *Grayson*, 454 A.2d at 1300-01.

Accordingly, Delaware will recognize a foreign judgment only if it was issued in conformity with due process. *Id.*

As reported in Johnson's affidavit, the judgment of two Virginia "intake officers" that Virginia did not have jurisdiction over the modification of custody petition is not entitled to any preclusive or conclusive effect in a Delaware court. There is absolutely no evidence that either "intake officer" was imbued with judicial authority. Indeed, it is even questionable whether the "intake officers" were authorized to give the alleged advice attributed to them. Even if Johnson's inquiries were somehow deemed "judicial proceedings," the record clearly indicates that the "proceedings" violated due process, because Yost had abso-

lutely no notice or opportunity to contest the "intake officers" findings.

We conclude that the trial court had no authority to modify Johnson's custody petition under the UCCJA. The Family Court violated Yost's due process rights, and lacked an independent rationale to find subject matter jurisdiction under the UCCJA.⁴ Thus, the Family Court's decision to uphold subject matter jurisdiction on the basis of the default provision of 13 *Del.C.* § 1903(4) was incorrect under the circumstances. Accordingly, the judgments of the Family Court are hereby REVERSED.



4. We note that the Virginia court may have deferred jurisdiction to Italy if Johnson had filed his child custody modification petition in Virginia. Yost argued that Italy could satisfy the first two jurisdictional tests of UCCJA Section Three because the children had continuously resided in that country for at least one year preceding Johnson's suit. Johnson, however, correctly argued that Section Three only refers to residence in a "state." He also correctly claimed that the UCCJA defines a "state" as "any state, territory or possession of the United States, the Commonwealth of Puerto Rico and the District of Columbia." 13 *Del.C.* § 1902(10). Johnson therefore concluded that the Italian courts should never obtain jurisdiction.

No state court has yet resolved the issue whether a foreign country can qualify as a "state" within the meaning of Section Three of the UCCJA. However, in a case that mirrors the present dispute, the Virginia Supreme Court ruled that England qualified as a "state" within the meaning of the *forum non conveniens* section of the UCCJA. See *Middleton v. Middleton*, 227 Va. 82, 95, 314 S.E.2d 362, 368 (Va.1984).

Middleton involved a custody dispute between a separated couple. The husband resided in Virginia and the mother lived in England. According to a Virginia custody agreement, the children lived in England and visited their father on summer vacations. 227 Va. at 88, 314 S.E.2d at 364. During one summer visitation, the father decided not to return the children and sought to modify the custody decree in Virginia without warning his estranged wife. *Id.* The mother flew to Virginia and took her children back to England. *Id.* She then instituted a custody suit in the English courts and requested the Virginia court to defer its judgment pending the outcome of the foreign suit. *Id.*

The parties in *Middleton* both agreed that Virginia had subject matter jurisdiction. Instead,

the mother requested Virginia to defer to the English court's decision under the *forum non conveniens* section of the UCCJA. The relevant section of the Virginia version of the UCCJA provides that a court should defer judgment if "a court of another state is a more appropriate forum." *Id.* at 94, 314 S.E.2d at 368 (emphasis added).

Middleton decided to give the term "state" a liberal interpretation to help effectuate the general purposes of the UCCJA. *Id.* The Virginia Supreme Court reasoned that recognizing England as a "state" was justifiable under the UCCJA because: (1) English law was very similar to Virginia jurisprudence; (2) England had a closer connection between the mother and her children; and (3) most of the relevant evidence was located in England. *Id.* at 94-95, 314 S.E.2d at 367-68.

Middleton also recognized the procedural advantage the father obtained when he refused to return his children to England. The court noted:

While father did not "snatch" the children in the true sense of the word, he engaged in an equivalent act by refusing to return them in violation of a visitation agreement; he procured a tactical advantage by his conduct. *Id.* at 95-96, 314 S.E.2d at 369.

We were also mindful of the tactical advantage Johnson secured when he "contacted" Virginia and then chose to file his petition in the Delaware Family Court the next day. Johnson's counsel even admitted at oral argument that the Virginia court would probably have found that Italy was a proper forum under *Middleton*. Although we express no view as to the motives underlying Johnson's conduct in this matter, we will not permit parties in a custody dispute to "forum shop" with the Delaware courts in complete derogation of the stated purposes of the UCCJA. *Id.* at 91-94, 314 S.E.2d at 366-367.