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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001994-MR

TERRY GOFF

APPELLANT

v. APPEAL FROM WARREN FAMILY COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 96-CI-00768

LAURA ANDREWS GOFF

APPELLEE

OPINION
REVERSING IN PART
AND AFFIRMING IN PART
** **

BEFORE: DYCHE and KNOFF, JUDGES; AND JOHN D. MILLER,
Special Judge.¹

KNOFF, JUDGE: Terry Goff appeals from an order of the Warren Family Court which set aside the existing custody, support, and visitation orders entered in its 1997 dissolution decree, and which dismissed his pending motions to modify custody. He

¹ Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

argues that the trial court had original jurisdiction at the time the decree was entered, and that the trial court retains continuing jurisdiction to address the pending motions to modify custody. We agree with Terry that the original orders were not void for lack of subject-matter jurisdiction. The trial court properly exercised jurisdiction at that time because the child's home state declined to exercise its jurisdiction. However, since the child has resided outside of Kentucky for more than six months, we find that Kentucky no longer has continuing jurisdiction over the motion to modify custody. Hence, we reverse in part, and affirm in part.

Terry Goff (Terry) and Laura Andrews (Laura) were married in Wilson County, Tennessee on June 17, 1996. On July 10, 1996, less than one month after the marriage, Terry filed a petition for annulment of the marriage in Warren Circuit Court.² In October of 1996, he filed an amended petition seeking dissolution of the marriage.

During the brief time that Terry and Laura were together, they purchased a house in Nashville, Tennessee. Upon their separation, Laura moved into the Nashville residence. Terry continued to reside in Warren County, Kentucky. On

² This case was originally assigned to Division Two of the Warren Circuit Court. It was later transferred to Division One, and then to Division Three after the establishment of Family Court in Warren County.

October 13, 1996, Laura gave birth to a daughter, Olivia Grace Sanderson Goff. Ten days earlier, Laura had filed an action for divorce in the circuit court for Davidson County, Tennessee. In addition to seeking dissolution of the marriage, Laura asked the Tennessee court to establish paternity of the child, and to award her custody and support. She also filed a motion to dismiss the Warren County action, asserting that Kentucky lacked jurisdiction over her and the child, and that Tennessee was the proper forum to resolve the issues relating to the divorce.

On January 17, 1997, the Tennessee court dismissed Laura's divorce action, citing the pending dissolution action in Kentucky. Thereafter, the parties informed the Warren Circuit Court that they had reached a settlement with regard to all issues in dispute in the dissolution action, including matters relating to the paternity, custody and support of Olivia. On March 3, 1997, the Warren Circuit Court entered an "Agreed Decree of Dissolution of Marriage." Among other things, the decree directed Terry to submit to a paternity test within 60 days from entry of the order.³ The decree also awarded custody of Olivia to Laura, ordered Terry to pay \$700.00 per month in child support, and awarded Terry "reasonable" visitation with Olivia as agreed by the parties.

³ Apparently, the paternity test confirmed that Terry is Olivia's father, as that issue never arose again.

However, the parties returned to court on a number of occasions to litigate various disputes regarding support and visitation. In April 1999, Laura filed a motion seeking past-due child support and to increase child support. By order entered on June 4, 1999, the court denied the motion to increase child support, but ordered Terry to pay an arrearage of \$2,800.00. In April of 2000, a dispute arose between the parties regarding visitation. On May 12, 2000, the trial court resolved the matter by entering a formal visitation order and schedule. In response to further disputes over visitation, the trial court entered a supplemental order on June 14, 2000.

There were additional motions filed over visitation disputes from May through October of 2000. In August of 2000, Terry filed a motion seeking joint custody of Olivia. He subsequently asked the court to order a joint custody evaluation. On October 30, 2000, Laura filed a motion to terminate Terry's visitation with Olivia, alleging that his behavior had subjected the child to emotional trauma. She also filed a motion to hold Terry in contempt after he failed to return Olivia from visitation as scheduled.

On November 28, 2000, Laura filed a petition in the Chancery Court for Williamson County, Tennessee, seeking to register the Kentucky decree and to modify the terms of custody and visitation. In conjunction with this action, Laura filed a

motion in the Warren County action to dismiss all pending custody and visitation motions and to transfer the case to Tennessee. She argued that Tennessee has become Olivia's home state, and as a result Kentucky no longer has jurisdiction to hear the custody or visitation matters. On February 16, 2001, the trial court entered an order denying Laura's motion. The court found that Kentucky has continuing jurisdiction over the custody matters, and that Kentucky has significant contacts with the child.

In a separate order, the trial court also ordered the parties to submit to a joint custody evaluation. Thereafter, the court found Laura in contempt due to her failure to keep appointments with the evaluator. In April of 2001, Terry filed an additional motion, seeking either joint or sole custody of Olivia.

Finally, in July of 2001, Laura filed a motion to set aside the original custody award and to dismiss Terry's motions to modify custody. She argued that because Olivia has resided in Tennessee since her birth, Kentucky was never her home state. Hence, she asserted that Kentucky never had subject-matter jurisdiction over the custody and visitation matters, and as a result the provisions of the decree relating to these matters were void.

In an order entered on September 7, 2001, the trial court agreed with Laura, and granted her motion to set aside the original custody decree. The court found that Kentucky had never been Olivia's home state, and concluded that none of the other jurisdictional prerequisites set out had been met. Consequently, the court concluded that it never had original jurisdiction to decide the custody, support, and visitation issues, and all prior orders entered by the Warren Circuit Court on these matters were void. This appeal followed.

The parties agree that the jurisdictional issue is governed by the Uniform Child Custody Jurisdiction Act (UCCJA),⁴ and the federal Parental Kidnapping Protection Act (PKPA).⁵ The purposes of the UCCJA are set out in KRS 403.400, as follows:

"(1) The general purposes of [the UCCJA] are to:

(a) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in the state which can best decide the case in the interest of the child;

(c) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection

⁴ KRS 403.400 *et seq.*

⁵ 28 U.S.C. § 1738A.

and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(f) Avoid relitigation of custody decisions of other states in this state insofar as feasible;

(g) Facilitate the enforcement of custody decrees of other states;

(h) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(i) Make uniform the laws of those states which enact it.

To these ends, the UCCJA sets forth certain prerequisites necessary for courts of this state to have jurisdiction in child custody cases. The jurisdictional rules are set forth in KRS 403.420(1) and provide, in relevant part, as follows:

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.

Similarly, under the Federal counterpart to the UCCJA, the Parental Kidnapping Protection Act (PKPA),⁶ a Kentucky court has jurisdiction to make a child custody determination 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

⁶ 28 U.S.C.A. 1738A.

home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relations;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

In addition, the PKPA contains a provision that explicitly preempts conflicting state law, pursuant to the Supremacy Clause of Article VI of the United States Constitution. However, the PKPA does not, of itself, grant

continuing jurisdiction to a state; the state must be able to assert continuing jurisdiction under its own state law.⁷ The UCCJA does not specifically grant continuing jurisdiction, referring instead to the question of whether the child has a "significant connection" to this state. The statute, in other words, places a limit on jurisdiction but does not grant it unless state law authorizes it.

Terry relies heavily on Markham v. Markham,⁸ in which the former Court of Appeals upheld a modification-of-custody order even though the mother and her children never resided in Kentucky. Because the mother and the children voluntarily entered an appearance in the Kentucky dissolution proceeding, the Court held that Kentucky properly exercised jurisdiction over the custody matter.⁹ Based on Markham, Terry contends that Laura's appearance in the Warren County action and her litigation of the child custody, support, and visitation matters were sufficient to invoke the court's original jurisdiction, and hence its continuing jurisdiction

The trial court distinguished Markham by noting that it was rendered before the adoption of the UCCJA. The court

⁷ Reeves v. Reeves, Ky. App., 41 S.W.3d 866, 867 (2001).

⁸ Ky., 461 S.W.2d 545 (1970).

⁹ Id. at 546.

held that Turley v. Griffin¹⁰ is the applicable authority. Turley v. Griffin was decided four years after Markham and applied the Child Custody Jurisdiction Act, the predecessor to the UCCJA. The jurisdictional requirements of the Child Custody Jurisdiction Act were substantially similar to the UCCJA. The former Court of Appeals held that once a child resides outside Kentucky for more than six months, Kentucky ceases to be the child's home state, and no longer has jurisdiction to modify custody.¹¹ Based on Turley and the cases which follow it, the trial court concluded that Markham is no longer viable.

We agree with the trial court that the Markham opinion is of questionable value in light of the adoption of the UCCJA and the PKPA. Moreover, jurisdiction of the subject matter cannot be conferred by waiver or consent.¹² 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.¹³

However, we disagree with the trial court that it lacked original jurisdiction to enter the custody decree in

¹⁰ Ky., 508 S.W.2d 764 (1974).

¹¹ Id. at 766.

¹² Commonwealth, Dept. of Highways v. Berryman, Ky., 363 S.W.2d 525, 526 (1962); Johnson v. Bishop, Ky. App., 587 S.W.2d 284, 285 (1979); CR 12.08.

¹³ Berryman at 526-27.

1997. Because Olivia was born in Tennessee and has lived there all her life, Kentucky clearly is not her home state. Nonetheless, physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine her custody.¹⁴ KRS 403.420(1)(d) and 28 U.S.C. § 1728A(c)(2)(D) permit a Kentucky court to exercise jurisdiction when it appears that no other state would have jurisdiction or another state has declined jurisdiction.

The trial court found these sections do not apply because the Williamson County, Tennessee court is actively asserting jurisdiction over the child in this matter. But while it is true that a Tennessee court is currently asserting jurisdiction over Laura's motion to modify custody, the controlling question is whether a Tennessee court was asserting jurisdiction when the original decree was entered in 1997. To the contrary, the Davidson County, Tennessee court declined to exercise jurisdiction over the custody matter in 1997, dismissing Laura's dissolution action in favor of the Kentucky action. Consequently, Kentucky had original jurisdiction under KRS 403.420(1)(d) to enter custody and support orders as part of the dissolution action.¹⁵ Therefore, the original custody,

¹⁴ KRS 403.420(3).

¹⁵ See also Gullett v. Gullett, Ky. App., 992 S.W.2d 866 (1999). In Gullett, the mother moved to Ohio prior to the birth of the

support and visitation orders entered by the Warren Circuit Court remain valid and enforceable.

However, our analysis does not end here. There is a significant distinction between the court's enforcement jurisdiction and its modification jurisdiction. Kentucky retains jurisdiction to enforce an original custody decree until it is superceded by a custody modification order properly entered by a court with jurisdiction.¹⁶ As demonstrated in this action, the parties returned to Warren County on a number of occasions to litigate various visitation and support disputes.

In contrast, the "home state" requirements of the UCCJA and the PKPA apply to a determination of the court's jurisdiction to modify an existing custody decree. Under the PKPA, a court which has made a child custody or visitation determination has continuing jurisdiction if the child resides

child, but the child was born after the Kentucky petition for dissolution was filed. Since an unborn child cannot have a "home state" for purposes of the UCCJA or the PKPA, and since no other state, including Ohio, could have exercised jurisdiction at the time the petition was filed, this Court held that Kentucky properly exercised jurisdiction over the custody matter under KRS 403.420(1)(d). The fact that Ohio became the child's home state upon its birth did not divest Kentucky of that jurisdiction. *Id.* at 870. In the present case, both Kentucky and Tennessee could have exercised jurisdiction over the custody matters, as both the Kentucky and Tennessee actions were pending when Olivia was born. But the Tennessee court expressly declined to exercise its jurisdiction in favor of the Kentucky action.

¹⁶ Brighty v. Brighty, Ky., 833 S.W.2d 494, 496 (1994).

in the state, or if the state asserting continuing jurisdiction has been the child's home state within the last six months, and one of the parties continues to live within the state.¹⁷ If this minimum threshold requirement is not met, then it would appear to be improper for a state to continue to assert jurisdiction.¹⁸

In this case, Olivia has resided outside of Kentucky for more than six months. Hence, Kentucky is not her home state. Under Turley v. Griffin and its progeny, the state which has the "most significant connection" to the child needs to be the one to assert jurisdiction over matters affecting custody and visitation.¹⁹ The fact that a Kentucky court has experience with a particular case is not sufficient reason, under the PKPA, to assert continuing jurisdiction. Furthermore, at the time the trial court entered its order, a Williamson County, Tennessee court had invoked its jurisdiction over the custody-modification matter.²⁰ Clearly, Tennessee is the only state at this time which can legitimately assert jurisdiction over this matter, as

¹⁷ 28 U.S.C § 1738A(d).

¹⁸ Reeves v. Reeves, 41 S.W.3d at 868, *citing* Torres v. Torres, 62 Cal. App. 4th 1367 (1998); Shockley v. Shockley, 611 A.2d 508 (Del. 1992).

¹⁹ Turley, 508 S.W.2d at 766.

²⁰ In an order entered on May 4, 2001, (and filed with the trial court on May 9), the Williamson County, Tennessee court found that it had jurisdiction under Tennessee's version of the UCCJA to modify the Kentucky custody order.

it is now the home state of both Laura and Olivia.²¹ Any further matters concerning Olivia's custody should be litigated there. Therefore, the trial court properly dismissed Terry's pending motion to modify custody.

Accordingly, the order of the Warren Family Court is reversed insofar as it set aside the original custody order in this case. The custody, support, and visitation order entered by the court on March 3, 1997, and the subsequent orders by the court enforcing that order are hereby reinstated. The order of the Warren Circuit Court is affirmed insofar as it dismissed the pending motions to modify custody.

DYCHE, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS WITH RESULT.

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²¹ Reeves, 41 S.W.3d at 868.