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Supreme Court of Texas.
In re: Suzanne C. Saperstein, Relator.
No. 06-0129.

December 6, 2006.

Appearances:

Thomas R. Phillips, Austin, Texas, for relator.
Lynne Liberato, Haynes and Boone, LLP, Houston, Texas, counsel for
Real Party in Interest.

Before:

Scott A. Brister, Phil Johnson, Dale Wainwright, Nathan L. Hecht,
Paul W. Green, David M. Medina, Harriet O'Neill, Wallace B. Jefferson,
Supreme Court Justices.

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JUDGE #1: 06-0129, In re Suzanne C. Saperstein. Justice Millard is
not sitting in this hall.

COURT ATTENDANT: May it please the Court. Mr. Phillips will
present argument for the petitioner. Mr. Phillips has reserved five
minutes for rebuttal.

ORAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF THE PETITIONER

MR. PHILLIPS: May it please this Honorable Court. This is a case
of first impression on the construction of a key provision of a new
form statute that has been adopted by all 50 States. The provision is
Section 159.204 and the statute is the Uniform Interstate Family
Support Act which minutes the time our code use has been interpreted.
This Section has been adopted by all 50 states at the direction of
Congress which in 1996 in the Welfare Reform Act said, "If you do not
adapt this statute, you'd no longer adapt your title toward it long." A
principle purpose of UIFSA was to vest exclusive jurisdiction over
support orders in only one State at a time which within the old
practice under UIFSA and RUIFSA of having conflicting support orders,
ordinance about whether or not states were concombative with each other
and who should, who should defer to who else.

JUDGE #2: Mr. Phillips.

MR. PHILLIPS: Yes.

JUDGE #2: Sir, I have a-- we have a November 29th letter 2006,
David from, from Alene Levy and with some attachments involve -

MR. PHILLIPS: Yes, your Honor.

JUDGE #2: - got some orders attached to, what, what bearing does that have on this argument here today?

MR. PHILLIPS: Well, probably -

JUDGE #2: Nothing.

MR. PHILLIPS: - counsel-- no, I would-- counsel for David, for the real party has submitted that, that's a more of what were ...

JUDGE #2: Well, what in fact do you think it has, cause it's a or frankly, muddled the water from?

MR. PHILLIPS: Well, they are part of the problem why that is going on here is that two states are claiming jurisdiction over spousal support, Texas and California and they both are continuing to act. The California has just said it is going to -

JUDGE #2: Why ...

MR. PHILLIPS: - refer on the marital property division. That is the actual Poors Park case until Texas acts and then California will decide whether or not they should be approving on that part of the case too but California Court has definitely decided and [inaudible] so that it has jurisdiction over spousal support. It clearly has jurisdiction over child support, Texas has conceded that but this are some recent orders in part entered by the California Judge, as that judge continuous on down the path of deciding what he is and he is not going to hear. Meanwhile, proceedings are or are-- proceeding in Texas, both States have issued spousal support orders which are inconsistent and the parties in fact cannot comply with both orders at the same time ...

JUDGE #3: But we're going to have parallel proceedings regardless.

MR. PHILLIPS: Well, I mean, parallel but not on the same subject.

JUDGE #3: Of course.

MR. PHILLIPS: California clearly has child support.

JUDGE #3: We're going to do child support, we're going to property, and so we just -

MR. PHILLIPS: Yes.

JUDGE #3: - we go on which one spousal support.

MR. PHILLIPS: Correct. In property, we still--that's for another day, another time, another court whether that should properly waive it. For now, Texas is going to have a trial in January on property division.

JUDGE #1: There's-- did both sides have agreed that, that's where the property division? I know that's the heart of this case but that, that should take place in Texas?

MR. PHILLIPS: No, Suzanne, the relator claims that, that should be in California. But that's -

JUDGE #1: What?

MR. PHILLIPS: - our next-- that's, that's a next year problem.

JUDGE O'NEILL: Well, but, but one of the, the under pinnings out that problem is the argument has been made that you can't really separate spousal support from child support. They're just too been related, they need to get together, -

MR. PHILLIPS: That's your Honor ...

JUDGE O'NEILL: - that's presumably the purpose behind 159.204(b) but isn't there an argument also that the separation of spousal support and property division is pretty inextricably intertwined too?

MR. PHILLIPS: In-- the, the easiest case is where everybody doesn't want step. There's no doubt about that. But we believe that a determination has been made by the Texas Legislature and all other legislators that spousal support and child support should start at any right in the same state as possible. And that, that's of knowledge

determination for courts either trial courts on a case by case basis or Supreme Court. It's been -

JUDGE O'NEILL: Well, ...

MR. PHILLIPS: - made by the Legislature and ...

JUDGE O'NEILL: Along that line, what is the "if relevant" mean under Subsection 3?

MR. PHILLIPS: We think it means that if a couple has no minor children, no one-- none, no un-emancipated minor children then you're going to have track. Spousal support determined in the state where the divorce was first filed. But if there are minor un-emancipated children that spousal support and child support should go together to which ever state under this scheme prevails and has exclusive jurisdiction. They say ...

JUDGE O'NEILL: If there any ...

JUDGE #4: Let's me ask you about part (a) statute. It says a tribunal of the state may exercise jurisdiction. And you talk about that as, as being whether the court has jurisdiction but it kind of sounds like extension provision more than a jurisdictional provision, what's your will over that?

MR. PHILLIPS: It's, it's a reasonably unique statute but, but I think it's purpose is to get jurisdiction in one form at a time on one particular problem: a) is the converse, that's what California looks at. It did-- the whole part (a) at 159.204 is when nor the second filed state for divorce and; b) is when the dispersed spouse is that the closest we can come to is perhaps, removal. Certainly, a state trial court may have jurisdiction over an issue and over the parties but if the defendant jumps through certain time hoops and certain subject matter hoops and gets in to federal court under the United States statute, then the federal court has exclusive jurisdiction and the trial court no longer does and of course the federal court can send it back but I, but I think that's the closest analogy. Certainly, for the Sapersteins as the California trial judge found, Justice O'Neill, when making a spousal support orders, child support and spousal support overlap. Overlap for them in, in their housing and in the ranches for practicing, racing and in their various types of air transport. It's even more important for a family of limited means where the housing is frequently the biggest expense you pay and spousal -

JUDGE #1: Excuse me, what you ...

MR. PHILLIPS: - support and child support would overlap.

JUDGE #2: You said limited means, that's not a family ...

MR. PHILLIPS: If the people hasn't, this is even more important to have the child support and spousal support being considered by the same to form that is a wearable spec because otherwise you're quite like it have double, double awards and double talent.

JUDGE O'NEILL: But what I've wanted the promise-- it's hard for me to envision how any court can do one without the other two. I mean, if you're dividing the property in Texas, say for example a property is given to Suzanne but in terms of support, she needs a certain amount to maintain that property which I presume would go under spousal support as oppose to property division, how do you look at this in a vacuum in each different place? I mean, spousal support could arguably be as relevant to property division as it can to child support.

MR. PHILLIPS: Well, perhaps that's true and perhaps that is specially true when we're talking about final spousal support, as rather than a temporary or inner motives that we're dealing with here. But it is a call that the legislature has made, that we want when there are children that are minor and un-emancipated, we want the same judge

looking at these support questions, best interest of the child control. And presumably, if one state enters the final divorce order, we'll going to award the property and another state is looking at final support orders, they-- which ever state goes first, will take the other award into account.

JUDGE #1: What normally happens in this cases as child support, spousal support usually short quick in properties where most litigation is about or am I wrong about that, that they normally -

MR. PHILLIPS: I would think that would be true.

JUDGE #1: - normally get rid of those pretty quick and then ...

MR. PHILLIPS: Every state has some type of guidelines on support. They can vary from a manner as the judge, judges have done here but, but there are guidelines. And so generally, the file and certainly, that would be the case here is over how big this -

JUDGE #1: In which -

MR. PHILLIPS: - state is, what's community and what's separate and what that ...

JUDGE #1: In which case then, whoever, whoever decides the property can take into account. Just the right division of the property could take into account whatever court anywhere is decided on child, spousal support as both.

MR. PHILLIPS: That's true and it's also the Congress is true.

JUDGE #1: Right.

MR. PHILLIPS: Well, because jurisdiction continuous over those support orders and the judges handling that can take into account how the property has been divided now.

JUDGE #2: Counsel, assume you are right under 159.204(b) of the Uniform Act, assume that you're right at the three conditions in order to have a first filed lawsuit stick on the home state of the children as a different state, assume that your analysis there is correct ...

MR. PHILLIPS: And right, we don't want the first file to stick. We say under 159.204(b) Suzanne had about second in California has satisfied these three records there.

JUDGE #2: And, and you further argued that the respondents have not established that any of the three provisions have not been satisfied so I, I understand your argument there. Then you say that the trial court lacks jurisdiction here in Texas. One, of the most interesting parts of these legal matter to me is that the courts talked, they've solved the dispute, discuss the statutes that apply at least indirectly referenced them in the conversation and use, and use the language of some of the statutes at least and they didn't cite specific numbers and sections, and the statute say that courts may exercise jurisdiction. They say they may defer to another state's court and the specific provisions that we're talking about in the comment, it says, the intent is to encourage, quote, cooperation between in deference by sister state tribunals to avoid competing orders, and the courts-- two courts did that and settle them what they thought made sense here. And not what's-- of course what California Court was overturned by its courts of-- Court of Appeals. But not withstanding that, the two courts talked, trial courts talked. They say that Texas Court lacks jurisdiction. So the-- so your argument is implicitly at least that the trial courts can't agree on, even with this language and the statute to cooperate and talk and differ, can't agree on how to reasonably split up this-- the parts of the case to avoid a conflict, is that right?

MR. PHILLIPS: Yes, that's correct.

JUDGE #2: Well, explain that.

MR. PHILLIPS: Part of the-- you have to go back to the old system which was UIFSA and then RUIFSA I think is the one that the court has been dealing with in modern times which relied on agreements. Well, unfortunately there were no agreements, there were disagreements a lot. And so everybody agrees that the, the key purpose of UIFSA was to reduce trial court discretion and give of course, guidelines if they could follow. What you're quoting from is a comment and comments certainly have some meaning but they are not statutory language and they don't talk statutory language. We, we think it's a good thing for the judges to talk, they did talk, their entire conversation verbatim is in tab four of our handout -

JUDGE #2: [inaudible]

MR. PHILLIPS: is now into the statute and the order of November the 2nd which is tab (d) to our record -

JUDGE #2: No, it's not ...

MR. PHILLIPS: - tab (h) of our record, does not mention UIFSA and it doesn't track the language. It was purely a prudential thing, "well, you got a big case here, I'll take this, you take that."

JUDGE O'NEILL: Well, and that, that gets back to my question on the "if relevant" case. I've look there if there's any legislative history, it seems like they could've easily said, "and if there are children, the other home state the children or the other home state of the children if any but 'if relevant' seems like an odd phrase to use and can the courts decide the children are about to be emancipated, spousal support in which is a more likely to focus on property division in this instance, and therefore, it's not going to be as relevant child support?"

MR. PHILLIPS: We-- it's our belief. Well, first of all, I agree with everything you said about this could've been written better. There is frankly no legislative history and I don't know what to call legislative history going handful of uniform commissioners get ready, get together, write statute that the AVA then adapts, Congress directs, every state legislature to, to pass and of course they pass it on, paying a great financial harm.

JUDGE O'NEILL: But it seems to me that -

MR. PHILLIPS: But, but that's prefatory because in ...

JUDGE O'NEILL: - it seems like that qualify "if relevant" it could be very significant because if it is intended to vest the, the individual courts for some sort of discretion to determine the relevance of the children's home state to the overall support issues, it could make a big difference in this case.

MR. PHILLIPS: If it's read that way, it certainly could. We believe that, that is probably not the best reading of the statute because this is not suppose to be ...

JUDGE O'NEILL: It gets you back even if it's [inaudible]

MR. PHILLIPS: Yes. This is suppose to be a statute that the judges can sit down and they can tell who wins -

JUDGE #1: Can -

MR. PHILLIPS: - and move on.

JUDGE #1: - can you take one moment -

MR. PHILLIPS: [inaudible] has said yes.

JUDGE #1: - to tell us why an appeal is not an adequate remedy?

MR. PHILLIPS: Yes, I can. First, under prudential current laws as I understand it, if you weigh the, the benefits and the detriments to this, certainly, there's a tremendous detriment to these parties in having to proceed in two, four at one time. And that detriment is even stronger in cases where people have very or very limited resources and

the lawyers are going to get all the money rather than the children or the spouse or, or the marital at stake. You are the first court to decide this issue. Temporary orders are not appealable at the right we're going on this two trains may have been received.

JUDGE #1: Yes.

MR. PHILLIPS: And right we're going, going down to the parallel tracks, it maybe years before the parties have the benefit of knowing which set of orders they should have been following all along. And it seems to me in these cases, where interstate committee is involve and it's clearly the intent of this law that one court not have jurisdiction, that all of our jurisprudence in this state over the last 30 years should say, it's a proper case for mandamus.

JUDGE #4: Just one with follow up question, If the trial were in January, would that lift this case?

MR. PHILLIPS: No, it does not because the interim support would continue on until there's a final judgment and then in either state, there'll be issues about permanent support. This money makes a lot of-- I mean, under California law, permanent spousal support is much bigger issue than it is in Texas law.

JUDGE #3: The transcript of the conversation between the judges that they say that there is a dispute throughout the Uniform Interstate Family Support Act that use a terminology of jurisdictional challenge pending to talk about home state of the children and all the terminology from the statute. I'm going to come back to that on rebuttal.

MR. PHILLIPS: All right, I see where you are on page 6. They do use the terms, they don't look at any of the three criteria in making this decision.

JUDGE #3: In the interest of time, I guess I want to know in rebuttal, can the trial courts ever agree on something that makes sense without from your stand point violating the statute, if it may suggest something different?

MR. PHILLIPS: I'll answer that when I come back.

JUDGE #1: The court is ready to hear argument from the Real Party in Interest.

COURT ATTENDANT: May it please the Court. Ms. Liberato will present argument for the Real Party in Interest.

ORAL ARGUMENT OF LYNNE LIBERATO ON BEHALF OF THE RESPONDENT

MS. LIBERATO: May it please the Court. Let me start with the issue of mandamus and the point that several of the questions have indicated that what are the standards that apply here and does a mandamus proceeding appropriate in the situation. The answer to-- from our standpoint of course is that it's not because there is an adequate remedy of-- by appeal and because the judge did properly exercise her discretion.

JUDGE #4: How could, how could you appeal it?

MS. LIBERATO: You appeal the plea in abatement. That's what they are abate or challenging as to plea in abatement and her assumption of jurisdiction and they could appeal that. And ...

JUDGE #4: But, but you couldn't appeal-- you probably could arrange this issue in a-- after final judgment because ...

MS. LIBERATO: After final judgment in Texas, that's correct. You

could raise it in the final judgment.

JUDGE #4: Are you saying that temporary support shouldn't have been what it was?

MS. LIBERATO: Well, what it would be is not the temporary support but the on-going support because the spousal support would continue beyond the-- assuming that's awarded in Texas but it would continue or not continue on after the final judgment. So it would still be right in that sense, as it continued on. Now, as it works through, the appellate process and suppose there's an argument that it could be ultimately move because there's a time limitation of three years for spousal support in Texas, and if took that long to get to the appellate process then arguably it would be moved. But nonetheless, it would be David that, that's paying that check-- that spousal support. I think that that's a really important issue too in terms of the harm discussion that, that, that it was touched on. And that is that, that David is paying for all the support, all the living expenses of the one child he does not have custody of, that's the youngest child who is Suzanne has custody, of course for the two, two children he has custody of anything for all their living expenses. The other aspect of course is the abuse of discretion and here, the statute clearly contemplates that the judges exercise discretion in making the determination of who's going to accept jurisdiction over spousal support.

JUDGE #4: That's not usually something that judges can agree about.

MS. LIBERATO: But I bet it is here and this is a weird da-, no question about it -

JUDGE #4: But isn't there ...

MS. LIBERATO: - family lose that way.

JUDGE #4: If it were of extension or something like that, maybe you could agree but if it's subject matter jurisdiction, that's usually-- they'll determine that in the sky, someplace and the trial courts are bound by it.

MS. LIBERATO: Well, that's right. And, and maybe there, maybe there's a way to parse it a little bit here aside from just saying that, that family and law matters are unique but it's really more of, of an extinc-, of an abstention. It's not a complete-- it's one court excepting jurisdiction along with the other court defers, not completely giving up jurisdiction but defers ...

JUDGE #1: Well, except the statute says that, then you may not exercise-- the trial court may not exercise jurisdiction if those three conditions are met, right?

MS. LIBERATO: That's right. I think there's two aspects of that: number one, that in the comment, the comments says that the court's will confer in the language and the comment is discretionary type of language where it set the court's opinion on the circumstances, one of the two tribunal should defer not must defer but should defer; and in the second aspect, is if you look in the same statute under the first part of 204 under (a), it says that the second trial court may defer. And so that discretionary language too, your mirror images ...

JUDGE #1: Says "only if" only if though, at the end of that.

MS. LIBERATO: "Only if" that's right. Now, so that allows discretion if those factors then you then that the courts apply those of fact-, those factors. But if you accept or one accept Suzanne's analysis of those factors, there can be no discretion because ...

JUDGE O'NEILL: But wasn't that the purpose, wasn't that the purpose of this act, to prevent competing orders, to take away that discretion to make it crystal clear.

MS. LIBERATO: Well, it's certainly was to prevent competing orders but their-- but, but with the court's looking at the situation in determining which court is the appropriate court to go forward. And I, and I think this is an important point to make here is that from the very start, Suzanne understood what this statute meant because she followed it exactly. What it, what it means is, is that the, the, the courts will confer and make-- and then, you know, then decide which-- excuse me-- that she omit that track. She-- what she ask the Texas court to do in her plea on abatement was not to dismiss the one in jurisdiction but what she ask is the court abate proceedings to allow the California Court to determine whether it would be excepting jurisdiction over the support orders. That's exactly what the statute contemplates. And so she knew that, so she ask for the right type of relief in her plea in abatement. The, the trial court, keep in mind, actually granted her plea in abatement.

JUDGE #1: But it was filed subject to the special appearance and so the trial court had no jurisdiction.

MS. LIBERATO: Right. But that was a challenge to impersona jurisdiction not to subject matter jurisdiction. And so this was the subject matter jurisdiction. The subject matter being the spousal support and that special appearance was denied but again that was impersona jurisdiction. So she knew what she was asking for, she knew the right procedure but she didn't like the result. And the result, keep in mind too, if I may, just put this on the context, what's the result? The California Court was the one who defer. Did she look at the transcript that's been provided to you here and is in, and is in the record and in their discussion, it is the California judge who does virtually all the talking but nonetheless, at the end of all the talking that he does, he says, "I'll take child support and I'll defer to you on spousal support" and she said -

JUDGE #2: But presumably -

MS, LIBERATO: - okay.

JUDGE #4: - but presumably, if he'd now-- what the Court of Appeal probably delayed her, he would delay that thing.

MS. LIBERATO: But the Court of Appeal later didn't make a substantive ruling, Judge and I think that's really confusing but, but it's really important to hear too, to understand that and your question raises that. I'm glad you did because all the California Court did was to say, "Go back and be sure you're applying at California law, you're not just making an agreement." He didn't say what California-- the, the Court of Appeal did not say what California law was ...

JUDGE O'NEILL: No, but they kind of have now. Haven't they just-- the trial court determined what it was and now there's been-- the appellate courts have pretty much accepted that. Now, I've realize that you have-- you say that, "Denying the petition doesn't mean they excepted it," but it's a pretty good indication here.

MS. LIBERATO: Well, I don't think so Judge and I mean, more than if I file or any party files a mandamus to the Court of Appeals and the Court of Appeals denies that mandamus and then we file our next mandamus up here and you deny it, that's no substantive ruling. It could well be what the California Court decided. If you need to follow your adequate remedy by appeal that mand-, what they call mandate, what we call mandamus, that mandate isn't proper here. There is absolutely no indication from the California Court that they're making a substantive ruling. Their rulings were [inaudible] used or I think if it's refused, I mean, do not ...

JUDGE O'NEILL: What do you ...

JUDGE #3: One more question on that same point, where we've change, if I may, California Court of Appeals -

JUDGE O'NEILL: - Appeal, it's hard to say, -

JUDGE #3: Court of Appeal.

JUDGE O'NEILL: - California Court of Appeal. Right.

JUDGE #3: In, in the part we're talking about may have not have made the substantive ruling but seem to clearly indicate to the trial court, we're not really happy of what you did, when it's says we conclude the respondent court exceeded its jurisdiction when it ordered that the issue of child-- of spousal support should be adjudicated in Texas not California and the respondent court did not report to base its, its decision on California law. I'm the trial judge, that's a signal to me that the-- how the court didn't like what I've did and I'm going to reassess it which it did then.

MS. LIBERATO: What it did?

JUDGE #3: So by-- so the argument then coming from the other direction which you've seen in her right and you've heard is the plea in abatement was granted, went to California, the trial court California made the wrong decision the first time, the right decision in the second time. And therefore, there's no more deferral to the Texas Court, it all should go to California. I should-- we look at the Court of Appeal decision in California as being the answer to the opportunity to make a decision rather than the trial court California's first decision being the ...

MS. LIBERATO: I think there's, there, there, there, there is a kind of two parties into the first part being that-- I think that's where it's reading too much into what California did. But putting that aside, let's just assume for a minute that there was a substantive ruling in California by the California Supreme Court that it's absolutely, positively against us. Just assume that when it hadn't happen that assume that for a minute. They're applying California law, this Court applies Texas law. They're decision is not applicable to what this Court, -

JUDGE O'NEILL: But what ...

MS. LIBERATO: - the decision of this Court.

JUDGE O'NEILL: That's applying interpretations of the same uniform statute.

MS. LIBERATO: That's correct, that's correct, although, frankly, they-- their statute is a little different from ours because they are following the earlier version of the statute. And that's the one that is, is in effect in California now and we're following a later version ...

JUDGE O'NEILL: But for purposes of the provision we're looking at here, that doesn't matter, does it?

MS. LIBERATO: Not in this particular regard, it does in regard to another issue on continuing exclusive jurisdiction -

JUDGE O'NEILL: Right.

MS. LIBERATO: - but that's correct, there's so many difference here.

JUDGE O'NEILL: Section 159.204(b)3, what is "if relevant" mean?

MS. LIBERATO: "If relevant" mean that, that the courts exercise their discretion to determine whether the, the, the issue of, of the home state of the child is going to be relevant to the property to ...

JUDGE O'NEILL: Do we have any, any guidance on how to interpret "if relevant" I mean, I-- you could read it to say, "if relevant" meaning if there are children or you could read it to, to import some sort of discretionary -

MS. LIBERATO: Right.

JUDGE O'NEILL: - case. And, and do we have any help on that ...

MS. LIBERATO: I think that the, that the, that the only real help on that is in the comment and just the over all approach in purpose behind the statute. I think that's the help and I think in another sense, if you will, this, this isn't direct authority and I can't help myself but to say this point, that's one reason mandamus said inappropriate here because the, the law has not developed and it should develop in the normal process. But putting that aside, practically speaking, just thinking, what, you know that, what's going on here, what, what are the courts trying to do. Their trying to make the most sense out of which court should hear this types of unique issues that come up in family law cases. In this situation, there are two parallel trains headed down the track and the question is: "Did the trial court judge abuse her discretion in determining that spousal support was more appropriate with the division of property, then it was with, with, with child support?" Now, ...

JUDGE O'NEILL: But there was nothing in that discussion that dealt with propriety. I mean, it was more-- is-- it was not how old are the kids or was this going to relate to more. If they're going to substantive discussion, I might agree but it really was just sort of "you take this, I'll take that."

MS. LIBERATO: It was but, but, but you know, courts don't have to explain their decisions. And I have to say, they were fully briefed on it both there were, there were briefs filed on this issue in California, there were briefs filed on this issue in Texas. So they were aware of the issues. But, but to take it one step further, if I may Judge, and that is to, to, to-- why it's a logical, why that would be the right and why dis-, you know, putting aside discretion, it was the right decision. It's because in Texas, we have very limited alimony, very limited but we make up for that because we give the trial court a lot of discretion in the award of property adjusting -

JUDGE #1: But if -

MS. LIBERATO: - right.

JUDGE #1: - but again if-- my question to opposing counsel if the support orders were indeed pretty quickly because they've generate government largely by guidelines, we can still do that once those are decided at California. We can do or we can adjust or just, just the right determination here, if we know-- if we let the California Court go in to decide spousal support then we can make that adjustment here or we just-- because properties will be tied up for years, they'll all be back up to your own property several years from now.

MS. LIBERATO: But we'll have a final judgment in January or February final for, for, for purposes that Texas views as final judgments. We will have that in January or February after the trial has overview in how long it takes but except for January and ...

JUDGE #4: Is that-- would that be another reason for the court not to grant mandamus?

MS. LIBERATO: I think so yes, your Honor. That would be another reason ...

JUDGE #1: Well, let me turn it to the, on the mandamus again -

MS. LIBERATO: Right.

JUDGE #1: - assume that we agree with Mrs. Saperstein that the court did not have subject matter jurisdiction, Texas Court doesn't have subject matter jurisdiction over supports, spousal or otherwise. Then, if that's true then the court has no business, you know, ordering deposition, potentially sanctioning parties ordering appearances and

that sort of thing. It has no power over that aspect of the case. Haven't we held in the past that a court without jurisdiction is subject to mandamus to the extent that court issues orders over subject matter that I mean, that it has no jurisdiction of.

MS. LIBERATO: If, if, if it's-- if, if the Texas Court had no jurisdiction then her orders are void and the courts issued mandamus in that situation, that's, that's right, that's right. Now, the, the, the court has also issued mandamus when there's conflicting orders -

JUDGE #1: That's right.

MS. LIBERATO: - but those cases, if, if in taking it to that step, those cases are always conflicts within the State of Texas. This is a conflict potentially with a risk -

JUDGE #1: But shouldn't ...

MS. LIBERATO: - with the California Court -

JUDGE #1: But what's the ...

MS. LIBERATO: - and that's a different situation.

JUDGE #1: It's, it's different situation but it's no different problem.

JUDGE #3: In fact it maybe even more compelling for us to get involve when our state and another state court is conflicting.

MS. LIBERATO: If our judge did the wrong thing but our judge did the right thing, their judge did the wrong thing. It ...

JUDGE #2: But I mean, you make some compelling argument that judges in this instance should try to work this issues out and it appears that they did or be it that there could've been a mistake. When opposing Counsel argues otherwise, they don't have that as a way under the statute. Please address the ...

MS. LIBERATO: That should have been the statute, Judge, that, that's exactly right. So the, the-- I mean, that, that, that at least is one of the fundamental issues, I mean, if once you get path is mandamus even appropriate here but substantively, that's the issue.

JUDGE #1: How does the post nuptial agreement impact our decision?

MS. LIBERATO: The, the post nuptial agreement is a set that the law of Texas applies -

JUDGE #1: On the judicial.

MS. LIBERATO: - and I think should the policy stand point, it applies, I don't think it directly applies to the decision on jurisdiction where I do think it applies though, is to go back to the question of whether child support is relevant or if the relevant issue is the, the, the split of community property. I think that's-- so we know that issue is going to be determined under Texas law and under the post nuptial agreement although, in fairness, they have dispute over the validity of the post nuptial agreement. -

JUDGE #2: Did that put ...

MS. LIBERATO: - So I think that's where it fits in as back there.

JUDGE #2: Did that agreement plainly grow in the-- either the court, either the California or this Court's support determinations?

MS. LIBERATO: No. Here, but, but it-- by extrapolation, it is-- that maybe to direct an answer on, on the entry directly but there is, is, is-- it is implicated only in so far as the property division will be done in Texas. And I have to-- but I don't want to clarify something here too. There has been no dispute in Texas by Suzzane that Texas does not have jurisdiction over property. In other words, she hasn't disputed Texas jurisdiction over the property division in Texas. She's done that in California but not in Texas. So that will go forward.

JUDGE O'NEILL: What if there had been no agreement among the, the courts here and we were just looking to the statutory language, -

MS. LIBERATO: Well, ...

JUDGE O'NEILL: - wouldn't we be directed to send the spousal support issue to California?

MS. LIBERATO: I think it depends on whether the trial court abuse their discretion. I mean, I think that the, the factors apply, she would've apply the factors in issuing her order accepting jurisdiction ...

JUDGE O'NEILL: Well, let's take that as the case -

MS. LIBERATO: Okay.

JUDGE O'NEILL: - let's take everything happened here without the conversation between -

MS. LIBERATO: Right, right, right.

JUDGE O'NEILL: - the two trial courts. And the trial court here had taken jurisdiction over the support order as had the California Court over the spousal support. What would our situation be then, would have look the plain language of the statute. -

MS. LIBERATO: Right.

JUDGE O'NEILL: - And it, it ,it seems to me the plain language would say spousal support would have to be decided in California.

MS. LIBERATO: But the plain language doesn't say that, I mean, I think, the, the plain language says that you take into account this three factors and then the question goes in, is did she abuse her discretion in determining that the third's factor is focusing out in the third factor that the home state of the child was relevant and therefore it, it went to California or the home state of the child was not relevant and therefore she kept it. So I think that there's still a discretionary analysis that would have to be applied ...

JUDGE #1: So that's just split it-- so "if relevant" just means whether the trial judge feels like it?

MS. LIBERATO: Well, if that's what discretion is, then the answer is yes ...

JUDGE #1: But that would-- but the whole purpose is, was so we wouldn't have trial judges to decide on this or what it felt like?

MS. LIBERATO: Absolutely, true and that's what happened here, that's what happened right from the start. The problem is in California, Judge, the problem in with our Texas judge who did the right thing.

JUDGE #1: But California is the, the home state of the child.

MS. LIBERATO: Home state of the child, that's right but Texas is where all the proper-, [inaudible] the property division is going to be made, where David's business is ...

JUDGE #1: I know whoever was drafting this, all 50 states, they didn't put property in here, they didn't put anything in here, really, other than timing stuff and where is the home state.

MS. LIBERATO: That's right, so the question is what is ...

JUDGE #1: So how does this-- if the trial judge can disregard home state, then all this is, is a timing statute and then trial judge just we're back we were, [inaudible] do what ever you want.

MS. LIBERATO: Well, no. I think that, that, I think that, that the trial judge can consider that, that, that, that there are situations where the home state of the child would be relevant to the, the decision of the spousal support decision. -

JUDGE #1: What you're arguing is ...

MS. LIBERATO: - It's just not true here.

JUDGE #1: It wouldn't, it wouldn't be relevant if the property is mostly somewhere else.

MS. LIBERATO: Well, if the property division is being made in--

I'm saying the trial court didn't abuse her discretion in making the decision that property division here meant that, that was relevant and that, that made the child sup-, where the home state of the child was irrelevant and in fact, factually here, the home state of the child is irrelevant. There is no, there, there is no reason for it to-- that it-- for it to be decided there as far as the relevancy of the home state of the child being out there. David's custody to the children, he is paying for all of the ...

JUDGE #1: That's what you're arguing in this case? -

MS. LIBERATIO: Okay.

JUDGE #1: But there, but there could be a hundred other cases.

MS. LIBERATIO: There could ...

JUDGE #2: Where would not be faced with the argument "if relevant" means something other than whether we decide that property division.

MS. LIBERATIO: Well, and I think that's right. I think there are circumstances to be sure that "if relevant" that, that, that, that, that, that, that the home state of the child could be relevant to the determination of spousal support. It's just not here, the judge didn't abuse her discretion, mandamus is not appropriate.

JUDGE #1: [inaudible] how would you answer his argue-- coun-, opposing counsel's argument that we have been through a statute where we tried to get the trial judges to agree on it and that-- and now we've moved to another, another statute because that didn't seem to be working out, through out this whole-- the family law process.

MS. LIBERATIO: Well, my recollection Judge, I could be wrong, I don't think the early one contemplated that the judge is talking together and I could be wrong on that but I don't remember that, that they actually were to talk under the previous statute. That, that what would happen is that, that there is, you know, that each judge could issue a separate order. Okay. The same thing, our, our respondents ...

JUDGE #1: But burden is a practical matter we did in some instances have the judges in different states talking and we just-- we ended up -

MS. LIBERATIO: That's right.

JUDGE #1: - and, and we had difficulties with that, I-- as I understood, -

MS. LIBERATIO: Court

JUDGE #2: - as you already explained, we had difficulties with the judges talking and just didn't get done. So we've now moved to the statute as -

MS. LIBERATIO: Right.

JUDGE #1: - do you have any response to that?

MS. LIBERATIO: And, and, and I do, and that is that, that we are in an agreement that, that's the purpose of the statute to, to avoid the conflict and if these judges did the right thing, they talked even if they hadn't talked, there still no conflict that the California Court defer and now-- and, and, and it changed his mind later but I don't know any circumstance where the, the later action of another court, another state can change the jurisdiction of Texas. And that's essentially what they've done. So the right thing happened, the right result obtained, it's just that David [inaudible].

JUDGE #1: Any further question? Thank you.

REBUTTAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF PETITIONER

MR. PHILLIPS: Justice Wainwright like removal, a party can have a right to do that and can choose not to avail itself about right and the parties could have decided that they want the Texas Court to hear this. But what's-- one of the parties wanted California to hear it even though Texas was the first filed state of the divorce. I believe the underline purpose of UIFSA was to take that discretion away from the two judges and provide a bright line rule that would decide what, what court had exclusive jurisdiction. They could have written it better but "if relevant" to us, means that there are minor un-emancipated children and that those children have a home state. Opposing counsel cited this case from Virginia where one of the children-- one minor child live in California and one minor child lived in Virginia. They didn't talked about this section of UIFSA but they sort of -

JUDGE #2: I think ...

MR. PHILLIPS: - that the children where the-- they did not go in the home state of the child in the same where child support choose it could be decided.

JUDGE #2: The two temporary orders are certainly inconsistent, are there direct conflicts solely? -

MR. PHILLIPS: Well, ...

JUDGE #1: - so that one judge says "you got to do this" and the other judge says "you can't do the same thing"?

MR. PHILLIPS: Yes, in some instance. We know that the Simi Valley which is a horse ranch that one judge says, "You'll get some remedy to use over it" and the other one says, "You don't," I believe that, that there are different at anyway. There were more differences about some of the other property, those ski resort in Colorado and Malibu. Well, a California judge, just a week ago deferred to some findings that the Texas Master, Joe Reynolds had made and twit to the support order. So there are fewer of those conflicts but we think there are still some and of course there's money conflict then the California judge just last week, ordered Mr. Saperstein to write a \$375,000 check to catch up on the reritis because he was honoring the Texas order. So that's money, you know, isn't it, that he'll not try to get it back or that the some final waiver order will have to adjust if California didn't have jurisdiction.

JUDGE #2: But the California Court said he wouldn't have to pay under both.

MR. PHILLIPS: That's correct. They give, they give it in credit.

JUDGE #2: Exactly.

JUDGE #3: You talk when you first stood up on rebuttal, counsel about the, the parties being able to agree, were you distinguishing that from the case here where the trial judges just reach an agreement, the parties didn't -

MR. PHILLIPS: Yeah.

JUDGE #3: - agree to that?

MR. PHILLIPS: If, if that was all that was required, there either, we wouldn't have three categories in Section 204 argued have it provide itself. Provided that the judges have a better idea and they both agree on it that isn't told, it does not say that. It has categories that at least attempt that provide clear guidance that one state has jurisdiction and one state does not have jurisdiction. The second requirement was mentioned by opposing counsel on jurisdiction. That's a little unclear as well, whether the timely assertion of jurisdiction has to be made is, is a like a personal jurisdiction or like a subject matter jurisdiction. We believe whichever it is, Suzanne clearly

complied with both. She filed those special appearance that could-- that, that all the requisites of Rule 128 asserted like a personal jurisdiction also, mentioned subject jurisdiction-- subject matter jurisdiction there anyway.

JUDGE #1: Are different context, though.

MR. PHILLIPS: It did not mentioned spousal support because David hadn't sued for spousal support and tried their hard to tell her, Judge, I don't have jurisdiction over something that's not with the lawsuit at the time. Then after Judge Millard on her own said, "You know, I think I'm done with the spousal support." Immediately, Suzanne went out and filed a plea in abatement. And we've talked about that plea in abatement. Prior to the judge making her ruling, she also filed at the judge's request a detailed brief that went into Section 204 and it's requisites in great detail and orally prior to the judge making the ruling, Suzanne pointed out to that under 204, the judge do not have jurisdiction over spousal support. So taking those singly or all together, I don't believe there's any doubt that Suzanne met the requisites of Subsection 2 and of course there's no doubt about Subsection 1 should time on file on her own lawsuit in California.

JUDGE #3: Counsel, did-- under your position order, if mandamus but we have to say as a matter law under (b)3 that when the child resides in California-- when the child resides as this child under these facts in California, as a matter of law that makes that home state relevant, forecloses the any discretion on the trial court.

MR. PHILLIPS: Yes.

JUDGE #3: And that means then if Suzanne comes to Texas and that in California's old state and comes to Texas and say, "let's just do the whole thing over here." Texas still does not have jurisdiction -

MR. PHILLIPS: Whether did you know on ...

JUDGE #3: - but you can agree on subject matter jurisdiction. If, if we've taken relevant and said, "California is home state of the child." That makes-- that takes a discretion out then that means she can't come over here not before one says the home state, we still can't do it over here.

MR. PHILLIPS: On spousal support, that's right. On child support,

-

JUDGE #3: On child support ...

MR. PHILLIPS: - child support would change because it follows a

...

JUDGE #1: No, this is a funny kind of jurisdiction though, this you can waive completely by not filing your lawsuit in the another state on time, right?

MR. PHILLIPS: There are many ways to waive this.

JUDGE #1: So it's not as the US Supreme Court said there are many kinds of jurisdiction.

MR. PHILLIPS: And this maybe ...

JUDGE #1: Sometimes we don't know what they mean when they have said that.

MR. PHILLIPS: This maybe its own kind of jurisdiction.

JUDGE #3: Well, let me, let me follow up on that. Did she has in fact complied with: (b)1 petition she filed timely, (b)2 can she now come over or she locked in, I mean that, that mean for future cases not this one but I just say that, that the parties, there's, there going to be lock in under your view of the statute?

MR. PHILLIPS: They are locked into California for spousal support not child support but in this particular case, if the party who is advantage by the application of California law, we're to say that

you're like Texas law, the parties could certain on their own ...

JUDGE #3: This could start all over again -

MR. PHILLIPS: That's right.

JUDGE #3: - that's not his what ...

MR. PHILLIPS: Business and, and it start a claim in Texas. So I think that the problem is more apparent than real but as a strictly legal matter, yes, spousal support under this law is locked-in in California.

JUDGE #4: Sit back, I have one question.

MR. PHILLIPS: Yes.

JUDGE #4: Some of the-- so you-- there was a comment about some final ruling being made in January or something. Ruling that pertains to the property, what impact of any does that have on your mandamus request?

MR. PHILLIPS: There will be-- a trial is set for January the 23rd in Judge Millard's Court that's already been one continuance at this trial, hopefully, it won't be continued than it will go to the trial at sometime February, March or April I would say, there maybe a final order. The California judge still has jurisdiction over spousal support and at some point, that may change from, from they call an interim order into a final order but it's, it has no effect on this mandamus and that there's still a problem of the Texas Court issuing orders for which the Texas Court has no jurisdiction, interfering with the jurisdiction of the California Court.

JUDGE #1: Any further question? Thank you both counsel. The cause is submitted. That concludes the arguments for these morning [inaudible] court.

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