

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000324-MR

ROBERT F. NIENHOUSE

APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 03-CI-00217

DONNA K. NIENHOUSE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Robert F. Nienhouse has appealed from the Spencer Circuit Court's order denying his petition to enforce the portion of a decree relating to sibling visitation entered by a court in Cook County, Illinois. We affirm.

Robert and Donna K. Nienhouse were married in Cook County, Illinois on December 9, 1989. During their marriage, Robert and Donna adopted a son, Carlton, born December 15, 1982. Catherine, a child of the marriage, was born on December 10, 1990. In 1995, Donna filed a Petition for Dissolution of Marriage in the domestic relations division of the circuit court

of Cook County, Illinois. On March 19, 1997, another daughter, Caroline, was born. By an order entered shortly after her birth, Robert was declared not to be Caroline's father. However, Robert sought custody of all three children.

On October 7, 2002, the Illinois court entered an order following a pre-trial conference providing as follows:

Caroline and Catherine shall be together Sundays from 1:00 p.m. to 5:00 p.m. at Norma Alencastro's home. Donna shall drop off Caroline at 1:00 p.m. and pick her up at 5:00 p.m. Robert shall drop off Catherine at 12:45 p.m. and pick her up at 5:15 p.m. Neither parent shall enter the home and they shall both leave Ms. Alencastro's immediately after pick up and drop off.

This order appears to have been drafted by Donna's counsel. The following February, Robert and Donna entered into a trial stipulation and agreed order, which provided that Robert would have sole custody of Catherine and that visitation between Catherine and Donna was reserved. The agreed order also provided for a course in mother and daughter conjoint counseling for Donna and Catherine. A trial on the contested issues was held on April 4, 2003. During that hearing, Donna acknowledged the agreement regarding visitation between Caroline and Catherine, and her attorney indicated that the agreement was going to become a part of the final judgment.

On May 16, 2003, the Illinois court entered a Judgment for Dissolution of Marriage. Pursuant to the earlier

stipulation, Robert was awarded sole custody of Catherine. Also incorporated into the judgment was the October 7, 2002, order providing for sibling visitation on Sundays between Caroline and Catherine. In the judgment, the Illinois court indicated that it retained jurisdiction to enforce the provisions of the judgment.

Later that May, Robert filed a petition to hold Donna in indirect civil contempt for her violation of the judgment of dissolution based upon the lack of sibling visitation. On August 1, 2003, the Illinois court entered an order indicating that Donna and Caroline had relocated to Kentucky and ordered Jacalyn Birnbaum, the court-appointed attorney for Catherine, to assess conditions for sibling visitation in Louisville on August 8th. The Illinois court then indicated that it was taking the issue of its jurisdiction over Caroline under advisement and that it would rule on that issue on August 20th. Several motions, including a Petition for Rule to Show Cause, were continued to the same date. The certified record before this Court does not appear to contain an order specifically related to the August 20, 2003, court date. However, later orders reflect that Donna was ordered to appear before the Illinois court on October 2, 2003, to show cause why she should not be held in contempt for failing to comply with the order regarding sibling visitation. Donna failed to appear. In early November,

the Illinois court ordered Donna to personally appear before it on November 6th in relation to the rule to show cause. A process server attempted to serve Donna in Kentucky with a copy of the order and of the draft order that would be entered if she failed to appear.

When Donna again failed to appear, the Illinois court entered an order on November 6, 2003, appointing Donna's sister, Sharyn Jo Malone, as Guardian ad litem for Caroline and granted her possession of Caroline to effectuate the terms of sibling visitation. Donna was given the option of purging this sanction and reclaiming possession of Caroline by appearing before the court on November 10th and presenting sufficient evidence to demonstrate her future compliance with the terms of sibling visitation. A body attachment order was issued on November 7th. On November 10th, the Illinois court entered another order finding that Donna had failed to facilitate sibling visitation. The Illinois court again appointed Sharyn Jo Malone as Guardian ad litem for Caroline, and granted her possession of Caroline from that date until November 12th to effectuate sibling visitation.

The action in Kentucky commenced with the November 7, 2003, filing of Robert's petition for enforcement of the Illinois court's orders concerning possession of Caroline as well as his motion for immediate possession of Caroline. The

same day, Donna filed a domestic violence petition against Robert for events occurring on November 3rd, when she claimed a man hired by Robert attempted to remove Caroline from her possession. The circuit court entered an emergency protection order, restraining Robert from any communication with Donna and ordering him to remain at least two thousand feet away from her. A hearing was held on the EPO on November 10th, at which time there was much discussion as to whether the sibling visitation order was contrary to Kentucky's public policy. The circuit court then extended the EPO for two more weeks, and scheduled a hearing date for December 1st. Donna's petition was later dismissed and a subsequent temporary injunction was dissolved. Donna eventually filed a response to Robert's petition, in which she indicated that she had requested and had attempted to make different arrangements for visitation between Catherine and Caroline. Donna also indicated that she hoped to facilitate conjoint counseling with Catherine in Kentucky.

Counsel for Robert appeared before the Illinois court on November 12th, and which time the judge indicated that she had received a telephone call from the circuit court's clerk, who indicated that Judge Stewart decided to not call her to discuss the case. Furthermore, counsel stated that the Kentucky court was questioning Illinois's jurisdiction regarding sibling visitation. The same day, the Illinois court entered an order

stating that it was retaining original jurisdiction over the cause, the parties and the minor children for purposes of enforcing its orders, specifically sibling visitation. A status conference was then scheduled for December 12th. The record does not contain any further Illinois court documents.

On January 22, 2004, the circuit court entered an order refusing to enforce the custody/visitation order of the Illinois court, although all other provision of the Decree of Dissolution were to remain in full force and effect. Specifically, the circuit court stated that, "[Donna's] minor child, Caroline, is not a party to this action, is not a child of the marriage of the parties, is a resident of the Commonwealth of Kentucky and [Donna] (mother of Caroline) objects to visitation." This appeal followed.

On appeal, Robert argues that the circuit court erred in relying upon its four findings to refuse to enforce the Illinois court's order and in failing to communicate with the Illinois court. On the other hand, Donna argues that the Illinois court lacked jurisdiction because the Illinois statute providing for sibling visitation was declared unconstitutional in 2002. Because the Illinois court lacked jurisdiction, neither Kentucky's version of the Uniform Child Custody

Jurisdiction Act (hereinafter "UCCJA")¹ nor the Parental Kidnapping Act (hereinafter "PKPA")² would apply to require enforcement of the visitation order. Finally, Donna argues that Robert did not have standing to petition the circuit court for sibling visitation; rather, the petition should have been filed in Catherine's name.

Under Kentucky's version of the UCCJA in effect at the applicable time, KRS 403.540(1) provided:

A certified copy of a custody decree of another state may be filed in the office of the clerk of any Circuit Court of this state. The clerk shall treat the decree in the same manner as the custody decree of the state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.

However, the controlling federal PKPA more specifically provides as follows:

- (a) The appropriate authorities of every State shall enforce according to its terms . . . any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.
- (b) . . .
- (c) A child custody or visitation determination made by a court of a State is consistent with the provision of this section only if-

¹ KRS 403.400, et seq.

² 28 U.S.C.A. § 1738A.

- (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 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 relationships;
 - (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 the child, a sibling, or parent of the child 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 or 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.

(d) 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.

At the outset, we agree with Robert that the circuit court's findings in relation to the denial of the petition were misplaced. But the ruling was nonetheless correct. First, we agree with Donna that neither the UCCJA nor the PKPA applies

because the Illinois court did not have jurisdiction over Caroline, who was not a child of the marriage. Had 750 ILCS 5/607, the Illinois statute that provided for grandparent, great-grandparent and sibling visitation, not been declared unconstitutional,³ Illinois could arguably have had jurisdiction over Caroline regarding sibling visitation. However, that statute was declared unconstitutional prior to both the entry of the agreed order providing for sibling visitation and the decree of dissolution, which incorporated the agreed order. This is not to say that Illinois is precluded from enforcing the agreed order and the portion of the decree incorporating that order, as Donna stated in her brief. We are merely holding that Kentucky is not required by either the version of the UCCJA in effect at the time or the PKPA to enforce sibling visitation or the order requiring Donna to turn over Caroline to a Guardian ad litem.

We also agree with Donna that Robert did not have standing to petition the circuit court for enforcement of the sibling visitation order under the PKPA or the UCCJA. Robert does not meet the definition of "contestant" under either the PKPA or Kentucky's version of the UCCJA. The PKPA defines a "contestant" as "a person, including a parent or grandparent,

³ Wickham v. Byrne, 199 Ill.2d 309, 769 N.E.2d 1, 263 Ill.Dec. 799 (2002); Schweigert v. Schweigert, 201 Ill.2d 52, 772 N.E.2d 299, 265 Ill.Dec. 191 (2002).

who claims a right to custody or visitation of a child."⁴ Similarly, the UCCJA defines "contestant" in KRS 403.410(1) as "a person, including a parent, who claims a right to custody or visitation rights with respect to a child." Robert is not Caroline's parent, and the agreed order specifically provided for visitation between half-siblings, Catherine and Caroline, without providing any visitation for Robert. Therefore, he cannot claim a right to visitation and has no standing to seek enforcement of such an order. Rather, the petition should properly have been brought in Catherine's name because she is the only person, other than Caroline, with a true interest in the enforcement of sibling visitation. Finally, we agree with Donna's argument that Robert's reliance upon Stevens v. Stevens⁵ and Harvey v. McGuire⁶ is misplaced. Neither case involved the enforcement of an out-of-state court order, while both involved the financial support of a child of the parties, in which the parent filing the action would have an interest.

For the foregoing reasons, the order of the Spencer Circuit Court declining to enforce the sibling visitation order of Cook County, Illinois is affirmed.

ALL CONCUR.

⁴ 28 U.S.C.A. § 1738A(b)(2).

⁵ 798 S.W.2d 136 (Ky. 1990).

⁶ 635 S.W.2d 8 (Ky.App. 1982).

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