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CAROLYN C. GEORGE, PLAINTIFF VS. GUY R. NEAL,
DEFENDANT, Franklin County Branch, Civil Action-Law No.
F.R. 1995 - 515

Subject Matter Jurisdiction - Custody

Plaintiff brought action for custody against defendant for their minor child. Defendant raised a preliminary objection to the jurisdiction of the court. The court held that under the Uniform Child Custody Jurisdiction Act it could not modify an existing custody decree from another state unless it was shown that the court which rendered that decree no longer had jurisdiction or had declined to assume jurisdiction. A Maryland court had previously entered a custody order regarding the same subject matter. The court stated that it could not find that the Maryland court did not have or had declined to assert jurisdiction. The preliminary objection was sustained and the case dismissed.

1. When another state has made a custody decree, a court of this Commonwealth shall not modify that decree unless the plaintiff can show that the court which rendered the decree does not have, or has declined jurisdiction. 23 Pa.C.S.A. § 5355.
2. The UCCJA is intended to create continuing jurisdiction in the initial decree state and to avoid forum shopping and re-litigation of issues.
3. Plaintiff must demonstrate that initial decree state does not have jurisdiction or has declined to assert jurisdiction for a court of this Commonwealth to properly assert jurisdiction.

Carol L. Van Horn, Esq., Attorney for Plaintiff
Kimberly S. Gray, Esq., Attorney for Defendant

OPINION

KAYE, J., November 15, 1995

In the instant proceeding, Carolyn C. George ("plaintiff") seeks an award against Guy R. Neal ("defendant") for custody of their child, Brian Walker Cox Neal, born January 19, 1993. The custody complaint was filed in this matter on June 9, 1995, and preliminary objections raising jurisdictional questions were filed on September 28, 1995. The preliminary objections were briefed and argued at the November, 1995 argument court. Disposition of the preliminary objections is being expedited due to the nature of the underlying subject matter, and because a custody hearing is currently scheduled to begin on December 14, 1995.

No evidence has been presented by either party, so the decision in this case must be based solely upon the pleadings filed, and upon certain facts stipulated to by the parties.¹

I. Stipulated facts:

Plaintiff, Carolyn C. George, and defendant, Guy R. Neal, are the natural parents of Brian Walker Cox Neal, born January 19, 1993. The parties previously litigated the issue of the child's custody in the Circuit Court for Frederick County, Maryland which entered an order on September 6, 1994, granting sole legal and primary physical custody to defendant, and what we would term partial physical custody to plaintiff.

For the first eight (8) months of the child's life, he resided in Frederick County, Maryland with both parties. For the next four (4) months he resided in Frederick County with his father only. The following twelve (12) month period the child and his father lived in Carroll County, Maryland. On December 11, 1994, defendant and the child moved to Waynesboro, Franklin County, Pennsylvania. Slightly less than six (6) months after the move to Franklin County, plaintiff initiated the instant custody action.

After the institution of this action, defendant returned with the child to live in Frederick County, Maryland. Since leaving the residence of the defendant in August, 1993 when this child was eight (8) months old, plaintiff has returned to Adams County, Pennsylvania, to resume living with her husband and their twelve (12) year old son. Plaintiff and her husband were married throughout the relationship of plaintiff and defendant.

II. Discussion

Pennsylvania has enacted the Uniform Child Custody Jurisdiction Act ("UCCJA"), 23 Pa.C.S.A. § 5341 *et seq.*, which is the governing law in this case. Particularly pertinent is section

¹ Numerous factual matters are referenced to in the parties' briefs which are *de hors* the record, and will not be considered in the decision herein.

5355 of the UCCJA which controls the modification of a custody decree of another state, and provides:

(a) General rule. If a court of another state has made a custody decree, a court of this Commonwealth shall not modify that decree unless:

(1) it appears to the court of this Commonwealth that the court which rendered the decree does not have jurisdiction under jurisdictional prerequisites substantially in accordance with this subchapter or has declined to assume jurisdiction to modify the decree; and

(2) the court of this Commonwealth has jurisdiction.

23 Pa.C.S.A. § 5355.

This section of the UCCJA

"requires that the state of the initial custody decree have exclusive continuing jurisdiction of custody matters involving the original parties and children."

Barndt v. Barndt, 397 Pa.Super. 321,346, 580 A.2d 320, 332 (1990) (Cercone, J., concurring); See also *Commonwealth ex rel. Zaubi v. Zaubi*, 275 Pa.Super. 294, 418 A.2d 729 *aff'd* 492 Pa. 183, 423 A.2d 333 (1980).

"The intention of the Pa. UCCJA in creating continuing jurisdiction in the initial decree state was to achieve greater stability of custody decrees, and to avoid forum shopping by insuring that the courts of only *one* state should have responsibility for the custody of a particular child."

Barndt at 327, 580 A.2d at 323.

Plaintiff in this case has presented extensive argument designed to show that this Court has jurisdiction as the "home state" under the definition of that term in the UCCJA. However, even assuming arguendo that plaintiff's assertion is correct, in some situations the trial court may determine that the home state is not the most appropriate forum. *Merman v. Merman*, 412 Pa.Super. 247, 603 A.2d 201 (1992). Section 5355 shows a recognition by the legislature that jurisdiction may simultaneously lie in another jurisdiction. When child custody jurisdiction exists

in two states, only one state can properly adjudicate the custody issue. *Id.*

An analysis of section 5355 of the UCCJA will disclose that for this Court to modify the Frederick County, Maryland custody order, there would have to be a showing that 1/ the Frederick County Court does not now have jurisdiction over this matter, or the Frederick County Court has declined to exercise jurisdiction and 2/ this Court has jurisdiction. So far as the first prong of this statutory provision is concerned, there is no evidence to indicate that the Frederick County Court has declined to exercise jurisdiction in this matter. Thus, for this Court to have statutory authority to consider possible modification of the custody order, plaintiff would have to demonstrate that the Frederick County Court does not now have jurisdiction over the custody issue.

We once again emphasize that we have a very limited basis for making this determination, as we have only the pleadings and the limited stipulation of facts entered into by the parties, as providing the basis for this decision. From this, it is possible to discern that the instant action was filed slightly less than six (6) months after defendant left Maryland, and came to Franklin County.

We are unable to find from this fact alone that the Court in Frederick County is deprived of jurisdiction in this matter. Whether a state has jurisdiction to entertain a custody action is set forth in section 5344 of the UCCJA, which affects both original custody actions and those brought to modify an existing custody order. One of the sections for jurisdiction contained therein provides the following basis for jurisdiction:

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(2) It is in the best interest of the child that a court of this Commonwealth assume jurisdiction because:

(i) the child and his parents, or the child and at least one contestant, have a

significant connection with this Commonwealth; and

(ii) there is available in this Commonwealth substantial evidence concerning the present or future care, protection, training and personal relationships of the child;...

23 Pa.C.S.A. §5344(c).

Applying the foregoing language to Maryland, instead of to Pennsylvania, it would appear that a court in Maryland could exercise jurisdiction in this matter. The order whose modification is sought was entered on September 6, 1994 in Frederick County, Maryland, and the instant action was filed on June 9, 1995. The complaint herein alleges that the child resided either in Frederick or Carroll County, Maryland from his birth on January 19, 1993 until December, 1994, and that he then moved with his father to Franklin County, Pennsylvania. Plaintiff alleges that she resides in Adams County, Pennsylvania. The Maryland order was entered following litigation of the child custody issue, and we gather from that Court's findings that it heard expert testimony, and had before it some type of study of the parties' homes, in addition to other testimonial evidence. While a custody decision is based upon the facts currently existing, nonetheless it is apparent from the Court's findings that a substantial amount of evidence regarding the child would be available in that jurisdiction, and that both defendant and the child have a significant connection with the State of Maryland, and Frederick County specifically. Thus, we are not able to find that jurisdiction would not lie in Frederick County, Maryland.

Finally, we must keep in mind that the UCCJA contains a preface which consists of a number of purposes for the passage of the Act, and which specifically instructs that the sections of the Act are to be construed to promote the general purposes contained therein. These stated purposes include the following:

(a) *Purposes.* - The general purposes of this subchapter are to:

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

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(6) Avoid relitigation of custody decisions of other states in this Commonwealth insofar as feasible.

(7) Facilitate the enforcements of custody decrees of other states.

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23 Pa.C.S.A. §5342.

We think these objectives would be obtained optimally by maintaining this litigation in the jurisdiction wherein the original custody decree was entered. Obviously, if that Court were for some reason to decline to exercise jurisdiction, we would have to reconsider this determination, and would not hesitate to do so. However, it would appear to make little sense for this Court to hear evidence *ab initio* as would obviously be the case if we were to exercise jurisdiction at this time. As this opinion is written, the child is less than three years of age, and the issue of his custody has now already been raised twice in two jurisdictions - and been fully litigated once, without any suggestion that either parent is abusive, neglectful, or otherwise unfit to exercise his custody.

It is our belief that if the issue has to be litigated, the child at least deserves to have it done in the jurisdiction where the Court already possesses the evidentiary background and experience with

the first litigation and the benefits that derive from that experience.

Based upon the foregoing, we will enter an order which sustains defendant's preliminary objections.

ORDER OF COURT

NOW, November 15, 1995, defendant's preliminary objections raising a question of jurisdiction are SUSTAINED, and the complaint for custody is DISMISSED.

The order of court which fixed a time and date for hearing in this matter is hereby vacated.