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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 74-610

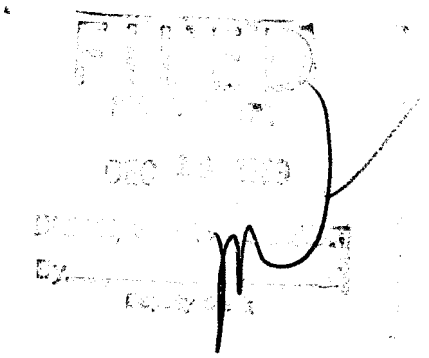
RONA E. YURGEL,
n/k/a RONA E. GREEN,

Petitioner,

vs.

GLENN G. YURGEL,

Respondent.
_____/



BRIEF OF RESPONDENT ON CERTIFIED QUESTIONS

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Appeal from the District Court of Appeal
for the Fourth District of Florida
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SUMMARY OF ARGUMENT

The controversy between the parties to this Appeal may be resolved by viewing the action of the Trial Court in dismissing the matter, Sua Sponte, as a de facto review of an earlier Motion to Dismiss based upon inconvenient forum. The Trial Court orally denied this Motion, but this was never reduced to an Order. Courts have inherent power to review Interlocutory Orders prior to issuance of a Final Decree, and the action of the Trial Court, in dismissing, may be a mislabelling of the concept inconvenient forum.

The first question certified is not relevant, as the Respondent does not assert that the exercise of appellate jurisdiction does not constitute "jurisdiction" within the meaning of the UCCJA. The point is not whether this state exercised jurisdiction during the pendency of the Appeal, but whether it continued to exercise jurisdiction after the termination of the Appeal.

Under the facts of this case, the two other questions certified may not be answered with a simple "yes" or "no". The thrust of these questions is the position taken by Respondent, and which is reasserted in this Brief, that, during the pendency of an Appeal, the Trial Court loses jurisdiction to modify a custody determination, and a relinquishment of jurisdiction by the Appellate Court for that purpose is required. A modification proceeding filed without said relinquishment is of no legal significance, since the Trial Court may take no action and may not even enter a Default. The movant has not effectively invoked

the modification jurisdiction of the Court, as a result of which, upon the conclusion of the Appeal, there is nothing "pending." As the State is no longer exercising jurisdiction at the moment of the conclusion of the Appeal, Home State jurisdiction shifts if the children have been residing elsewhere for a period in excess of six months. Therefore, the second and third questions should be answered by holding that, under the facts of this case, the filing of the unauthorized proceeding does not toll the vesting of Home State jurisdiction, and that the relinquishment of jurisdiction by the Appellate Court is a condition precedent to the preservation of continuing Home State jurisdiction. The result would be different only if the Appellate Court extends jurisdiction by remanding the matter.

Pursuant to the UCCJA, the exercise of jurisdiction on the basis of "Home State" requires merely that the children be residing in the State for a period in excess of six months. The application of the "significant contact" basis for jurisdiction, however, requires a determination that it is in the best interests of the child that the Court assume jurisdiction, that. the child and at least one parent have significant connection with the State, and that there is available in the State substantial evidence concerning the child's present or future care. The District Court of Appeal was correct in remanding for these findings, (although the application of the concept of a review by the Court of its own prior determination as to inconvenient forum, would obviate the necessity of remanding). The cases which base signficant contact jurisdiction merely upon

the continued residence of one parent in the State, and some contact with the child, are incorrect, as these cases ignore the necessity for utilizing the discretion vested in the Statute.

A superficial reading of the PKPA allows the interpretation of that federal statute in such fashion as to make it appear to conflict with the UCCJA with regard to the continuing jurisdiction of a State, for modification purpose, where one of the parties continues to reside in the State. The PKPA, however, recognizes the inherent authority of a State to decline to exercise jurisdiction as, for example, when the Court recognizes that it is an inconvenient forum.

Special consideration must be given to the language in the PKPA requiring that "such Court has jurisdiction under the Law of such State." This does not refer to the concept of subject matter jurisdiction, but refers to the power of a Court to determine whether it has jurisdiction, based upon its own laws, and based upon the facts of the case. The discretion to decline jurisdiction is inherent in that concept. A Court may still be in compliance with the PKPA, and have the discretion to determine that it is no longer a convenient forum, or that another forum would be more appropriate, or that, pursuant to the failure to follow the Appellate Rules, Home State jurisdiction has shifted, and that a determination may be made as to whether it would be in the best interests of the children to apply the concept of significant connections.

ARGUMENT

(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? 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?

This Appeal involves a proceeding for modification of custody which presents a factual history resulting in a lengthy sua sponte decision by the Trial Court, an opinion by the District Court of Appeal, and a dissent by one of the Judges in the District Court of Appeal, all of which disclose a "gut feeling" by each of these Judges that this litigation no longer belongs in Florida. The four Judges thus far involved have expressed three different approaches to that end. The Brief of the Amicus Curiae, while taking issue with the manner in which the legal principles were applied by the Trial Court and by the District Court, recognizes, on Pages 18 through 20 thereof, that the Circuit Court was under no obligation to continue with this case, and suggests alternative means by which the Circuit Court could have accomplished the same end without doing violence to the applicable provisions of the UCCJA and PKPA, as interpreted by the Amicus Curiae. Petitioner, on the other hand, in taking exception with the opinion, not only of the Circuit Court, but

also the District Court of Appeal, has viewed the facts and the law from what amounts to a fifth perspective. It now falls upon Respondent, in spite of the mass confusion which this case has already engendered, to present this Honorable Court with a sixth point of view.

Prior to presenting a detailed analysis, some comment upon the Certified Questions themselves is justified. It should be noted that these questions were certified to this Court upon Petitioner's suggestion to the Fourth District Court of Appeal. Respondent is somewhat perplexed at the fact that these three questions were certified, as worded. As to the first question, Respondent views same as a somewhat moot point. In his Brief to the District Court of Appeal, Respondent suggested that the exercise of Appellate Jurisdiction might not necessarily be viewed as the exercise of jurisdiction by a state, in connection with the issue of "Home State" jurisdiction under the UCCJA. However, Respondent withdrew from this point at time of oral argument, and neither the majority opinion nor the dissent, in that Court, questions whether an Appeal from a Custody Order is a "custody proceeding" within the meaning of the UCCJA. Respondent agrees that the answer to this question is in the affirmative, and fail to comprehend why the District Court of Appeal bothered to certify that question.

The two remaining questions also present a cause for perplexity. This is because they are intertwined, and we believe that both questions need to have some additional language inserted therein, in order to be clearly applicable to this case,

before a simple "yes" or "no" answer may be given. The second question asks whether the filing of a Petition for Modification during the pendency of an Appeal is sufficient to toll the vesting of "Home State" jurisdiction in another state. However, it does not contain the specific qualification needed with regard to the facts and law before the Court, in that it is a blanket question which ignores the point raised; to-wit, that the filing of a Petition for Modification was done absent a relinquishment of jurisdiction by the Appellate Court. Likewise, the third question, is merely a corollary to the second. This question does not make it clear that the issue is not the preservation of continuing "Home State" jurisdiction during the pendency of the Appeal, but rather, after conclusion of the Appeal.

Respondent believes that this Court cannot pass upon those questions without extended qualification or explanation. As the grant of discretionary jurisdiction herein, however, calls up the entire matter for review, Respondent believes that the Supreme Court may resolve the litigation between these parties without the necessity of passing upon these questions at all. Moreover, regardless of the view this Court takes with regard to the alleged conflicts presented in viewing jurisdiction under the UCCJA and the PKPA, Respondent believes that there is ample reason to affirm the dismissal of the matter pending between these parties, based upon concepts other than "Home State", "significant connection'' or "continuing jurisdiction." That basis for dismissal lies in the concept of inconvenient forum. (Section 61.1316 (1), Fla. Stat.(1987). As shown by Paragraph 15

of the Agreed Statement of Facts submitted to the District Court of Appeal, incorporated in the "Statement of the Case and of the Facts", forming a part of Petitioner's Brief,

> "On December 11th, **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 longer a convenient forum within the meaning of the UCCJA."

Admittedly, both branches of the Motion were denied by the Trial Court in its oral decision. The Brief submitted by Respondent. to the District Court of Appeal asks that the Trial Court's Sua Sponte Order of Dismissal be viewed as a de facto review of the Interlocutory Order denying the aforesaid Motion to Dismiss. The majority opinion of the District Court ignores that request, but the decision of Judge Warner recognizes the reality of the application of the concept of inconvenient forum to this matter, holding, in pertinent part:

> 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. This must be considered under Section 61.1316, Florida Statues **(1987).** It is on those grounds, and not the issue of jurisdiction, upon which the trial court may consider declining to act in this matter. See Johnson v. Farris, 469.So.2d 221 (Fla. 2d DCA **1985).** Therefore, I would reverse and remand for further proceedings, without prejudice to raising the question of inconvenient forum. The trial court:
>
> (M)ay 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.

61.1316(1), Fla. Stat. (1987).

The concept that the Trial Court may reject jurisdiction at any time before making a decree based upon inconvenient forum is a crucial one, and Respondent asserts to this Court that only in connection with the preparation of this Brief, did Respondent recognize the fact that the Order of January 15th, 1988, found at Pages 2 and 3 of the Petitioner's Appendix, does not address the question of inconvenient forum raised in the Motion to Dismiss, but discusses only the issue of "failure to state a cause of action." Thus, the argument that the Trial Court was effectively revisiting its earlier decision is more poignant. It is noteworthy that the District Court of Appeal, on Page 3 of its opinion states "The Trial Court correctly found a lack of "Home State" jurisdiction (although mislabeled "subject matter" jurisdiction)." There is ample reason to carry this one step further and conclude that the Trial Court mislabeled its entire Sua Sponte Order, and that said Order was merely a recognition, prior to the entry of a decree, that Florida was an inconvenient forum.

To view the matter in this regard does not require any stretching of the imagination. As shown by Paragraphs 20 and 21 of the Agreed Statement of Facts, the Husband filed a Motion for Summary Judgment on November 14th, 1988, one week prior to the date the Trial Court sent its Sua Sponte Motion to Dismiss. Memoranda of Law were required from both counsel on December 2nd, 1988, which was, in fact, the same date that the Court denied the Motion for Summary Judgment. In point of fact, said Motion for

Summary Judgment (Respondent's Appendix Pages A7-A24) was eighteen pages long and reviewed in detail the history of the case and the nature of the discovery conducted, as well as the nature of the testimony which could possibly be elicited. Respondent firmly believes that the Trial Court, in reviewing the Motion for Summary Judgment, recognized the fact that Florida was clearly an inconvenient forum, and that the case should be dismissed, but the Court clearly was reluctant to grant the Motion for Summary Judgment, as this would have been effectively with prejudice to the alleged changes of circumstances as to which Petitioner/Wife was clearly in no position to present evidence in the State of Florida. The Sua Sponte Order of Dismissal would have had the effect of removing the matter from the Florida Courts, while preserving Petitioner's right to present the same facts in New York, following the declining of jurisdiction by Florida.

The Order of the Trial Court which resulted in dismissal reviews the broad history of this case, observing the fact that, some four and a half months after the children had moved to New York, the Wife filed a Motion for Modification seeking, on an emergency basis, to stay the return of the children to New York. The "emergency" application was denied. Nonetheless, the Wife did nothing further, but, instead, waited for the appeal of the initial custody award to be decided, many months later. She then discharged her counsel and obtained new counsel. Effectively, there was no active resumption of this litigation until November, 1987; some 15 months after the children had moved to New York,

and well into the children's second school year in New York. The Wife could have asked the District Court to relinquish jurisdiction for purpose of her modification proceeding. Instead, she decided to take a "time out" and wait to see what would happen with the Appeal.

The Trial Court found that this "time out" could not be considered as tolling the acquisition of home state jurisdiction by the State of New York, citing Palmore v Sidoti, 472 So. 2nd. 43 (Fla. 2nd. DCA, 1985). The Trial Court noted that the wife did not obtain any order relinquishing jurisidction for modification purposes, and that the filing of her initial modification petition was improper, as jurisdiction was with the District Court of Appeal. The Trial Court properly recognized that it is inappropriate to permit a party losing an initial custody battle, where permission is given to the prevailing party to take the children to another state, to simply file a pleading seeking modification and await the outcome of the appeal, expecting that the filing of that pleading will prevent the shift of home state jurisdiction, so that if the appeal is lost, the non-custodial parent would be certain to retain the litigation in the original forum state. This may be in the best interests of the wife, but it is certainly not in the best interests of the children, who had been living in New York and attending school there for well over a year at the time the litigation resumed, and who had been living in New York for nearly 2 1/2 years and were nearly half way through the third school year in New York at the time the Court dismissed the Amended Petition. (It is now

one year later, and the children are half way through the fourth school year in New York).

The legal and practical effect of the failure by Petitioner to have sought a relinquishment of jurisdiction from the District Court of Appeal is at the core of the questions certified to this Court. Respondent believes that the following question more succinctly expresses the concept under review:

> WHERE, DURING THE PENDENCY OF AN APPEAL, A PARTY FILES A PROCEEDING FOR MODIFICATION OF CHILD CUSTODY IN THE TRIAL COURT, WITHOUT FIRST SEEKING RELINQUISHMENT OF JURISDICTION FOR THAT PURPOSE FROM THE DISTRICT COURT OF APPEAL, IS HOME STATE JURISDICTION LOST UPON THE ISSUANCE OF THE MANDATE FROM THE DISTRICT COURT OF APPEAL WHERE THE CHILDREN HAVE BEEN LIVING IN ANOTHER STATE AT THE TIME OF THE ISSUANCE OF THE MANDATE, AND WHERE THE DISTRICT COURT OF APPEAL HAS NOT REMANDED THE MATTER FOR FURTHER PROCEEDINGS IN THE TRIAL COURT?

Although the above question is somewhat convoluted, Respondent urges that the concept contained in the Order of the Trial Court and the decision of the District Court of Appeal is contained therein. The reasoning proffered by Respondent is logical and sequential. These are as follows:

1. While the Appeal was pending, Petitioner filed a proceeding for Modification of Custody and did not ask for a relinquishment of jurisdiction.

2. That filing was of no consequence, as the Trial Court did not have jurisdiction at the time.

3. Jurisdiction was with the District Court of Appeal, and that Court subsequently issued its mandate, affirming the Final Judgment of Dissolution.

4. As there was no remand to the Trial Court for further proceedings, that terminated the Appeal.

5. At that moment, since the children had been residing in New York for well over the requisite six-month period, and there was nothing pending in a Florida Court having jurisdiction, "Home State Jurisdiction" shifted to New York.

It should now be clear that the first question certified is inapplicable, and that the other two cannot be dealt with independently of each other. The Trial Court and two of the Judges in the District Court of Appeal have accepted the hypothesis proffered by the Respondent. Judge Warner has rejected same, and the Briefs submitted by Petitioner and the Amicus Curiae attempt to support the rejection of the position that the failure to request a relinquishment of jurisdiction resulted in the shift of Home State Jurisdiction.

This is in direct conflict with the majority opinion in the District Court, which holds, in pertinent part:

> Wife's Petition to Modify, although filed within six months of the children living in Florida, had no force or effect because it was filed during the time the Appeal divested the Trial Court of jurisdiction. Soles v. Soles, 536 So. 2d, 367 (Fla. 1st DCA 1988).

The Brief of the Amicus Curiae raises a point which must be dealt with in order to pursue the arguments offered by both sides. The Amicus has taken the position that relinquishment of jurisdiction is not necessary for modification, because the subject matter before the Appellate Court is based only upon the prior state of facts. Respondent takes serious issue with that

position because it is clear that the issue before the Appellate Court is not "custody based upon the prior state of facts," but rather the broad issue of custody of the subject minors, without qualification. Soles v. Soles, Supra., provides the key as to whether or not this argument is tenable. That decision deals with child support, rather than child custody, but it is noteworthy that the Order which was entered without request for relinquishment of jurisdiction from the Appellate Court was ''deemed to be both a clarification and a modification." While the facts given in the decision do not specify in detail the basis upon which modification was sought, it is beyond caval that. the same principle which applies to modification of custody (substantial change in circumstances) also applies to modification of child support. Presumably, if relinquishment of jurisdiction pursuant to Fla. R. App. P. 9.600, were not required for purposes of modification, the lower Court could have proceeded to enter an Order on Modification, to the extent that Modification were requested. Obviously, the first District, in Soles, Supra., did not view the aforesaid Rules as permitting the lower Court to proceed on Modification without the requisite relinquishment of jurisdiction. As to the argument that the Order was quashed, but not the underlying Motion, it is most obvious that the concept of quashing the underlying Motion was quite moot, in view of the fact that. the entire cause was remanded. However, as the question of whether or not a pleading filed during such time as the lower Court has been divested of jurisdiction by an Appeal has any efficacy has been called up by

the opinion of Judge Warner, as well as the Briefs filed by Petitioner and by the Amicus, resort should be had to the wording of Rule 9.600. Subsection (b) states that "When the jurisdiction of the lower tribunal has been divested by an Appeal from a Final Order, the Court by Order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the Appeal." Subsection (c) provides that "in dissolution of marriage actions, the lower tribunal shall retain jurisdiction to enter and enforce Orders awarding separate maintenance, child support, alimony, or other awards necessary to protect the welfare and rights of any party pending appeal...." There is nothing in either of these subsections which discloses any power of the Trial Court to proceed with a modification of the Final Judgment. Most notably, however, the Rule does not limit the divestiture of jurisdiction to the final step of entering an Order. It quite clearly prohibits the lower tribunal from proceeding. This would mean, for example, that if a party were to file a pleading requiring a response, and that pleading were ignored, the lower tribunal would be powerless to enter a default. It is clearly implicit in the Statute that such a pleading is of no effect. To reason that it becomes effective upon the termination of the Appeal, is to engage in wild speculation. For example, if a responsive pleading is required, then the time within which to respond must terminate at some point. To permit the filing of such a pleading to be of no effect, except for the narrow result of tolling the vesting of Home State jurisdiction in another state, would be to create a

result which is not provided for in any of the Statutes or Appellate Rules, and which is not desirable, as there are other means of extending the jurisdiction of the Florida Courts: to-wit, via the concept of "significant connections." There is, however, one further aspect of the opinion of Judge Warner which ought to be commented upon prior to discussion of "significant connections." Respondent takes issue with the reasoning contained in said opinion, to the extent that said opinion suggests that the Appeal itself extended the jurisdiction of the Florida Courts, sufficiently to preserve Home State jurisdiction, it is submitted that this reasoning is erroneous. This is because all Appellate proceedings had indeed been terminated upon the issuance of the mandate from the District Court of Appeal. As the previously filed Modification Motion was legally ineffective, the Florida Courts were not, effectively, exercising jurisdiction subsequent to the issuance of the mandate. It was at that point that the shift of Home State jurisdiction occurred.

The attempt by the Amicus to analogize the Appellate Rule requiring relinquishment of jurisdiction to proceedings under Rule of Civil Procedure 1.540 as to relief from Judgments, fails to take cognizance of the fact that the parallel is inapplicable because said Rule specifically provides that there is no limitation upon the power of a Court to entertain an <u>independent action</u> to relieve a party from a Judgment, etc. Therefore, it does not matter whether the pendency of an Appeal effectively tolls the one-year period within which to make a Motion under Rule 1.540. There is the remedy of separate action available.

Additionally, there is effectively no limitation of time as regards modification of Judgments of Dissolution based upon change of circumstances. Moreover, the reliance upon FINST Development, Inc., v. Bamaor, 449 So. 2d 290 (Fla. 3rd DCA 1983) is misplaced. That case does not stand for the proposition that a Trial Court may "entertain proceedings" generally, it merely stands for the principle that the Trial Court can proceed with the taxing of Attorney's Fees pending an Appeal. This is quite different from proceeding to modify the child custody, where the issue of child custody is the central issue on Appeal.

There is certainly an inter-relation between the concept of inconvenient forum and the concept of "significant contact" under the UCCJA. Examining the agreed statement of the case filed with the District Court (incorporated by Petitioner in her Statement of Facts in her Brief herein), it is noted in paragraph 17 thereof, that the motion to set final hearing had requested the setting of a 3 day hearing in order to allow necessary scheduling and taking of extensive depositions in New York. It is further noteworthy that that the wife, in her brief submitted to the District Court, at the bottom of Page 5 thereof, states: "due to the respective financial circumstances of the parties and the time and expense expended in Florida in the lower Court, it was inequitable and unjust for the lower Court to belatedly determine the absence of subject matter jurisdiction..." These two points, taken together, are most telling. While there was at least a minimum amount of litigation on this post-judgment application, most of this was procedural jockeying. The only item of real

significance to the ultimate trial was the taking of the deposition of one of the children. Frankly, since this child resides in New York, there is no reason that she could not be produced in Court in New York. Further, the taking of her deposition was hardly a useless gesture, in that it generated a transcript which certainly could be utilized in litigation in New York as well. The point is, that the limited resources of these parties had prevented this matter from being prepared in a manner which would result in a full, fair and complete trial. These three children had been in New York for three school years, yielding nine teachers who certainly would have made appropriate witnesses for hearing of this matter. (It is now four school years). Their depositions were not taken. Pursuant to the Order dismissing the wife's emergency application in January, 1987, the father was ordered to provide therapy for the children. Like the teachers, the therapist in New York was obviously not going to appear at a trial in Florida, and his deposition had not been taken.

The Amended Petition for Modification (Respondent's Appendix PP1-7) alleges two bases for the change of custody sought. The first, to the effect that the wife had remarried, and that her situation was ameliorated, was obviously totally irrelevant as a matter of law. Wilson v Condra, 255 So. 2nd., 702 (1 DCA, 1972); Risti v Risti, 160 So. 2nd., 159 (3 DCA, 1964): Phillips v Phillips, 13 So. 2nd., 922 (Fla. , 1943); Belford v Belford, 32 So. 2nd., 312 (Fla., 1947). All of her other allegations concern incidents which supposedly occurred in New York.

The Trial Court ultimately recognized that this was, indeed, a New York case. Although it will be demonstrated, infra, that the significant contacts rule does not apply herein, the review of the prior order denying motion to dismiss on the basis of forum non conviens, is implicit, and it is well settled that the trial Court has inherent authority to vacate or reconsider any of its interlocutory rulings at any time before final judgment. Diaz v Public Health Trust of Dade County, 492 So. 2nd. 1082 (Fla. 3rd DCA 1986); Whitaker v Wright, 100 Fla. 282, 129 So. 889 (1930); Margulies v Levy , 439 So. 2nd 336 (Fla. 3rd DCA 1983); Holman v Ford Motor Co., 239 So. 2nd. 40 (Fla. 1st DCA 1970); Bettez v The City of Miami, 510 So. 2nd. 1242 (Fla. 3rd DCA 1987).

Turning now to the supposed conflict between the UCCJA and the PKPA, which has been strenuously argued by Petitioner, and which elicited the intervention as Amicus Curiae, by the Family Law Section of the Florida Bar, Respondent asserts, as does the Amicus, that there is no real conflict between the Federal Statute and the Uniform Act, as is relevant hereto. Respondent's reasons are different, however, and result in a different conclusion as to the legal significance of these two Statutes. As to the question of "Home State Jurisdiction vs. Significant. Contacts Jurisdiction" has been raised once again, it is necessary to view these concepts under the UCCJA prior to considering them as affected by the PKPA. To do otherwise would be to further muddy the waters. Therefore, before considering the PKPA, Respondent will present this Court with the analysis of the UCCJA which was presented to the District Court of Appeal.

In order to analyze the inter-relationship between the "Home State" and "Significant Contacts" aspects of UCCJA Jurisdiction, scrutiny of the statute is appropriate. Florida Statutes Sec. 61.1308 (1) (a) 1 provides for jurisdiction based upon the basis of Home State with no other conditions. However, the application of the significant contacts theory is more complex. Florida Statutes Sec. 61.1308 (1) (b) provides that it must be in the best interests of the child that the Court assume jurisdiction because the child and at least one parent have the significant connection with the state and there is available, in the state, substantial evidence concerning the child's present. or future care.

Thus, the significant contact basis, as an alternative to Home State jurisdiction, must first involve a determination that it is to be relied upon only in the best interests of the children. The District Court of Appeal, by remanding for such a finding, recognized that this is the correct interpretation of the language in the Statute. This immediately vests discretion in the Court. The Petitioner and Amicus have relied heavily upon the 1st District case of Reeve v Reeve, 391 So. 2d, 789 (1 DCA, 1980) and its progeny. It is submitted that Reeve, Supra., provides an anomalous interpretation of the jurisdictional aspects of the UCCJA, and that its reasoning goes off on a tangent which has been scrupulously followed only by that District. Reeve stands for the principle that the Court should follow a hard and fast rule that where Florida was the original forum state, and the petitioning parent continues to reside in

Florida and has not lost contact with the child, that, in and of itself, constitutes significant contact and that there is no necessity of weighing the relative wealth of evidence available in the other forum. It is respectfully submitted that the First District's analysis is incorrect, and is in conflict with numerous other cases in other Districts, even though Reeve is sometimes cited with approval. There would be no need for the statute to refer to "best interests" if all that is required is an application of the Reeve formula. The consideration of the "best interests" prerequisite before utilizing the significant contacts rule, must involve a weighing of the relative wealth of evidence in the two forums. The First District reapplied its reasoning in Hamil v Bower, 487 So. 2nd. 345 (1 DCA, 1986).

The Second District cited Reeve, Supra., with approval in Johnson v Farris, 469 So. 2nd. 221 (2 DCA 1985), but that case is distinguishable because it was not only the petitioning husband who resided in Florida, but also the wife's parents. The reasoning in Reeve, requires merely that one parent reside in Florida, while the statute requires that the child and at least one parent have the significant connection. It would then seem that Reeve stands for the principle that the residence of one parent constitutes a significant contact not only for that parent, but also for the child. Thus, the parent pulls himself up by his own bootstraps.

At bar, the only substantial Florida evidence was already considered in the initial custody determination. The new evidence in Florida would consist of the mother's alleged change

of attitude towards the father's visitation and her insistance that her remarriage was a change for the better. The aforesaid are both questionable grounds, as the latter constituted the cementing of a relationship which the initial trial Court specifically found to be contrary to the children's best interests, and the former is merely a self-serving claim of rehabilitation of her view point. On modification, the Florida Court would first have to examine the "New York evidence" and, if it found a change of custody to be warranted, the Florida evidence would be only marginally relevant, if at all.

It is submitted that the wealth of evidence in the various forums is most pertinent. This is especially so in a case such as the one at bar, in which the children have been attending school in New York, have a therapist in New York, have lived with their father in New York for several years, and where the entire paternal family resides in New York. In the case of Genoe v Genoe, 515 So. 2nd. 237(4 DCA 1987) The Fourth District reiterated the well reasoned decision of the trial Court and specifically adopted same. That decision recognized that the Reeve decision represents an aberration in the First District's construction of the statute. It also recognizes that the First District has used FSA Sec. 61.1308 (1) (b) as a vehicle to <u>proliferate</u> jurisdiction rather than to <u>limit it</u>, specifically recognizing that the commissioner's notes to this section of the UCCJA indicate that it was intended to <u>limit</u> jurisdiction and <u>not</u> proliferate. It recognizes that jurisdiction exists only if it is in the <u>child's</u> interests, not merely the interest or

convenience of the feuding parties. In Genoe, supra, the Court recognized that other District Courts of Appeal have chosen not to follow the First District, and approved the declination of jurisdiction based upon the other state being the home state, having closer connection with the children, and that substantial evidence concerning the children's present and future care, protection, training and personal relationships is more readily available in the other state. That is precisely the situation at the case at bar, where all of the essential information concerning the children's upbringing since the time of the initial trial is to be found.

The Trial Court relied on Sperry v Sperry, 537 So. 2nd. 1043 (2 DCA 1988) where the Petitioner/Father remained in Florida and one of the children of the marriage also lived in Florida at the time of the filing of the Petition. Even with the visitation in Florida added, the Court, in Sperry, refused to apply the significant contact rule, and specifically noted its determination was contrary to Reeve, supra. The Court noted that the children, as here, had an established home in another state and the Court in that state had access to school and medical records and other relevant information concerning their home life. This is precisely the point, and is the reason that the Trial Judge herein relied upon Sperry in declining jurisdiction.

In Palmore V Sidoti, supra the Second District also based its determination, in part, upon the fact that the other forum was the more appropriate and convenient one. In Hollander v

Hollander, 466 So. 2nd. 268 (3 DCA 1985), the Third District issued a decision which initially followed Reeve, Supra. On rehearing, the Court rejected its reasoning. The Fifth District, in Prickett v Prickett, 498 So. 2nd. 1066 (5 DCA 1986) found that substantial evidence concerning the child's care would not appear to be available in Florida because the child spent the last two years in Connecticut. It went on to enunciate the rule that exceptional circumstances must exist for Florida to retain jurisdiction when another state has clearly become the child's home state. Goldman v Goldman, 523 So. 2nd. 781 (5 DCA 1988).

The Brief of the Amicus Curiae suggests that the decision of this Court in Mondy v. Mondy, 428 So. 2d 235 (Fla. 1983) supports the position urged by the Amicus. However, it cannot be over-emphasized that the fact pattern in Mondy, Supra., involves the mother taking the children to Florida in violation of an Idaho Order. This conduct undermines the very bedrock purposes of both the UCCJA and the PKPA. That situation cannot be applied to a case such as the instant one wherein the initial Judgment of the decree State authorizes the move to the other State.

Thus, it can be seen that the Courts which have chosen not to follow Reeve have properly probed the facts of each case and conformed to the statutory prerequisite of determining that, if jurisdiction is to be predicated upon significant connections, the relative wealth of evidence in the two forums must be weighed qualitatively and/or quantitatively. When it is clear, as here, that the nature of the evidence available in Florida is such that

it is overwhelmed by the nature of the evidence available in the other state, jurisdiction under the UCCJA must be declined.

Although it might have been better for the parties if the Trial Court had declined jurisdiction earlier on, it was best for the children that the Court recognized, before it was too late, that their interests could not be served by a trial in Florida. New York had become the only place where the case could be fully, fairly and properly tried.

The final issue for discussion in this Brief is the effect of the PKPA (28 U.S.C.A. Sec.1738A). This Statute was not discussed by the Trial Court or the District Court of Appeal, and differing viewpoints regarding same have been adopted in the Brief of Petitioner and the Brief of the Amicus Curiae. The adoption of the arguments urged in either of these Briefs, however, would achieve a result favorable to the Petitioner; to-wit, the prolongation of jurisdiction in Florida. Respondent calls this Court's attention to the fact that the case of Steckel **v.** Blafas, now reported at 549 So. 2d 1211 (Fla. 4DCA 1989) cited by the Amicus, does not impact upon the case at bar, as it is merely a recognition of the inapplicability of the continuing jurisdiction concept in the PKPA, when both contestants and the child have left the original decree state. Respondent has a third viewpoint which dispells either the notion that there is a conflict between the UCCJA and the PKPA, or that it is necessary to continue to exercise jurisdiction over this matter in this state.

At the outset, it should be noted that, at the time of the enactment of the PKPA, Congress was aware that nearly every state had already adopted the UCCJA. With that background, if Congress had wished to effectively overrule, via the Supremacy Clause, certain portions of the UCCJA which relate to interstate jurisdiction, we might expect that the PKPA would specifically so state. However, we must also recognize the fact that the result would be the application of the Supremacy Clause to elevate an ordinary federal statute above an enactment by the legislatures of many more states than would be necessary to amend the Constitution itself! With that in mind, it is clear that every effort must be made to interpret the UCCJA and the PKPA in such fashion as to avoid a conflict.

Respondent has scrutinized the arguments in both of the Briefs submitted herein, which at first blush appear convincing. Upon close scrutiny of the language of the PKPA, however, it became apparent that there was a fatal flaw in the reasoning proffered by the Petitioner, the Amicus, and a number of Courts which have passed upon the subject.

The key to understanding the lack of conflict between the two Statutes in question lies in the interpretation of a few simple words contained in the PKPA.

In order to reach the desired end, it is necessary to work backwards. 28 U.S.C. Sec.1738A (f) provides that a Court of the state may modify a determination of the custody of the same child made by a Court of another state if it has jurisdiction to do so, and "(2) the Court of the other state no longer has jurisdiction,

or it has declined to exercise such jurisdiction to modify such determination." It is thus quite clear that the PKPA recognizes the right of a state to decline to exercise modification jurisdiction.

28 U.S.C. Sec.1738A (d) provides for continuing jurisdiction of the state which initially made the custody determination so long as the state remains the residence of the child or of any contestant, and so long as the "requirement of Sub.Sec.(c)(1)" continues to be met. Since, in the case at bar, we know that one of the contestants continues to reside in Florida, our examination must center on Sub.Sec.(c)(1).

Sub.Sec.(c) provides, in pertinent part: "A child custody determination made by a Court of a State is consistent with the provisions of this Section only if -

(1) such Court has jurisdiction under the law of such State: and

(2) one of the following conditions is met.. .."

The conditions set forth in the Statute under Subd.(2) track the conditions for jurisdiction under the UCCJA, and add continuing jurisdiction pursuant to Sub.Sec.(d) which has been briefly discussed above. It has been suggested that the aforesaid is evidence of a split between the UCCJA and the PKPA, as the provision for continuing jurisdiction appears to make same mandatory if the State remains the residence of the child or of any contestant, whereas the UCCJA couples this with significant connection and "best interests."

This argument fails to recognize the fact that the continuing jurisdiction under Sub.Sec.(d) couples the requirement of continued residence with the requirement that Sub.Sec.(c)(1) continues to be met. We now come to the all- important language. Sub.Sec.(c)(1) states, in what initially appears to be straightforward language: "Such Court has jurisdiction under the Law of such State...." What is meant by this? The other Briefs submitted herein interpret such language as meaning that the only requirement is that the Florida Courts have, generally, subject matter jurisdiction. **As** recognized by the decision of the District Court herein, "Florida Circuit Courts have 'subject matter' jurisdiction over child custody proceedings. Sec.26.012, Fla. Stat. (1987)." It is further submitted that Chapter 61 confers subject matter jurisdiction, as well. Applying the simplistic logic proffered by Petitioner and the Amicus, it would then follow that, since the Circuit Courts have subject matter jurisdiction, the PKPA mandates continued jurisdiction as long as the child and one of the contestants resides in Florida. This reasoning, however, cannot be reconciled with the concept of inconvenient forum as embodied in both the UCCJA and the PKPA. Both Sub.Sec.(c)(2)(D) and (f)(2) of the PKPA make reference to the right of the State to decline to exercise jurisdiction. The former section refers specifically to declining to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum, and the latter subsection speaks of a State having "declined" to exercise such jurisdiction to modify such determination."

Were a State not to be afforded the right to decline jurisdiction as aforesaid, one could imagine a scenario where an initial custody determination is made while the child in question is an infant, with the child then being removed to another State which becomes said child's "Home State" and remains so for a period of perhaps fourteen or fifteen years, during which time there is no contact between the child and the non-custodial parent who continues to reside in the original state. The non-custodial parent, seeking a modification as to custody or visitation, would then be able to argue that the PKPA precludes any State other than the original decree State from assuming jurisdiction to modify. This absurd result is avoided where reference is made to Sub.Sec.(c)(1), which requires that the continuing jurisdiction also be contingent upon the Court having jurisdiction under its own laws. It is most respectfully submitted that, in virtually every case, "the law of such State" will be the UCCJA. This is certainly *so* in the case of Florida. This simplistic approach (interpreting this Section as meaning that the Courts of the State have, generally, subject matter jurisdiction to determine custody matters) would, as shown above, prevent a state from ever declining jurisdiction as, presumptively, each of the fifty states has subject matter jurisdiction over custody disputes. Respondent urges, however, that this section encompasses the right of a State Court to determine whether, under its laws and under the facts of the case, jurisdiction exists. This must, of course, include the mandatory and discretionary jurisdiction embodied in the UCCJA.

Therefore, the language "Such Court has jurisdiction under the law of such State" must be interpreted to mean, by extension, that the Court must not have determined that it is no longer a convenient forum, or that some other forum would be more appropriate. Thus, the inconvenient forum argument which was proffered by the Respondent at the very outset is clearly consistent with the requirements of the PKPA.

The District Court of Appeal did not, however, base its determination upon the assumption that the Sua Sponte Order of Dismissal constituted a de facto revisiting of the Motion to Dismiss on the basis of inconvenient forum. As this Honorable Court may likewise decline to view the matter in that fashion, an examination of the majority opinion of the District Court of Appeal should be undertaken in order to determine whether or not that holding is consistent with the PKPA. Respondent submits that it is. Applying the same reasoning as above, it is noted that the District Court of Appeal examined Sec. 61.1308, Florida Statutes (1987), which, as stated by the District Court "determines whether a Florida Circuit Court can determine interstate child custody in a particular case," and Rule of Appellate Procedure, 9.600. It concluded that, under the facts of this case, Florida would no longer have jurisdiction unless it were found, in accordance with the law of this State, (the UCCJA) that the best interests of the children would be served by a Florida Court continuing to exercise jurisdiction. The matter was remanded for the sole purpose of making that determination, in accordance with Sec.61.1308 (1)(b), Fla. Stat. (1987).

Although Respondent would obviously urge this Court to adopt the view that the Trial Court dismissed the case on the basis of inconvenient forum, (as that would terminate the matter in this State at this point, without resort to further proceedings), it is submitted that the decision of the District Court of Appeal is likewise in conformity with the requirements of both the UCCJA and the PKPA.

This position is supported, even by the Amended Brief of the Amicus Curiae, which states, on Page 20 thereof that "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." On Page 21, it states: "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." Finally, on Page 22, the Amicus Brief states: "Although once Florida declined jurisdiction, New York would have obtained jurisdiction, as it was now the "Home State" and the prior State had declined." This is a recognition by the Family Law Section of the Florida Bar, repeated three-fold, that, under the facts of this case, and under the PKPA, as well as the UCCJA, the Trial Court had the right to decline jurisdiction.

CONCLUSION

Respondent urges that this Court dispose of the controversy between the parties hereto by viewing the Sua Sponte Motion for Dismissal as a de facto revisiting of the Motion to Dismiss based upon inconvenient forum, and affirm on that ground.

In response to the questions certified by the Fourth District Court of Appeal, the first question may be answered in the affirmative, and as to the second and third questions, it is urged that this Court hold that a Modification proceeding filed during the pendency of an Appeal does not serve to toll the vesting of Home State jurisdiction in another state, unless the movant has first obtained a relinquishment of jurisdiction for that purpose from the Appellate Court.

If this Court chooses not to view the action of the Trial Court as a disposition based upon inconvenient forum, then it is submitted that the opinion of the District Court of Appeal should be affirmed, to the extent that it remands to the Trial Court for a determination as to whether or not it would be in the best interests of the children to apply the significant connections basis for jurisdiction, but that this remand should be without prejudice to the raising of the issue of inconvenient forum, as suggested in the minority opinion.

Respectfully submitted,

MARC H. BRAWER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to A. Matthew Miller, Esquire, Attorney for Petitioner/Wife, Miller, Schwartz & Miller, P. A., 4040 Sheridan Street, Post Office Box 7259, Hollywood, Florida 33081-1259; and to Deborah Marks, Chairman Amicus Curiae Committee, Hertzberg & Malinski, P. A., 1010 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, on this _____ day of December, 1989.

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