

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JUNE 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-000443-DG

DATE 7-7-05 ELIAG SCOTT+DC.

RAYMOND SCOTT

APPELLANT

V. ON REVIEW FROM COURT OF APPEALS
2001-CA-001999-MR
LIVINGSTON CIRCUIT COURT NO. 00-CI-00054

DIETTA SCOTT (NOW SUMMERS)

APPELLEE

OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

The marriage of Raymond Scott and Dietta Summers was dissolved by the Livingston Circuit Court, and shortly thereafter Dietta, who was designated as “the primary residential care giver” of the parties’ two minor children, moved to Texas with the children and her new husband. Raymond has continued to reside in Kentucky. After living in Texas for approximately eight months, Dietta obtained an order from a Texas court modifying the visitation ordered by the Livingston Circuit Court. Raymond contends that the Livingston Circuit Court had exclusive jurisdiction to modify its custody decree. Because the Livingston Circuit Court “relinquished” its jurisdiction in favor of the Texas court, we hold that the Texas court had jurisdiction to modify visitation.

II. BACKGROUND

Raymond Scott and Dietta Summers were married in McCracken County, Kentucky, on December 13, 1993. Two children were born of the marriage: Jonathon,

who was born on September 11, 1994, and Jamie, who was born on September 12, 1996. The parties separated on March 27, 2000, and Dietta filed a petition for dissolution of marriage on March 29, 2000 in the Livingston Circuit Court. On August 2, 2000, the Livingston Circuit Court dissolved the parties' marriage and approved the parties' settlement agreement which awarded the parties joint custody of the children with Dietta "being the primary residential care giver."

On August 18, 2000, Dietta remarried and shortly thereafter moved with the children to Addison, Texas, where her new husband resided. Because of the children's relocation to Texas, the children would not be able to visit with Raymond as provided in the settlement agreement, and thus Dietta filed a motion in Livingston Circuit Court on September 5, 2000, to modify visitation. Dietta's motion eventually resulted in an agreed order being entered by the Livingston Circuit Court on April 9, 2001,¹ modifying visitation so that Raymond would have the children with him for most of their spring break, summer break, Thanksgiving break, and Christmas break.

On May 25, 2001, Dietta filed a petition in the District Court of Dallas County, Texas ("Texas District Court") seeking a temporary order modifying the Livingston Circuit Court's custody order and a temporary *ex parte* restraining order prohibiting Raymond from removing the children beyond the jurisdiction of the court for any purpose. Dietta alleged that the Texas District Court had jurisdiction to make an initial child custody determination and to modify a child custody determination. She also alleged that the Texas District Court had "temporary emergency jurisdiction to make a

¹ This was an "Amended Agreed Order for Modified Visitation" that amended an "Agreed Order for Modified Visitation" that was entered on March 7, 2001. The amended order provided for visitation by Dietta with the children while they were staying with Raymond during the summer break.

child-custody determination.” On the same day, the Texas District Court, exercising temporary emergency jurisdiction based on affidavits filed with the petition, issued “temporary ex parte restraining orders” preventing Raymond from removing the children “beyond the jurisdiction of the Court.”

Subsequently, on June 20, 2001, the Texas District Court held a hearing on Dietta’s petition to modify the Livingston Circuit Court’s custody order. Based on the hearing, the court entered “Temporary Orders” on July 19, 2001, finding that the children had been residents of Texas for eight months prior to the filing of the petition by Dietta, and therefore, the court concluded that it had jurisdiction under the Texas version of the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”).² The court then modified custody by severely limiting Raymond’s visitation with the children. The Texas District Court suspended all summer visitation granted by the Livingston Circuit Court, required that visitation be supervised by Dietta’s mother or by some other person chosen by Dietta, restricted visitation to times selected by Dietta, and required that “[a]ll telephone calls or contact of any kind shall be monitored by [Dietta] or her agent.”

Upon Dietta’s failure to honor the parties’ agreed order that modified visitation, Raymond filed a motion in Livingston Circuit Court on July 10, 2001 seeking to have Dietta show cause why she should not be held in contempt of court. On August 14, 2001, however, the Livingston Circuit Court noted that Dietta and the children had

² The Court of Appeals mistakenly stated that the Texas District Court “exercised temporary emergency jurisdiction under Texas’ version of the Uniform Child Custody Jurisdiction Act (UCCJA).” Texas adopted the UCCJEA, effective September 1, 1999, and it was thus applicable to Dietta’s petition to modify custody. 1999 Tex. Sess. Law Serv. Ch. 34 § 2. Kentucky, however, did not adopt the UCCJEA until 2004, effective July 13, 2004. See 2004 Ky. Acts ch. 133. Accordingly, the UCCJA was applicable to the custody proceedings in Kentucky.

resided in Texas for six months or more and that under KRS 403.420 Kentucky was no longer the home state of Dietta or the children. Solely for this reason, the Livingston Circuit Court relinquished custody jurisdiction to the Texas District Court and accordingly denied the motion.

Raymond appealed the Livingston Circuit Court's ruling to the Court of Appeals, which held that the Texas District Court "properly assumed 'home state' jurisdiction under the UCCJA when it decided to entertain Dietta's motion for modification of Raymond's visitation." It then reasoned that "[o]nce Texas assumed jurisdiction and modified the visitation order, there no longer existed an enforceable Kentucky visitation order for Raymond to attempt to enforce through a motion for contempt." The Court of Appeals, therefore, affirmed the circuit court's ruling. We accepted discretionary review.

III. ANALYSIS

Raymond disputes the holding of the Court of Appeals that the Livingston Circuit Court was divested of jurisdiction to enforce its visitation order. We agree for two reasons.

First, the Texas District Court's assumption of emergency jurisdiction was for the purpose of entering a temporary order to protect the children while they were in Texas. The assumption of emergency jurisdiction, however, did not include jurisdiction to modify the Livingston Circuit Court's custody order.³ Accordingly, Kentucky was not

³ Saavedra v. Schmidt, 96 S.W.3d 533, 548-549 (Tex.App.-Austin 2002) ("We reiterate that the trial court's assumption of temporary emergency jurisdiction does not include jurisdiction to modify the California court's child custody determination. A court's exercise of temporary emergency jurisdiction is temporary in nature and may not be used as a vehicle to attain modification jurisdiction for an ongoing, indefinite period of time. . . . The temporary orders must remain in effect for only as long as necessary to ensure that the emergency situation will be resolved and the safety of the children will be protected." (citations omitted)); Tex. Fam.Code Ann. § 152.204 ("(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the

necessarily divested of jurisdiction by the issuance of the temporary emergency order by the Texas Court.

Second, this case does not involve initial jurisdiction, but rather it involves modification jurisdiction, the applicable rules of which are different.⁴ Although under the UCCJA, "home state" jurisdiction would generally triumph over a state with "significant connection" jurisdiction in a contest to decide initial custody,⁵ a state that grants initial custody maintains exclusive continuing jurisdiction to modify its custody award so long as it still has "significant connection" jurisdiction.⁶ "Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and

child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. . . .").

⁴ See Brigitte M. Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA, 14 FAM.L.Q. 203, 204 (1981) ("The [UCCJA] replaces multiple and concurrent jurisdiction with strictly limited jurisdiction. Initial jurisdiction and modification jurisdiction are treated differently.").

⁵ 15 LOUISE GRAHAM & JAMES KELLER, KENTUCKY PRACTICE, DOMESTIC RELATIONS LAW § 14.28 (2d ed. West Group 1997).

⁶ KRS 403.530(1), repealed by 2004 Ky. Acts. ch 133, § 46 ("If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with KRS 403.420 to 403.620 or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction."); Brigitte M. Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA, 14 FAM.L.Q. 203, 214 (1981); Fuerstenberg v. Fuerstenberg, 591 N.W.2d 798, 805 (S.D. 1999) ("Under the UCCJA, the state that granted the initial custody decree maintains exclusive continuing jurisdiction over later custody questions until all the litigants have moved from the state or the initial decree state declines to further exercise jurisdiction.").

where one parent or another contestant continues to reside.”⁷ In other words, “[o]nly when the child and all parties have moved away is deference to another’s state’s continuing jurisdiction no longer required.”⁸ Kentucky was the home state of the children when the Livingston Circuit Court rendered the initial custody decree in August 2000, and Raymond continues to reside in Kentucky. For this reason, Kentucky maintained “significant connection” jurisdiction⁹ and exclusive continuing jurisdiction to modify visitation. The Texas District Court, therefore, was without jurisdiction to modify the Livingston Circuit Court’s visitation unless the Livingston Circuit Court declined its jurisdiction to modify its custody decree. This conclusion, however, does not end our inquiry.

Both the UCCJA and the Parental Kidnapping Prevention Act (“PPKA”) allows a state with continuing exclusive jurisdiction to decline to exercise its modification jurisdiction.¹⁰ And here, because the children had lived in Texas since September 2000 and Texas had become the home state of the children, the Livingston Circuit Court, although it was not required to do so, declined its jurisdiction by “relinquish[ing] jurisdiction in the above styled action regarding said children to the District Court of Dallas County, Texas.” By relinquishing jurisdiction, the Livingston Circuit Court allowed

⁷ Brigitte M. Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA, 14 FAM.L.Q. 203, 215 (1981).

⁸ Id.

⁹ KRS 403.420(1)(b), repealed by 2004 Ky. Acts. ch 133, § 46 (“(1) 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: (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. . . .”).

¹⁰ KRS 403.530(1), repealed by 2004 Ky. Acts. ch 133, § 46; 28 U.S.C.A. § 1738A(f)(2).

the Texas District Court to assume jurisdiction, and, in effect, the prior orders of the Texas District Court were validated by the Livingston Circuit Court's decline of jurisdiction. Accordingly, we hold that the Texas District Court's order modifying visitation is valid and enforceable.

Finally, we would note that Kentucky, like Texas, has now adopted the UCCJEA and it should provide better guidance to trial courts and lawyers deciding continuing jurisdiction issues. It should lead to clearer results in cases similar to the present case.

IV. CONCLUSION

Because the Livingston Circuit Court declined to exercise its jurisdiction to modify the custody decree, the Texas District Court had jurisdiction to modify the visitation schedule and the Livingston Circuit Court was not required to decide the issues presented in Raymond Scott's show cause motion. We, therefore, affirm the Court of Appeals.

Lambert, C.J.; Cooper, Graves, Johnstone, Scott and Wintersheimer, JJ., concur.

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