IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 74,610

Florida Bar No. 182731

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

Petitioner

v.

GLENN G. YURGEL,

Respondent.

BRIEF OF PETITIONER ON CERTIFIED QUESTIONS

****
Appeal from the District Court of Appeal
for the Fourth District of Florida
****

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CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

This is a Petition for this Court to review questions certified by the District Court of Appeal for the Fourth District of Florida upon Petitioner's Suggestion For Certification as matters of statewide application and of exceptional or great public importance.

Petitioner filed an appeal below in the District Court of Appeal for the Fourth District of Florida, pursuant to Rule 9.110(d) of the Florida Rules of Appellate Procedure, to review the Final Order entitled "Order Dismissing Wife's Supplemental Petition For Modification" of the Seventeenth Judicial Circuit, in and for Broward County, Florida, entered by the Honorable J. Leonard Fleet, and docketed by the Clerk of the Circuit Court of the Seventeenth Judicial Circuit on December 8, 1988.

The parties filed an Election Of Fastrack With Request For Oral Argument on February 7, 1989, in the District Court, which was approved by Order of that Court dated February 14, 1989, and the parties subsequently filed an Agreed Statement Of The Case (including essential facts), approved and signed on behalf of the Trial Court by the Honorable J. Leonard Fleet.

The parties to this proceeding will be referred to by their designation in the Trial Court below: that is, Petitioner will be called **"Wife"** and Respondent will be called **"Husband".**

"A" refers to **"Appendix** To Brief Of Petitioner On Certified Questions".

All emphasis is the writer's unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

The Agreed Statement of The Case, including essential facts, approved and signed by the Trial Court, was as follows:

1. This is an appeal pursuant to Rule 9.110 (d) of the Florida Rules of Appellate Procedure to review the final order entitled "Order Dismissing Wife's Supplemental Petition For Modification" of the Seventeenth Judicial Circuit, in and for Broward County, Florida, entered by the Honorable J. Leonard Fleet, and docketed by the Clerk of the Circuit Court of the Seventeenth Judicial Circuit on December 8, 1988.

2. The Order appealed is in the nature of a final order because it dismisses the Wife's post-dissolution Amended Petition For Modification Of Final Judgment *And* For Other Relief upon the Trial Court's sua sponte Motion for lack of subject matter jurisdiction upon the Trial Court's interpretation of the Uniform Child Custody Jurisdiction Act (U.C.CJ.A.).

3. A Final Judgment Of Dissolution Of Marriage was originally entered by the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, on March 4, 1986, in which ,the Circuit Court specifically reserved jurisdiction of the parties and the subject matter. (Emphasis added)

4. The Final Judgment Of Dissolution Of Marriage provides, inter alia, that:

> A. The parties shall share parental responsibility of their three minor children, to wit: S[redacted] I[redacted] Y[redacted] born May 10, 1976; T[redacted] I[redacted] Y[redacted] born August 24, 1978; and Z[redacted] I[redacted] Y[redacted] born September 10, 1980.
>
> B. The Husband shall have physical custody of the children based upon the following findings: First despite the superior physical environment of the Wife's residence, the emotional environment created by the adult of the household is not a positive factor. Second, the Court finds that there appeared to be far less

difficulties with non-residential parent contact when the children resided with the Husband.

5. The "adult of the household" referred to in the Final Judgment Of Dissolution Of Marriage refers to the Wife's then boyfriend, now husband, Donald Green.

6. The Wife had temporary custody of the parties' three (3) minor children during the pendency of an extremely bitter two-year dissolution of marriage action in which custody was the focal point, and the children resided with the Husband during the summer visitation period. (Emphasis added)

7. At the time of the final hearing in the original dissolution action, the Trial Court was aware that the Husband would be residing in New York so that upon the transfer of physical custody of the children from the Wife to the Husband, the children would be residing in New York. The Final Judgment provided that the transfer of physical custody from the Wife to the Husband take place on August 15, 1986, and in fact the transfer of physical custody did take place at that time.

8. The parties moved to Florida in October, 1978, at which time the parties' oldest child was approximately two (2) years of age, the parties' second child was a few months old, and prior to the birth of the parties' third child on September 10, 1980. All three (3) children continued to reside in Florida until August 15, 1986.

9. A timely appeal from the Final Judgment Of Dissolution Of Marriage was taken by the Wife, and the Final Judgment Of Dissolution Of Marriage was affirmed by this Court on April 15, 1987. See Yurcsel v. Yurcsel, 505 So. 2d 636 (Fla. 4th DCA 1987).

10. On January 5, 1987, while the children were in Florida visiting with their mother for the Christmas/New Year Holiday, and during the pendency of the appeal from the Final Judgment, the Wife filed her original Petition For Modification in the Lower Court, together with her Emersencv Motion To Stav Return Of Children To New

York. After proceedings in the Lower Court on the Wife's Emergency Motion To Stay Return Of Children, an Order was entered on January 15, 1987, denying the Motion. Emphasis added)

11. The Wife's original Petition For Modification was filed approximately four and one-half (4 1/2) months after the change in physical custody. No state other than Florida exercised jurisdiction over the parties, their children, or the subject matter of the Wife's Petition For Modification, and no proceeding between the parties was commenced in any other state up to and throughout the proceedings in the Lower Court through the entry of the Order appealed.

12. The parties' three (3) minor children are in Florida approximately two and one-half to three (2 1/2-31 months each year during the summer, Christmas, and Easter vacations, and on other occasions at the residence of the Wife, who has remained in Florida continuously and without interruption since the entry of the Final Judgment on March 4, 1986. (Emphasis added)

13. On May 4, 1987, a mandate from this Court affirming the Final Judgment was filed in the Lower Court. Between June, 1987, and November, 1987, several hearings were scheduled and rescheduled regarding the Husband's Motions To Dismiss The Wife's Petition For Modification and a substitution of counsel for the Wife occurred.

14. On November 16, 1987, the Wife filed, through her new counsel, the Amended Petition For Modification Of Final Judgment And For Other Relief dismissed by the Order appealed.

15. On December 11, 1987, the Husband filed his Motion To Dismiss The Wife's Amended Petition For Modification Of Final Judgment And For Other Relief upon the basis that the Amended Petition failed to state, prima facie, an adequate basis for a change of custody, or in the alternative, that Florida was no lonser a convenient forum within the meaning of the U.C.C.J.A. (Emphasis added)

16. The Husband's Motion To Dismiss was denied by Order of the Lower Court dated January

15, 1988, and the Husband's Motion For Reconsideration of January 21, 1988, was denied by Order of the Lower Court dated February 26, 1988. Thereafter, the Husband filed an Answer and Counterpetition, and the parties proceeded with discovery and preparation for final hearing. (Emphasis added)

17. On April 21, 1988, the Wife's Motion To Set Final Hearing On Wife's Amended Petition For Modification Of Final Judgment And For Other Relief was filed requesting the setting of a three-day final hearing subsequent to September, 1988, in order to allow necessary time for the scheduling and taking of extensive depositions in New York.

18. In August, 1988 the Husband filed an Emergency Motion For Injunction which was denied by Order of the Court dated August 4, 1988.

19. On October 28, 1988, a Notice Of Hearing for November 3, 1988, on the Wife's Motion To Set Final Hearing was filed in the Lower Court, and at hearing on November 3, 1988, the Lower Court agreed to schedule final hearing on the Court's non-jury trial calendar beginning the week of Monday, December 5, 1988, the Order to be prepared and entered by the Court.

20. On November 14, 1988, prior to the Lower Court's preparation and entry of an Order Setting Final Hearing, the Husband filed a Motion For Summary Judgment, which was subsequently denied by Order of the Court dated December 2, 1988.

21. On November 21, 1988, prior to the Lower Court's preparation and entry of an Order Setting Final Hearing, the Lower Court sent its sua sponte Motion To Dismiss For Lack Subject Jurisdiction, in letter form, to counsel for the respective parties hereto requesting Memorandums of Law from respective counsel by no later than December 2, 1988. Subsequent to the filing of the Memorandums, the Lower Court entered the Order appealed herein dismissing the Wife's Amended Petition For Modification Of Final Judgment And For Other Relief for lack of subject matter jurisdiction.

22. A true and correct copy of the docket of this case in the Lower Court reflecting the progress of the case from March **6, 1986,** through December **15, 1988,** is attached hereto and made a part hereof.

The Wife's Amended Petition For Modification Of Final Judgment And For Other Relief filed on November **16, 1987,** was filed pursuant to leave of Court granted by Order dated October **27, 1987** (A **1).**

The issue presented in the District Court by the Wife was as follows:

> THE TRIAL COURT'S SUA SPONTE DISMISSAL OF THE WIFE'S POST-DISSOLUTION AMENDED PETITION FOR MODIFICATION OF FINAL JUDGMENT AND FOR OTHER RELIEF FOR LACK OF SUBJECT MATTER JURISDICTION, NOTWITHSTANDING THAT SUBJECT MATTER JURISDICTION WAS NEVER CHALLENGED BY EITHER PARTY, THAT THE TRIAL COURT PREVIOUSLY DECIDED IT HAD JURISDICTION BY ORDER DATED JANUARY 15, **1988,** AND THAT THE MATTER WAS IT ISSUED, PREPARED FOR TRIAL, AND READY TO BE SET, WAS WRONG, AS A MATTER OF LAW.

The majority opinion in the District Court determined, inter alia, as follows:

> **(1)** That the Trial Court correctly found the lack of "home state" jurisdiction (although mislabeled **"subj**ect matter" jurisdiction) because at the time the Wife filed her Petition To Modify, the children did not live in Florida.
>
> **(2)** That although the Wife's original Petition To Modify was filed within six **(6)** months of the children living in Florida, because it was filed during the pendency of an appeal from the Final Judgment and there was no relinquishment of jurisdiction by this Court, the filing of the original Petition had no force or effect, citing Soles v. Soles, 536 So.2d **367** (Fla. 1st DCA **1988).**
>
> **(3)** That the Wife's Amended Petition filed over a year after the children left Florida did not relate back to the filing date of the original Petition To Modify because to permit it to do so

would negate the rule granting exclusive jurisdiction in an appellate court during an appeal.

Judge Warner's disagreement with the majority opinion below in the District Court may be summarized as follows:

> (1) That while the Trial Court may not have had the ability to act on the original Petition For Modification, the divestment of the Trial Court's jurisdiction during the pendency of the appeal from the Final Judgment did not change the time of "commencement of the proceedings".
>
> (2) That even if it were determined that proceedings were not **"commenced"** because of the pendency of the appeal, the appeal itself gives the Courts of Florida continuing jurisdiction over this cause because the Courts of Florida were still exercising jurisdiction over these parties and continued to exercise it until the termination of all of the appellate proceedings.
>
> (3) That there was a basis for exercising jurisdiction under Section 61.1308(1)(a), i.e., "home state" jurisdiction, because Florida had been the child's home state within six months before commencement of the proceeding; and the Trial Court did not have to consider whether it also had jurisdiction under Section 61.1308(1)(b), i.e., "significant connections" jurisdiction.
>
> (4) That the real question in this case is whether or not the Trial Court should decline to exercise that jurisdiction because Florida is now an inconvenient forum.

The entire opinion of the District Court is now reported at 546 So.2d 746 (Fla. 4th DCA 1989), including the following questions certified to this Court:

> **1)** IS AN APPEAL FROM A CUSTODY ORDER IN THE LOWER COURT A "CUSTODY PROCEDDING" 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 PARTIESD 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? AND

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

SUMMARY OF ARGUMENT

Florida was the initial custody decree state and has exercised jurisdiction over the parties and the subject matter, either in the Trial or Appellate Courts, continuously and without interruption since the entry of the initial custody decree (FJDM). An appeal from a custody decree **is** a "custody proceeding" within the meaning of the UCCJA. Accordingly, Florida never lost "home state" jurisdiction and "home state" jurisdiction never vested in any foreign state.

The Wife's Amended Petition For Modification, filed with Leave of Court, related back in time to the filing of the original Petition For Modification, and was of full legal force and effect, for purposes of determining "commencement date" within the meaning of the UCCJA, notwithstanding the pendency of an appeal. Although Rule 9.600 of the Florida Rules of Appellate Procedure did not provide concurrent jurisdiction to permit the Trial Court to enter an Order on the Petition For Modification, and none could be entered, in the absence of a relinquishment of jurisdiction, jurisdiction in the Appellate Court did not and does not render the filing of the Petition For Modification in the appropriate court, i.e., the Trial Court, a legal nullity. The transfer of jurisdiction to the Appellate Court merely prevented the Trial Court from ruling

on the Amended Petition For Modification until jurisdiction was remanded by the Appellate Court.

Under the PKPA, once the state with initial custody jurisdiction makes a custody award, that state has continuing jurisdiction for as long as the child or either contestant continues to reside in the initial decree state. Here, the Wife, one of the contestants, did continue to reside in Florida, the initial decree state, continuously and without interruption.

The PKPA establishes a policy of federal preemption in custody disputes which, under the Supremacy Clause of the United States Constitution, takes precedence over the UCCJA and preempts the UCCJA in questions of interstate custody jurisdiction. Florida, under the undisputed facts in this case, has exclusive modification jurisdiction under the UCCJA as construed in conformity with the PKPA.

Florida, under the undisputed facts in this case, also has "significant connections" jurisdiction in that the Wife continued to reside in Florida continuously and without interruption since the entry of the initial custody decree and the children, who lived in Florida most of their lives, continued to visit in Florida with their mother and maternal grandparents approximately three (3) months each year. The Trial Court, accepting that there is substantial evidence in Florida regarding the future care, protection and training

of the children and regarding their personal relationships, has already denied the Husband's challenge of non-convenient forum. The Husband never challenged the Trial Court's subject matter jurisdiction on the basis of "home state" or "significant connections" jurisdiction. The Husband only sought to have the Trial Court transfer jurisdiction to New York on the basis that Florida had become an inconvenient forum.

ARGUMENT

(1) IS AN APPEAL FROM A CUSTODY ORDER IN THE WWER 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 WWER 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? AND

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

The Trial Court's sua sponte dismissal of the Wife's Post-Dissolution Amended Petition For Modification Of Final Judgment And For Other Relief For Lack Of Subject Matter Jurisdiction was based upon a misconstruction of the meaning of Section 61.1308 of the Florida Statutes. The Trial Court was apparently of the view that absent "home state" jurisdiction within the meaning of Section 61.1308(1)(a)(i) of the Florida Statutes, the Trial Court was without subject matter jurisdiction.

The District Court agreed with the Wife that either "home state" **or** "significant connections" jurisdiction could provide the Trial Court with the necessary jurisdiction. Because the Trial Court failed to consider "significant connections" jurisdiction, the matter was remanded for such consideration.

Florida was the initial decree state. The parties, during happier days, moved to Florida when two of their three children were infants because they wanted to raise their children in Florida. The parties' third child was subsequently born in Florida and all three of the children lived in Florida most of their lives. The Wife remained in Florida post dissolution and the children still continue to have significant contacts with Florida in that they return to Florida for **"visitation"** with their mother for approximately three months each year. The Wife's parents live in Florida, and the children also visit their maternal grandparents when in Florida. Under these circumstances, the preservation of continuing **"home** state" jurisdiction and "significant connections" jurisdiction in Florida fall within the public policy of requiring the liberal construction of Chapter 61[1].

The undisputed facts would have allowed the District Court to specifically find that Florida **has** "significant **connections"** jurisdiction, as a matter of law, without a remand for further proceedings, see Johnson v. Farris, 469 So.2d 221 (Fla. 2d DCA 1985), where the court found that "significant

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[1]Section 61.001 of the Florida Statutes provides that Chapter 61 shall be liberally construed and applied to promote its purposes, which are to preserve the integrity of marriage and to safeguard meaninsful family relationships; to promote the amicable settlement of disputes that have arisen between parties to a marriage; and to mitigate potential harm **to** spouses **and** their children caused by the process of legal marriage dissolution. (Emphasis added).

connections" jurisdiction existed, as a matter of law, where one parent remained in Florida and the child lived in Florida at least two (2) months each year.

The "significant connections" test is met where the original custody decree is entered in Florida and the non-custodial (non-residential) parent remains in Florida, maintaining a continuous relationship with the child even if another state has since become the child's "home state". Reeve v. Reeve, 391 So.2d 798 (Fla. 1st DCA 1980).

All modifications must be addressed to the state which rendered the decree if that state had and still retains jurisdiction. This is so even though a second state has become the "home state" within the meaning of the UCCJA. No other state may modify a Florida custody decree for so long as Florida has jurisdiction over the case. There is no concurrent modification jurisdiction. Hamill V. Bower, 487 So.2d 345 (Fla. 1st DCA 1986).

In 1980, Congress enacted the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. 1738A, which establishes mandatory federal standards for subject matter jurisdiction in interstate child custody proceedings. Notwithstanding that the Florida appellate courts have virtually ignored the existence of the PKPA, federal law requires that the UCCJA be construed consistent with the PKPA, and that under the Federal Supremacy Doctrine, where the two statutes are inconsistent, the PKPA shall prevail.

The PKPA and the UCCJA both rely upon the principle of continuing jurisdiction, and provide that the initial decree state retains exclusive modification jurisdiction for some period of time after the original custody decree is entered.

Under the PKPA, once the state with initial custody jurisdiction makes a custody award, that state has continuing jurisdiction for as long as (1) the child **or** either contestant continues to reside in the initial state (Emphasis added): and (2) the initial state has jurisdiction under its own law. 28 U.S.C.A. Section 1738A(c)(1) and Section 1738A(d). See also Meade v. Meade, 812 F.2d 1473 (4th Cir. 1987).

The initial decree state loses modification jurisdiction under the PKPA only after both contestants and the child or children move out of state. The initial decree state, therefore, retains exclusive modification jurisdiction under the PKPA as long as at least one contestant continues to live in the initial decree state, provided, of course, that continuing jurisdiction can exist under the law of the initial decree state.

The UCCJA, as enacted in Florida, does specifically provide for post-decree continuing modification jurisdiction. Section 61.1308(1)(b) of the Florida Statutes.

Section 14 of the Uniform UCCJA provides that no other state may modify the initial decree state's custody order for as long as the initial decree state has jurisdiction over the case. In Florida, Section 61.133 of the Florida Statutes.

The courts must look to both the PKPA and the UCCJA in order to determine child custody jurisdiction. If the child and both parties have left the initial decree state, the continuing jurisdiction ends under the PKPA; otherwise, continuing jurisdiction last as long as there is a "significant connection" under the UCCJA.

Inexplicably, the Florida courts have failed to recognize the existence and supremacy of the PKPA. Thompson v. Thompson, 108 S.Ct. **513 (1988).** See also In Re: Custody of Thorensen, **730** P.2d **1380** (W.Ash.App. **1987),** which held that the PKPA preempts the UCCJA under the Supremacy Clause of the United States Constitution in questions of inter-state custody jurisdiction; and Arbosast v. Arbosqast, **327** S.E.2d **675** (W.Va. **1984),** where the West Virginia Supreme Court of Appeals also held that the PKPA establishes a policy of federal preemption in custody disputes which, under the Supremacy Clause, takes precedence over state law (UCCJA).

Florida's failure to recognize the supremacy of the PKPA can seriously impair both the validity of Florida custody decrees and their recognition by other states. See, for example, In Re: Marriage of Leyda, **398** N.W.2d **815** (Iowa **1987),** where the Iowa Supreme Court invalidated a Florida custody order because the Florida court did not follow the PKPA.

The only court in Florida to fully examine the applicability of the PKPA was the United District Court for the Northern District of Florida. McDougald v. Jenson, **596** F.Supp.

680 (N.D. Fla. 1984), affirmed, 786 F.2d 1465 (11th Cir. 1986), cert. denied, 107 S.Ct. 207 (1987).

The Wife believes that Florida did not lose "home state" jurisdiction in view of the pending appeal from the Final Judgment Of Dissolution Of Marriage and the pending modification proceeding. The Trial Court's finding in the Ordered appealed to the District Court, that the losing party in a custody case cannot await the outcome of an appeal and then resume active litigation on modification, is illogical, particularly where, as here, no other state had exercised subject matter jurisdiction and no other state could properly do so under the PKPA. Clearly Judge Warner's view below, i.e.,

> that while the Trial Court may not have had the ability to act on the original Petition For Modification, divestment of the Trial Court's jurisdiction during the pendency of the appeal from the Final Judgment Of Dissolution Of Marriage did not change the time of "commencement of the proceedings".

is the better and more logical view.

The Wife initiated post-dissolution modification proceedings in the Trial Court approximately four and one-half months after the children moved to New York, prior to New York becoming the "home state", and while the District Court was exercising jurisdiction in the appeal from the Final Judgment Of Dissolution Of Marriage.

The majority opinion in the District Court, that Florida lacked "home state" jurisdiction completely overlooks or disregards the existence of the PKPA, and incorrectly interprets

the UCCJA. Again, as Judge Warner correctly stated in her opinion:

> even if it were determined that proceedings were not **"commenced"** because of the pendency of the appeal from the Final Judgment Of Dissolution Of Marriage, the appeal, itself, gives the courts of Florida continuing jurisdiction over the cause because the courts of Florida were still exercising jurisdiction over the parties and continued to exercise it until the termination of all of the appellate proceedings.

The UCCJA does not distinguish between trial and appellate courts, for example:

> **(1)** Section **61.1306(3)** does **not** limit a "custody proceeding" to proceedings in a trial court.
>
> (2) Section **61.1308(1)** does **not** limit jurisdiction under the UCCJA to a trial court of this State, and specifically says, "A court of this State which is competent to decide child custody matters". (It cannot be disputed that the appellate courts of this State are competent to decide child custody matters properly presented for review.)
>
> **(3)** Section **61.1314(1)** does not limit its application to simultaneous proceedings pending in a trial court of another state, and
>
> **(4)** Section **61.132** does **not** limit the disclosure of verified information of custody proceedings to actions pending **only** in a trial court of this or any other state.

The Soles[2] opinion relied upon by the majority below, ~~does not~~ support their conclusion:

> that the filing of the original Petition To Modify had no force or effect because it was filed during

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[2] Soles v. Soles, **536** So.2d **367** (Fla. 1st DCA **1988).**

the time the appeal divested the Trial Court of jurisdiction.

In Soles, the First District held only that the Lower Court lacked concurrent jurisdiction within the meaning of Rule 9.600 of the Florida Rules of Appellate Procedure to enter an order clarifying or modifying the appealed Order

> Because the subsequent Lower Court Order directly addressed the substance of the matter appealed. (Emphasis added)

The Soles opinion does not determine, as a matter of law, that the filing of a motion for clarification or a petition for modification of an appealed order, is of no force or effect simply because of the pendency of an appeal. Soles determined that the subsequent order deemed to be a clarification and modification of the order appealed, exceeded the scope of the Lower Court's concurrent jurisdiction. Thus, the motion or petition may not be adjudicated prior to the remand.

Here, the Amended Petition was filed pursuant to Leave Of Court granted by Order dated October 27, 1987, and it should relate back to the filing date of the original Petition for purposes of determining the "commencement" date. It should also be noted that the Order dated October 27, 1987, deferred ruling on the Husband's Motion To Dismiss For Inconvenient Forum, and that the Motion To Dismiss For Inconvenient Forum was subsequently denied by the Lower Court by Order dated January 15, 1988. (A 2-3)

CONCLUSION

An appeal from a custody order in the Lower Court **is** 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.

The filing of a Petition For Modification Of Custody in the Lower Court within six (6) months of the children residing in the Florida, and while an appeal is pending in Florida, tolls the vesting of "home state" jurisdiction in a foreign state, and relinquishment of jurisdiction pursuant to Rule 9.600(b) of the Florida Rules of Appellate Procedure is not a condition precedent to the preservation of continuing "home state" jurisdiction. Relinquishment of jurisdiction is only necessary where the Lower Court is requested to rule on the Petition For Modification prior to the conclusion of the appeal.

Here, Florida was still the **"home** state" within the meaning of the UCCJA and Florida has exclusive modification jurisdiction within the meaning of the UCCJA as construed in accordance with the PKPA. Florida also had and continues to have "significant connections" jurisdiction.

The Trial Court was wrong, as a matter of law, in dismissing the Wife's Amended Petition For Modification, sua sponte, for lack of subject matter jurisdiction. The first two certified questions should be answered in the affirmative, the third certified question should be answered in the negative, and

the Order appealed to the Fourth District Court should be reversed based upon the foregoing reasons and authorities.

Respectfully submitted,

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By _____
A. MATTHEW MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: MARC H. BRAWER, ESQUIRE, Attorney for Respondent (Husband), 8360 W. Oakland Park Boulevard, Southern Building, Suite 204, Sunrise, Florida 33351, on this 29th day of September, 1989.

A. MATTHEW MILLER