

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002513-MR

PATRICIA A. SCHMIDT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 96-CI-002356

DANIEL WINGENFELD

APPELLEE

### OPINION

#### AFFIRMING IN PART AND VACATING IN PART

\* \* \* \* \*

BEFORE: BUCKINGHAM, JOHNSON, and KNOX, Judges.

BUCKINGHAM, JUDGE: Patricia Schmidt (Patricia) appeals from an order of the Fayette Circuit Court involving child support arrearage, attorney's fees, and travel expenses. We affirm in part and vacate in part.

Patricia and Daniel Wingenfeld (Daniel) were married in October 1988, and Patricia gave birth to a daughter in February 1989. Daniel filed for divorce from Patricia in Ohio in August 1989, and the initial divorce pleadings filed on behalf of Daniel and Patricia acknowledged that the child was Daniel's. Likewise,

a subsequent paternity test showed a 98.81 percent probability that Daniel was the child's father.

In December 1989, Daniel was ordered to pay temporary child support of \$96.36 per week, which he failed to pay. During the divorce proceedings in 1990, Daniel's stepmother made allegations that Daniel had abused his stepbrother, and Patricia alleged that Daniel had abused their child. These allegations were never substantiated, but Daniel and Patricia entered into an agreed judgment of divorce which recited that there were no children born of their marriage. This agreed judgment also expressly stated that each party waived arrearages for past child support.

In September 1990, Daniel filed a motion in Ohio to set aside the agreed judgment insofar as it stated that no child was born of his marriage with Patricia. Patricia moved to Kentucky with the child in March 1992, and in May 1992, the Ohio trial court granted Daniel's motion and vacated the finding that no children were born of the marriage and that the parties waived child support arrearages. Issues involving parental rights and responsibilities were expressly reserved for a later determination. Patricia appealed the Ohio trial court's ruling vacating the relevant portion of the agreed judgment to the Court of Appeals of Ohio, which affirmed the trial court's ruling in December 1993.

In July 1994, a hearing was held before a referee in Ohio concerning the parental rights and responsibilities of the parties. The referee's report stated in relevant part that

Patricia would be the child's custodial parent, that Daniel was entitled to visitation in accordance with a schedule, and that Daniel was to pay Patricia the sum of \$200 per month plus a two percent administrative fee every month for the support of the child, effective July 20, 1990, the date on which the agreed judgment of divorce was received for filing. Daniel was also ordered to pay \$100 per month on the arrearage of \$4,294.56 plus a two percent administrative fee until the arrearage was paid in full. The referee found that Daniel's total annual income was \$22,000 and Patricia's was \$5,720. Based upon those incomes, the referee found that Daniel's support obligation pursuant to Ohio's child support schedule would be \$281 per month, but that that amount would be "unjust or inappropriate and not in the best interest of the minor child due to the extraordinary costs associated with visitation . . . as well as the unknown benefits Defendant receives from her remarriage . . . ." Thus, child support was set at \$200 per month. Patricia's objections to the referee's report were overruled by the trial court, and no appeal was taken from the trial court's order approving and adopting the referee's report.

Daniel later filed a motion in Ohio to modify visitation and to require Patricia to show cause why she should not be held in contempt for refusing to allow Daniel to exercise his visitation rights. These motions were heard before a magistrate in Ohio in April 1996. The magistrate found that Ohio had jurisdiction over the proceedings but that Ohio was an "inconvenient forum for future parenting proceedings" pursuant to

the Uniform Child Custody Jurisdiction Act (UCCJA) and that Kentucky would be a more appropriate forum. No objections were filed to the magistrate's report, and it was adopted by the Ohio trial court in June 1996. The Ohio trial court ordered the relevant portions of the record to be transmitted to the appropriate Kentucky court, and the relevant judgments of the Ohio courts were registered with the Fayette Circuit Court (hereafter "the trial court") in July 1996 by Daniel's Kentucky attorney.

Later in July 1996, Daniel filed a motion to modify visitation with the trial court. Patricia responded to the motion and subsequently filed a motion to reduce child support arrearages owed by Daniel to a lump-sum judgment. Daniel filed a response to Patricia's motion in which he alleged that Kentucky did not have jurisdiction to modify foreign support orders under the (UCCJA), found in Kentucky Revised Statute (KRS) 403.400-403.620.

While the motion to reduce child support arrearages to a judgment was pending, Daniel filed a motion to determine transportation responsibilities in regard to visitation and seeking to require Patricia to bear some of the costs associated with visitation. In response to Daniel's motion regarding transportation responsibilities, Patricia requested the trial court for attorney's fees pursuant to KRS 403.220.

The trial court issued an order in April 1997 in which it found that the Ohio court's order concerning child support arrearages did not address how arrearages which had accrued from

July 1990 until March 1995 should be paid. The court noted Daniel's contention that it had no jurisdiction over the support issues but, nevertheless, provided that "[r]ather than make the parties incur the cost of returning to Ohio for clarification on this point, this Court will assume jurisdiction and rule on the omitted term." The order did not state that the court had jurisdiction over the support questions. The trial court ordered Daniel to pay support and arrearages as ordered by the Ohio court but denied Patricia's motion to reduce arrearages to a judgment. Patricia's motion to alter, amend, or vacate the April 1997 order followed.

In September 1997, the trial court issued an order resolving the lingering visitation issues between Patricia and Daniel. This order further provided that Patricia was responsible for reimbursing Daniel for a portion of his visitation expenses. The order also set forth the amount of arrearage owed by Daniel to be \$14,994.15, but refused to alter or vacate its previous order denying Patricia's motion to reduce that amount to a judgment. Finally, the order denied Patricia's motion for attorney's fees. Patricia then filed a notice of appeal in which she noted that she was appealing only from the September 1997 order.

Patricia's first argument is that the trial court had no discretion to refuse to enter a judgment for arrearages as "unpaid periodical payments for maintenance of children . . . become vested when due. The accrued sum of delinquencies is a fixed and liquidated debt . . . ." Dalton v. Dalton, Ky., 367

S.W.2d 840, 842 (1963). See also Stewart v. Raikes, Ky., 627 S.W.2d 586 (1982).

We agree with Daniel that the trial court had no jurisdiction to rule on matters involving child support. Although Daniel did not file a cross-appeal concerning the rulings that the trial court made involving child support, subject matter jurisdiction may not be waived and an appellate court may find a lack of subject matter jurisdiction sua sponte. Cann v. Howard, Ky. App., 850 S.W.2d 57 (1993). Kentucky's adoption of the UCCJA gave the trial court jurisdiction "to decide child custody matters" in KRS 403.420(1). KRS 403.410(2) defines "custody determination" as "a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person[.]"

The trial court acquired jurisdiction of child custody and visitation rights pursuant to the UCCJA when Ohio declined to exercise its jurisdiction, but such jurisdiction did not include jurisdiction over child support matters. At least two other states have reached similar conclusions. See Peck v. Jones, 878 P.2d 390, 391 (Okla. Ct. App. 1994); In re Marriage of Buchanio, 635 N.E.2d 980 (Ill. App. Ct. 1994), appeal denied by Buchanio v. Buchanio, 642 N.E.2d 1274 (Ill. 1994). In short, we hold that the trial court correctly denied Patricia's motion to reduce child support arrearages to a judgment as it had no jurisdiction of the matter.

Patricia's second argument is that the trial court abused its discretion by not awarding her attorney's fees. KRS 403.220 allowed the court to award attorney's fees for the cost "of maintaining or defending any proceeding under this chapter." As the UCCJA is located in KRS Chapter 403, the trial court had the authority to award attorney's fees in this action. However, attorney's fees are "entirely within the trial court's discretion." Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675, 679 (1993). As Daniel was successful on his motion for visitation rights, and as the trial court had no jurisdiction to consider Patricia's child support motion, we conclude that the trial court did not abuse its discretion in denying Patricia's motion for attorney's fees.

Patricia's final argument is that the trial court erred in ordering her to pay a portion of the expenses Daniel incurred when exercising his visitation rights with the child. She notes that the Ohio trial court ordered Daniel to pay only \$200 per month due to his visitation expenses rather than the \$280 per month called for by the Ohio child support schedule and argues that the trial court abused its discretion in ordering her to pay a portion of those expenses. Again, we conclude that the trial court did not have jurisdiction under the UCCJA to enter an order relating to a "monetary obligation of any person." See KRS 403.410(2).

The order of the Fayette Circuit Court is affirmed in part, but is vacated to the extent that it makes determinations concerning child support and reimbursement of travel expenses.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven F. Vicroy  
Lexington, KY

BRIEF FOR APPELLEE:

Patrick F. Nash  
Lexington, KY