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,

vs.

GLENN G. YURGEL,

Respondent.

REPLY BRIEF OF PETITIONER ON CERTIFIED QUESTIONS

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Appeal from the District Court of Appeal
for the Fourth District of Florida
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CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

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

"AA" refers to "Appendix To Reply Brief Of Petitioner On Certified Questions".

All emphasis is the writer's unless otherwise indicated.

CERTIFIED QUESTIONS PRESENTED

(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?

SUMMARY OF ARGUMENT

The Trial Court clearly **did not "revisit"** the inconvenient forum issue. The trial judge's sui sponte letter motion was clear and unambiguous as to the basis for dismissal. The Husband's Motion To Dismiss For Inconvenient Forum was denied by the Trial Court, after the Trial Court weighed the relative wealth of evidence available in the two forums, and the Husband did not appeal that Order. He should not now be permitted to obtain through the "back door" what he did not previously even attempt to obtain through the "front door".

The Fourth District Court below specifically found that Florida was not the "home state". Thus, the first certified question is clearly relevant and material, and should be answered by this Court. The PKPA provides for exclusive modification jurisdiction in the initial decree state as long as the child or either parent continues to reside therein and as long as the initial decree state has jurisdiction. Here, Florida jurisdiction is not based solely on the general jurisdiction in circuit courts but rather, is based upon a specific reservation of jurisdiction contained in the Final Judgment Of Dissolution Of Marriage reserving jurisdiction over the parties and the subject matter.

The filing a Notice Of Appeal only divests the Trial Court of jurisdiction with respect to matters which interfere with the authority of the Appellate Court or with the rights of a

party to the appeal under consideration. The mere filing of a Petition For Modification in the Trial Court while an appeal from the FJDM is pending does not so interfere. If the appeal were an interlocutory appeal, the filing of the Petition For Modification would not have been considered a nullity, and there is no reason or justification to create a different **"rule"** for plenary appeals in matrimonial proceedings. The Wife did not seek relinquishment of jurisdiction because on modification, she would be held to a heavier burden which she would not have to address if she were successful in her appeal from the FJDM. If relinquishment is determined to be a condition precedent, as a matter of law, then relinquishment must be automatic, upon request, as a matter of law in order to avoid violence to the UCCJA and the PKPA.

The children want to be in Florida with their mother and new brother, and the **"overwhelming"** wealth of evidence of their future care, if in the custody of the Wife, is in Florida, it would, therefore, be in the best interests of the children that the litigation be in Florida. Florida is the initial decree state, the mother has remained in Florida, the children continue to have significant connections with Florida, and no other state assumed jurisdiction of the parties or the subject matter at any time relevant and material hereto. The certified questions need to be answered, the confusion among the district courts regarding the UCCJA needs to be eliminated, and the supremacy of the PKPA needs to be recognized by this Court. The issue in this case is

jurisdiction, not inconvenient forum. The Trial Court has already resolved the issue of inconvenient forum and this Court need not address that issue in resolving this matter.

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?

Florida was the home state of the Yurgel children within six months before the commencement of the Wife's modification proceeding, subsequently amended, with leave of Court, after the conclusion of the first appeal. The Trial Court had jurisdiction over the modification proceeding, pursuant to a specific reservation of jurisdiction contained in the Final Judgment Of Dissolution Of Marriage (FJDM) reserving jurisdiction ~~over the~~ parties and the subject matter, however, because the Trial Court could not enter any order which would interfere with the subject matter of the appeal or which would otherwise render the appeal moot, the Trial Court could not proceed to adjudicate

the modification petition, absent relinquishment of jurisdiction.[1]

The filing of a Notice Of Appeal only divests the Trial Court of jurisdiction with respect to matters which interfere with the authority of the Appellate Court or with the rights of a party to the appeal under consideration.[2] The mere filing of a Petition For Modification in the Trial Court while an appeal from the FJDM is pending does not so interfere. Judge Werner's dissenting opinion in the District Court below is clearly the better view. A Trial Court does not lose all jurisdiction during the pendency of an interlocutory appeal, and pleadings filed in the Trial Court during the pendency of an interlocutory appeal ~~are not~~ a nullity. The Trial Court is merely precluded from entering a final order or any order which would interfere with the subject matter of the interlocutory appeal or which would otherwise render it moot. There is no reason or justification to create a different "rule" for plenary appeals in matrimonial proceedings.

Although the Husband did abandon his argument regarding the first certified question at oral argument in the District

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[1] See Blum v. Blum, 382 So.2d 52 (Fla. 3rd DCA 1980), which holds only that the trial court may not enter orders modifying a final judgment without the consent of the appellate court while the appeal was pending.

[2] Weider v. Weider, 402 So.2d 66 (Fla. 4th DCA 1981).

Court below, the panel in the District Court below may not have realized it, and in any event, the majority decision specifically found that notwithstanding the timely appeal from the FJDM, Florida was, in fact, not the home state because at the time the Wife filed her petition to modify, the children did not live in Florida. Accordingly, and notwithstanding the Husband's conclusion to the contrary, the first certified question is clearly important.

Under the PKPA, home state jurisdiction is not discretionary and modification jurisdiction rests exclusively with the initial decree state as long as the child or either contestant continues to reside in the initial decree state. Here, the Wife has continued to reside in the initial decree state, without interruption, since the entry of the FJDM. A Florida court, either the circuit court or the district court, has exercised jurisdiction over the parties and the subject matter, continuously and without interruption, since the entry of the FJDM. The Wife and her parents have remained residents of Florida continuously and without interruption since the entry of the FJDM and the children have been in residence in Florida at least three months of each and every year since the entry of the FJDM.

Florida is where the two older children were brought to live and be raised, at a very young age, by both parents, in the happier days of their marriage, and where the third child was

born. All three children lived in Florida all or most of their lives until the Husband unilaterally decided to relocate their residence to New York. The children are now older and more mature and wish to reside in Florida with their mother and their new brother. The Wife is of limited financial means. The Husband, although also of limited financial means, is financially better off than the Wife. All evidence of the children's future care and welfare, if placed in the custodial care of their mother, is in Florida, and the Wife, under the circumstances, should not be required to file in New York[3] in order to regain custody of her children.

The Husband urges this Court to dispose of the controversy between the parties by viewing the sui sponte Motion For Dismissal as a defacto revisiting of the Motion To Dismiss based upon inconvenient forum, and to affirm the Trial Court on that basis. The Husband's inconvenient forum argument begs the question. The Trial Court clearly **did not "revisit"** the inconvenient forum issue. The trial judge's sui sponte Motion To Dismiss For Lack Of Subject Matter Jurisdiction, in letter form,

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[3] 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 Trial Court through the entry of the Order appealed.

to counsel for the respective parties (AA 1) is clear and unambiguous:

> Gentlemen:
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> In reviewing the court file in this matter, the Court came upon the case of Sperry V. Sperry, 13 FLW 2067 (Fla. 2d DCA 9/2/88). If my analysis of the Sperry case is correct, this Court does not have subject matter jurisdiction in this particular case.

The Husband might just as well argue that if he were a woman, he could give birth to a baby! Inconvenient forum **is not** an issue in this proceeding and was not an issue in the District Court below. The Husband's Motion For Summary Judgment, contained in his appendix, is irrelevant and immaterial. The only significance of the Motion For Summary Judgment is that the Trial Court denied it, thus reaffirming its earlier ruling that the Wife's Amended Petition For Modification did, if fact, state a cause of action. True and correct copies of the Wife's Response In Opposition To The Husband's Eighteen Page Motion For Summary Judgment (AA 2-6) and the Wife's Affidavit In Opposition To Husband's Motion For Summary Judgment (AA 7-8) are in the Appendix to this Brief, together with a true and correct copy of the Order On Husband's Motion For Summary Judgment (AA 9).

The New York discovery provisions in the Trial Court below were for the Husband's benefit, not the Wife's. The Husband argued at hearing on his Motion To Dismiss For Inconvenient Forum that all of his witnesses were in New York and

that he could not afford to bring them to Florida. The Trial Court offered several alternate suggestions as to how the Husband could present those witnesses and time was allocated for him to take the necessary discovery there. He never did, and he never listed any New York witnesses on a witness list or advised the Wife of any intent to call any New York witnesses at trial.

The Husband never demonstrated that there was **"overwhelming"** evidence in New York and, in any event, the Trial Court weighed the relative wealth of evidence in the two forums and denied the Husband's Motion To Dismiss For Inconvenient Forum. The Order denying the Husband's Motion To Dismiss For Inconvenient Forum was never appealed. The Husband now attempts to remedy the failure to appeal that Order by improperly challenging it in this appeal. In so doing, he attacks the underlying merits of the Wife's Amended Petition For Modification, which are irrelevant and immaterial in this proceeding.

The Wife alleged a change in her marital status and the rehabilitation of Donald Green, a change in the children's supervisory needs occasioned by their maturation, and that with the children's changing needs, they would do better with their mother. This, together with their reasonably stated, long manifested, and unwavering preference to reside with their mother, in Florida, forms the primary basis upon which the Wife

seeks a change in custody.[4] The children are of sufficient intelligence, understanding and experience to express this preference and substantial New York discovery is not and was not necessary to the presentation of the Wife's case. The inconvenient forum argument is not persuasive and has already been rejected by the Trial Court. The issue in this case is that of jurisdiction, not inconvenient forum.

The Husband, concluding that Florida is not the "home state", as did the majority of the panel in the District Court below, next argues that the Trial Court's discretion to invoke the alternate basis for jurisdiction, significant connections jurisdiction, should not be exercised because it is in the best interests of the children that the litigation be in New York. It is clear that it is in the best interests of the Husband that the litigation, if continued, be in New York. However, since the children want to be in Florida with their mother and new brother,

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[4] See Purdon v. Purdon, 529 So.2d 334 (Fla. 1st DCA 1988), where the panel affirmed a change in custody to the husband because circumstances materially changed with regard to the husband's ability to more fully assume his duties and responsibilities as a father now that he has left the military and has settled, with his second wife, into a successful practice, and where the child, who was intelligent, well adjusted, and exceptionally mature, stated a long manifested, unwavering preference to be with his father. See also Schofield v. Schofield, 489 So.2d 808 (Fla. 3rd DCA 1986), where the panel affirmed a change in custody based solely upon a change in the child's supervisory needs occasioned by the maturation process, following McGregor v. McGregor, 418 So.2d 1073 (Fla. 5th DCA 1982).

and since the "overwhelming" wealth of evidence of their future care,[5] if in the custody of the Wife, is in Florida, would it not be in the best interests of the children that the litigation be in Florida?

The Wife did not seek relinquishment of jurisdiction pending appeal because the modification burden was a heavier burden to meet. If the appeal from the FJDM was successful, the Wife would not have to meet that heavier burden. If the Wife had sought relinquishment, the Husband would probably have found some reason to object and the District Court may well have denied relinquishment. If relinquishment of jurisdiction is to become a condition precedent, as a matter of law, then relinquishment must become automatic, upon request, as a matter of law. Otherwise, if the Husband's position is correct, the state of relocation will automatically acquire exclusive jurisdiction, for all purposes other than emergencies, notwithstanding the PKPA and the UCCJA, six months after relocation, or immediately upon the conclusion of a plenary appeal in the initial decree state,

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[5] See Steckel v. Blafas, 549 So.2d 1211 (Fla. 4th DCA 1989), where the panel held, inter alia, that under the UCCJA Florida could be deemed to have significant connections jurisdiction because there was available in Florida substantial evidence concerning the child's present and future care, protection, training and personal relationships. The panel also held, inter alia, that under the PKPA, jurisdiction in the initial decree state depends upon the continued presence of the child or either parent.

retroactively. Such a rule would practically render the PKPA and the UCCJA moot.

The Husband argues that this Court can resolve the present conflict between the parties without even addressing the three certified questions. In view of the recent and increasing trend of permitting geographical relocation of the residence of minor children to foreign jurisdictions,[6] it is respectfully suggested that the certified questions must be definitively answered, that confusion among the district courts regarding the UCCJA be eliminated, and that the supremacy of the PKPA, be recognized by this Court. The Husband has attempted to convince this Court to do otherwise by advocating a limitation of remedies for Florida residents in custody proceedings and by focusing his attention on a matter which is a non-issue in these proceedings, inconvenient forum. Hopefully, this Court will nevertheless recognize the need to answer the certified questions.

RESPECTFULLY SUBMITTED,

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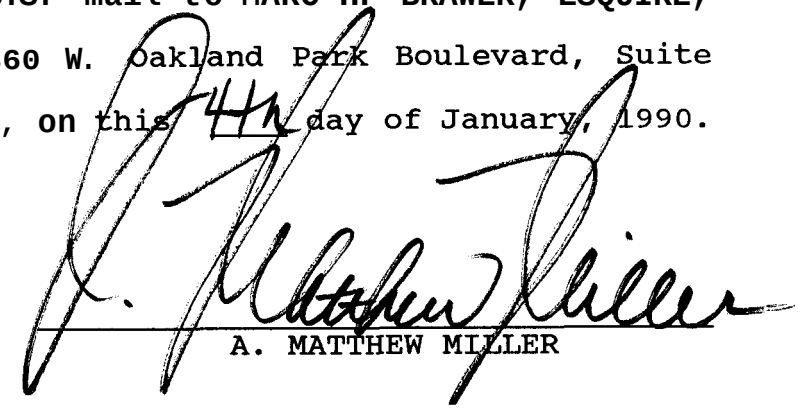
[6] See, for example, Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989), and the cases cited therein. See also George v. George, 545 So.2d 341 (Fla. 4th DCA 1989).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to MARC H. BRAWER, ESQUIRE, Attorney for Respondent, 8360 W. Oakland Park Boulevard, Suite 204, Sunrise, Florida 33351, on this 4th day of January, 1990.



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