[Cite as *Burrowbridge v. Burrowbridge*, 2005-Ohio-6303.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KARLA K. BURROWBRIDGE nka Karla K. Walton Plaintiff-Appellee -vs- STEPHEN BURROWBRIDGE Defendant-Appellant	: : : : : : : : : : :	JUDGES: Hon. John F. Boggins, P.J. Hon. William B. Hoffman, J. Hon. Julie A. Edwards, J. Case No. 2005CA00049 <u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2004DR00044
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	NOVEMBER 21, 2005

APPEARANCES:

For Plaintiff-Appellee
Karla K. Walton:
SETH W. ARKOW
300 Bank One Tower
101 Central Plaza, South
Canton, OH 44702

For Defendant-Appellant
Stephen L. Burrowbridge:
WENDY J. ROCKENFELDER
5502 Market Avenue, North, Suite B
Canton, OH 44721

Boggins, P.J.

{¶1} This is an appeal from a sentence issued by the Stark County Court of Common Pleas, Domestic Relations Division, for failure to pay child support.

STATEMENT OF THE FACTS AND CASE

{¶2} The parties to this cause were married on September 7, 1974. Three children were born thereof: Heather, emancipated, date of birth, December 7, 1975, Megan, date of birth, November 2, 1977, and Rachel, date of birth January 24, 1979.

{¶3} On August 29, 1994, by an agreed entry, custody of Rachel was granted to one, Cindy Vidro, without support by Appellant, Case JU86677.

{¶4} A dissolution action resulting in termination of the marriage occurred on July 21, 1995.

{¶5} The Court in such dissolution action was not provided a Uniform Child Custody Jurisdiction Affidavit and Cindy Vidro was not joined as a party.

{¶6} The separation agreement approved by the court included support for Rachel, in addition to Megan.

{¶7} A contempt finding and suspended sentence for non-payment of child support was issued in 1998.

{¶8} In 2004, the Stark County Child Support Enforcement Agency (CSEA) requested imposition of the 1998 suspended sentence.

{¶9} The motion of CSEA was granted on February 2, 2005.

{¶10} The sole Assignment of Error is:

ASSIGNMENTS OF ERROR

{¶11} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN IMPOSING SENTENCE FOR APPELLANT'S FAILURE TO PAY CHILD SUPPORT BECAUSE THE AWARD WAS VOID FOR FAILURE OF SUBJECT MATTER JURISDICTION."

{¶12} The statute intended to be referenced and since repealed which was in effect during these proceedings was R.C. §3109.27, not R.C. §3109.04 as Appellant states. It provided in part:

{¶13} "(A) Each party in a parenting proceeding, in the party's first pleading or in an affidavit attached to that pleading, shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the name and present address of each person with whom the child has lived during that period. In this pleading or affidavit, each party also shall include all of the following information:

{¶14} "(1) Whether the party has participated as a party, a witness, or in any other capacity in any other litigation, in this or any other state, that concerned the allocation, between the parents of the same child, of parental rights and responsibilities for the care of the child and the designation of the residential parent and legal custodian of the child or that otherwise concerned the custody of the same child;

{¶15} "(2) Whether the party has information of any parenting proceeding concerning the child pending in a court of this or any other state;"

{¶16} "(3) Whether the party knows of any person who is not a party to the proceeding and has physical custody of the child or claims to be a parent of the child who is designated the residential parent and legal custodian of the child or to have parenting time

rights with respect to the child or to be a person other than a parent of the child who has custody or visitation rights with respect to the child;"

{¶17} Revised Code §3127.53 is of consequence also and it states:

{¶18} "A motion or other request for relief made in a parenting or child custody proceeding or to enforce a parenting or child custody determination that was commenced before the effective date of this section is governed by the law in effect at the time the motion or other request was made.

{¶19} In reviewing the sole Assignment of Error, we find that Appellant relies on R.C. §3109.27 and the interpretation by the Ohio Supreme Court in *Pegan v. Crawmer* (1996), 76 Ohio St.3d 97 which was addressed by this court on other grounds. Such case cited the court's prior ruling in *Pasqualone v. Pasqualone* (1980), 63 Ohio St.2d 96. The *Pasqualone* case also involved significant issues as to the Full Faith and Credit Clause of the United States Constitution as the custody dispute involved Ohio and Illinois.

{¶20} Appellee's brief is based primarily on the contractual nature of the separation agreement between the parties, the lack of appeal previously and absence of a Civ.R. 60(B) motion.

{¶21} As the question is one of subject matter jurisdiction, we find Appellee's arguments, while factual, to be ineffective in regard to such jurisdiction question.

{¶22} There is no doubt that the Ohio Supreme Court in *Pegan v. Crawmer*, supra, stated specifically:

{¶23} "Each party in parentage proceeding which included custody and visitation determinations was required to file child custody affidavit. R.C. §3109.27(A).

{¶24} "Requirements that parent bringing action for custody inform court at outset of proceedings of any knowledge he has of custody proceedings pending in other jurisdictions is mandatory jurisdictional requirement of such action. R.C. §3109.27."

{¶25} A closer examination of such case reveals certain similarities to the case sub judice which affects the conclusion we reach as to this appeal.

{¶26} In *Pegan*, initially a paternity action, the court had issued certain orders as to support to be paid by Crawmer for their child, Candi.

{¶27} A subsequent change of custody motion was filed by him without the child custody affidavit of R.C. §3109.27.

{¶28} Notwithstanding the mandatory jurisdiction aspect of such statute, the court found that, without the file on the paternity action, it could not determine if the required affidavit was filed therein. Because of this, the Supreme Court ruled that the court's continuing jurisdiction arising out of the paternity action controlled even though the affidavit was not filed with the change of custody motion. It was incidentally filed with a second change of custody motion, however.

{¶29} This continuing jurisdiction statue of R.C. §3111.16 was applied.

{¶30} In the instant case, the similarity is that we are not presented with knowledge of whether the R.C. §3109.27 affidavit was filed in the custody action which involved Cindy Vidro as to Rachel.

{¶31} We therefore must look to the obligation to provide child support and the continuing jurisdiction applicable to the domestic relations court authority in non-paternity actions.

{¶32} In *Re: Adoption of McDermitt* (1980), 63 Ohio St.2d 301, stated:

{¶33} "Initially, it is noted that appellant, as a parent of a minor, has the common-law duty of support as well as a duty of support decreed by court. The judicial decree of support simply incorporates the common-law duty of support."

{¶34} R.C. §3105.65 provides in part:

{¶35} "The court has full power to enforce its decree and retains jurisdiction to modify all matters pertaining to the allocation of parental rights and responsibilities for the care of the children, to the designation f [sic.] a residential parent and legal custodian of the children, to child support, to parenting time of parents with children, and to visitation for persons who are not the children's parents."

{¶36} We therefore determine that the trial court had continuing jurisdiction to enforce its prior order of contempt in the manner it determined which jurisdiction arose out of Case No. JU 86677 and continued thereafter.

{¶37} This cause is affirmed at Appellant's costs.

By: Boggins, P.J.

Edwards, J., concurred separately

Hoffman, J., concurred separately

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JUDGES

EDWARDS, J., CONCURRING OPINION

{¶38} I concur with the majority as to the disposition of this case but not the analysis. My analysis follows.

{¶39} Appellant argues that an order in a dissolution action which orders a father to pay child support to the mother and physical custodian of those children is invalid if the order granting legal custody of the children to the mother is void because of the failure to file a UCCJA in the dissolution action. I do not agree with that argument. A parent has a common law duty to support his or her children which is not dependent on a valid custody order. "The judicial decree of support simply incorporates the common-law duty of support." *In Re: Adoption of McDermitt* (1980), 63 Ohio St.2d 301, 305 408 N.E.2d 680. This common law duty of support is owed to a person who has the physical custody of the child or children as long as that physical custody is not in contravention of the rights of anyone who may have legal custody of the child.

{¶40} Based on the majority's analysis in the case sub judice, Cindy Vidro is presumed to still have valid legal custody of Rachel. Appellant has provided no evidence to the trial court that the physical placement of Rachel with her mother is without consent of Cindy Vidro. No evidence was presented to the trial court that anyone has valid legal custody of Megan.

{¶41} One of the rationales behind the UCCJA requirement is to discourage a person who does not have legal custody of a child from taking that child to another jurisdiction and establishing custody. A court, before proceeding in a custody matter, must, to the best of its ability, establish that no other court has jurisdiction over the child. The UCCJA requirement was enacted as another way to protect the child. A parent who owes

a duty of support to a child cannot avoid that duty by asserting that the custody order regarding that child is not supported by a UCCJA and therefore invalid. The best interests of the child require that the child must be supported by the party or parties who have that common law duty.

{¶42} Neither R.C. 3109.05 nor 2151.231 says that a court can only order support to someone who has valid legal custody. R.C. 3109.05(A)(1) states that in a dissolution of marriage the court may order either or both parents to support their children. R.C. 2151.231 states that the person with whom a child resides may bring an action for child support without regard to the marital status of the child's parents. See my dissent in Tuscarawas County *CSEA v. Sanders*, Tusc. App. No. 2003AP030020, 2003-Ohio-5624.

{¶43} Initially, I found appellant's argument persuasive. It seemed logical that a valid custody order should exist before child support is ordered to be paid to the child's custodian. But when I considered the rationale behind the UCCJA requirement and considered that family law statutes should be applied to serve the best interests of children, I concluded that the failure to file a statutorily required UCCJA does not negate a parent's common law duty to support a child.

{¶44} In addition to my preceding analysis of the issue sub judice, I specifically disagree with the analysis of the majority in two ways. First, I do not agree with the majority's reliance on *Pegan v. Crawmer*, 76 Ohio St.3d 97, 1996-Ohio-419, 666 N.E.2d 1091. In the case sub judice, we do not know if a UCCJA was filed in the case which granted custody of Rachel to Cindy Vidro. But the support order being challenged in the case sub judice is payable to the mother of the child, not Cindy Vidro. So, I do not understand why the majority finds that a valid custody order to Cindy Vidro would justify a

child support order to the mother of the child. Secondly, the analysis provided by the majority goes only to Rachel, not to Megan. I cannot discern how the majority upholds the validity of the child support order regarding Megan.

{¶45} I, therefore, concur in the disposition but not the analysis of this case by the majority.

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Judge Julie A. Edwards

JAE/mec

Hoffman, J., concurring

{¶46} I agree with Judge Edwards, reliance on *Pegan v. Crawmer* to support the trial court's decision is misplaced. *Pegan* is distinguishable in that it began as a paternity action and is unique because of the creation of the Domestic Relations Division of the Licking County Court of Common Pleas in 1991. R.C. 2301.03(S) gave that newly created court exclusive jurisdiction over post-decree proceedings in parentage actions. The *Pegan* court's justification for continuing jurisdiction relies on R.C. 3111.13(C). That section is specific to judgments determining the existence or nonexistence of the parent and child relationship. No such determination was made in the case sub judice. In the instant matter, the prior juvenile case wherein Cindy Vidro was given legal custody is not subject to continuing jurisdiction by the domestic relations division as a result of R.C. 3111.13(C). As noted by Judge Edwards, the support order being challenged in the case sub judice is payable to the mother of the child, not Cindy Vidro. The order emanates from a separate case number in the Domestic Relations Division, not the same juvenile case number wherein Vidro was granted custody.

{¶47} I agree with Judge Edwards the failure to file the UCCJA in the dissolution action does not preclude enforcement of a child support order therein. Although the validity of the custody determination made therein may be subject to collateral attack, the child support order is independently supportable under a parent's common law duty to support his or her child. [1]

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JUDGE WILLIAM B. HOFFMAN

[1] I find reconsideration of *CSEA v. Sanders*, and R.C. 2151.231, unnecessary to determine this case as appellant has not challenged the right of the trial court to issue the child support order on the basis appellee is not the legal custodian. Appellant has not asserted a violation of R.C. 3119.07(C), as was raised in *Sanders*.

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KARLA K. BURROWBRIDGE nka KARLA K. WALTON	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
STEPHEN BURROWBRIDGE	:	
Defendant-Appellant	:	Case No. 2005CA00049

For the reasons stated in our accompanying Memorandum-Opinion, the Stark County Court of Common Pleas, Domestic Relations Division, is affirmed. Costs assessed to Appellant.

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JUDGES