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In the Court of Appeals

**Court of Appeals
From Brazoria County, Texas**

In re DAVID TIMOTHY BUTTERFIELD,

Relator

**Original Proceeding from the 300th District Court, Brazoria County, Texas
The Honorable Judge Randall Hufstetler
Trial Court Case No. 97319-F**

PETITION FOR WRIT OF MANDAMUS

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ORAL ARGUMENT IS REQUESTED

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REQUEST FOR ORAL ARGUMENT

Relator requests oral argument.

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Statement of the Case

Nature of the Case: Suit to determine parentage, conservatorship, possession, and support of a 19 month old child, E.B.

Respondent Trial Court: The Honorable Judge Randall Hufstetler
300th Judicial District Court
Brazoria County

Respondent's Action: On August 8, 2018, Respondent accepted jurisdiction of the suit despite a previously filed child custody action in Colorado and denied Relator's Special Appearance, Plea to the Jurisdiction, Request for Court to Decline Jurisdiction. Respondent on August 30, 2018, denied a motion to reconsider his ruling and proceeding to hear and render temporary orders regarding the child.

Emergency Relief Requested: Relator requests this Court to stay the temporary orders of the trial court.

ISSUES PRESENTED

- ISSUE NO. ONE:** Did the Texas trial court abuse its discretion in accepting UCCJEA jurisdiction even though Texas was not the child’s home state, Colorado had been the child’s home state during the six months before the filing of the custody case, and there was a previously filed custody case pending in Colorado?
- ISSUE NO. TWO:** Did the inability of the Texas and Colorado courts to communicate change which state had UCCJEA home state jurisdiction?

STATEMENT OF FACTS

This case involves a 19 month old child, E.B., born in Colorado to Jacqueline Torres (“Jacqueline”) and David Butterfield (“David”).

The following chart summarizes the basic facts of this case:

Event	Colorado	Texas
E.B. born	Child born 3/9/17 in Colorado ²	
Jacqueline moves with E.B. to Texas	Jacqueline’s UCCJEA affidavit says she lived in Colorado until 1/20/18 ³	

² Appendix 5, page 30

³ Appendix 6, page 34

Event	Colorado	Texas
Jacqueline and E.B. arrived in Texas		1/21/18 per Jacqueline's UCCJEA affidavit ⁴
David filed Petition for allocation of Parental Responsibilities in Colorado	6/8/18 ⁵	
Jacqueline filed Petition to Adjudicate Parentage in Texas		6/28/18 ⁶
Texas court denies David's Special Appearance, Plea to the Jurisdiction and Request for Court to Decline Jurisdiction		8/8/18 ⁷ (Order signed 8/10/18 ⁸)
Colorado Court denies Motion to Dismiss and Retains Jurisdiction	8/29/18 ⁹	

⁴ Appendix 6, page 34

⁵ Appendix 10, page 71

⁶ Appendix 3, page 10

⁷ Appendix 2, page 6

⁸ Appendix 1, page 1

⁹ Appendix 13, pages 86-89

Event	Colorado	Texas
Texas court denies David's Motion to Reconsider Special Appearance, Plea to the Jurisdiction and Request for Court to Decline Jurisdiction		8/30/18 ¹⁰
Texas court conducts hearing on temporary orders and makes ruling		8/30/18 ¹¹

Respondent, Judge Hufstetler, tried to communicate with the court in Colorado, but was unable to do so.¹² The Texas trial court's docket sheet makes it clear that no court reporter's record was made of the August 8, 2018 attempt by Judge Hufstetler to communicate with the Colorado court.¹³ That was the day when the Texas trial court denied David's Special Appearance, Plea to the Jurisdiction and Request for Court to Decline Jurisdiction without hearing evidence about how long the child lived in Colorado, when E.B. was moved to Texas or when the various lawsuits were filed.¹⁴

¹⁰ Appendix 2, page 6

¹¹ Appendix 2, pages 6-7

¹² Appendix 9, pages 58-68

¹³ Appendix 2, page 6

¹⁴ Appendix 9, pages 58-68

The record does not show that Judge Hufstetler considered the above dates or which state was E.B.'s home state when he accepted jurisdiction and denied David's Plea to the Jurisdiction and Request for Court to Decline Jurisdiction or when he denied David's Motion to Reconsider his Plea to the Jurisdiction and Request for Court to Decline Jurisdiction.¹⁵

The Colorado court has denied Jacqueline's request that Colorado decline jurisdiction over E.B.¹⁶ David continues to live in Colorado.¹⁷

So, today there are two pending child custody cases involving E.B. pending in both Texas and Colorado.

The Texas court has not yet entered formal temporary orders based on its

¹⁵ The Texas trial court's docket sheet, Appendix 2, page 6, says, "8/08/18. Set for phone call with Colorado court on issue of jurisdiction, scheduled by Colorado Court for 2:00 p.m. this day....record not made as conference did not take place. Colorado court declined to participate in the call to resolve jurisdiction. 300th Court assumed subject matter jurisdiction to proceed with matter." The docket entry for 8/30/18 merely says: "Set for TO/Motion to Reconsider. Counsel for both sides appeared and presented argument....Motion to Reconsider denied. Hearing on T.O...." Appendix 2, page 6. The court reporter's record of the 8/30/18 hearing on the motion to reconsider has Judge Hufstetler talking about the lack of communication with the Colorado court and David's attorney arguing: "the Texas Family Code is also very specific and requires that Texas was the home state of the child or that the home state of the child has declined jurisdiction." Appendix 9, page 62. Judge Hufstetler then resumed his discussion about the lack of communication with the Colorado court but nowhere in the record does he discuss when the child was moved to Texas, which state was the child's home state or how the UCCJEA could grant him jurisdiction.

¹⁶ Appendix 13, pages 86-89

¹⁷ Appendix 10, pages 71

ruling on August 30, 2018.¹⁸

ARGUMENT

Mandamus is an extraordinary remedy appropriate only when an abuse of discretion has occurred and the relator is without an adequate appellate remedy. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). "A writ of mandamus is an appropriate means to require a trial court to comply with the UCCJEA's jurisdictional requirements." *Powell v. Stover*, 165 S.W.3d 322, 324 (Tex. 2005) (orig. proceeding); *In re Burk*, 252 S.W.3d 736, 738–39 (Tex. App. - Houston [14th Dist.] 2008)(orig. proc.). An abuse of discretion occurs if the law has not been analyzed or applied correctly. *Powell v. Stover*, 165 S.W.3d at 323. Construction of the UCCJEA's "home state" provision as codified in the Texas Family Code and the existence of subject-matter jurisdiction are questions of law that the appellate court reviews de novo. *Id.*

¹⁸ Appendix 2, pages 6-7

ISSUE NO. ONE: Did the Texas trial court abuse its discretion in accepting UCCJEA jurisdiction even though Texas was not the child's home state, Colorado had been the child's home state during the six months before the filing of the custody case, and there was a previously filed custody case pending in Colorado?

The child custody suit in Colorado regarding E.B. was filed first, so the Texas court should have been precluded from exercising its jurisdiction if the Colorado court had UCCJEA jurisdiction substantially in conformity with Texas Family Code chapter 152. *See* Tex. Fam. Code Sec. 152.206(a); *In re Burk*, 252 S.W.3d 736, 740 (Tex. App. - Houston [14th Dist.] 2008)(orig. proc.); *Geary v. Peavy*, 878 S.W.2d 602, 604 (Tex. 1994).

"Motivated in part to prioritize 'home state jurisdiction' in child custody proceedings, Texas adopted the Uniform Child Custody Jurisdiction and Enforcement Act" (UCCJEA), which establishes clear rules under which a court has jurisdiction and discourages competing child custody orders. *In re Dean*, 393 S.W.3d 741, 743 (Tex. 2012) (orig. proceeding).

Except in cases invoking temporary emergency jurisdiction, which is not at issue here, a Texas court "has jurisdiction to make an initial child custody determination only if" the requirements of Section 152.201 of the Act are met." Tex. Fam. Code Sec. 152.201(a). Section 152.201(a) confers jurisdiction only if:

(1) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) a court of another state does not have jurisdiction under Subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 152.207 or 152.208

(3) all courts having jurisdiction under Subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 152.207 or 152.208; or

(4) no court of any other state would have jurisdiction under the criteria specified in Subdivision (1), (2), or (3).

Tex. Fam. Code Ann. § 152.201(a).

Sec. 152.201(b) makes clear: “ Subsection (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.”

The UCCJEA prioritizes "home state" jurisdiction. See Tex. Fam. Code Sec. 152.201(a)(1); *In re Dean*, 393 S.W.3d 741, 746 (Tex. 2012) (orig. proceeding); *Powell v. Stover*, 165 S.W.3d 322, 325 (Tex. 2005). In determining where a child lived for purposes of establishing home state jurisdiction, courts focus on the child's "physical presence" in a state, not the legal residency of the child's parents. *Powell*, 165 S.W.3d at 326-28. The Texas Family Code defines

"home state" to mean:

the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence of a parent or a person acting as a parent is part of the period.

Tex. Fam. Code Sec. 152.102(7).

"[T]he operative date for determining whether Texas has jurisdiction is the date the suit was filed in Texas." *In re Walker*, 428 S.W.3d 212, 219 (Tex. App.-Houston [1st Dist.] 2014, orig. proceeding) (internal quotation marks omitted); see also Tex. Fam. Code § 152.102(5) ("Commencement' means the filing of the first pleading in a proceeding.").

A review of the facts absolutely proves that Texas was not the child's home state when the Texas case was filed and Colorado had been the child's home state during the six month period before the Colorado case was filed.

Jacqueline and E.B. arrived in Texas on January 21, 2018.¹⁹ Jacqueline filed her Petition to Adjudicate Parentage in Texas on June 28, 2018.²⁰ Six months before June 28, 2018 was December 28, 2017. Thus, the child had not lived in Texas for six months prior to June 28, 2018 and Texas was not the

¹⁹ Appendix 6, page 34

²⁰ Appendix 3, page 10

child's home state on the date Jacqueline filed her petition in Texas. Texas had not been E.B.'s home state during the six month period before the Texas custody case was filed because the child lived in Colorado from her birth until January 20, 2018.²¹

Colorado's version of the UCCJEA (which is essentially identical to Texas' UCCJEA in respects pertinent to this case) provides:

Colo. Rev. Stat. 14-13-201. Initial child-custody jurisdiction

(1) Except as otherwise provided in section 14-13-204, a court of this state has jurisdiction to make an initial child-custody determination only if:

(a) **This state** is the home state of the child on the date of the commencement of the proceeding, or **was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;**

(b) A court of another state does not have jurisdiction under a provision of law adopted by that state that is in substantial conformity with paragraph (a) of this subsection (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under a provision of law adopted by that state that is in substantial conformity with section 14-13-207 or 14-13-208, and:

(I) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(II) Substantial evidence is available in this state concerning the child's care, protection, training, and personal

²¹ Appendix 6, page 34.

relationships;

(Emphasis added).

Under Colorado's UCCJEA, Colorado had jurisdiction when David filed his custody case there because Colorado was E.B.'s home state "within six months before the commencement of the proceeding" and, on the day David filed his case in Colorado, the child was absent from Colorado but a parent (David) continued to live in that state. Colo. Rev. Stat. 14-13-201(1)(a).

The child, E.B., resided in Colorado from her birth on March 9, 2017 until Jacqueline took E.B. from Colorado on January 20, 2018.²² David filed his Petition for Allocation of Parental Responsibilities in Colorado on June 8, 2018.²³ Six months before June 8, 2018 was December 8, 2017. Colorado was clearly E.B.'s home state on January 20, 2018 and that date was "within six months before the commencement of the proceeding" in Colorado and on June 8, 2018 (when David filed his Colorado case), the child was absent from Colorado but David continued to live in Colorado.

So, it is clear that Colorado was E.B.'s home state during the six months before David filed his custody action and Texas was not the child's home state when Jacqueline filed her paternity action in Texas.

²² Appendix 6, page 34

²³ Appendix 10, page 71

The Colorado court has accepted jurisdiction and is proceeding with its custody determination.²⁴

No basis for UCCJEA jurisdiction in Texas exists under Texas Family Code Section 152.201(a) because:

- (1) Texas was not the home state of the child on the date of the commencement of the proceeding and was not the home state of the child within six months before the commencement of the proceeding;
- (2) a court of another state (Colorado) does have jurisdiction under Subdivision Sec. 152.201(a)(1);
- (3) Colorado has not declined to exercise jurisdiction; and
- (4) a court of another (Colorado) state would have jurisdiction under the criteria specified in Subdivision (1).

Tex. Fam. Code Ann. § 152.201(a).

Moreover, the UCCJEA should have specifically prevented the Texas trial court from accepting jurisdiction of this case because another custody proceeding was already pending in Colorado:

Sec. 152.206. SIMULTANEOUS PROCEEDINGS.

(a) Except as otherwise provided in Section 152.204 [emergency temporary jurisdiction], **a court of this state may not exercise its jurisdiction under this subchapter if, at the time of the**

²⁴ Appendix 13, pages 86-87

commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 152.207.

Tex. Fam. Code Sec. 152.206(a)(emphasis added).

As noted above, the UCCJEA as adopted in Colorado is essentially identical to the UCCJEA incorporated into the Texas Family Code. Since Colorado had been E.B.'s home state during the six month period before David filed his custody case in Colorado, the Colorado court had " jurisdiction substantially in conformity with this chapter."

In re Walker, 428 S.W.3d 212, 217 (Tex. App.- Houston [1st Dist.] 2014)(orig. proc.) is exactly on point. There the Houston First Court of Appeals granted a writ of mandamus because the Texas trial court accepted UCCJEA jurisdiction even though the child had not lived in Texas for six months prior to the date the Texas case was filed. *Id.* at 216-217. The child had also not lived in Georgia for six consecutive months prior to the filing of the Texas suit. However, the court of appeals determined that Georgia was the child's home state within six months before the custody proceeding was commenced and thus UCCJEA jurisdiction was in Georgia, not Texas. *Id.* at 218.

In re Marsalis, 338 S.W.3d 131, 136 (Tex. App. - Texarkana 2011)(orig.

proc.) likewise held that Texas was not the child's home state because the child had not lived in Texas for six months prior to the filing of the custody case.

In re B.Q.S., No. 11-13-00043-CV, 2014 WL 2957451, at *8–11 (Tex. App. - Eastland 6/26/14, no pet.)(mem. op.) likewise held that Texas did not have UCCJEA jurisdiction because the child had lived in Texas for less than three months when the mother filed her case.

In re Burk, 252 S.W.3d 736, 740 (Tex. App.-Houston [14th Dist.] 2008)(orig. proc.) also involved a UCCJEA jurisdiction dispute between Colorado and Texas but with the “reverse” facts. In *Burk*, the child was moved from Texas to Colorado and the parties agreed that Colorado was not the child's home state since the child had not lived in Colorado for six months at the time the custody case was filed. The Houston Fourteenth Court of Appeals held that Texas was the child's home state “within six months before the commencement of the proceeding.” *Id.* at 741.

The facts and law are clear: the Texas trial court lacked jurisdiction under the UCCJEA, and it abused its discretion by accepting jurisdiction because the Colorado case was filed first, Texas was not the child's home state, Colorado had UCCJEA jurisdiction, and a Colorado court has accepted jurisdiction and is proceeding with its custody case.

ISSUE NO. TWO: Did the inability of the Texas and Colorado courts to communicate change which state had UCCJEA home state jurisdiction?

The UCCJEA, as adopted in Texas, provides:

Sec. 152.206. SIMULTANEOUS PROCEEDINGS.

(b) Except as otherwise provided in Section 152.204, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 152.209. **If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state.**

(Emphasis added).

The Texas judge and the Colorado judge did apparently try to call each other without success, although there is a sharp disagreement on who was at fault for their failure to communicate. Regardless, the judges did try to communicate and their inability to communicate does not change the fact that Texas was not E.B.'s home state and Colorado was the child's home state within six months of the filing of the respective custody cases. No amount of communication would change the facts or the applicable law and so the inability of the judges to communicate was harmless error, if it was even error.

Judge Hufstetler, Respondent, stated that he tried to call the Colorado court on two occasions, July 2 and August 8, 2018.²⁵ He also stated that he did receive a phone message from the Colorado court on August 29, 2018.²⁶

The order of the Colorado court denying Jacqueline's motion to dismiss and assuming jurisdiction in Colorado states in part:

13. This Court has attempted to confer with the Texas Court on more than one occasion.

14. This Court's first call to the State of Texas was placed directly to Judge Hufstetler, who is the assigned judicial officer in the State of Texas, on July 2, 2018. This call was in response to a call from Judge Hufstetler placed to the Family Court Facilitator in the 10th Judicial District on July 2, 2018. A voice mail was left on the Family Court Facilitator's telephone asking that this Court call him to confer.

15. On July 2, 2018, this Court returned the call directly to Judge Hufstetler. The call was not answered and a voice mail message was left for a return call. No return call was ever received from Judge Hufstetler.

16. This attempt at conferral was reflected in this Court's Order of July 18, 2018.

17. At setting held on July 31, 2018, the Court noted that a conference call with the Texas Court would be scheduled. The Court directed the Division Clerk for this Division to arrange for the telephone conferences.

18. The Division Clerk did in fact arrange for the telephone conference to take place on August 8, 2018, between Judge Hufstetler and this Court. On July 31, 2018 the Division Clerk called and left a message for a return call. On August 3, 2018, the Division Clerk received a call directly from Judge Hufstetler and scheduled the conference call to take place on

²⁵ Appendix 9, pages 58 - 59.

²⁶ Appendix 9, pages 66 - 67.

August 8, 2018, at 1:00 p.m. Colorado time. It was confirmed that this Court would call the Texas Court at (281) 756-1228.

19. On August 8, 2018 this Court attempted two phone calls to the number and received voice mail on both occasions. The practice of the 10th Judicial District is that these calls are conducted on the record. Therefore, this Court placed the phone calls from the Division 402 Courtroom.

20. It was later learned from a call log history on the Division Clerk's telephone that Judge Hufstetler was attempting to place a call to the Division Clerk at her desk phone at 1:03 p.m. and 1:14 pm. The Division Clerk was unavailable as she and this judicial officer were in the Courtroom attempting to call Judge Hufstetler per the prior arrangements.

21. Judge Hufstetler later that day called the Family Court Facilitator in the 10th Judicial District. By the time that call was placed, the Court was in another hearing and not available to take the call. Based on the Family Court's Facilitator's conversation with Judge Hufstetler, The Family Court Facilitator informed the Division Clerk that we had in fact attempted to call the correct telephone number and that Judge Hufstetler would be out of the office the following week so it would be a couple of weeks before he could reschedule anything.

22. Upon subsequent attempt by the Division Clerk to reschedule the telephone conference beginning August 20, 2018, the week the Judge was again to be available, this Court was informed that the Texas Court had decided that he was keeping jurisdiction. This Court has subsequently learned that on the very day of the attempted conference call, Judge Hufstetler entered an Order in the Texas action stating that this Court "declined to participate in the scheduled telephone conference".

23. This finding by the Texas Court is directly contrary to the facts, and this Court could just as easily find that the Texas Court declined to participate in the attempted conference call when it received only voice mail at the time of the scheduled call. This Court however, declines to make that finding in that it would be factually inaccurate.

24. Upon learning of the entry of the Texas Order by counsel for

Petitioner filing a copy of that Order in this case, this Court has on two occasions attempted to contact Judge Hufstetler directly and received only voice mail. Further this Court has engaged in email correspondence with the Judge's Clerk who stated to this Court that she would forward the Court's message onto him. No return calls or e-mails have been received from Judge Hufstetler attempting to resolve this issue in accordance with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act. Therefore, this Court finds that the Texas Court has declined to make sufficient attempt to appropriately communicate with this Court pursuant to the requirements of the Uniform Child Custody Jurisdiction and Enforcement Act.²⁷

At the August 30, 2018 hearing on David's Motion to Reconsider Special Appearance, Plea to the Jurisdiction and Request for Court to Decline Jurisdiction, Judge Hufstetler was able to read the above Colorado order and he, to put it mildly, did not agree with the Colorado judge's recollection of events, stating:

So, I don't know what confusion they may have had; but there was no confusion on our end. I spoke to the court administrator. So, for this Judge, who has a law license presumably, to perjure herself and make this kind of statement is absolutely beyond belief for me. So, this order where she is assuming jurisdiction has no force and effect here. It's 19 days late.
....

I know I'm speaking to the messenger not the person who needs to be spoken to, but I'm not calling her again. I made multiple phone calls to her, starting from July and eventually got it set up.

Now, maybe there's a miscommunication between she and her coordinator or administrator but not on my part. I actually spoke to the Court. I gave

²⁷ Appendix 13, pages 87-89.

two numbers, my 1228 and my court coordinator's number 1227. Neither one of them rang. Now, amazing, it rang yesterday.

Motion to reconsider is denied.²⁸

There are no Texas UCCJEA cases directly on point which involve two courts which each tried to call the other but were unsuccessful.

Saavedra v. Schmidt, 96 S.W.3d 533, 541 (Tex. App. - Austin 2002, no pet.) involved a California court which refused to communicate with the Texas court and which made rulings so bizarre that the Texas Court concluded the child would be in danger if she was returned to California pursuant to the other's state order. *Saavedra* involved a modification of a prior order from California and only addressed the ability of the Texas court to assume temporary, emergency jurisdiction. In contrast, this case is an original custody proceeding and so a different legal analysis is applied to determine jurisdiction. This case involves two courts who clearly tried to communicate with each other and not a situation where one court refused over months to communicate.

The Fort Worth Court of Appeals also addressed a court's failure to communicate in a UCCJEA case in 2016 and held:

In *Saavedra*, as here, the home-state court failed to communicate with the Texas trial court; but in *Saavedra*, unlike here, the home-state court actually modified its initial child-custody order and specifically stated in the modified order that it continued to maintain exclusive jurisdiction

²⁸ Appendix 9, pages 66 - 67.

under the UCCJEA. Id. at 538. The Florida court here did not sign any type of order indicating that it intended to exercise continuing, exclusive home-state jurisdiction, even though Father had filed a motion requesting such an order. Consequently, *Saavedra* is factually different from the present situation.

Under the unique facts presented here, we hold that the Florida court's failure to communicate with the trial court for over six months and the Florida court's failure to rule on Father's motion filed with it—for over six months before the trial court proceeded to a final hearing, for over eight months before the trial court signed a final judgment, and for over fourteen months to date—constitutes an implied determination by the Florida court to decline to exercise its home-state jurisdiction and an implied determination by the Florida court that Texas is a more convenient forum for litigation of Mother's modification SAPCR. To hold otherwise would undermine the purposes of the UCCJEA. The comments to the UCCJEA state that the “Act should be interpreted according to its purposes which are to: ... [p]romote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child” and to promote consistent and speedy resolution of child custody issues involving multiple states. Unif. Child Custody Jurisdiction & Enft Act §§ 101–405, 9 U.L.A. 649 (1999 & Supp. 2005);

In re T.B., 497 S.W.3d 640, 650-1 (Tex. App. - Fort Worth 2016, pet. denied).

Unlike the case of *In re T.B.*, the Colorado court in this case did try to communicate with the Texas court and the Colorado court has ruled it will exercise jurisdiction.

McGuire v. McGuire, 18 S.W.3d 801 (Tex. App. - San Antonio 2000, no pet.) involved the Uniform Child Custody Jurisdiction Act (UCCJA), the predecessor to the UCCJEA. There, the Texas Court would not communicate

with the Illinois court which had made the original custody ruling. The Texas Court did assume jurisdiction over the child and, upon hearing that news, the Illinois court then declined to keep jurisdiction. The Court of Appeals ruled that the Texas Court erred in assuming jurisdiction and stated:

Finally, as a matter of public policy, we cannot sanction the “bootstrapping” of jurisdiction onto a court which fails in its duty to communicate with a sister state.

Id. at 807.

There are no other Texas cases which involve the UCCJEA and a court’s failure to communicate with a court of another state. All fifty states have enacted the UCCJEA, so there are cases from other states that address this issue. The decisions from other states all seem to fall into two categories of rulings: either the appellate court decides (1) to remand with instructions for the trial court to communicate with the court in the other state, or (2) the failure to communicate is considered to be harmless error.

For example, in *Steckler v. Steckler*, 921 So.2d 740, 744 (Fla. Dist. Ct. App. 2006), the appellate court remanded the case and ordered the trial court to communicate with the other state’s court.

The appellate court in *Ramsey v. Ramsey*, 995 So.2d 881, 888 (Ala. Civ.

App. 2008) ruled that the trial court's failure to communicate with the other state's court was harmless error, stating:

However, we agree with the mother that the posture of this case was such that the failure to communicate was, if error, harmless error. See Rule 45, Ala. R.App. P. (explaining that "[n]o judgment may be reversed ... unless ... it should appear that the error complained of has probably injuriously affected substantial rights of the parties"). The Nebraska trial court stayed further action on the child-custody proceeding pending in that court upon the father's motion; the Alabama trial court was apprised of this circumstance and had a copy of the Nebraska trial court's order stating that it was awaiting the Alabama trial court's decision on whether it would exercise home-state jurisdiction under the UCCJEA. Any communication with the Nebraska trial court, which had only approved the parties' stipulation regarding temporary custody and stayed the case pending the Alabama trial court's decision whether to decline jurisdiction, would have yielded little, if any, information helpful to the Alabama trial court.

In this case, Judge Hufstetler in Texas had a copy of the Colorado's court order when he denied David's motion to reconsider his Special Appearance, Plea to the Jurisdiction, Request for Court to Decline Jurisdiction.²⁹ The Colorado judge was clearly aware that Judge Hufstetler had assumed jurisdiction when the Colorado court denied Jacqueline's motion to dismiss and accepted jurisdiction over the child.³⁰ It is not clear at all how communication between the two courts now would resolve this jurisdictional issues, especially given the harsh words the two judges have said or written about each other.

²⁹ Appendix 9, page 8.

³⁰ Appendix 13, page 88.

The inability of the two courts in this case does not change the facts or the law and it is clearly harmless error, if it is error. An error by the trial court is harmless unless the record shows the error probably caused the rendition of an improper judgment. Tex. R. App. Proc. 44.1(a)(1). If the two judges had talked on the phone, there is no reason to think the communication would have caused the Colorado judge to decline jurisdiction given the dates of when E.B. lived in Colorado, when she was moved to Texas and when the Colorado custody case was filed. A phone call would not have changed the fact that the Colorado judge had UCCJEA jurisdiction.

This is not a case where a judge refused to communicate. The record shows that both judges tried to call the other judge on several occasions. But, even if the judges had talked, nothing the judges could have said to each other would have made Texas E.B.'s home state or changed the clear fact that Colorado was the child's home state within six months of the suits being filed.

The inability of the two judges to actually talk to each other on the phone was not error (because they tried) and, if it was error, it was harmless error.

REQUEST FOR RELIEF

Relator requests this Court to grant his petition for writ of mandamus and direct the Texas trial court to dismiss the action filed by the Real Party in Interest and vacate all orders entered in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this notice is being filed with the appellate clerk in accordance with rule 25.1 (e) of the Texas Rules of Civil Procedure. I certify that a true copy of this Appellee's Brief was served in accordance with rule 9.5 of the Texas Rules of Appellate Procedure on each party or the attorney for such party indicated below by the method noted on October 12, 2018 as follows:

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Via hand delivery

/S/ Greg B. Enos
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CERTIFICATION

I certify that this filing complies with the word count and font size limitations as provided by Rule 9 of the Texas Rules of Appellate Procedure and that there are 6,498 words.

/S/ Greg B. Enos
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