

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001999-MR

RAYMOND SCOTT

APPELLANT

APPEAL FROM LIVINGSTON CIRCUIT COURT
v. HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 00-CI-00054

DIETTA SCOTT SUMMERS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Raymond Scott has appealed from an order entered by the Livingston Circuit Court on August 14, 2001, which denied his motion for an order requiring his ex-wife, Dietta Summers, to show cause why she should not be held in contempt for failing to comply with a visitation order. Having concluded that the Livingston Circuit Court correctly ruled that it did not have jurisdiction over Raymond's motion for enforcement of its previous order, we affirm.

Raymond and Dietta were married in McCracken County, Kentucky on December 13, 1993. They had two children, Jonathon, who was born on September 11, 1994, and Jamie, who was born on September 12, 1996. On March 29, 2000, Dietta filed a petition for dissolution of the marriage in the Livingston Circuit Court. The parties entered into a settlement agreement, and their marriage was dissolved by the Livingston Circuit Court on August 2, 2000. The settlement agreement provided that the parties were to have joint custody of the children, with Dietta being designated as the primary residential caregiver. The settlement agreement further provided that Raymond would have weekly visitation with the children each Sunday through Tuesday, and that "[t]he parties may deviate from this arrangement only upon agreement by both parties." The parties also agreed to frequently confer with each other "on all important matters pertaining to the child[ren]'s health, welfare, education and upbringing."

On August 18, 2000, only 16 days after the settlement agreement was approved by the circuit court, Dietta remarried and began planning to move with her children to Addison, Texas.¹ The move was completed on September 6, 2000. Due to her pending move to Texas, on September 5, 2000, Dietta filed in the Livingston Circuit Court a motion to modify custody, since

¹ Apparently, Dietta's new husband resides in Addison, Texas.

Raymond would be unable to visit with his children as the parties had previously agreed. On October 30, 2000, the Domestic Relations Commissioner filed a report recommending that Dietta be held in contempt of court for "blatantly" failing to abide by the terms of the settlement agreement. Dietta filed objections to the commissioner's report and an evidentiary hearing was held before the circuit judge on January 3, 2001. On January 23, 2001, the Livingston Circuit Court entered an order holding Dietta in contempt of court for violating court orders by "willfully and intentionally interfering with [Raymond's] custodial rights and visitation with [his] children." Subsequently, the parties modified their agreement and Raymond was given visitation with the children for most of their spring break, summer break, Thanksgiving break, and Christmas break. This modified visitation schedule was approved by the Livingston Circuit Court in an agreed order entered on April 9, 2001.

On May 25, 2001, Dietta filed in the District Court of Dallas County, Texas, a motion seeking modification of the Kentucky custody order and a temporary ex parte restraining order prohibiting Raymond from removing the children beyond the jurisdiction of the court for any purpose, including summer visitation. The District Court exercised temporary emergency jurisdiction of the case under Texas' version of the Uniform

Child Custody Jurisdiction Act (UCCJA) based on the need to protect the children. The District Court granted the temporary ex parte restraining order on that date.

On June 20, 2001, the District Court held a hearing on Dietta's motions. The Dallas County District Court exercised jurisdiction pursuant to the Texas Family Code since the children had not been a resident of any state other than Texas for the eight months preceding the filing of the petition in the Dallas County District Court.² The Dallas County District Court noted that Raymond had been "duly and properly notified" of the proceedings, but "did not appear and wholly made default." The District Court considered the testimony of Dr. Sharon J. Anderson, a children's psychologist, who, based upon her personal interviews with the children, opined that Raymond's continued interaction with the children had the potential to cause them severe psychological damage.

On July 19, 2001, the Dallas County District Court entered a temporary order modifying Raymond's visitation and contact with his children. More specifically, the Texas court suspended Raymond's summer visitation privileges and ordered that all contact with his children be monitored. The Texas court also issued a temporary injunction prohibiting Raymond from removing the children from its jurisdiction.

² Tex.Fam.Code § 152.201 and § 152.203.

When Dietta failed to honor the modified visitation agreement that had been approved by the Livingston Circuit Court, Raymond filed in the Livingston Circuit Court on July 10, 2001, a motion for an order requiring Dietta to show cause why she should not be held in contempt of court for failing to comply with the modified visitation agreement. On August 14, 2001, the Livingston Circuit Court entered an order pursuant to KRS³ 403.420, which relinquished jurisdiction to the Dallas County District Court and denied Raymond's motion for a contempt hearing. This appeal followed.

In his appeal Raymond argues that KRS 403.420 is inapplicable since a contempt proceeding is not a "custody proceeding" under the UCCJA.⁴ The UCCJA, which is codified at KRS 403.400, et seq., sets forth the jurisdictional requirements under the statute at KRS 403.420, in relevant part, as follows:

(1) A court of this state which is

³ Kentucky Revised Statutes.

⁴ KRS 403.410(2) provides:

"Custody determination" means 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[.]

KRS 403.410(3) provides:

"Custody proceeding" includes proceedings in which a custody determination is one (1) of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings[.]

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.

In support of its ruling, the Livingston Circuit Court noted that Kentucky "was not the home state of [Dietta] and the children within six months before commencement of the proceeding [to hold Dietta in contempt]." ⁵ The Livingston Circuit Court further acknowledged that the "Texas Court has assumed jurisdiction of the children." While we agree with the Livingston Circuit Court's finding that Kentucky was not the "home state" of the children when Raymond initiated the contempt proceeding, to resolve the question before this Court we must also consider whether the Texas order which modified the parties' previous custody and visitation agreement was validly entered.

In Brighty v. Brighty, ⁶ the Supreme Court of Kentucky was presented with a similar case. The appellant in Brighty, Bruce Brighty, had filed a motion in the Jefferson Family Court requesting the court to enforce a previously entered contempt order against his ex-wife, Dara Hopton, regarding visitation of the parties' minor child, Brooke. In response Dara relied on KRS 403.420 and argued that since Brooke had been living with her in New Jersey for more than two years, the Jefferson Family

⁵ See KRS 403.420(1)(a).

⁶ Ky., 883 S.W.2d 494 (1994).

Court did not have jurisdiction over the proceeding. The Jefferson Family Court agreed and the Court of Appeals affirmed.⁷

The Supreme Court granted discretionary review and reversed. The Supreme Court concluded that the UCCJA had no application to the contempt proceeding brought in the Jefferson Family Court. The Supreme Court held that there was a clear difference between a court's enforcement jurisdiction, which is "strictly limited to a basic determination of whether a custody order was valid when entered, and can be enforced[,] and its modification jurisdiction, which "necessarily involves an evidentiary hearing dedicated to resolution of the issue consistent with the best interest of the child."⁸ In support of its holding, the Supreme Court cited the "paramount importance of a court's inherent authority to enforce its own orders[.]"⁹

Since the original custody decree entered by the Jefferson Circuit Court¹⁰ in Brighty was still valid and binding, the Supreme Court concluded that the Jefferson Family Court retained the authority to enforce any subsequent orders relevant to that decree. Central to the Supreme Court's holding, however, was the fact that no modification had been sought or

⁷ Id. at 496.

⁸ Id. at 496-97.

⁹ Id. at 497.

¹⁰ The case was initially brought in the Jefferson Circuit Court and later reassigned to the Jefferson Family Court. Id. at 495.

obtained prior to the filing of the contempt proceeding; for if the original custody decree entered by the Jefferson Circuit Court had been validly modified by a court from another jurisdiction prior to the filing of the contempt proceeding, the Jefferson Family Court would no longer have had the authority to enforce the initial custody decree. The Supreme Court stated:

The UCCJA governs custody determinations. According to the statute, a "'custody determination' means a court decision and court orders and instructions providing for the custody of the child, including visitation rights. . . ." KRS 403.410(2). (emphasis added). In the present case, the custody determination with regard to the minor child (including visitation with her father) was established in 1985 by order of the initial decree of the Jefferson Circuit Court. The original custody decree is valid and binding until superseded by a custody modification order properly entered by a court with jurisdiction. The record before us demonstrates that no attempt to modify custody or the terms of visitation had been sought by either party in any court at the time the challenged contempt proceeding was first heard and decided in Kentucky.

Where no modification is sought or obtained, courts have consistently held that the UCCJA does not apply to contempt proceedings. This reason is fundamental and makes sense. The UCCJA explicitly applies to "child custody determinations by initial or modification decree." KRS 403.420(1). An order for contempt is simply not a custody determination in any way, shape or form.
[citation omitted].¹¹

¹¹ Id. at 496.

Accordingly, we must determine whether the order entered by the Dallas County District Court, which modified the visitation order from the Livingston Circuit Court, was valid. If the Livingston Circuit Court's order was validly modified, then jurisdiction had properly vested in the Dallas County District Court and the Livingston Circuit Court lacked jurisdiction to enforce its previous orders. On the other hand, if the Livingston Circuit Court's order had not been validly modified by the Dallas County District Court, then the Livingston Circuit Court retained jurisdiction to enforce its previous orders.

It is undisputed that the April 9, 2001, amended visitation order was valid when entered by the Livingston Circuit Court. Thus, that order was binding on the parties until it was "superceded by a custody modification order properly entered by a court [of competent] jurisdiction."¹² On May 25, 2001, the Dallas County District Court entered a temporary ex parte restraining order prohibiting Raymond from removing the children from Texas for any purpose. On July 19, 2001, the Dallas County District Court entered a temporary order modifying Raymond's visitation and contact with his children. Under KRS 403.520, this modification order can be recognized and

¹² Brighty, 883 S.W.2d at 496.

enforced by the courts of this Commonwealth only if Texas "assumed jurisdiction under statutory provisions substantially in accordance with KRS 403.420 to 403.620." That is to say, Texas must have satisfied one the jurisdictional requirements enumerated in KRS 403.420 prior to modifying the amended visitation order entered by the Livingston Circuit Court on April 9, 2001.

As noted above, under KRS 403.420(1)(a), a state has jurisdiction to make a child custody modification if the state is the "home state" of the child at the time of commencement of the proceeding. KRS 403.410(5) defines "home state" as the state in which the child lived with a parent for at least six consecutive months immediately preceding the time of commencement of the proceeding. Jonathon and Jamie clearly had been living with their mother in Texas for at least six consecutive months prior to the filing of Dietta's motion to modify visitation.¹³ Furthermore, there was no pending motion in Kentucky pertaining to custody when Dietta filed her motion in Texas. Thus, the Texas court properly assumed "home state" jurisdiction under the UCCJA when it decided to entertain Dietta's motion for modification of Raymond's visitation. Once Texas assumed jurisdiction and modified the visitation order,

¹³ The children had been living in Texas since September 2000. Dietta's motion to modify custody was filed in May 2001.

there no longer existed an enforceable Kentucky visitation order for Raymond to attempt to enforce through a motion for contempt. Accordingly, the Livingston Circuit Court lacked jurisdiction to enforce a visitation order that had been superceded by the order from the Dallas County District Court and was no longer valid. To hold otherwise would be contrary to the UCCJA, which was enacted primarily to prevent jurisdictional conflicts between the states in matters of child custody.¹⁴ While this issue is one of first impression in Kentucky, our holding is consistent with the results reached by the majority of jurisdictions that have addressed this issue.¹⁵

For the foregoing reasons, the order of the Livingston Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tod D. Megibow
Paducah, Kentucky

BRIEF FOR APPELLEE:

Anne M. Smith
Calvert City, Kentucky

¹⁴ See KRS 403.400(1)(a).

¹⁵ See e.g., Marquiss v. Marquiss, Wyo., 837 P.2d 25, 38 (1992); Levis v. Markee, Mo.App., 771 S.W.2d 928, 931 (1989); Commonwealth ex rel. Taylor v. Taylor, Pa.Super.Ct., 480 A.2d 1188, 1191 (1984); In re Marriage of Corrie, Was.App., 648 P.2d 501, 596 (1982); and Daily v. Dombroski, Ga., 297 S.E.2d 246 (1982). See also Danny R. Veilleux, Annotation, What Types of Proceedings or Determinations are Governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 78 A.L.R.4th 1028 §§ 14 and 15 (1990).