

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000470-OA

IRONA FINN

PETITIONER

v.

ORIGINAL ACTION
REGARDING MCCREARY CIRCUIT COURT
ACTION NO. 00-CI-00283

HON. JERRY WINCHESTER,
JUDGE, MCCREARY CIRCUIT COURT

RESPONDENT

AND

DANIEL THIELS

REAL PARTY IN INTEREST

OPINION AND ORDER
GRANTING CR 76.36 RELIEF

** ** ** ** **

BEFORE: BARBER, McANULTY AND TACKETT, JUDGES.

TACKETT, JUDGE: Petitioner, Irona Finn (Finn), has filed a petition for writ of mandamus or prohibition. The real party in interest, Daniel Thiels (Thiels), has responded thereto and, further, has filed a motion to amend his response. It is ORDERED that the motion be GRANTED. The tendered amended response is ORDERED FILED and was considered by the Court. The petition is also GRANTED and a writ of mandamus shall issue.

Finn, a Maryland resident, seeks an order from this

Court prohibiting the McCreary Circuit Court from exercising jurisdiction over a modification of visitation and ordering it to give full faith and credit to an existing visitation decision issued by a Maryland court.

Finn is the maternal grandmother of a child born in Maryland to a mother who was killed in a motorcycle accident in July, 1999. The child's father, Thiels, moved to Kentucky in 1998. The parties were in the process of divorcing in Maryland when the child's mother died, but no custody decision had yet been made. The child moved to Kentucky in August, 1999. In September, 1999, Finn filed a complaint for custody in Maryland. She was awarded temporary custody. Then on April 6, 2000, the Maryland court granted Thiels permanent custody of his child, with Finn being awarded visitation. Finn states that Thiels "refused to respect the Maryland order" and she moved the Maryland court in October, 2000, to hold Thiels in contempt of the visitation decree. The court then issued a show cause order for Thiels to appear in Maryland on December 19, 2000.

On November 13, 2000, Thiels moved the McCreary Circuit Court for modification of visitation with appended certified copy of the Maryland order of custody and visitation. Finn objected to Kentucky's jurisdiction based on the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.S. §1738A, and the Uniform Child Custody Jurisdiction Act (UCCJA), Kentucky Revised Statutes (KRS) 403.400 et seq., arguing that Kentucky could not modify the Maryland visitation order until and unless Maryland declines to exercise continuing jurisdiction. She moved for dismissal of the

action.

By order entered December 29, 2000, the McCreary Circuit Court determined to assume jurisdiction because the child had resided in Kentucky for more than six (6) months and referred the visitation matter to the Domestic Relations Commissioner. On February 16, 2001 the Maryland Court, before whom Thiels never appeared, held him in contempt of its visitation decree. The court found it obtained jurisdiction in 1999; it disputed Kentucky's determination of jurisdiction based on a six-month residency, opining this element pertains to an initial determination, not to a modification; and decided that Maryland was entitled to keep jurisdiction "until we give it up."¹

Finn contends Kentucky has a duty, pursuant to the Supremacy Clause, U.S. Constitution Article VI, to honor the Maryland visitation decision because it was entered consistent with PKPA requirements. Maryland had jurisdiction when she filed her petition for custody in September, 1999, as the child had resided there her entire life and until August, 1999. She contends that, pursuant to 28 U.S.C.S. §1738A(f), Kentucky may not modify the Maryland visitation order unless Maryland no longer has jurisdiction, or declines to exercise it, which it has

¹ In addition, the Maryland court stated:

On the other hand, if a Court of another jurisdiction, after opportunity to be heard is afforded both sides, issues a final order that jurisdiction is to the contrary, I don't know where that leaves us.

At this time we will issue a contempt order, although we will entertain any challenges to our jurisdiction.

expressly not done at this time. Finn adds that continuing jurisdiction pursuant to 28 U.S.C.S. §1738A(d) is satisfied by the child's significant connection with Maryland and Finn's continuing residence in that state. Finn contends she has not seen the child since October, 2000, and is suffering irreparable harm from which an appeal is not an adequate remedy.

In his response, Thiels argues that all necessary prerequisites to jurisdiction have been satisfied by Kentucky because Kentucky is the home state of the child and the state of residence of her only living parent. He contends that, as the home state, Kentucky has jurisdiction under the PKPA to modify the Maryland order. He further contends that it is in the child's best interest that Kentucky exercise jurisdiction as Maryland is an inconvenient forum and Kentucky should not "concede jurisdiction to Maryland merely because [Finn] persists in filing motions to keep those proceedings active." (Response, p. 10).

A writ of prohibition or mandamus is an extraordinary and discretionary remedy. It is generally issued only when a petitioner has shown that a lower court is proceeding, or is about to proceed, outside its jurisdiction and there is no adequate remedy by appeal, or that it is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result to the petitioner if the court should do so. See e.g., Southeastern United Medigroup v. Hughes, Ky., 952 S.W.2d 195, 199 (1997). Having reviewed the parties'

arguments and the appended record, this Court has determined that Finn has shown entitlement to a writ because the McCreary Circuit Court failed to base the exercise of its jurisdiction on an application of the law controlling the matter at hand. Therefore, an appeal would not be an adequate remedy. See, Chamblee v. Rose, Ky., 249 S.W.2d 775 (1952).

The McCreary Circuit Court's decision does not refer to either the PKPA or the UCCJA, but it is clearly based on the concept of "home state" i.e., that the child "ha[d] resided in Kentucky for more than 180 days prior to the filing of the motion to modify visitation. . . ." ² Although the circuit court had been advised of the pendency of the proceedings in the state of Maryland, its decision makes no findings about those proceedings and whether or not they affect its jurisdiction. We are of the opinion that the circuit court erred in failing to do so. In a case like this one where the provisions of the PKPA apply as well as those of the UCCJA, and where a state other than Kentucky might also have jurisdiction, a Kentucky court may not decide visitation in a vacuum. As this Court stated in Cann v. Howard, Ky. App., 850 S.W.2d 57, 60 (1993):

[T]he PKPA's full faith and credit requirement is violated when a Kentucky court proceeds to exercise its jurisdiction without making a determination that [another state] has lost or declined to exercise its jurisdiction.

The threshold question in this matter is whether the Maryland Court's initial custody/visitation decision was made

² "Home state" is defined at 28 U.S.C.S. §1738A(b)(4) and KRS 403.410(5).

consistently with the PKPA. 28 U.S.C.S. §1738A(c).³ Thiels argues that Maryland did not have jurisdiction to so decide. However, he did not appeal from that decision in Maryland and, although subject matter jurisdiction may be challenged at any time, it is a matter for Maryland, and not for this Court, to resolve.⁴ However, since the record indicates that Maryland was the parties' marital domicile before Thiels departed for Kentucky and was the child's home state when Finn filed her complaint for custody, and since no competing custody/visitation action was pending any place else, it appears reasonable to conclude that the Maryland decision is entitled to full faith and credit at this time.

The next question is whether the PKPA empowers Kentucky with the jurisdiction to modify Maryland's visitation decision. This specific question is controlled by 28 U.S.C.S. §1738A(f), which reads as follows:

A court of a State may modify a determination of the custody of the same child made by a

³ The subsection provides:

A child custody determination made by a court of a State is consistent with the provisions of this section only if-

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding

⁴ As stated in Cann v. Howard: "The courts of this Commonwealth, however, should not be acting as appellate courts with respect to decisions by courts of other states. See KRS 403.400." Id. at 62.

court of another State if-

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

As in Cann, supra, the facts of this case create a context in which two states may be sharing concurrent jurisdiction. Certainly, the McCreary Circuit Court has jurisdiction to hear a petition to modify visitation. In addition, it determined that Kentucky is the "home state" of the child. However, PKPA requirements mandate that Kentucky's analysis proceed beyond that determination because Maryland could have "continuing jurisdiction" pursuant to 28 U.S.C.S. §1738A(d).⁵ In fact, Maryland has already decided that it has continuing jurisdiction and that it will exercise it to enforce its own visitation decree. This Court stated in Cann, supra, at 60:

Whether Kentucky has home state jurisdiction depends not only on Kentucky law, determined under KRS 403.420(1), but also on whether [another state] has lost or declined to exercise its continuing jurisdiction. See, 28 U.S.C.S. §1738A(b)(4), (c)(2), (f). This

⁵ This subsection reads as follows:

The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

last point is the important addition which the PKPA made to the law.

Therefore, the McCreary Circuit Court erred when it failed to conduct that initial inquiry before deciding to exercise its jurisdiction. We note that, as a matter of Kentucky law, the mere fact that a child and his custodial parent live together in one particular state does not automatically divest another state of jurisdiction. See, Dillard v. Dillard, Ky. App., 859 S.W.2d 134 (1993).

In addition, the United States Congress amended 28 U.S.C.S. §1738A in 1998 with the addition of Section (h) which provides:

A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

Based on the foregoing statutory authorities and on the principles set forth in Cann v. Howard, supra, we conclude that the McCreary Circuit Court incorrectly decided to exercise its jurisdiction at this time. Therefore, the matter is REMANDED to the McCreary Circuit Court with directions to vacate its order of December 29, 2000, and to proceed in the same manner as ordered by this Court in Cann at 61-62, i.e., that the court refuse to modify Maryland's visitation decree until Thiels demonstrates that Maryland lacks jurisdiction (e.g., Finn has moved to another state), or has declined to exercise it; or that the court promptly communicate with the Maryland court in accordance with the provisions of KRS 403.450 to ascertain "what that court wants

to do.”

ALL CONCUR.

ENTERED: June 1, 2001

Julia K. Tackett
JUDGE, COURT OF APPEALS

COUNSEL FOR PETITIONER:

Jennifer Nicholson
London, Kentucky

COUNSEL FOR REAL PARTY IN
INTEREST:

Timothy W. Allen
Lexington, Kentucky