

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001538-MR

RONNIE CLAYTON

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 00-CI-00129

KIM CLAYTON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DYCHE, AND KNOPF, JUDGES.

KNOPF, JUDGE: Ronnie Clayton appeals from an order of the Casey Circuit Court which dismissed his petition to modify a North Carolina decree which granted custody of his two children to his former wife, Kim Clayton. We agree with the trial court that Kentucky did not have jurisdiction to modify the North Carolina decree because Kentucky never became the children's home state, because Kentucky has no substantial connections to the children, and because the custody matter was proceeding before a North Carolina court during most of the time in question. Hence, we affirm.

Ronnie and Kim were married in York, South Carolina on April 15, 1989. Two children were born of the marriage: Ebonie¹ and Veronica.² During most of the marriage, the parties resided in Charlotte, North Carolina. Ronnie alleges that the relationship was stormy, and that Kim engaged in abusive conduct toward him. After the parties separated in 1997, Ronnie and the children went to live with his mother in Jamestown, Kentucky. At that time, Ronnie filed a motion in Russell District Court seeking emergency custody of the children. The Russell District Court declined to accept jurisdiction, concluding that North Carolina was the children's home state. Following this ruling, Ronnie and the children returned to Charlotte.

On June 23, 1997, the parties were divorced by a decree entered in the North Carolina dissolution proceeding. Thereafter, on August 27, 1997, Kim filed a separate action in a trial court of Mecklenburg County, North Carolina.³ During the pendency of these proceedings, the North Carolina court awarded temporary custody of the children to Ronnie, and allowed Kim only supervised visitation. There were numerous disputes involving Kim's failure to comply with the court's orders regarding payment of child support, visitation, and Kim's attendance at domestic violence classes.

¹ D.O.B.: February 24, 1990.

² D.O.B.: September 27, 1992.

³ Kim Clayton v. Ronnie Clayton, Action No. 97-CVD-11021 (General Court of Justice, District Court Division, Mecklenburg County, North Carolina). A copy of the certified record of the North Carolina proceedings was made part of the record in the case below, and is included in the record on appeal.

On May 28, 1999, the North Carolina court entered its final order on support and custody of the children. The court awarded sole custody of the children to Ronnie, and ordered Kim to pay child support. The court also set out a visitation schedule and guidelines for both of the parties.⁴ The court further directed Kim to notify it of any change in her address, and directed Ronnie to keep Kim notified of the children's mailing address.

In June of 1999, Ronnie and the children moved back to Jamestown, Kentucky. On July 21, Kim filed a motion in the North Carolina court, alleging that Ronnie had absconded with the children and seeking an emergency change of custody. The North Carolina court immediately entered a show-cause order directing Ronnie to return the children to North Carolina for a hearing on August 12.

On July 31, Kim arrived at Ronnie's Jamestown, Kentucky residence and attempted to retrieve the children. Apparently, there was an altercation between the parties, during which Ebonie was injured. Ronnie filed criminal charges against Kim for assault and child abuse. Kim was arrested and briefly incarcerated, but the charges against her were ultimately dismissed.

On August 17, Kim filed a motion in the Russell District Court seeking the return of the children to North Carolina in accord with the North Carolina court's show-cause

⁴ The North Carolina court had previously removed its supervision requirements on Kim's visitation with the children.

order. Ronnie initially agreed to return to North Carolina with the children, but he then left Russell County with the children. When Ronnie failed to appear at the scheduled hearing on August 21, the North Carolina court held him in contempt, and it ordered that the children be turned over to the custody of Kim's mother, Ethel Pride Agurs. Agurs and Kim live together at Agurs's home in South Carolina.

The North Carolina court also entered an arrest warrant for Ronnie. Pursuant to this order, Ronnie was arrested on March 29, 2000 in Albany, Kentucky for interference with Kim's custodial rights. The children were located shortly thereafter and were placed in Agurs's custody in South Carolina. On June 1, 2000, the North Carolina court entered an order finding that North Carolina remained the children's home state, and it gave sole custody of the children to Kim, allowing Ronnie only supervised telephone contact.

On August 25, 2000, Ronnie filed this action in Casey Circuit Court, seeking registration and modification of the North Carolina custody order. He asserted that the children have not resided in North Carolina since June of 1999, and consequently Kentucky should be considered their home state. Kim opposed the motion, arguing that North Carolina was the children's home state and was continuing to exercise jurisdiction over the custody matters. The trial court agreed with Kim, finding that Kentucky had an insufficient connection to the parties and the children and concluding that it lacked jurisdiction to modify the North Carolina custody order. Ronnie now appeals.

Ronnie argues that the trial court erred in finding that it lacked jurisdiction to modify the North Carolina custody order. The parties agree that the jurisdictional issue is governed by the Uniform Child Custody Jurisdiction Act (UCCJA),⁵ and the federal Parental Kidnapping Protection Act (PKPA).⁶ The UCCJA permits a Kentucky court 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

⁵The UCCJA has been adopted in Kentucky at KRS 403.400 through 403.630.

⁶ 28 U.S.C. § 1738A.

the child that this court assume jurisdiction.⁷

Likewise, the PKPA permits a Kentucky court to modify a child custody determination made by a 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.⁸

Ronnie first argues that the UCCJA requires an evidentiary hearing on the question of whether jurisdiction exists in a particular forum to entertain a motion for a child custody determination.⁹ Because the trial court failed to conduct an evidentiary hearing on this matter, he asserts that the trial court's order must be set aside and this case remanded for further proceedings. From our review of the record, however, we find no indication that Ronnie requested an evidentiary hearing before the trial court. Thus, he waived any objection on this ground.¹⁰ Furthermore, the matter was submitted to the trial court on the documentary evidence, including the entire certified record of the North Carolina proceeding. We find that there were no disputed issues of material fact, and the trial court properly addressed this question as a matter of law.

Ronnie next asserts that the trial court gave undue weight to the 1997 ruling by the Russell District Court. We

⁷ KRS 403.420(1).

⁸ 28 U.S.C. §1738A(f).

⁹ Brighty v. Brighty, Ky., 883 S.W.2d 494, 496 (1994).

¹⁰ CR 52.04.

agree with Ronnie that the earlier order is not relevant to this proceeding. The Russell District Court held that the North Carolina Court was then exercising jurisdiction over the custody issues related to the dissolution proceedings. Consequently, the Russell District Court concluded that those issues must be resolved in North Carolina. However, that ruling merely determined that North Carolina was the home state of the children in 1997, that North Carolina was then exercising jurisdiction over the custody issue, and that Kentucky lacked jurisdiction over the matter at that time. The district court's ruling did not purport to hold that North Carolina would always retain jurisdiction over the matter. Nonetheless, this portion of the trial court's decision does not affect the outcome of Ronnie's appeal.

Ronnie primarily argues that North Carolina cannot be considered the children's home state under the UCCJA. Ronnie points out that the children resided in Kentucky continuously from June of 1999 until March of 2000. He also notes that since the children were returned to their mother, they have lived with her in South Carolina. As a result, Ronnie contends that North Carolina no longer has any substantial connection to the children, and Kentucky is free to exercise jurisdiction over the custody matter.

However, among its other stated purposes, the UCCJA is intended to avoid jurisdictional competition and conflicts with courts of other states in matters involving child custody, and to deter abductions and other unilateral movements of children to

obtain custody awards.¹¹ To this end, home-state jurisdiction cannot be created when a parent improperly removes a child to Kentucky in violation of the terms of another state's custody order.¹² The children's presence in Kentucky from August of 1999 until March of 2000 was in violation of a direct order of the North Carolina court. Under these circumstances, Kentucky never became the children's home state.

Moreover, KRS 403.450(1) prohibits Kentucky from exercising its jurisdiction "if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with" Kentucky's version of the UCCJA.¹³ Kim promptly filed a motion with the North Carolina court to obtain the children's return to that jurisdiction. At the time she made that motion, in July of 1999, North Carolina was still the children's home state, and the North Carolina court had continuing jurisdiction to enforce its prior orders. Until North Carolina declined to exercise that jurisdiction further, Kentucky could not assume jurisdiction over the custody matter.

Finally, Ronnie filed his motion to change custody less than three months after the North Carolina court entered its most

¹¹ KRS 403.400.

¹² Wood v. Graham, Ky., 633 S.W.2d 404, 406 (1982). *See also* Wieczorek v. Sebastian, Ky. App., 751 S.W.2d 38 (1988)

¹³ Likewise, the PKPA provides in relevant part: "A court of a state shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another state where such court of that other state is exercising jurisdiction consistently with the provisions [of the PKPA]." 28 U.S.C. § 1738(g). *See also* Gullett v. Gullett, Ky. App., 992 S.W.2d 866, 870-71 (1999).

recent custody order, and nearly five months after the children were removed from Kentucky. Although the children's physical presence in Kentucky is not a prerequisite to the exercise of jurisdiction,¹⁴ their absence leaves Kentucky no substantial connection to these children other than Ronnie's wrongful retention of the children in this state.¹⁵ Therefore, under both the UCCJA and the PKPA, Kentucky does not have jurisdiction to decide this custody matter.

Ronnie clearly feels that the North Carolina court was wrong in granting custody of the children to Kim. Ronnie contends that the original custody order did not specifically prevent him from moving out of North Carolina with the children. However, such action could be considered a violation of Kim's visitation rights as set out in that order. He also complains that the North Carolina court ignored Kim's long history of domestic violence, her failure to pay child support, and his valid reasons for moving to Kentucky to obtain employment. Nevertheless, the North Carolina court has exercised nearly continuous jurisdiction over this matter since at least 1997. Ronnie had the opportunity to raise all of these issues in the North Carolina court. Instead, he chose to remove the children to Kentucky without that court's prior approval, and then he willfully refused to obey the North Carolina court's orders which directed their return. And by the time Ronnie brought his motion to modify, the children had left Kentucky and whatever connection

¹⁴ Gullett, 992 S.W.2d at 870.

¹⁵ See Reeves v. Reeves, Ky. App., 41 S.W.3d 866, 868 (2001).

this state had to them had lapsed. Consequently, the trial court did not err in dismissing Ronnie's motion to modify custody.

Accordingly, the judgment of the Casey Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS IN RESULT.

COMBS, JUDGE, CONCURS IN RESULT AND FURNISHES SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: Although I agree that North Carolina has retained jurisdiction over this matter, I would emphasize that Ronnie's move to Kentucky with the children did not violate the order of the North Carolina court and could not be equated with "absconding." I believe that he has valid issues to raise as to his entitlement to custody under the circumstances. However, I agree that North Carolina is the proper forum in which he must do so.

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