

IN THE COURT OF APPEALS

FILED

November 22, 1999

Cecil Crowson, Jr.
Appellate Court Clerk
AT KNOXVILLE

TONY MILO CROWE)	SULLIVAN COUNTY
)	03A01-9812-CV-00423
Plaintiff-Appellee)	
)	
v.)	HON. RICHARD E. LADD,
)	JUDGE
)	
WANDA JUNE COMER)	
)	
Defendant-Appellant)	AFFIRMED AND REMANDED

TIMOTHY L. BALDRIDGE OF KNOXVILLE FOR APPELLANT

JAMES H. BEELER OF KINGSPORT FOR APPELLEE

O P I N I O N

Goddard, P.J.

This is an appeal from the Circuit Court's order finding it had subject matter jurisdiction to determine the custody of the minor child Nicholas Crowe. Wanda Comer, Defendant-Appellant, contests the Circuit Court's subject

matter jurisdiction.

On May 17, 1989, the District Court of Jackson County, Oklahoma granted the parties a divorce. The court granted custody of the minor child, Nicholas Crowe, to Wanda Crowe. Ms. Crowe (hereinafter Ms. Comer) remarried and moved to Texas with the minor child. Mr. Crowe moved to Kingsport, Tennessee.

On January 9, 1996, the Texas Department of Protective and Regulatory Services filed a Petition to Appoint Temporary Managing Conservator over Nicholas Crowe due to an incident appearing to be abuse that occurred at the Comer home. The Department investigated the incident of alleged abuse and determined that it was an accident. Nicholas Crowe was returned to Ms. Comer.

Mr. Crowe was notified of the proceedings and filed a motion to modify custody. On July 1, 1996, the 72nd District Court of Crosby County, Texas appointed Mr. Crowe Sole Managing Conservator of Nicholas Crowe. After the appointment, Mr. Crowe and Nicholas Crowe moved to Kingsport, Tennessee. However, service of process on Ms. Comer was defective. On April 3, 1997, Ms. Comer was properly served. On May 20, 1997, the Texas court again appointed Mr. Crowe Sole Managing Conservator of Nicholas Crowe. On June 11, 1997, Ms. Comer filed a motion for new trial which alleged her failure to appear was the result of an accident or mistake and

that the Texas court did not have personal jurisdiction. On July 21, 1997, the Texas court granted the motion for new trial. An order dismissing the Texas proceedings was filed on March 9, 1998. It is unclear from the record whether the Order of Dismissal applied to the entire Texas proceedings or only to the new trial proceedings.

On August 4, 1997, Mr. Crowe filed a petition to domesticate and modify the Texas custody order in the Circuit Court for Sullivan County, Tennessee. Ms. Comer filed a petition to enroll the May 17, 1989 Oklahoma divorce decree and a motion for immediate custody on March 16, 1998 in the Circuit Court for Sullivan County, Tennessee. In an order filed June 23, 1998, the trial court domesticated the Texas order and modified visitation. On July 6, 1998, Ms. Comer filed a motion to set aside the court's order domesticating the Texas order and requested that the Court review the entire Texas file. In the Court's order filed August 7, 1998, Judge Ladd maintained that Tennessee had jurisdiction and that the Texas order was valid and enforceable. However, Judge Ladd changed his previous order by granting Mr. Crowe temporary custody pending a future hearing to determine the best interests of the child. On September 4, 1998, Ms. Comer filed a motion to dismiss for lack of subject matter jurisdiction. On November 9, 1998, the Court denied the motion to dismiss. In denying the motion, the Court found Tennessee had jurisdiction because Tennessee has the greatest interest in

the child.

The Uniform Child Custody Jurisdiction Acts (UCCJA) of Tennessee¹ and Texas and the Parental Kidnaping Prevention Act (PKPA) govern this interstate child custody dispute.

Under the Tennessee UCCJA, a court has jurisdiction over a child custody decision either initially or by modification if Tennessee:

- (A) Is the home state of the child at the time of commencement of the proceeding; or
- (B) Had been the child's home state within six(6) months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
- (2)(A) It appears that no state has jurisdiction under subdivision (a)(1), or each state with jurisdiction under subdivision (a)(1) has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child; and
 - (B) The child and at least one (1) contestant have a significant connection with this state; and
 - (C) There is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationship; and
 - (D) It is in the best interest of the child that a court of this state assume jurisdiction; or
- (3) It appears that no state has jurisdiction under subdivision (a)(1) or (2) or each state has refused jurisdiction on the ground that this is the more appropriate forum to determine child custody, and it is in the best interest of the child that a court of this state assume jurisdiction.

Tenn. Code Ann. § 36-6-203(a) (1998). The "home state" is defined as "the state in which the child immediately preceding the time involved lived with such child's parents, a parent or a person acting as a parent, for at least six (6) consecutive months." Tenn. Code Ann. § 36-6-202(5) (1998).

The Texas UCCJA and the PKPA are similar to the Tennessee UCCJA because these statutes place the most significance on "home state" status. See Tex. Fam. Code § 152.003(a) (1998); 28 U.S.C.A. § 1738A(c) (1998). The home state has priority over other states which claim to have jurisdiction. Accordingly, we must determine the home state of the minor child, Nicholas Crowe, at the commencement of these proceedings.

Ms. Comer relies on Wilcox v. Wilcox, 862 S.W.2d 533 (Tenn. Ct. App. 1993) to assert that Texas is the child's home state because "the time involved" began with the Texas proceedings in 1996. The Wilcox court interpreted "commencement of the proceeding" and "the time involved" to be when the parties originally filed for divorce in Indiana and not the filing for modification in Tennessee. Wilcox, 862 S.W.2d at 543. We disagree with this interpretation. Two Tennessee Supreme Court cases interpreted "commencement of the proceeding" and "the time involved" in a modification proceeding to mean the date the modification petition was filed. See Brown v. Brown, 847 S.W.2d 496, 507 (Tenn. 1993); State ex. rel. Cooper v. Hamilton, 688 S.W.2d 821, 823-24 (Tenn. 1985).

Mr. Crowe filed the modification petition in this case on August 4, 1997. At that time, Nicholas Crowe had

lived in Tennessee with Mr. Crowe for approximately a year. Therefore, Tennessee is the child's home state.

Although Tennessee is the home state, a Tennessee court may not exercise jurisdiction under certain circumstances. If there are pending proceedings in another state, a Tennessee court must stay the proceeding and communicate with the other court to decide which court is the more appropriate forum. See Tenn. Code Ann. § 36-6-207(a),(c) (1998). At the time the petition was filed in Tennessee, there were pending proceedings in Texas. At the time of the hearing on the petition in Tennessee, an order of dismissal had been filed in Texas. Judge Ladd contacted the Texas Judge involved in the case, Judge Cherry. Judge Ladd considered the Texas order of dismissal as dismissing the grant of a new trial. Therefore, the May 20, 1997 order would still be valid and enforceable. Judge Cherry said Texas had no further interest in this case because neither party nor the child resided in Texas at that time. Judge Ladd interpreted Judge Cherry's statements as meaning Texas was declining to exercise jurisdiction because Tennessee was the more appropriate forum.

We find Judge Ladd substantially complied with the procedures described in Tennessee Code Annotated section 36-6-207. He communicated with Judge Cherry to determine the more appropriate forum to adjudicate the custody of Nicholas Crowe.

Judge Cherry and Judge Ladd agreed that Tennessee was the more appropriate forum. We agree with their determination.

Another reason a Tennessee court may not exercise jurisdiction is that the petitioner has "unclean hands." See Tenn. Code Ann. § 36-6-209(b) (1998). "Unclean hands" refers to a situation where the petitioner wrongfully removes a child from the person with rightful custody even for a short period of time.

In this case, the petitioner brought the child to Tennessee under a valid Texas order granting him custody. However, the order was later discovered to be invalid because Ms. Comer was not served. At this point, the petitioner should have returned the child to Ms. Comer. Mr. Crowe did not return the child to Ms. Comer. However, the Texas court granted Mr. Crowe custody again after Ms. Comer was properly served.

Even assuming the petitioner acted with "unclean hands" under the circumstances of this case, a Tennessee court may exercise jurisdiction if "required in the interest of the child." Tenn. Code Ann. § 36-6-209(b) (1998). Judge Ladd found it was in the best interests of the child for Tennessee to exercise jurisdiction. Texas has no contacts with either of the parties or the child. Tennessee has been the child's and the petitioner's home for over three years now. Accordingly, we affirm this finding.

Finally, we address Mr. Crowe's motion to assess

costs of a frivolous appeal, including attorney's fees, to Ms. Comer. We find Ms. Comer's appeal questioning the subject matter jurisdiction of the Circuit Court was not frivolous.

For the foregoing reasons the judgment of the Circuit Court is affirmed and the cause remanded for collection of costs below. Costs of this appeal are adjudged against Wanda Comer and her surety.

Houston M. Goddard, P.J.

CONCUR:

Charles D. Susano, Jr., J.

D. Michael Swiney, J.