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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002433-MR

ROBIN LEE DUCKWORTH — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
CIVIL ACTION NO. 97-CI-00220

EDWARD NEIL DUCKWORTH — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, MILLER and TACKETT, Judges.

HUDDLESTON, Judge. Robin Lee Duckworth appeals from an order denying her motion to redocket a petition for dissolution of marriage. Additionally, Robin challenges the circuit court's decision to decline subject matter jurisdiction, the failure to conduct an evidentiary hearing in arriving at that decision and the dismissal due to inconvenient forum.

I. FACTS AND PROCEDURAL HISTORY

The Duckworths were married on May 5, 1996, in Fort Bend County, Texas. On June 3, 1997, Edward filed a petition for dissolution of his marriage to Robin in Knox Circuit Court. At the

time, the Duckworths lived in Barbourville, Kentucky. They had a son who was seven months old and Robin was pregnant with a child due in January 1998. Edward properly served Robin with notice of this action. On June 23, 1997, Robin filed a pro se reply to Edward's petition.

Sometime prior to March 10, 1998, Edward moved to Texas. At some point, though it is not clear from the record when, the children joined him in Texas. On September 10, 1998, Edward filed a notice of voluntary dismissal of the Knox Circuit Court action. On May 10, 1999, Robin filed a motion to redocket the original petition with a supporting affidavit. On May 12, 1999, Ron Reynolds, counsel for Edward, filed an affidavit in support of his actions taken to have the original petition voluntarily dismissed.

On May 28, 1999, the Knox County Domestic Relations Commissioner wrote a letter to a judge in Tyler, Texas. The Commissioner's understanding was that Edward had filed a petition to dissolve the Duckworth marriage in Texas on the same day that he had filed his notice of voluntary dismissal in Kentucky. This letter stated that the DRC had conferred with the circuit court judge in Kentucky to determine whether the Kentucky court would accept or decline jurisdiction. Based on the failure of the parties to go forward with the case in Kentucky, the DRC and the judge decided to decline jurisdiction. On June 3, 1999, the district court of Rockwall County, Texas, entered a final decree of divorce. Robin and Edward appeared in person, with counsel, and announced ready for trial on that date. There is nothing in the record to suggest that either party objected to the jurisdiction of

the Texas court; and the court found that it had jurisdiction of the case and of all the parties.

On June 10, 1999, the DRC filed a report on the original action. On June 18, 1999, Robin filed an objection to the DRC's report. She then requested that the court enter an order specifically reiterating the court's decision to decline jurisdiction.

On August 10, 1999, Edward filed a copy of the final divorce decree and other papers from the Texas divorce action in Knox Circuit Court. The Texas divorce decree found the home state of both infant children of the marriage to be the State of Texas.

On August 23, 1999, Knox Circuit Court denied Robin's exceptions to the DRC's report and it denied her motion to redocket the original action. On September 2, 1999, Robin appealed to this Court.

II. PROOF OF SERVICE

The first question presented is whether a party has properly served an answer when an offer of proof of service is made by a statement within a motion and affidavit filed more than seven months after receiving notice of voluntary dismissal. The question requires an interpretation of the language of two Kentucky Rules of Civil Procedure - CR 5.03 and CR 41.01. First, we look to the language of CR 41.01(1) which, in pertinent part, states that "any claim . . . may be dismissed by the plaintiff without order of the court, by filing notice of dismissal at any time before service by the adverse party of an answer . . . . " This begs the question of

what constitutes proof of "service" of an answer? The civil rules resolve this question in CR 5.03 where it is stated:

> Whenever any pleading or other paper is served . . . , proof of the time and manner of such service shall be filed before action is to be taken thereon by the court or the parties. Proof may be by certificate of a member of the bar of the court or by affidavit of the person who served the papers, or by any other proof satisfactory to the court.

Conceding that proof by certification does not exist here, Robin urges us to look to the last two phrases of the rule, specifically, that service is proper if "by affidavit of the person who served the papers, or by any other proof satisfactory to the court." However, neither method of proof was properly made here.

While Robin filed her reply to the original petition with the circuit court, nothing in the record proved her assertion that she had properly served Edward or his counsel with an answer prior to the notice of voluntary dismissal. Proof of service "shall be filed before action is to be taken thereon by the court or the parties."[1] The only proof Robin filed concerning service of a reply came more than seven months after Edward had filed the notice of voluntary dismissal; therefore, her filing of proof of service was not timely made.

Whether there existed "other proof satisfactory to the court" that Robin had properly served Edward or his counsel is a

[1] Ky. R. Civ. Proc. (CR) 5.03. Emphasis supplied.

question of fact. Determination of the existence of such proof is within the sound discretion of the trial court.

III. SUBJECT MATTER JURISDICTION

The second question presented is whether the court's decision to decline jurisdiction was erroneous. "The question of subject matter jurisdiction may be raised at any time and is open for the consideration of the reviewing court whenever it is raised by any party."[2] Robin urges us to follow Brighty v. Brighty[3] where it was stated that:

> Under the UCCJA[4], the question of whether jurisdiction exists in a particular forum to entertain a motion for a child custody determination, either by initial or modification decree, necessarily involves an evidentiary hearing dedicated to resolution of the issue consistent with the best interests of the child.[5]

However, reliance on this portion of the Brighty decision is misplaced. The issue in Brighty was whether the trial court had jurisdiction to enforce a contempt order although it no longer had jurisdiction to modify the underlying visitation order. Here, the court entered no initial decree in Kentucky. Therefore, no

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[2] Gullett v. Gullett, Ky. App., 992 S.W.2d 866, 869 (1999), citing Commonwealth, Dept. of Highways v. Berryman, Ky., 363 S.W.2d 525, 526 (1962).

[3] Ky., 883 S.W.2d 494 (1994).

[4] Uniform Child Custody Jurisdiction Act (the Act has been codified in Kentucky as Ky. Rev. Stat. (KRS) 403.400 et seq.)

[5] Brighty, supra, n. 3, at 496.

modification issue exists. Since a voluntary dismissal of the original divorce action existed, the motion to redocket does not rise to the level of a child custody determination. Therefore, Robin is not entitled to an evidentiary hearing under the terms of Brighty.

Robin's argument that KRS 403.430 requires a court to give reasonable notice and opportunity to be heard before making a child custody determination must fail for the same reason. Since the court was never required to make a child custody determination, the rule does not apply to her case.

IV. DISMISSAL ON OTHER GROUNDS

Finally, Robin asserts that the court erred in failing to apply the appropriate legal standards in dismissing the dissolution action on the ground of inconvenient forum. This argument is fatally flawed. Since Edward voluntarily dismissed the action, it was not dismissed on the ground of inconvenient forum. The only reference to inconvenient forum in the record was in a letter from the DRC to the judge in Tyler, Texas. In the closing of the letter, the DRC mentions that he and the circuit court judge believe the proper forum conveniens would lie in the Texas court. The assertion that the court dismissed the action on the ground of inconvenient forum unsupported by the record.

V. CONCLUSION

The court properly denied Robin's motion to redocket the divorce action. Additionally, the court's decision to decline subject matter jurisdiction and its failure to conduct an

evidentiary hearing in arriving at that decision were proper under the circumstances. We affirm the order.

ALL CONCUR.

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