

ORAL ARGUMENT – 12/10/03
03-0299
IN RE ANN MARIE FORLENZA

LAMORGESE: The position I advocate today is supported by a basic legal principle of fairness. One, Ms. Forlenza's position is supported by the code of commentary that we've cited to the court, which I will read again. The code commentary to §152.202 states that jurisdiction attaches at the commencement of a pleading. If Sate A had jurisdiction under this section at the time a modification proceeding was commenced there it would not be lost by all parties moving out of the state prior to the conclusion of the proceeding. State B would not _____ to hear modification unless State A decided State B was more appropriate under §207, which is in convenient form. And here the TC made the determination that the form was not in convenient.

Ms. Forlenza's position is also supported by Tex. Fam. Code §152.107 mandating priority for jurisdictional disputes, and directing that they be handled expeditiously. Ms. Forlenza's position also avoids judicial sampling and wasting of resources.

OWEN: When the children were in Texas prior to the time when the motion to modify was filed, how long were those visits?

LAMORGESE: Typically, because they were interstate, is that they were longer than weekends. It would be several weeks during the summer. One of the children, the oldest child now has year round school. I don't believe that appears in the record. Those visits couldn't be as long as they would be under the regular standard possession _____. That's one of the reasons why this modification...

OWEN: Does the record reflect how many days _____ set time periods the children will be in Texas?

LAMORGESE: I don't think it reflected the duration of the visits. I don't think the record reflects that.

OWEN: You argue in your brief that the father was responsible for denial of visitation, which made it hard to have contact with the children in Texas. What does the record show about that?

LAMORGESE: I believe the record shows that several motions were filed in regard to denial of visitation. And I think that appears in Ms. Forlenza's testimony, which is in vol. 3 of the record at the very beginning of it.

OWEN: Factually what does the record show?

LAMORGESE: Ms. Forlenza testified that that was one of the reasons she filed this modification petition was, because Mr. Forlenza was making it difficult for her to visit.

OWEN: And what was he doing to make it difficult?

LAMORGESE: I don't think that was reflected in the record. The record also, I think reflected that during the proceeding there was some disagreements over the holiday visitation that was going to take place. So several hearings were held with regard to that. And that does appear in the record.

O'NEILL: 152.202(a)(2) says substantial evidence is no longer available, is there any case law that sort of interprets what quantum of evidence is necessary to be substantial under that section? In other words, the parties have briefed it almost as some sort of a contact sort of analysis. But the statute actually says substantial evidence concerning the child's care, protection, training and personal relationship. It strikes me if you've got a parent here, that alone could be substantial evidence about the child's care and protection. But I haven't seen any case law of what quantum of proof is needed.

LAMORGESE: And I think that's one of the problems we have here is that it isn't well defined.

O'NEILL: But it's a uniform act. Do you know how many states that have adopted it?

LAMORGESE: I think the code commentary said somewhere around 32.

O'NEILL: Do you know if any of those courts have interpreted that term "substantial evidence"?

LAMORGESE: I did not see many cases in my search on that. Because the statute is fairly recent in almost all of those states. So the UCCJEA sort of emanated from Texas and so other states have also adopted that.

HECHT: Can one spouse's residence, or Texas affect either prong to the significant connection for substantial evidence?

LAMORGESE: That's a difficult question. Because the statute itself provides if all parents leave the state, then jurisdiction will probably leave as well to go where the children are.

HECHT: Why probably?

LAMORGESE: Because it seems that the statute quite candidly would require something more than just residence. In this case, I think we do have that something more.

HECHT: But if everybody left surely Texas has no continuing jurisdiction?

LAMORGESE: That's correct.

HECHT: What effect does one spouse being here have? If you can consider it it looks to me like it would always be pretty significant, and if you can't then what are we left with?

LAMORGESE: I think in this case it's particularly significant. I could think of an example if one spouse wholly didn't exercise their possession. There were completely no evidence in Texas. And sort of if one of the spouses went off and did their own thing and really didn't ever have any contact with the family again, that may be a situation where jurisdiction would leave. I don't think that's the case here, and I think Ms. Forlenza's presence is the significant tie to this case.

HECHT: Wouldn't it always be, and so you would always win? Whoever was in Texas would always win.

LAMORGESE: I don't think that would always be the case.

HECHT: When would it not be? It look to me like it would always be because there would always be some significance, some visits, some trips to the doctor, some friends, some playing with the neighbors, and so you would always win if you were in Texas, or any other state for that matter.

LAMORGESE: Under the normal circumstances, I think that would be correct that Texas would retain jurisdiction. There have been cases, I've personally seen where one spouse will move off and then sort of no longer take an interest, maybe not pay child support, maybe not do the visitation. And in that case it seems like if that spouse resided in Texas and stayed in the divorce jurisdiction, the one who wasn't visiting, who wasn't fulfilling their duties, that the evidence would become to attenuated to contacts that there would no longer be jurisdiction.

HECHT: Here we don't have much more than the visitation do we? I mean if the visitation had been half of what it turned out to be in this case, would that be enough for significant connection if one of the parents remained in the divorce jurisdiction? I'm trying to get at a level of when there is a significant connection.

LAMORGESE: That's the hard question. In this case when you have enough evidence of the children visiting - and I think part of the problem here was the denial of visitation, which was why this was filed, that things were becoming very difficult to visit. But when we're talking about regular visits, we're talking about evidence of people with knowledge of relevant facts. As in this case there were a lot of Texas residents.

HECHT: But the children don't live here. They haven't for a long time.

LAMORGESE: That's correct.

HECHT: And so - I'm just trying to understand. J. O'Neill asked if you know any authority. If you don't what is your view of when there is enough: 2 visits a year? 1 visit a year? 3 days in a year? When is there enough for there to be a significant connection if a parent resides in the divorce state?

LAMORGESE: I think that several visits would be enough if there is other information. In this case, the children were going to church here when they were here. They did visit the doctor here. So we're talking about evidence building up. And in an interstate case it's difficult to exercise standard possession every other weekend. As a practical matter that never happens. And so the big visitation usually comes during the summer and then maybe break times. And so if you have that sort of exercise going on, I think that jurisdiction would stay here when we're talking about very, very young children. It may at some point if those visits don't occur, if these things aren't occurring it could leave the state.

I don't know that there's a bright line there. But if we're talking about a regular parent who's interested and attempting to exercise at the very least or actually exercising, I think jurisdiction would stay because there is that significant connection.

BRISTER: Wouldn't it depend on what the question is in the motion to modify? I mean if the question is, I want to move the children to Taiwan. Then the question is how close are the children? how much have the children been leading their mother? The question is whether dad's child support ought to increase? And you're going to have different witnesses in that hearing aren't you?

LAMORGESE: Child support is treated a little differently because that's based on a person.

BRISTER: Some other aspect of the visitation?

LAMORGESE: Our position, we would generally agree with that. The jurisdiction here is not evaluated in a vacuum. You're going to be looking at that as a relative term. In other words, when you look at what Texas's ties are to the litigation, significant ties or substantial evidence, I think you also should look at it in consideration of what other state jurisdiction would go to or where jurisdiction would go to in that state's ties.

BRISTER: If the question is we're going to move the children to Taiwan so dad can make twice as much money. And if the evidence is going to be mom sees them a couple of weeks a year, and the majority of the time she flies to see them, not they fly to see her, then we're probably not going to have some doctor from Dallas, or the youth pastor from the church testify, because they are not really involved. We're not talking about are the children being abused or anything like that.

LAMORGESE: Each case is obviously different. But those witnesses may have something to say about the mother's relationship.

BRISTER: So the substantial evidence is going to depend on what the underlying question is in the modification isn't it?

LAMORGESE: I think so.

HECHT: Would it make any difference in this case, take all the same facts except that the girls had not moved, they had gone to one state and lived there the whole time.

LAMORGESE: I think that probably would make more of a difference.

HECHT: Why does it make any difference whether the children's contacts with Texas are significant depending on whether they resided in one other state, or two other states or five other states?

LAMORGESE: I will qualify that with I don't think it would change the result in this case. It would make it a more difficult case. In this case, I think we still do especially in relation to the other states involved in this proceeding, have a very significant Texas tie in that the mother has remained here, has done visitation here, has taken the children to church here. And Texas is ready to try this case.

HECHT: I just don't see in the statute where any of that makes any difference. What difference does it make that Texas is ready to try the case under 152.202(a)(1)?

LAMORGESE: Where that position is supported by is the code commentary that jurisdiction attaches at the commencement. And so we don't have the record from the first motion to dismiss hearing. And appellate review, mandamus review which would have been appropriate was not sought. And so at that point I think and the code actually defines the commencement as the filing of the first pleading in a proceeding. And that's 152.102 under the definitions section.

So when we're talking about something that was not filed at the beginning of the proceeding, but near the very end, then if multiple filings are indeed permissible, then what evidence may the court consider? And I think we would advocate if multiple filings are permissible, which we don't agree with, then we're not going to make this determination in a vacuum. We're going to look at what evidence has accumulated up to the date of the filing of the motion.

HECHT: I don't see how that makes any sense. You're going to determine it as of the date it was filed based on evidence that has occurred since.

LAMORGESE: Up to the date of the filing of the motion if we're talking about multiple filings being permissible.

HECHT: I understood your position at the outset to be must determine jurisdiction as of the day of the filing of the proceeding. It's not your position?

LAMORGESE: Jurisdiction needs to be determined at the commencement. That's our position.

HECHT: Of the proceeding?

LAMORGESE: Yes.

HECHT: How can you consider evidence that arose after that?

LAMORGESE: Well if multiple filings are permissible, which we disagree with, we do agree jurisdiction attaches at the commencement, then the court ought to not evaluate the exact same evidence that's already evaluated. That doesn't make sense in our opinion.

If you're going to have a trial eve motion to dismiss, then we ought to not look at it in a vacuum. We ought to look at what's occurred during you know the money the parties have spent, who they have hired, what evidence has accumulated.

WAINWRIGHT: Neither side has made much of a point of the agreed modification order that originally gave the father exclusive right to establish the children's primary physical residence. Is that just not significant here, and if not, why? It's been mentioned in the briefs, but no significant argument has been made by either side about that.

LAMORGESE: I think it was significant in that that was one of the reasons as the record shows why the motion to modify was filed and why an injunction was put in place. Because it wasn't crystal clear whether one party would be able to move out of the country with the children. So I think that was significant.

WAINWRIGHT: But do you think that should carry any significance with the court today?

LAMORGESE: I don't think that affects the jurisdiction standard. I don't think the two are related.

WAINWRIGHT: Does the record reflect why that agreement was entered into at that point in time?

LAMORGESE: I don't believe so.

O'NEILL: Is there a burden of proof issue in _____? Does it presume jurisdiction where the original order was signed unless someone can overcome that presumption? And if your answer is yes, are we just presuming that from the language of the statute or is there any authority _____ burden shifting?

LAMORGESE: I have found no authority on who bears the burden, and I don't think the

statutes very clear on that. I think traditionally the movant would bear the burden. And so I think that's the burden in this case, because the default is continuing exclusive jurisdiction.

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REAL PARTY

ROBERTSON: I would like to speak immediately to some of the questions that the court has asked Mr. LaMorgese. First, I think there's a basic misunderstanding of the concept of continuing jurisdiction. Continuing jurisdiction came in to Texas family law with the passage of Title 2 of the Family Code, which became effective Jan. 1, 1974.

The problem up to that point was that people who moved around our state, 254 counties, wouldn't know where to file a proceeding if they have moved from the county in which the case was originally decided. And so the concept of continuing jurisdiction came into existence, which created what the law professors thought up as mother court. So you always have to go back to the mother court to file a pleading irrespective of what you want.

Now you may file a pleading in the mother court that says we need a modification, and because no one lives in this county it needs to be transferred to another county.

At that point in time the UCCJA, which was passed in 1960 really didn't have a concept of continuing jurisdiction.

We were fortunate in Texas in that we had so much influence over what happened in the UCCJA because of the reporter and one of the commissioners are well known Texas lawyers. The concept of continuing jurisdiction came into existence when the UCCJEA, because of a conflict that existed between the UCCJA and the PKPA (Parental Kidnaping Prevention Act). There were disputes with respect in which state you could file a proceeding under the UCCJA, and the PKPA created preference for home state prior to _____ state. The state had to pass a law which conformed to the federal law which was the PKPA.

So the principal difference between the UCCJEA and UCCJA is that this concept of mother court was taken from Texas to this new statute, which is the uniform law which has been passed by about 34 states. The concept is virtually identical. You have to go back to the court in the state that initially made the determination. And that continuing jurisdiction is an unusual kind of jurisdiction. It's the jurisdiction that allows you to go into that court for purposes of determining whether that court is the proper place thereafter.

JEFFERSON: So they went to the original court for that determination under 152.202. Isn't it true that there are implied findings by the TC that there was a significant connection with the state and there was substantial evidence with the child's care, protection, training and personal relationships as it pertains to the state of Texas. Weren't there implied findings?

ROBERTSON: I think not.

JEFFERSON: Why not? Because there is evidence on each of those issues.

ROBERTSON: The facts are undisputed. And there is no evidence either in the pleadings, and the _____ on the plaintiff's behalf that they put into evidence in their pleadings allegations that support jurisdiction. And simply alleging that you have continuing jurisdiction because that's the court that decided the case initially isn't sufficient.

OWEN: There are two comments of the commissioners I want to ask you about. They seem to imply at least that in construing as we look at the contact between the parent who still lives in the mother state, and the child, at one place in paragraph 1, it says if the relationship between the child and the person remaining in the state with the exclusive continuing jurisdictions become so attenuated that the court could no longer find significant connections and substantial evidence jurisdiction would no longer exist. What if the mother lives in Texas and she flies every other weekend over a period of 5 or 6 years to visit the children in Georgia, and the children never come to Texas. Would the court of continuing jurisdiction have lost jurisdiction simply because the contacts took place outside the state?

ROBERTSON: Yes they would have. And that's not only dependent upon the Texas cases, but an analysis of 63 other UCCJEA cases from other states in addition to the Texas cases. The problem is that there are ways that you could have significant contact even though the parent is in Texas and the children are somewhere else. And that simply wasn't done.

OWEN: My example is you do have. She flies every other weekend and then they come for holidays.

ROBERTSON: If in fact that were the case, I think you could consider that. That wasn't the case here. There were five visits in four years in Texas.

OWEN: How long were those visits?

ROBERTSON: The record doesn't reflect how long they were, but they were not lengthy visits. They were visits, I think a week, 10 days, maybe two weeks at the most one summer.

OWEN: But there's another piece of the comment. It's in para 2 of the second comment. It talks about the difference between the PKPA and this act. And it seems to say that you can't have a - just the fact that a grandparent remains in the state, well _____ continuing jurisdiction. It seems to say that significant connection between the original state and the parent and the child that would suffice. It doesn't necessarily imply in these comments the child has to come to Texas as long as one parent who lives in Texas maintains significant contact with the child.

ROBERTSON: The comments, I don't think fully contemplate facts of this case. And if you

look at the statute, the statute says that neither the child, nor the child and the parent, nor a person acting as a parent. And that wasn't the case in this. There was no person acting as a parent. The comments also say that mere physical presence of one party left in the state isn't sufficient to establish a significant connection or substantial evidence, that priority is given...

HECHT: Is it to be taken into consideration, and if so, how?

ROBERTSON: The significant connection test and the substantial evidence requirement are conjunctive. So you can't separate them. It has to be both. It can't be one. So if you look at the significant connection, and you say what does that mean? The UCCJA, the one thing that was a continuing from the UCCJA to the UCCJEA is the definition of significant connection and substantial evidence.

So counsel's comment in the brief that the UCCJA isn't relevant is a mistake. So we have cases since 1960 that talk about what a significant connection is and what substantial evidence is. Now in Texas since the UCCJEA, we have several cases. The problem is we know what a significant connection is.

HECHT: Then tell me what it is.

ROBERTSON: What it is is a case similar to that in Bellamy.

O'NEILL: The Bellamy case is an example where they found it, but they never say that that quantum - I mean how often are you going to have a child that crosses the border to go to school everyday? Holding that up as a paradigm of what's necessary for significant connection - did the court ever say you need this type of connection to be significant?

ROBERTSON: No. It's not a paradigm. What it is is it establishes parameters.

OWEN: It just says under those facts. It doesn't say anything less than this would not be.

ROBERTSON: What it says in CCB v. MJV is it says specifically that - it talks about Bellamy. And then it says these are the types of contacts that might cause a Texas court to retain subject matter jurisdiction. Now that's a case that followed Bellamy. That's a case out of the El Paso CA.

O'NEILL: The same type motion was filed earlier in the modification proceeding saying that Texas was not the right place to bring this. It should be in Virginia. Let's say the TC had granted father's motion to dismiss then. Mom goes to Virginia and files it in Virginia right after the dismissal is signed. Proceedings start in Virginia. Dad moves to Colorado. A motion to dismiss would be presumably granted in Virginia.

ROBERTSON: No.

O'NEILL: Okay. If it's not, then you've got parties from Colorado and Texas going to Virginia that now has no relationship. Help me with that scenario.

ROBERTSON: First of all the suggestion that there were duplicate motions filed is just simply incorrect. The first motion to dismiss was filed under §152.201, and I wasn't the attorney. And a non family lawyer filed a motion to dismiss saying that the Texas court didn't have original jurisdiction to file a custody action.

O'NEILL: Because?

ROBERTSON: First of all, it wasn't an original action for a custody. And so J. Henderson looked at it and said, Well, you know. I kind of agree that - he dismissed that because he said this is a modification. You're asking me to dismiss this case based on the fact that we don't have jurisdiction to file an original action.

This isn't an original action. And so the motion that we filed Jan. 27, 2002 to dismiss the case because of lack of subject matter jurisdiction was a totally different motion. The only similarity was the words "motion to dismiss" above it. The first was ill conceived, and incorrectly filed, and the judge properly did what he did with respect to that motion.

O'NEILL: Presume that it is improperly filed. Presume that the evidence was the same as it is here now, that the children had been in Virginia for 2-1/2 years and it should have been dismissed on that basis. Because I presume if you had brought this motion at that point the same argument would apply that you're making here today. It would have been dismissed back then.

ROBERTSON: The _____ date is Sept. 10, 2001 and it was kind of like being pregnant - you are or you're not. And the court did or didn't have subject matter jurisdiction on Sept. 10, 2001. You can't go past Sept. 10, 2001 to decide. You can only look back. And if there had been a motion filed to dismiss and had been granted, and she had gone to Virginia, it wouldn't have mattered whether he had gone to Colorado or not, because Virginia would have been the home state until the children had lived in Colorado for 6 months. And so she could have filed in Virginia and that would have been where it was held.

O'NEILL: I thought under your analysis once they've got 6 months home state in another state, that divest the court of jurisdiction.

ROBERTSON: Absolutely not. Home states are important because when you have a modification, the process the court goes through to determine whether or not they have subject matter jurisdiction is to say first of all, is there a home state in Texas? And if there is shut out the lights, the party is over. Texas has jurisdiction. If Texas isn't the home state, Virginia is the home state, then you have to look to the other possible bases for subject matter jurisdiction. And the only

one that exist in this case is that you have to have significant connection, and substantial evidence at the time of the filing of the motion - Sept. 10, 2001.

OWEN: Under the plain meaning of the statute they would lose jurisdiction in Virginia once both parents and children no longer lived in Virginia. Once they've been in Colorado for 6 months unless you get to trial within the 6 month period it seems like they would lose jurisdiction.

ROBERTSON: If you filed in Virginia within the 6 months from the time that the case was dismissed for want of jurisdiction in Texas, the case would stay in Virginia irrespective of when they moved to Colorado or how long they had been there.

OWEN: Well the statute says even that court has jurisdiction.

ROBERTSON: I think you're misreading it. That's not what the statute says. The statute is that once you've established a home state and filed in that home state, or if you file in the home state within 6 months of the time the parties left that home state, that state still has jurisdiction.

OWEN: So that would be an original proceeding not a...

ROBERTSON: That's correct. In a modification proceeding, you have jurisdiction - there's not a different standard. In a modification proceeding you simply cannot modify the order of another state unless that state has found that they no longer have subject matter jurisdiction, or both parents have left that state.

And we're not really talking about modification jurisdiction under 152.203. We're really talking about jurisdiction under 152.202. The reality is that if you look at the evidence, first if you look at the pleading. There were no allegations in the pleadings of a significant connection or substantial evidence in Texas. The lawyer who filed the suit knew Virginia was the home state. The lawyer in Texas...

BRISTER: Was there any special exception?

ROBERTSON: There weren't any special exceptions. Like I say. I'm the third attorney and I don't know why the lawyer did or didn't do what she did.

BRISTER: Normally if they were going to toss them out because their pleadings were insufficient - somebody would have to file a special exception.

ROBERTSON: Unless there is a burden on the person making the pleading. And if there's a burden on the person who is doing the pleading - for example. They are required. It says shall in the statute. Section 152.209, the party who files a modification, at the time of the filing, or in an affidavit attached thereto has to set out the place of residences of the children for the preceding 5 years. That's not discretionary. That's mandatory.

BRISTER: And if they don't, the appellate court when that's pointed out on appeal should dismiss the case?

ROBERTSON: No. It doesn't cause you to lose jurisdiction. What it does is it should color the decision of the court in that the person who has the obligation to provide the information that would tell the TC judge who has the obligation - if he thinks there's not subject matter jurisdiction he has that obligation to dismiss whether there's a motion filed or not. And what the party is doing when they file that without providing that information to him, whether it's through ignorance or deceit, they are misleading the TC judge.

JEFFERSON: I don't quite understand. How do you support your argument that there is no evidence to support either of those factors? I mean at a minimum there was evidence of the visitations in Texas of the children to the mother. There is evidence of prescriptions. We might consider that to be meager, or not a whole lot of evidence, but it was some evidence there are friends in Texas, there were relationships, the witnesses were from Texas. How was that not some evidence of a connection to Texas of substantial evidence?

ROBERTSON: Well it certainly is some evidence, but it's not substantial evidence. And what the code requires is that you have the significant connection and that you have substantial evidence. And the code says specifically in the commentary that you are to maximize, not minimize the possibility of evidence being available.

The UCCJEA specifically says we're prioritizing the child, not the parent left behind. And so the substantial connection, substantial evidence is evidence relating specifically to the child. And if you look at their pleadings, their pleadings contain no allegations of that whatsoever.

OWEN: Is the maximize language in the UCCJEA or the UCCJA?

ROBERTSON: UCCJEA and the comments to it.

OWEN: Where?

ROBERTSON: It's also in the cases, and not just the Texas cases, but the cases from other states.

Just to give you a ____ of what happened at trial. The question, and this is from the transcript, Reporters Vol. 2, pg. 116, line 1. Is there anything in your motion to modify where you talk about the contacts the girls have had with the State of Texas since July 1997? You mean other than my address? Other than your address. No, there is nothing in there.

HECHT: Do you think the statute contemplates that there will be some place that has significant connection and substantial evidence?

ROBERTSON: I think so. You look for significant connection. You say where have they lived? how long have they lived there?

PHILLIPS: Just one state? And there's five possible states here so there is going to be one right and four wrong?

ROBERTSON: No. You look at the state in which the children currently live. And that was Virginia at the time the motion was filed. You say how long have they been here? They've been here 3/1-2 years. How long have they gone to school here? Yes. Gone to doctors here? Yes. Go to church here? Yes.

OWEN: But it doesn't say most significant. It doesn't say most substantial. It just says substantial. It doesn't seem to say you pick the best. That's where I'm having trouble with.

ROBERTSON: I think the kind of contacts, the evidence that's available in Texas is de minimis. And that's obvious if you look at what Ms. Forlenza said.

HECHT: But if it's de minimis in several places, then do you compare or what do you do?

ROBERTSON: The first thing you do is you say do they have a home state? And if they have a home state, then you look to see whether or not there is a significant connection and substantial evidence in the home state of the children. And part of the analysis is you also look to see...

HECHT: It's kind of hard to imagine that you wouldn't have.

ROBERTSON: That's typically why if you look at all of the cases that have ever been decided under the UCCJA and JEA, there is not a single case counsel can cite you from any jurisdiction when the kids have been gone 5 years that the state retains subject matter jurisdiction over the case. There isn't one.

O'NEILL: But under your scenario someone could move every 6 months and really evade any sort of modification couldn't they?

ROBERTSON: And that's not Mr. Forlenza.

O'NEILL: I didn't mean to posit that it was.

ROBERTSON: I think not. I think that all you have to do is catch them...

O'NEILL: But you're playing catch.

ROBERTSON: No you're really not. If they move tomorrow to Alaska and you file suit in Texas the day after tomorrow, Texas is the home state because it's the state in which they lived 6

months prior to the time you file. There would be no other home state. Alaska wouldn't be their home state. Then you get to the analysis comparatively. And you say well should Texas exercise jurisdiction over a situation like that? And the answer is absolutely yes.

O'NEILL: So you file the modification and it sits there for 6 months, it's set for trial 8 months. Oops, there's now a new home state. So as long as you could file it and get it heard and decided within that 6 months you're not playing catch?

ROBERTSON: It doesn't matter that there's a new home state. The fact that these children live in Colorado is simply a fact that has nothing whatsoever to do with your determination of whether the court had subject matter jurisdiction. The fact is is that Virginia is the home state, and any other move is irrelevant for purposes of your consideration. The realty is the only thing you look to...

O'NEILL: So you're arguing this should be in Virginia and not Colorado?

ROBERTSON: At the time of the filing, Sept. 10, 2001.

O'NEILL: No. I'm saying if this case were dismissed where should mom file the modification right now?

ROBERTSON: What J. Henderson said in his opinion is that Colorado was the home state.

O'NEILL: But I thought you said home state didn't matter. Else you could be in a situation where you're trying to play catch?

ROBERTSON: If the case was dismissed for want of subject matter jurisdiction in Texas, and if she knows the children have been in Colorado for 6 months, and the judge has said that's their home state, it would be foolish for her to file in Virginia.

O'NEILL: If we say the TC erred in not dismissing it your argument was that at the time the TC ruled, the appropriate place would have been Virginia?

ROBERTSON: That's correct. And now if it's dismissed the proper place would be Colorado.

OWEN: I still come back to 201. If she had filed in Virginia, and then the children had moved to Colorado, this 201(a)(1) says that the Virginia court can't keep it because she doesn't live there. There is no parent or person acting as the parent that continues to live in Virginia. So how do you...

ROBERTSON: You're looking at the wrong statute. 201 is not the statute you will look at. That's an original action.

OWEN: I thought you told me what she should have done was to file in Virginia originally, and you said that would be initial custody.

ROBERTSON: No. Anytime there's a mother court you have to come back to Texas. And so 201 is essentially irrelevant for purposes of our inquiry.

OWEN: Let's say J. Henderson dismissed under 201. Under 202 he says I no longer have jurisdiction mom. Go to Virginia. The mother goes to Virginia, then the father takes the children and moves _____. When she goes to Virginia is that governed by 201 or 202?

ROBERTSON: 202. It's not an initial child custody determination. It's a modification of the existing order.

OWEN: She doesn't live there. The children no longer live there. The father no longer lives there. How can that court under 202 - it explicitly states once they all leave it doesn't have continuing jurisdiction.

ROBERTSON: No. When they all leave Texas, Texas no longer has continuing jurisdiction.

OWEN: They are in Virginia now. The Texas case has been dismissed. J. Henderson said, I don't have continuing jurisdiction anymore. So the mother goes to Virginia and files. The dad takes the kids and moves to Colorado. Under 202, Virginia loses jurisdiction.

ROBERTSON: I disagree. Virginia would not lose jurisdiction if she filed while he and the children were in Virginia or within 6 months after the date they left.

OWEN: As soon as they move this says you lose continuing jurisdiction if the parent and the children no longer live in the state.

ROBERTSON: That's for purposes of - if you have a Texas action and Mr. Forlenza moves to Virginia and Ms. Forlenza moves to Arkansas.

OWEN: She files in Texas like she is supposed to. The judge dismisses it and says I no longer have continuing jurisdiction. So then she goes to Virginia. The Virginia court begins the proceeding and the father takes the children and moves to Colorado. Now there's no longer a parent or a child living in Virginia. It seems to me under 202, the Virginia court no longer has continuing jurisdiction.

ROBERTSON: That's incorrect. The jurisdiction would have already attached, and once jurisdiction attaches irrespective of where he goes with the children, that court would have jurisdiction.

OWEN: For how long? 10 years? 5 years?

ROBERTSON: Until such time as that action was concluded.

OWEN: Where does the statute say that?

ROBERTSON: It's kind of like asking me why most barns are red? I've worked with this and dealt with this so much that I know that's right. I know there are cases to support that.

OWEN: We need some language in the statute. I'm just trying to go by what the statute says. The statute says you lose jurisdiction...

ROBERTSON: Specifically which provision are you looking at?

OWEN: You said 202 would govern under those facts.

ROBERTSON: 202 is modification. 203 is modification of an order of another state. So if you're talking about coming to Texas, 202 is the statute you have to look to. If you talk about going to Virginia to modify a Texas order, you have to look at 203.

OWEN: Does 203 say once you get it filed there they don't lose jurisdiction till they make the determination?

ROBERTSON: They prioritize home state in context. And that situation as you described with there having been there for 3 years, going to school there, going to doctors there, there would no doubt be substantial evidence - there would be significant connection and substantial evidence in Virginia, and the Virginia court if they rule properly would maintain jurisdiction over the action.

O'NEILL: And so they've moved to Colorado and you've got mom and dad and kids flying from Colorado and Texas to Virginia to determine modification?

ROBERTSON: I understand there may be logistical problems, but the reality is that. The question before the court is on Sept. 10, 2001 did Texas have subject matter jurisdiction? And those inquiries are interesting and we can discuss those and have different theories about what should happen, but that's not the question before the court.

There is a confusion between substantive issues, such as right to visitation and things like that, and subject matter jurisdiction. And subject matter jurisdiction or the power of the court to hear the particular controversy, and that's dependent upon the significant connection, and the substantial evidence at the time of the filing of suit. And personal jurisdiction really doesn't play a part in it. The best interest of the child doesn't play a part in it.

SMITH: Can this subject matter jurisdiction be waived?

ROBERTSON: Absolutely not. You can attack it for the first time on appeal. You can attack

it at any point in the trial proceeding. You can't waive subject matter jurisdiction, nor can it be granted by any kind of consent or waiver.

SMITH: Is dismissal without prejudice or with prejudice?

ROBERTSON: It would be dismissed with prejudice to refile in Texas unless they reestablish a residence in Texas.

WAINWRIGHT: You're not arguing that the TC was required to make findings of fact? The statute doesn't say that.

ROBERTSON: No.

WAINWRIGHT: Your argument is that there's not enough evidence there to constitute substantial evidence or a significant connection whether the TC made a finding or not?

ROBERTSON: That's correct. There are undisputed facts. And the error that the TC made is he misapplied the law to undisputed facts.

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REBUTTAL

LAMORGESE: If we follow Mr. Forlenza's argument to its logical conclusion, 152.203...

SIDE 1 ENDS.

LAMORGESE: ...jurisdiction would be lost in that case, and so it would be a chase. And that's what we're trying to avoid. The commentary to §152.101 states that the purposes of the act are to avoid jurisdictional competition and conflicts with courts of other states in matters of child custodies, which have in the past resulted in the shifting of children from state to state with harmful effects on their well being.

And also comment 3, the purpose of the act is to discourage the use of the interstate system for continuing controversies over child custody. And in that case, we would be following Mr. Forlenza wherever he goes. And I think that's one of the purposes of the statute is to eliminate the old UCCJA rule where you would follow them. It was a hard rule. The 6 month rule.

In response to the pleadings issue that was raised, I think the court points out that there were no special exceptions. And so I think any argument regarding pleadings were waived.

O'NEILL: Are there any disputed fact issues here, or is this simple application of law to facts? I notice there was some briefing about credibility of determinations. But it does appear that for our purposes there isn't anything more than just undisputed facts.

LAMORGESE: I think for the most part that's correct. The transcript is fairly short. I don't think there's any major significant disagreements. I think it's the application and judging the credibility of the witnesses was our major point on that issue.

HECHT: But even if you take everything the mother says is true, the question remains is that a significant and substantial? Is that true?

LAMORGESE: Yes. That's correct. And I think that's another point that the court has brought up is what kind of burden the litigants face in that circumstance. And so I don't believe it was our burden once the motion was filed. I think the burden was on Mr. Forlenza to sort of disprove those things through introduction of his evidence as well. And so I don't know if both parties would have a burden in that circumstance. I think Ms. Forlenza did come forth with evidence and insert things that would satisfy that.

I think our position is that this motion should have been filed at the commencement, is consistent with this statute's purpose, which is to avoid this shifting of the case. And I still come back to the commissioner's comment that once jurisdiction establishes at the commencement, which we know is the filing of the first pleading, then the Texas statute kicks in. And that if you have a jurisdictional question let's get it resolved expeditiously. Let's not go through preparing for a jury trial, hiring psychologists, engaging in this terrible custody battle that always incurs when you have custody case going to a jury trial. Let's get this resolved and move it to the state.

HECHT: Well that would be a good idea. But if people didn't do it why? It doesn't matter does it? That doesn't give the forum state significant contacts and substantial evidence just because somebody else was _____.

LAMORGESE: In that case if nobody brings it up and the court doesn't bring it up, then it possibly could be waived. And I think that this is in the nature - basically it goes back to the child support matters. Personal jurisdiction was necessary. Child support. And in custody they didn't want to make that a personal jurisdiction issue. So this was always treated sort of in the nature of a subject matter jurisdiction challenge, but not absolute.