RENDERED: JULY 30, 1999; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002313-MR

OPAL POWELL — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT GALLENSTEIN, JUDGE
ACTION NO. 93-CI-253

TONY R. LOGAN — APPELLEE

OPINION
VACATING
** ** ** ** **

BEFORE: COMBS, DYCHE AND GARDNER, JUDGES.

GARDNER, JUDGE: Opal A. Powell (Powell) appeals from orders of the Mason Circuit Court awarding child visitation to Tony R. Logan (Logan) and denying her Kentucky Rule of Civil Procedure (CR) 60.02 motion to vacate those orders. For the reasons stated herein, we must vacate.

The facts are simple and uncontroverted. Powell and Logan produced a child, Brandi Logan (Brandi), born outside of marriage in 1993. Powell and Brandi reside in Ohio, and Logan resides in Mason County, Kentucky. In August, 1993, Powell filed a petition in Mason Circuit Court pursuant to the Uniform

Reciprocal Enforcement of Support Act (URESA), Kentucky Revised Statute (KRS) Chapter 407. The petition sought to establish paternity, child support, medical coverage, and unreimbursed public assistance. During the pendency of the proceedings, Logan stipulated to paternity.

After proof was taken on the petition, the circuit court rendered an "Order of Paternity" on February 16, 1994, which adjudicated paternity, established temporary custody of Brandi with Powell, and established visitation rights in favor of Logan. It appears that no further action was taken until February 11, 1997, when the circuit court rendered an order setting forth the specific dates and times of Logan's right to visitation. Powell's subsequent motion to set aside the February 11, 1997 order was denied.

On August 25, 1997, Powell filed a CR 60.02 motion seeking to vacate all prior orders relating to visitation. As a basis for this motion, she argued that the circuit court lacked both personal and subject matter jurisdiction. The motion was denied by way of order entered September 5, 1997, and this appeal followed.

Powell now argues that the circuit court committed reversible error in failing to vacate its prior visitation orders. Specifically, she maintains that URESA, the statutory basis for her petition, expressly establishes the limited powers and duties of the responding tribunal (in this case the circuit court), and that the adjudication of visitation is not within the scope of those limited powers. As such, she argues that all

orders relating to visitation were void for lack of jurisdiction and that the circuit court should have so ruled on her motion for CR 60.02 relief. She also directs our attention to Abbott v. Abbott, 673 S.W.2d 723 (1983), which she maintains supports her argument that the circuit court was without jurisdiction to adjudicate visitation rights.

In a separate but related argument, Powell notes that she resides in Ohio, and that Brandi was born in Ohio and has resided there her entire life. The implicit argument is that jurisdiction to adjudicate visitation cannot be established independently of URESA because the petitioner and her child reside outside the Commonwealth.

We have closely studied the facts, the law, and the argument of counsel[1], and find Powell's argument persuasive. URESA, codified at KRS Chapter 407, sets forth the scope of the court's authority thereunder at KRS 407.5301. It provides as follows:

> (2) This section provides for the following proceedings:
>
> (a) Establishment of an order for spousal support or child support pursuant to KRS 407.5401;
>
> (b) Enforcement of a support order and income-withholding order of another state without registration pursuant to KRS 407.5501 to 407.5902;
>
> (c) Registration of an order for spousal support or child support of another state for enforcement pursuant to KRS 407.5601 to 407.5612;
>
> (d) Modification of an order for child support or spousal support issued by a tribunal of this state pursuant to KRS 407.5203 to 407.5206;

[1]Logan has not filed a responsive brief.

> (e) Registration of an order for child support of another state for modification pursuant to KRS 407.5601 to 407.5612;
> (f) Determination of parentage pursuant to KRS 407.5701; and
> (g) Assertion of jurisdiction over nonresidents pursuant to KRS 407.5201 and 407.5202.
>
> (3) An individual petitioner or a support enforcement agency may commence a proceeding authorized under KRS 407.5101 to 407.5902 by filing a petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state which has or can obtain personal jurisdiction over the respondent.

Clearly, the court's authority under Chapter 407 is expressly limited to the registration, establishment, enforcement or modification of spousal or child support orders, and to the adjudication of parentage. The dispositive question, then, is whether Chapter 407 implicitly confers jurisdiction to the court over matters not expressly enumerated. We must conclude that it does not. While, to our knowledge, there are no published cases within the Commonwealth so stating, there exists a vast array of extra-jurisdictional case law which almost universally supports Powell's claim that URESA does not confer jurisdiction over visitation. See generally e.g., In re Byard, 658 N.E.2d 735 (Ohio 1996), citing Mississippi Dept. of Human Services v. Marquis, 630 So.2d 331 (Miss. 1993); Hood v. Hood, 499 A.2d 772 (Vt. 1985); State ex rel. Dewyea v. Knapp, 674 P.2d 1104 (Mont. 1984); England v. England, 337 N.W.2d 681 (Minn. 1983); State ex rel. Hubbard v. Hubbard, 329 N.W.2d 202 (Wisc. 1983); People ex rel. VanMeveren v. District Court in and for Larimer County, 638

P.2d 1371 (Colo. 1982); Moffat v. Moffat, 612 P.2d 967 (Cal. 1980); Kline v. Kline, 542 S.W.2d 499 (Ark. 1976).

These cases stand for the general proposition that the scope of URESA is limited to the resolution of support and parentage issues, and in so doing the foreign courts concluded that the URESA cannot be interpreted as conferring jurisdiction over visitation. In further support of this proposition, the successor act to URESA, namely the Uniform Interstate Family Support Act (UIFSA), which adopts URESA's underlying purpose, Ostermiller v. Spurr, 968 P.2d 940 (Wyo. 1998), also contains commentary "[w]hich makes clear that visitation issues are not to be litigated in the context of a support proceeding." Ostermiller v. Spurr, 968 P.2d at 935, citing the Uniform Interstate Family Support Act, 9 Uniform Laws Annot. § 305 comment at 350 (1997 Supp.). In sum, we find the reasoning expressed in the above-cited cases and commentary to be compelling and supported by the clear language of URESA, and accordingly now adopt the conclusion that URESA does not confer jurisdiction to adjudicate visitation issues.

Having determined that URESA does not vest the court with jurisdiction to adjudicate visitation matters, we must then determine whether jurisdiction could be found under the instant facts separate from URESA. Jurisdiction over visitation issues may be found, if at all, by first determining if the court has jurisdiction over custody issues. Gaines v. Gaines, Ky. App., 566 S.W.2d 814 (1978). Jurisdiction over custody (and accordingly over visitation matters) is established pursuant to

KRS 403.420. Captioned as "Prerequisites to Jurisdiction", it states that,

> (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
>
> (c) The child is physically present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
>
> (d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

(2) Except under paragraphs (c) and (d) of subsection (1) of this section, physical presence in this state of the child, or of the child and one (1) of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

(4) A child custody proceeding is commenced in the circuit court:
(a) By a parent, by filing a petition:
1. For dissolution or legal separation; or
2. For custody of the child in the county in which he is permanently resident or found; or
(b) By a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one (1) of his parents.

KRS 403.420 reveals two bases upon which we must conclude that jurisdiction cannot be found under the instant facts separate from URESA. First, none of the prerequisites for jurisdiction under KRS 403.420 is present - Kentucky is not the home state of Brandi; Brandi does not have a significant contact with Kentucky; she is not physically present and in need of emergency protective orders; and, it cannot be said that no other state would have jurisdiction. Second, KRS 403.420(4) provides that such a proceeding may be commenced only by the filing of a petition for custody/visitation in the county in which the child permanently resides or is found. The failure of either of these requirements bars the exercise of jurisdiction. Neither is met

in the matter at bar, and as such we cannot find that the circuit court could have properly exercised jurisdiction via KRS 403.420.

For the foregoing reasons, the orders of the Mason Circuit Court which establish or otherwise address visitation are vacated.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gerald W. Shaw
Aberdeen, Ohio

NO BRIEF FOR APPELLEE