047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,610

Florida Bar No. **351490**

RONA E. YURGEL,
n/k/a RONA E. GREEN,

Petitioner,

v.

GLENN G. YURGEL,

Respondent.

FILED
SID J. WHITE
NOV 27 1989
CLERK, SUPREME COURT
By _____
Deputy Clerk

AMENDED BRIEF OF THE FAMILY LAW SECTION OF THE FLORIDA BAR AS AMICUS CURIAE

Family Law Section of
the Florida Bar
Cynthia Greene, Chairman
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Summary of the Argument

Nothing exempts an appeal from the definition of **"proceeding"** and, infact, it has been treated as a custody proceeding on several occasions.

A trial court may entertain proceedings and enter orders and even judgments so long as those judgments do not affect or interfere with the subject matter of the appeal. A modification proceeding, being in the nature of a supplemental petition based upon changed circumstances, seeks an adjudication of a new matter. While a lower tribunal may not change custody without the consent of the District Court- since the issue of custody based upon the prior fact pattern is in their exclusive arena, there is no prohibition against filing this new action. tion was obtained. Soles v. Soles, 536 So.2d 367 (Fla. 1DCA 1988) cited by the District Court of Appeal below only held that the court lacked jurisdiction to enter an order subsequent to the notice of appeal which addressed the substance of the appeal.

Since pending proceedings toll the vesting of home state jurisdiction in another state, and since both a commenced modification proceeding and an appeal are proceedings dealing with custody the Family Law Section of the Florida Bar believes that the answer to the first two certified questions should be in the affirmative.

The question as to whether the filing of the motion without a request for remand will **"toll"** the time for the vesting of home state jurisdiction in another state, (assuming that the issue of

home state jurisdiction has import) can only be dealt with by parallel to motions filed pursuant to Rule 1.540(b), Florida Rules of Civil Procedure. Utilizing that analogy, relinquishment should not be required.

The Family Law Section of the Florida Bar believes, however, that the issue of whether "home state" jurisdiction has been established in another jurisdiction is a non-issue in custody modification proceedings.

With minor deviation the District Courts of Appeal of Florida have interpreted F.S. **61.133** to mean that the court of original jurisdiction, that being the state which initially entered the custody decree, continues to maintain exclusive jurisdiction to modify that decree for so long as one parent remains in the jurisdiction and the child maintains some contact with the jurisdiction. This view is entirely consistent with the Parental Kidnapping Prevention Act (PKPA), **28** U.S.C.A. **1738A.**

With due consideration of the fact that Florida courts may decline to exercise their continuing jurisdiction in appropriate cases, the Family Law Section of the Florida Bar asks this Court to opine that the court of original jurisdiction retains continuing exclusive jurisdiction to modify under both the U.C.C.J.A. and PKPA where one parent remains in the jurisdiction and significant contact with the child occurs. This determination will render the certified questions to an academic rather than substantive status.

Arsument

(1) IS AN APPEAL FROM A CUSTODY ORDER IN THE LOWER COURT A "CUSTODY PROCEEDING" WITHIN THE MEANING OF THE UCCJA SO AS TO TOLL THE VESTING OF "HOME STATE" JURISDICTION IN A FOREIGN STATE WHILE THE ORIGINAL STATE CONTINUES TO EXERCISE JURISDICTION OVER THE PARTIES AND THE SUBJECT MATTER?

(2) DOES THE FILING OF A PETITION FOR MODIFICATION OF CUSTODY IN THE LOWER COURT, WITHIN SIX MONTHS OF THE CHILDREN RESIDING IN FLORIDA, AND WHILE AN APPEAL IS PENDING IN FLORIDA, TOLL THE VESTING OF "HOME STATE" JURISDICTION IN A FOREIGN STATE?

(3) IS RELINQUISHMENT OF JURISDICTION PURSUANT TO RULE 9.600 (b) OF THE APPELLATE PROCEDURE A CONDITION TO THE PRESERVATION OF CONTINUING "HOME STATE" JURISDICTION?

Pursuant to the U.C.C.J.A., as enacted in Florida, "Home State" means "the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as a parent for at least 6 consecutive months or, in the case of a child less than 6 months old, the state in which the child lived from birth with any of the persons mentioned". F.S. 61.1306(5). Home State Jurisdiction is jurisdiction to enter or supersede a custody order which is conferred because the state had been the home state of a child at the time of the commencement of a proceeding or had been the child's home state within six months before commencement of the proceeding and the child is absent from the state because of his removal or

retention by a person claiming his custody or for other reasons, and a parent or person acting as a parent continues to live in this state. F.S. 61.1308(1)(a).

While the questions certified to this Court appears at first blush to be simple, the ramifications of the answers require much deeper analysis than simple mechanical answers to the questions as phrased can provide.

A child's "home state" is ordinarily very easy to determine. The definition requires a quick look to see where the child has lived for six months prior to the commencement of a proceeding. The issue of whether that "home state" has jurisdiction to evaluate competing custody claims is far deeper.

Behind the certified questions appears to be an underlying belief that if "home state'' jurisdiction has vested in another state, that this state has lost jurisdiction. Due to that concern, the questions seek to elicit an answer as to whether a state maintains home state jurisdiction when the child is removed pursuant to a lawful final judgment when that judgment is on appeal. If an appeal is still a continuation of the proceeding, then home state jurisdiction is not being conferred in the other state despite the child's physical presence. If the modification proceeding filed within six months of the removal of the child and during an appeal is a valid commencement of a proceeding, the same result occurs.

The Family Law Section of the Florida Bar believes, however, that even assuming, arguendo, that there could be, by the definitions contained in the UCCJA, concurrent jurisdiction for modification in more that one state- the issue of whether "home state" jurisdiction is present in another state would still not be dispositive of where further custody determinations should properly be made.

There should be no question that a custody appeal is a proceeding wherein a state has continued to exercise jurisdiction over the the parties and the subject matter, to wit: the children. It is unquestioned that the appellate court could reverse a custody determination which permitted children to be removed from a state, thereby reinstating a prior status wherein the children were to live in Florida and could order their return. As such, it is a custody proceeding. Consistent with this position, an appellate proceeding in California was perceived as a custody proceeding by the District Court of Appeal, Fourth District, in Pedowitz v. Pedowitz, 492 So.2d 472 (Fla. 4DCA 1986); and in McCormick v. Norman, 453 So.2d 515 (Fla. 2DCA 1984) the District Court of Appeal for the Second District agreed that Florida should decline to exercise modification jurisdiction pending completion of all legal remedies in the state of original jurisdiction, including appellate proceedings. That being the case, the proceeding should toll the vesting of "home state" jurisdiction in another state.

The Family Law Section of the Florida Bar could not locate any authority to stand for the proposition that the filing of a petition for modification in the lower court, while an appeal was pending, would be a nullity and does not believe that that should be the law. A trial court may entertain proceedings and enter orders and even judgments so long as those judgments do not affect or interfere with the subject matter of the appeal. First Development, Inc. v. Bamaor, 449 So.2d 290 (Fla. 3DCA 1983). A modification proceeding, being in the nature of a supplemental petition based upon changed circumstances, seeks an adjudication of a new matter. While a lower tribunal may not change custody without the consent of the District Court- since the issue of custody based upon the prior fact pattern is in their exclusive arena, there is no prohibition against filing this new action. Rule 1.110(h), Rules of Civil Procedure, permits subsequent pleadings to be filed so long as jurisdiction over the parties has not terminated. An action is deemed commenced at the time when the complaint of petition is filed. See, Rule 1.050, Florida Rules of Civil Procedure. It is clear that the lower tribunal's jurisdiction over the parties as to modification was, at best, suspended and not terminated. Thus the filing of that pleading commenced the modification action which could not be finally determined until a mandate issued from the appellate court, or a relinquishment of jurisdiction was obtained.

Soles v. Soles, 536 So.2d 367 (Fla. 1DCA 1988) cited by the District Court of Appeal below only held that the court lacked jurisdiction to enter an order subsequent to the notice of appeal which addressed the substance of the appeal. The order was quashed but the motion was not stricken.

Since pending proceedings toll the vesting of home state jurisdiction in another state, and since both a commenced modification proceeding and an appeal are proceedings dealing with custody the Family Law Section of the Florida Bar believes that the answer to the first two certified questions should be in the affirmative.

The question as to whether the filing of the motion without a request for remand will "toll" the time for the vesting of home state jurisdiction in another state, (assuming that the issue of home state jurisdiction has import) can only be dealt with by parallel to motions filed pursuant to Rule 1.540(b), Florida Rules of Civil Procedure. Rule 1.540(b) motions have a set time for their filing- one year after the entry of the judgment sought to be vacated. The time for filing is not tolled by the filing of a notice of appeal. Seven UD Bottling Company of Miami, Inc. v. Georse Construction Corp., 153 So.2d 11 (Fla. 3DCA 1963) While there is no question that the filing of that notice of appeal precluded the lower tribunal from acting on any Rule 1.540(b) motion filed within the one year period where the appeal was not disposed of during that time frame, the District Court of Appeal, Third District, has opined that even where relinquishment was

denied, the motion to relinquish did toll the time. Glatstein v. City of Miami, 391 So.2d 297 (Fla. 3DCA 1980). Thus, relinquishment should not be required.

With reference to modification actions, the Family Law Section of the Florida Bar does not believe that a motion to relinquish jurisdiction should be required to validate the filing of the complaint.

Having responded directly to the questions certified questions raised herein, the Family Law Section of the Florida Bar asserts that the issue of whether "home state" jurisdiction has been established in another jurisdiction is a non-issue in custody modification proceedings.

With minor deviation the District Courts of Appeal of Florida have interpreted F.S. 61.133 to mean that the court of original jurisdiction, that being the state which initially entered the custody decree, continues to maintain exclusive jurisdiction to modify that decree for so long as one parent remains in the jurisdiction and the child maintains some contact with the jurisdiction. The Family Law Section of the Florida Bar believes that to be the correct view. This view is entirely consistent with the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. 1738A, enacted by Congress in 1980.

F.S. 61.133 states:

> (1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless:

(a) It appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdiction prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree; and

(b) The court of this state has jurisdiction.

Jurisdictional prerequisites include as one factor that the child and at least one contestant have a significant connection with this state and that there is available in the state substantial evidence concerning the child's present or future care, protection, training and personal relationships. F.S. 61.1308(1)(b). If a parent remains in the originating state, and maintains contact with the child, that state retains exclusive jurisdiction to make determinations (although not through "home state" jurisdiction) until such time as a determination is made to relinquish that jurisdiction to another forum. In custody modification proceedings, if one contestant is present in a state, then there would always be available evidence in that state as to the child's potential future care.

It is important to examine some of the cases from the various District Courts of Appeal to see precisely what the District Courts of Appeal have done to date regarding the jurisdictional disputes between competing states.

In Reeve v. Reeve, 391 So.2d 789 (Fla. 1DCA 1980) the District Court of Appeal considered whether a modification of a Florida Decree properly belonged in New Jersey since the child and residential parent had moved to New Jersey in excess of six

months prior to the Modification Action. The residential parent filed for custody determination in New Jersey as well. The court therein noted that there are four possible situations where subject matter jurisdiction will arise- one of which was where there was a parent and child with significant contact, and held that Florida was the proper forum.

The reverse situation was dealt the same evaluation in Hamill V. Bower, **487** So.2d **345** (Fla. 1DCA **1986).** In ~~Hamill~~ the facts indicated that the parties were divorced in California in **1978.** In **1985** the non-residential parent, with the consent of the residential parent but without court order, and the children commenced living together in Florida until **1985** when the residential parent took the children back. Proceedings were filed in both Florida and California. Relying on the analysis in Kumar v. Superior Court of California, **652** P.2d **1003** (Cal. **1982)** the court held that even where home state jurisdiction had vested in Florida, since the original state retained continuing exclusive jurisdiction to modify the decree unless that state no longer had jurisdiction prerequisites or had declined to act, Florida had no jurisdiction to modify the decree. The First District Court of Appeal went so far as to hold that prohibition would lie in this circumstance since although there was home state jurisdiction there was no jurisdiction ~~to act~~ based upon **F.S. 61.133.** The issuance **of** the writ was withheld, however, as the cause was remanded with directions to revisit the motion to dismiss.

In Wheeler v. Wheeler, 383 So.2d 655 (Fla. 2DCA 1980) (approved by this Court in Mondv v. Mondy, 28 So.2d 235 (Fla. 1983)) The court held that Florida was correct in not entertaining modification proceedings despite the child having significant connections with Florida because Texas has entered a valid custody decree, still maintained jurisdictional prerequisites, and had not declined to assume jurisdiction.

In Johnson v. Farris, 469 So.2d 221 (Fla. 2DCA 1985) a Florida decree was in issue, but the child and residential parent lived in Texas. The non-residential parent exercised his visitation to the fullest. The residential parent argued that the order dismissing the action was, in actuality, a determination that there was an inconvenient forum and thus a waiver of jurisdiction. The District Court of Appeal noted, however, that when a court exercised its discretion to decline jurisdiction it has an obligation to notify the court found to be the more convenient forum. Since there was nothing in the record to indicate that was done, the cause was remanded for a consideration of whether the court would choose to decline jurisdiction.

In Newcomb v. Newcomb, 507 So.2d 1145 (Fla. 3DCA 1987) the District Court of Appeal held that since Florida was the home state of the child at the time of the filing of a modification petition seeking to supersede a California decree, the court did have the right to determine whether the California Court, which it acknowledged still also had jurisdiction, was exercising

jurisdiction in conformity with the UCCJA. (If California no longer had jurisdiction under its version of the UCCJA then Florida may have been the correct forum.)

Pudlas v. Celaya, 469 So.2d 238 (Fla. 4DCA 1985) held that Florida was required to forego jurisdiction in favor of the courts of Arizona where Arizona entered the original decree, had continuing contact and had not declined jurisdiction-notwithstanding the fact that the children now lived in Florida.

Recently, in Steckel v. Blafas, 14 FLW 2472 (Case no. 89-133 Opinion filed October 18, 1989) the issue was whether Florida could modify a New York decree where the father had moved to New Jersey and the mother and child had moved to Florida after the decree. The parties had consented to continuing jurisdiction in New York. After holding the stipulation as to New York jurisdiction unenforceable since subject matter jurisdiction cannot be conferred by consent, the court went on to examine where jurisdiction lies. Florida had "home state" jurisdiction as the children had resided here in excess of six months. The court noted, however, that notwithstanding home state jurisdiction, this court cannot modify another court's order unless there has been a determination by that other jurisdiction that they decline to rule or that court no longer has jurisdiction. The court further noted that the PKPA holds that the jurisdiction of a court originating a custody determination continues for so long as the state remains the residence of the child or of any contestant and a custody determination can be made consistent

"home state" of the children, Pennsylvania had maintained contact with the children and had entered the original decree and that under those circumstances Section **61.133,** Florida Statutes **(1981)** applies and mandates that a Florida court shall not make a permanent change in the custody decree established by the decree of another state. In footnote **9** the court cited a UCCJA commissioners note to the fact that despite the fact that a second state has become the home state of the child, the original

state has preferred jurisdiction. Although the case was disposed of by interpretation of the UCCJA, footnote 3 discusses the PKPA which the court noted had been held to pre-empt state law.

De La Pena v. Torrone, 467 So.2d 336 (Fla. 5DCA 1985) held that a mother was properly found to be in contempt for failure to abide by an order requiring her to respond in Florida notwithstanding pending New York proceedings where Florida was the proper state to exercise jurisdiction. The court stated that the controversy between Florida and New York may be controlled by the PKPA which would have provided that action by New York was only permissible only if New York had jurisdiction (i.e. emergency jurisdiction under the UCCJA) AND Florida no longer had jurisdiction. Here, since Florida still had retained jurisdiction, New York would have been required to recognize Florida's jurisdiction.

The Fifth District continued its examination of conflicting jurisdiction in Gordey v. Graves, 528 So.2d 1319 (Fla. 5DCA 1988). Therein paternal grandparents sought to domesticate and modify a Nevada decree. The grandparents and child lived in Florida and had lived here for more than four years. At the outset the court noted that the mere fact that Florida was now the home state of the child did not end the inquiry into whether Florida should exercise its jurisdiction. Nevada had not declined to exercise jurisdiction. Therefore, Florida could only become involved if there had been no jurisdictional prerequisites

present in Nevada. The court held that the fact that the Mother was still in Nevada was not a factor since he had not seen his Mother since he was eight months old.

The PKPA was not discussed in Gordey, but it is possible that the same result would have been reached since under the PKPA jurisdiction is only retained if a party remains in the jurisdiction and state law allows for continued jurisdiction. Without an evaluation of what Nevada law requires in order to maintain significant connection jurisdiction, it is difficult to ascertain the correctness of this decision.

This year, in Johnson v. Denton, 542 So.2d 447 (Fla. 5DCA 1989) HRS had acquired custody of a child in dependency proceedings without complying with the UCCJA. The parties had divorced in Arkansas, but the child had lived in Florida since 1985. In 1987 the dependency proceeding was filed in Florida and, in 1988 an Arkansas court entered an Order transferring custody from the mother to the Father. Florida declined to accept and enforce that Order. The court found that there was no question that Florida was the home state of the child but noted that Arkansas still had jurisdiction to modify its order pursuant to F. s. 61.133 and had not declined to do so. In footnote the court noted that HRS conceded that the court had erred but had asked the court to hold that the PKPA governed the proceeding. Although the court noted that in other jurisdictions the PKPA had been

held to pre-empt state law where there was a conflict, in the instant case there was no factual conflict between the PKPA and a determination under the UCCJA.

The closest this Court has come to discussing the central issue herein is in the case of Mondv v. Mondv, 428 So.2d 235 (Fla. 1983). In Mondy, the parties were divorced in Idaho with custody awarded to the father. The mother took the children in violation of an Idaho order, to Florida. The father sought enforcement in Florida, and the mother countered with a petition to modify the Idaho decree and award her custody. The lower tribunal awarded the wife temporary custody and denied the father's motion to set aside the order and to dismiss for lack of jurisdiction. The First District Court of Appeal affirmed, but this Court reversed that decision agreeing that in view of the outstanding Idaho proceedings and decree, the court should have declined to exercise its jurisdiction. The opinion of this court held that the circuit court should have refused jurisdiction because the Idaho court had followed the UCCJA in making its determination. This court did not address F.S. 61.133 or the PKPA in making its determination, but it did approve Wheeler v. Wheeler, 383 So.2d 655 (Fla. 2DCA 1980) discussed above.

In answering the questions certified by the Fourth District Court of Appeal the Family Law Section of the Florida Bar believes it important to have this Court recognize that even if the Court holds that "home state jurisdiction" can vest in another state during the pendency of an appeal or that "home

state jurisdiction" is not preserved in this state when a petition for modification is filed within six months of the children living in Florida but during the pendency of an appeal, or that reqlinquishment of jurisdiction is required to preserve "home state jurisdiction", that **loss** of "home state jurisdiction" is not synonymous with loss of jurisdiction to modify the decree.

It is necessary in order to maintain consistency among the circuits that this Court opine that F.S. **61.133** grants continuing exclusive jurisdiction in the issuing state for so long as a contestant remains in that state and the children maintain contact. It is necessary that this Court acknowledge the the existence of PKPA and its impact. Given its name, the PKPA is all but overlooked as a means of determining the locale of custody disputes. While the Family Law Section of the Florida Bar believes that with proper application of F.S. **61.133** there will be very little conflict between decisions grounded on the UCCJA and the PKPA, there may be fact patterns in which conflict could arise- in which case the PKPA must be the determining factor. See, Thompson v. Thompson, 108 S.Ct **513** (1988).

It should also be stressed that the UCCJA and the PKPA provide for transfers of jurisdiction where another state is a better jurisdiction. Nothing requires a Florida court to keep an action where the children and residential parent have become residents of another state- the lower tribunal may decline jurisdiction and notify the courts of that other state of its determination. Also, if jurisdiction should, in accordance with

F.S. 61.133 and the PKPA, belong in another state and a modification action is filed in Florida because the children have lived here for a substantial period of time, nothing in the UCCJA or PKPA precludes the Florida court from communicating with the foreign court so as to determine whether the foreign court will decline jurisdiction. The prohibition is against superseding the foreign order, nothing stops the Florida court from determining its jurisdiction through communication- with the understanding that the foreign jurisdiction would take priority.

The lack of direction on this issue has opened the door to the type of problem seen in the within appeal. The lower tribunal in this cause sua sponte dismissed a petition for modification of a Florida final judgment filed in Florida where one contestant had maintained residence in Florida and there was evidence of continuing contact between Florida and the children based upon lack of "home state jurisdiction" at the time of the filing of the petition for modification. This determination misses the point- it fails to recognize continuing exclusive jurisdiction under either the UCCJA or PKPA and fails to recognize that this forum had a choice to make. If the lower tribunal had determined, after hearing, that it was an inconvenient forum and transferred jurisdiction to New York, there would be no reason to look further. But, since New York recognizes the pre-emption of the New York UCCJA by the PKPA, the New York court would not have accepted jurisdiction over the modification at the time the modification was filed. The lower tribunal had, in effect,

determined that at that moment no court had jurisdiction. (Although once Florida declined jurisdiction, New York would have obtained jurisdiction as it was now the "home state" and the prior state had declined.) Florida courts must be schooled to look at the effect of their determinations under the law of the foreign jurisdiction.

Conclusion

In response to the questions certified by the Fourth District Court of Appeal, the Family Law Section of the Florida Bar urges this Court to respond to the questions as posed, answering the first two questions in the affirmative and the last in the negative, but also to go further in responding to affirmatively state that the answers to those questions are merely one step in the determination of jurisdiction. Home state jurisdiction must be recognized as only one means of establishing jurisdiction, and a very low level consideration in modification proceedings. While home state jurisdiction is the primary factor to be considered in determining jurisdiction in initial custody proceedings, it is not the determining factor in modification proceedings by virtue of both the UCCJA and the PKPA.

Certificate of Service

I HEREBY CERTIFY that at true and correct copy has been mailed this 20th day of November, **1989** to A. Matthew Miller, Attorney for Petitioner (Wife) P.O. Box **7259**, Hollywood, Florida **33081** and to Mark H. Brawer, Attorney for Respondent (Husband), **8360** West Oakland Park Boulevard, Suite **204**, Sunrise, Florida **33351.**

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