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Franklin County Legal Journal

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**Preston-John Holton, Plaintiff/Petitioner v.
Kishickatiqua Lone, Defendant/Respondent**

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action - Law No. 2015-4558 in Custody

HOLDING: Despite previous child custody actions in Virginia and the Tonawanda Seneca Nation, Pennsylvania has jurisdiction to hear the custody matter of P.H.

HEADNOTES

Child Custody Proceedings – Jurisdiction

1. In order to have the power to determine the right to custody as between litigants, a court must have subject matter jurisdiction over the person of the child. Barndt v. Barndt, 580 A.2d 320, 325 (Pa. Super. 1990); In re Sagan, 396 A.2d 450, 452 (Pa. Super. 1978); Commonwealth ex rel. Graham v. Graham, 80 A.2d 829, 832 (Pa. 1951).
2. A court has the inherent power to determine on its own motion whether it has the jurisdiction to decide the case before it. Barndt v. Barndt, 580 A.2d 320, 325 (Pa. Super. 1990).
3. The determination of jurisdiction in a child custody proceeding is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”). 23 Pa.C.S. § 5401 et. seq.

Indian Child Welfare Act

4. In a child custody proceeding that pertains to a Native American child, the Indian Child Welfare Act, 25 U.S.C. 1901 et. seq., is given primacy. 23 Pa.C.S. § 5404(a).
5. A child custody proceeding that would be governed by the Indian Child Welfare Act means and includes: (i) foster care placement, (2) termination of parental rights, (iii) preadoptive placement, and (iv) adoptive placement. 25 U.S.C. § 1903(1).

Jurisdiction – Interstate Issues – Tribal Nation

6. Section 5404 of the UCCJEA requires a court to treat a tribe as if it were a state for the purpose of applying the jurisdiction provisions of the UCCJEA. 23 Pa.C.S. § 5404(b).
7. When a tribe has made a custody determination, a court need only recognize and enforce such a determination if it was made under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA. 23 Pa.C.S. § 5404(c).

Uniform Child Custody Jurisdiction Enforcement Act

8. Section 5426 prohibits a court from exercising jurisdiction if, at the time of commencement, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with the UCCJEA. 23 Pa.C.S. § 5426.
9. Commencement is defined by the UCCJEA as “the filing of the first pleading in a proceeding.” 23 Pa.C.S. § 5402.
10. Communication between courts is required when it is determined that a proceeding has been commenced in another state. 23 Pa.C.S. § 5426(b); 23 Pa.C.S. § 5426, Uniform Law Comment.
11. A Pennsylvania court may not modify a custody determination unless it has jurisdiction

to make an initial determination under section 5421(a)(1) or (2) and either the court of the other state determines it no longer has exclusive, continuing jurisdiction or another court is more convenient or a court determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state. 23 Pa.C.S. § 5423.

12. A court has jurisdiction to make an initial determination when the state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from the state but a parent continues to live in the state. 23 Pa.C.S. § 5421(a)(1).

13. Home state is defined as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months before the commencement of a child custody proceeding.” 23 Pa.C.S. § 5401.

Appearances:

Preston-John Holton, *pro se*

Kishickatigqua Lone, *pro se*

OPINION

Before Shank, J.

I. OVERVIEW

Before the Court is the question of Pennsylvania's jurisdiction, which was raised on the Court's own motion. For the reasons that follow, this Court finds Pennsylvania, and thus this Court, has jurisdiction to hear the custody matter of P.H. (2/6/2012 DOB).

II. PROCEDURAL BACKGROUND

On December 16, 2015, Preston-John Holton (“Father”) filed of record in Franklin County, Pennsylvania a custody order, dated December 11, 2015, (“Virginia Custody Order”) from Fairfax County, Virginia. No further docket activity occurred until August 25, 2020 when Father filed an *Emergency Petition for Contempt, Return of Child, and Modification* (“Emergency Petition”). Attached to the *Emergency Petition* as *Exhibit A* was a letter, dated December 10, 2015, (“Tonawanda Letter”) from Chief Darwin Hill addressed to Honorable Janine M. Saxe in Fairfax County stating the Tonawanda Seneca Nation had granted custody of P.H. to Kishickatigqua Lone (“Mother”).¹ On August 26, 2020, Father filed a *Petition for Special Relief*. On August 28, 2020, this Court ordered Father to file an amended petition setting forth the legal basis of this Court's jurisdiction based on significant jurisdictional questions the Court found from reviewing the record. The *August 28, 2020 Order* also directed Mother

¹ The Tonawanda Letter was also attached as *Exhibit A* to Father's *Amended Emergency Petition for Contempt, Return of Child and Modification*, filed September 8, 2020.

to file a verified Answer after receiving the Amended Petition. Father filed an *Amended Emergency Petition for Contempt, Return of Child and Modification* (“Amended Petition”) on September 8, 2020. Mother failed to file an Answer within the deadline set by the *August 28, 2020 Order*.² This Court set a hearing on jurisdiction for November 9, 2020. Both parties appeared and counsel for the Tonawanda Seneca Nation observed via telephone. The matter is now ripe for decision.

III. FACTUAL FINDINGS

P.H. was born on February 6, 2012 in Montgomery County, Pennsylvania. *Hearing Exhibit C*. Mother and P.H. are both citizens of the Tonawanda Seneca Nation. *Hearing Exhibits A and B*. Mother currently lives on the tribal territory of the Tonawanda Seneca Nation. Father currently lives in Franklin County, Pennsylvania. Per the *Virginia Custody Order*, Father exercises primary physical custody of P.H. and Mother exercises periods of partial physical custody annually from July 1 to August 20, Christmas Day through New Year’s Day, and Easter weekend. *Virginia Custody Order*.

Mother petitioned the Fairfax County Juvenile & Domestic Relations Court (“Virginia Court”) for a modification which ultimately resulted in the issuance of the *Virginia Custody Order*. The date mother petitioned the Virginia Court is not certain to this Court but Mother moved to the tribal territory of the Tonawanda Seneca Nation at some point between petitioning for modification and the issuance of the December 11, 2015 *Virginia Custody Order*. Mother failed to appear at the custody trial held by the Virginia Court. The Virginia Court received the Tonawanda Letter, dated December 10, 2015, prior to the issuance of its order. Father resided in Pennsylvania beginning in December 2015. Both parties have resided in their respective residences at least since December 10, 2015.

P.H. commenced summer custody with Mother on July 19, 2020. *Amended Petition* at ¶ 16. Father attempted to retrieve P.H. on August 20, 2020. *Id.* ¶ 17. Mother was not home and did not contact Father regarding how they should exchange custody. *Id.* As of date of filing, Mother still has not returned P.H. to Father.

IV. ANALYSIS

In order to have the power to determine the right to custody as between litigants, a court must have subject matter jurisdiction over the person of the child. Barndt v. Barndt, 580 A.2d 320, 325

² As of date of filing, Mother has yet to file an Answer.

(Pa. Super. 1990); In re Sagan, 396 A.2d 450, 452 (Pa. Super. 1978); Commonwealth ex rel. Graham v. Graham, 80 A.2d 829, 832 (Pa. 1951). A Court has the inherent power to determine on its own motion whether it has the jurisdiction to decide the case before it. Barndt, 580 A.2d at 325. The determination of jurisdiction is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”). 23 Pa.C.S. § 5401 et. seq.

As an initial matter, this Court recognizes that P.H. is a citizen of a Native American tribe, the Tonawanda Seneca Nation. The UCCJEA expressly details the application of the statute to Native American tribes in Section 5404. First, we must assess whether this is a child custody proceeding governed by the Indian Child Welfare Act, 25 U.S.C. 1901 et. seq., because the Indian Child Welfare Act is given primacy in those proceedings. 23 Pa.C.S. § 5404(a). A child custody proceeding that would be governed by the Indian Child Welfare Act means and includes: (i) foster care placement, (2) termination of parental rights, (iii) preadoptive placement, and (iv) adoptive placement. 25 U.S.C. § 1903(1). The matter before this Court is not a child custody proceeding governed by the Indian Child Welfare Act as it is not included in the above definition and is a custody matter between the two biological parents of P.H. Section 5404 of the UCCJEA requires a court to treat a tribe as if it were a state for the purpose of applying the jurisdiction provisions of the UCCJEA. 23 Pa.C.S. § 5404(b). Lastly, when a tribe has made a custody determination, a court need only recognize and enforce such a determination if it was made under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA. 23 Pa.C.S. § 5404(c).

Here, we have a tribal custody determination as shown in the Tonawanda Letter. The letter states: “In conformity of Nation law, the Council of Chiefs has granted custody to Ms. Lone. The child, therefore, will reside with Ms. Lone.” *Tonawanda Letter*. This Court did not receive any other evidence from Mother regarding the custody determination of the tribe. The Tonawanda Letter provides some reasoning for their determination of jurisdiction, in that neither party resided in Virginia at the time of the December 11, 2015 trial for modification. Father’s testimony and information contained in the *Virginia Custody Order* provides additional information. While it is unclear to this Court when the proceeding regarding modification in Virginia was initiated based on the evidence provided, Mother testified that she moved

to tribal territory after petitioning for modification in Virginia and began a new custody proceeding before the Council of Chiefs.

This Court finds that the Council of Chiefs determination was not made in substantial conformity with the UCCJEA. Section 5426 prohibits a court from exercising jurisdiction if, at the time of commencement, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with the UCCJEA. 23 Pa.C.S. § 5426. Commencement is defined by the UCCJEA as “the filing of the first pleading in a proceeding.” 23 Pa.C.S. § 5402. Under the facts of this case, the Tonawanda Seneca Nation would have been prevented from exercising jurisdiction because Mother had commenced a custody action in Virginia by filing a petition for modification in the state that had continuing, exclusive jurisdiction. The Uniform Law Comment states this section retains the “first in time” rule of the predecessor statute. 23 Pa.C.S. § 5426, Uniform Law Comment. The Virginia proceeding was first in time; therefore, the Tonawanda Seneca Nation is unable to exercise jurisdiction unless the first in time proceeding has been terminated or is stayed by the court of the other state. The tribe, if acting within substantial conformity with the UCCJEA, should have stayed their proceeding until communicating with the Virginia court. Communication between courts is required when it is determined that a proceeding has been commenced in another state. 23 Pa.C.S. § 5426(b); 23 Pa.C.S. § 5426, Uniform Law Comment. Chief Darwin Hill states in the Tonawanda Letter that he is aware of the proceeding before Judge Saxe of the Virginia state court. *Tonawanda Letter*. His communication with Judge Saxe was not to facilitate a discussion on jurisdiction; rather it stated that the Council of Chiefs had made a determination of jurisdiction and custody. Based on the testimony and evidence presented, it appears to this Court that the jurisdictional standards of the UCCJEA were not applied when the Council of Chiefs made their custody determination. Thus, this Court is not required to recognize or enforce their custody determination.

This Court must now turn to jurisdictional provisions of the UCCJEA to determine whether Pennsylvania can assert jurisdiction, keeping in mind that Virginia maintains exclusive, continuing jurisdiction. Initially, this Court notes there has been a period of five years since Virginia has entered an order in the matter of custody of P.H. Currently there are no ongoing

proceedings in any other jurisdiction.

The issue of interstate jurisdiction to modify a custody determination is governed by 23 Pa.C.S. § 5423. A Pennsylvania court may not modify a custody determination unless it has jurisdiction to make an initial determination under section 5421(a) (1) or (2) **and** either the court of the other state determines it no longer has exclusive, continuing jurisdiction or another court is more convenient **or** a court determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state. 23 Pa.C.S. § 5423 (emphasis added).

A court has jurisdiction to make an initial determination when the state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from the state but a parent continues to live in the state. 23 Pa.C.S. § 5421(a)(1).³ Home state is defined as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months before the commencement of a child custody proceeding.” 23 Pa.C.S. § 5401. Here, Pennsylvania is the home state of P.H. P.H. has lived in Pennsylvania with Father since December 2015. *Amended Petition* at ¶ 6. P.H. has solely been with Father in Pennsylvania for the last two years, with the exception of his summer visitation with Mother on July 19, 2020. *Id.* ¶ 22. P.H. has been on tribal territory since that time. While P.H. is temporarily absent from Pennsylvania, Father continues to live in Pennsylvania and therefore Pennsylvania maintains home state jurisdiction, as P.H. has lived in Pennsylvania for at least six consecutive months prior to the commencement of this action by Father's *Emergency Petition*, filed August 25, 2020. This Court, therefore, meets the first prong of the test prescribed in § 5423 to establish jurisdiction to modify a custody determination.

Next the Court must meet § 5423(1) or (2) in order meet the second prong to establish jurisdiction to modify a custody determination. Under § 5423(1) the court of the other state must determine it no longer has exclusive, continuing jurisdiction or that another court would be a more convenient forum. Virginia has not relinquished its exclusive, continuing jurisdiction nor has it determined that another court would be a more convenient

³ This Court will not discuss § 5421(a)(2), which is simply referred to as significant connection jurisdiction, because this Court is able to establish initial child custody jurisdiction under § 5421(a) (1), home state jurisdiction, and therefore does not need to proceed to (a)(2).

forum. This requires our analysis to proceed to § 5423(2), which states a court must make a determination that the child and the child's parents do not presently reside in the other state, in this case Virginia. Based on testimony provided by both parties, Father and the child live in Pennsylvania and Mother lives on the tribal territory of the Tonawanda Seneca Nation. Neither the child nor the parents presently reside in Virginia. By satisfying § 5423(2), this Court meets the second prong of the test to establish jurisdiction to modify a custody determination.

Because Pennsylvania has jurisdiction to make an initial custody determination under § 5421 and the child and the child's parents no longer live in Virginia, Pennsylvania has jurisdiction to modify Virginia's prior custody determination.⁴

CONCLUSION

For the reasons stated above, Pennsylvania has jurisdiction in this custody matter. An appropriate order follows.

ORDER OF COURT

⁴ It is important to note that if the Tonawanda Seneca Nation did the same modification analysis at this time, the Tonawanda Seneca Nation would not have jurisdiction to modify as Pennsylvania is the home state and therefore the Tonawanda Seneca Nation could not have home state and a significant connection analysis would be inappropriate. A significant connection analysis may only be completed if there is no home state. 23 Pa.C.S. § 5421, Uniform Law Comment, n.2. Without being able to meet the first prong of the test prescribed by § 5423, the Tonawanda Seneca Nation is unable to establish jurisdiction to modify the *Virginia Custody Order*.

AND NOW THIS 20th day of November, 2020, after review of the record and based upon the foregoing *Opinion*,

WHEREAS this Court has jurisdiction in this custody matter; and

WHEREAS there is a pending *Amended Emergency Petition for Contempt, Return of the Child, and Modification*, filed September 8, 2020; and

WHEREAS there is a pending *Petition for Special Relief*, filed August 26, 2020;

IT IS ORDERED:

1. A rule is issued upon Respondent, Kishickatigqua Lone, to show cause why Petitioner, Preston-John Holton, is not entitled to the relief requested in both Petitions;
2. The Respondent, Kishickatigqua Lone, shall file a verified Answer to the Petitions within 20 days of service upon the respondent;
3. The Petitions shall be decided under Pa.R.C.P. No. 206.7;
4. Hearing and/or argument shall be held on January 27, 2021, at 9:00 o'clock a.m. in the assigned Courtroom of the Franklin County Courthouse, Chambersburg, PA;
5. Notice of entry of this order shall be provided to all parties by the Prothonotary's Office.
6. Until further Order of this Court, it is ordered:
 - a. The Virginia Custody Order, dated December 11, 2015, shall remain in full force and effect until further Order of this Court, following a hearing in the matter.
 - b. Mother shall return the child to Father immediately.
 - c. Law enforcement is authorized to assist in returning the child to Father.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.