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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001939-ME

JENNIFER M. MATTINGLY
and CHARLES T. MATTINGLY APPELLANTS

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 14-CI-00139

LISA HATFIELD APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, TAYLOR AND L. THOMPSON, JUDGES.

COMBS, JUDGE: Appellants, Jennifer Mattingly and Charles Mattingly, appeal from orders of the Nelson Circuit Court denying their motions to dismiss on jurisdictional grounds and holding them in contempt for failure to comply with grandparent visitation. After our review, we affirm.

Appellants, Jennifer Mattingly and Charles Mattingly (Parents), are the married biological parents of a minor child. Appellee, Lisa Hatfield (Grandmother), is the child's maternal grandmother. In March 2014, Grandmother petitioned Nelson Circuit Court for visitation. At that time, all parties were residents of Nelson County, Kentucky.[1] By order entered on September 12, 2014, the circuit court determined that visitation was in the child's best interest and granted Grandmother's petition. Parents appealed. By opinion rendered May 15, 2015, this Court affirmed. *J.M. v. L.H.*, 2014-CA-001608-ME, 2015 WL 2330454 (Ky. App. May 15, 2015).

Thereafter, the court referred the parties to mediation due to Parents' intention to relocate to Florida. On December 29, 2015, a handwritten supplemental judgment was filed with the court regarding modification of the visitation schedule. That judgment was reduced to a formal agreed supplemental judgment entered on February 25, 2016.

On or about February 24, 2016, Parents filed a petition in the Leon County, Florida Circuit Court, to domesticate an out-of-state custody decree (the

[1] Kentucky Revised Statute (KRS) 405.021 governs grandparent visitation and provides at subsection (2) that "[t]he action shall be brought in Circuit Court in the county in which the child resides."

agreed supplemental judgment). Their request that the Florida court assume jurisdiction was denied.[2]

The First Contempt Proceeding

On September 7, 2016, Grandmother filed a motion for a rule to show cause why Parents should not be held in contempt for failure to abide by the agreed supplemental judgment. On September 20, 2016, Parents filed a motion to dismiss "for lack of jurisdiction. As grounds . . . they and the minor child . . . have resided in . . . Florida since January 1, 2016. [Parents] no longer have any significant connections to Kentucky and substantial evidence is no longer available here." A calendar order entered on September 21, 2016, reflects as follows: "motion to dismiss denied. Resps. cannot move out-of-state & Court automatically loses jurisdiction." Hearing was scheduled for October 26, 2016.

On October 11, 2016, Parents filed another motion to dismiss on ground that Kentucky is an inconvenient forum and sought to reschedule the hearing.

On October 14, 2016, Parents filed a notice of appeal to this Court from "the denial of our request for dismissal of this case for lack of

[2] By Order of June 22, 2017, "nunc pro tunc March 28, 2017," the Florida court denied Parents' Petition. The court held that Kentucky has continuing exclusive jurisdiction over the minor child, having "properly established initial child custody jurisdiction over the child in the above-styled case and the Agreed Supplemental Judgment is a lawful order from the State of Kentucky. Petitioners agree that original jurisdiction was lawfully established in Kentucky."

jurisdiction which was entered on September 21, 2016."

By order entered on October 21, 2016, the court denied Parents' motion to dismiss, having found that their "arguments of inconvenient forum based on KRS 403.834 unpersuasive. KRS 403.834 is a part of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and applies to custody disputes. No authority was shown as to its … applicability to the grandparent visitation questions at hand." The court also denied Parents' request to continue the hearing. That order recites that it was "interlocutory in nature."

On October 26, 2016, the court heard Grandmother's contempt motion. All parties were present and represented by counsel. By order entered November 1, 2016, the court found Parents in willful contempt and ordered them to serve 179 days in jail, to be probated on condition that they comply with all court orders. The court awarded Grandmother attorney's fees and judgment for monies lost due to Parents' failure to comply with visitation. That order recited that "[t]his is a final Order set forth on record and there is no just reason for delay." Parents did not appeal from the November 1, 2016 order.

On February 24, 2017, this Court entered an order in *Mattingly v. Hatfield*, No. 2016-CA-001547-MR, dismissing Parents' appeal from the September 21, 2016 order, because they failed to respond to a show cause order why it should not be dismissed as interlocutory.

The Second Contempt Proceeding

On June 26, 2017, Grandmother filed another motion to hold Parents in contempt. That motion is the subject of this appeal. On July 5, 2017, both parents were personally served rules by the Leon County, Florida, Sheriff's Office.

On October 10, 2017, Parents filed three motions: (1) to dismiss on grounds that the court lacked personal jurisdiction; (2) for a determination that Kentucky no longer has jurisdiction or, alternatively, that Florida is the home state and the appropriate forum and venue; and (3) to "reassign" the hearing set for October 26, 2017.

On October 18, 2017, Grandmother filed a response that Parents' motions amounted to "déjà vu," arguing, *inter alia*, that they should be summarily denied based upon the doctrine of law of the case and the principle of *res judicata*.

By order entered on October 24, 2017, the court once again determined that the UCCJEA is inapplicable and asserted its continuing jurisdiction to enforce its orders, and denying Parents' motions to dismiss and to reschedule the hearing:

> On October 10, 2017 [Parents] filed a motion which requested a finding that Kentucky no longer has jurisdiction, or in the alternative, that the appropriate venue and forum is in Florida . . . .
>
> This Court finds that UCCJEA is inapplicable to grandparent visitation actions. . . .

[T]he UCCJEA applies to a "person acting as a parent." KRS 403.800(13) **Notably absent from that definition is a grandparent.** In addition, this Court is unaware of any facts that would allow Lisa to qualify as a "person acting as a parent." [Emphasis added.]

Second, the UCCJEA describes how a child custody determination must be registered in each state. In doing so, the UCCJEA requires the movant to provide "the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation…" *See* KRS 403.850(1)(c) and Florida Statute 61.528(1)(c). Once again, [Grandmother] is unable to satisfy the definition of a "person acting as a parent."

The same issue was also addressed … in *Grandparent-Grandchild Contact of Pamela Stewart vs. Evans,* 136 P.3d 524 (Mt. 2006). . . .

> The UCCJEA is directed toward the custody of or visitation with children by parents or the persons acting as their parents; that is, the UCCJEA is concerned with children and their caregivers. **There is no indication that the Act's interstate jurisdiction provisions were intended to be available to grandparents seeking contact with their grandchildren who were being parented by others.**

Id. at 527 (emphasis added). *See also Moorcroft v. Stuart,* 2015 Tenn. App. LEXIS 527 (Tennessee UCCJEA does not apply to a Kentucky grandparent visitation order).

Finally, this Court believes that it has continuing jurisdiction to enforce its Orders, especially one in which the respondents have already been determined to have willfully violated same and then sentenced to probation on the condition of no further violations.

That Order recited that it was interlocutory in nature. On October 26, 2017, the court conducted a hearing on the contempt. Grandmother was present with counsel. Parents did not attend, but they were represented by counsel.

On October 31, 2017, the Nelson Circuit Court entered findings of fact, conclusions of law, and judgment. It determined that "it has been established by clear and convincing evidence that [Parents] have willfully disobeyed this Court's Order." The circuit court ordered that Parents serve 179 days in Nelson County Jail or that they purge themselves by allowing Grandmother to make up the visitation. In addition, the court ordered payment of compensation to Grandmother related to the denial of summer vacation and attorney's fees. That Judgment stated that it "is final and appealable with no just reason for delay."

On November 7, 2017, Parents served a motion pursuant to CR[3] 54.02 to the make the interlocutory judgment entered on October 24, 2017, final and appealable.[4]

[3] Kentucky Civil Rules of Procedure.

[4] Notwithstanding, the October 24, 2017, interlocutory Order became final and appealable when the October 31, 2017, final judgment was entered by virtue of Kentucky Rule of Civil Procedure (CR) 54.02(2), which provides that:

> When the remaining claim or claims in a multiple claim action are disposed of by judgment, **that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders** and judgments determining claims which are not specifically disposed of in such final judgment.

On November 15, 2017, the court entered a judgment making the October 24, 2017, interlocutory order final and appealable, "the court having found and concluded that said order is the court's final decision on the claims presented and that there is no just reason for delay."

On November 22, 2017, parents filed a notice of appeal to this Court from the October 31, 2017, and November 15, 2017, orders of the Nelson Circuit Court.

Grandparent visitation is governed by KRS 405.021, which provides in relevant part that "[t]he Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child **and issue any necessary orders to enforce the decree** if it determines that it is in the best interest of the child to do so." (Emphasis added).

In the case before us, there is no issue that the Nelson Circuit Court's Order of September 12, 2014, granting Grandmother visitation and the February 25, 2016, supplemental agreed judgment are valid orders.

On appeal, Parents contend that: (1) the circuit court erred when it exercised personal and subject matter jurisdiction over Parents, who were out-of-state residents, and (2) the court erred when it exercised personal and subject

(emphasis added). *See Lennon v. Kemp,* 2015-CA-001273-MR, 2018 WL 1033315, at *4 (Ky. App. Feb. 23, 2018) (Holding that a decision regarding recusal interlocutory until final judgment entered, when it becomes merged with the final judgment and then is appealable).

matter jurisdiction over Parents in a contempt action without proper service by the Secretary of State.

First, we address two arguments in Appellee's brief. Grandmother (Appellee) submits that Appellants' brief should be dismissed pursuant to CR 76.12(8)[5] for failure to conform to the requirements of CR 76.12 -- or that we should only review that brief for manifest injustice. That decision is a matter wholly assigned to our discretion. *Roberts v. Bucci*, 218 S.W.3d 395 (Ky. App. 2007). We deem such sanctions inappropriate in this case. *See Ellis v. Ellis*, 420 S.W.3d 528 (Ky. App. 2014).

Grandmother also contends that the circuit court's previous ruling that it retained jurisdiction constitutes the law of this case. However, the law-of-the-case doctrine does not apply because the "second appeal" was not decided on the merits. It was dismissed because Parents failed to respond to this Court's show cause order. *Gossett v. Commonwealth*, 441 S.W.2d 117, 118 (Ky. 1969) (Law of case "applies only to rulings made by an appellate court . . . as to such matters and such only as were ruled on by the appellate court."). However, the related doctrine of *res judicata* "precludes further litigation of issues that were decided on the

[5] CR 76.12(8)(a) provides that "[a] brief may be stricken for failure to comply with any substantial requirement of this Rule 76.12."

merits in a final judgment." *Slone v. R & S Mining, Inc.*, 74 S.W.3d 259, 261 (Ky. 2002).

> Res judicata consists of both claim preclusion and issue preclusion. The doctrine of claim preclusion requires identity of the parties, identity of the causes of action, and a resolution of the action on the merits. Issue preclusion bars parties from relitigating any issue actually litigated and finally decided in an earlier action. . . . [R]es judicata is basic to our legal system and stands for the principle that once the rights of the parties have been finally determined, litigation should end."

Jellinick v. Capitol Indem. Corp., 210 S.W.3d 168, 171-72 (Ky. App. 2006) (footnotes and internal quotation marks omitted).

In the first contempt proceeding, the Nelson Circuit Court determined that that it retained jurisdiction in its September 16, 2016, calendar order denying Parents' motion to dismiss for lack of jurisdiction. By order entered October 21, 2016, the circuit court denied Parents' motion to dismiss on grounds of inconvenient forum under KRS 403.834 because it did not believe that the UCCJEA applied to the "grandparent visitation issues at hand." Those orders became merged with the November 1, 2016, final and appealable order.[6] Parents did not appeal from the November 1, 2016 order. The issues at hand then are the same issues now before us. The doctrine of *res judicata* precludes their re-litigation.

[6] See footnote 5 above.

Parents also argue that they should have been served by the Secretary of State pursuant to Kentucky's Long Arm statute, KRS 454.210. However, as Grandmother correctly notes in her brief, Parents did not raise the issue of service under KRS 454.210 in the circuit court. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

We affirm.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Eric S. Grinnell Richmond, Kentucky	Alan Kent Akers, Sr. Bardstown, Kentucky