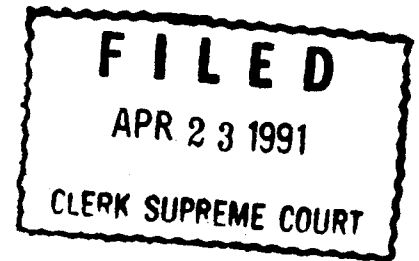


IN THE COURT OF APPEALS OF IOWA

No. 0-611 / 89-1332



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BRENDA ARLENE HILES,

Petitioner-Appellee,

vs.

FRANKLYN GENE HILES,

Respondent-Appellant.

BRENDA A. CROMWELL, f/k/a BRENDA A. HILES,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR PLYMOUTH COUNTY,

Defendant.

Appeal from the Iowa District Court for Plymouth County, Phillip S. Dandos and Edwin L. Mitchell, Judges.

Consolidated action of direct appeal and original certiorari arising out of defendant's failure to return child to mother pursuant to an Ohio divorce decree.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED; THAT PART OF WRIT CONSISTENT WITH THIS OPINION IS SUSTAINED.

Alice S. Horneber of Margolin, Gildemeister, Willia, Mugan & Keane, Sioux City, for appellant.

Mark L. Hemmingson of Bauerly, Hemmingson & Trotzig, LeMars, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Brenda and Frank's marriage was dissolved in 1981 by decree in the Common Pleas Court in Montgomery County, Ohio. The decree awarded custody of the parties' two children, Kimberlee and Carl, to Brenda.

In June 1989, the children came to Iowa to visit Frank. During the period the children stayed in Iowa, Frank contends Carl complained of pain in his arm. Subsequently Frank was informed by his sister that Kimberlee had stated that her stepfather was physically abusing Carl. Frank discussed the situation with Carl. He later took Carl to a doctor for psychological and medical evaluation.

On August 11, 1989, Frank filed a petition to Modify Child Custody (court file 26410) in Iowa district court. Brenda responded and submitted to the jurisdiction of the Iowa court by filing an application for enforcement of the Ohio decree on August 17, 1989 (court file 26412).

Hearing on Brenda's petition in court file 26412 took place on August 21, 1989. The judge filed his ruling on August 31, 1989, giving full faith and credit to the Ohio decree and instructing Frank to send Carl back to his mother. Frank filed notice of appeal to this ruling on September 1, 1989. He later declined to send Carl to his mother, contending Carl refused to board the plane.

Hearing on Frank's modification petition, court number 26410, was held on September 7, 1989. The judge filed his

ruling on September 15, 1989. In this ruling, the judge stated that he was entering an order as to both 26410 and 26412. He found that it would not be in Carl's best interest to return him to the custody of his mother at this time; but in the judgment part of the ruling, he granted custody of Carl to his mother under the Ohio decree and further provided that Carl's best interests would be served by continued visitation with Frank. The court, however, at least at this juncture, made no finding as to whether the child would be in imminent danger if immediately returned to his mother. On October 6, 1989, Brenda filed her petition for writ of certiorari.

In her certiorari action, Brenda contends the district court in the modification action (case 26410) acted beyond its jurisdiction in its September 15, 1989, order by combining the two cases and entering an order that pertains to case 26412. Specifically, she noted that a ruling had already been entered in this action (26412) to enforce the Ohio decree, and in fact, Frank had filed an appeal.

As it relates to the certiorari action, Justice David Harris of the Iowa Supreme Court entered an order which consolidated cases 26412 and 26410. He further instructed that any further appellate proceedings be stayed pending resolution by the district court of those unresolved matters raised by the parties in equity no. 26412. In response to this directive, Judge Mitchell, on November 13, 1989, found that Carl was not in imminent danger and

ordered his return to his mother. Frank also appeals this order.

Frank contends that the district court erred in its August 31 order enforcing the Ohio decree. He claims Brenda's application was defective because the demand for the writ of habeas corpus for custody of the child was not brought in the name of the child. Frank also argues that the court should have refused to proceed on Brenda's application and should have required her to file a counterclaim in his modification action. He alleges the court should not have enforced the custody provisions of the Ohio decree without conducting an evidentiary hearing to determine custody. He expresses concern that the November 13 order requiring him to return Carl to Brenda is not supported by the evidence; and he claims that he has never been given an opportunity to present his petition for modification to the court. Finally, he contends the district court is not precluded from proceeding in case no. 26410.

Brenda argues that when Frank filed his notice of appeal on September 1, the district court's jurisdiction was terminated. Therefore, she claims that the district court was without jurisdiction to hold a hearing on September 7. Also Brenda asserts that Frank's application for hearing on temporary matters is not authorized in modification proceedings. She further points out that the Ohio decree could not be modified in Iowa because the

jurisdictional requirements of Iowa Code section 598A.3 were not met. Brenda also argues that the court's actions on September 7 and subsequent order of September 15 deny full faith and credit to the Ohio decree.

Our review on the jurisdictional issue is de novo. O'Neal v. O'Neal, 329 N.W.2d 666, 667 (Iowa 1983). In considering whether Iowa has jurisdiction in the modification action, we accept Frank's allegation as true and place the burden of persuasion on him. But if and when he establishes a prima facie case of jurisdiction, Brenda has the burden of going forward with evidence to rebut or overcome it. St. Clair v. Faulkner, 305 N.W.2d 441 (Iowa 1981).

While the parties raise many issues, a number of the errors claimed were not preserved for appellate review. In addition, counsel on appeal assert that a number of motions and related matters were filed and/or submitted but were not ruled on. As to those and the claims we find were not properly preserved for appellate purposes, we decline to consider. This finding is of no great consequence for we find the central issue in this dispute to be whether the Iowa courts have jurisdiction to modify the custody provisions of the Ohio decree under the Uniform Child Custody Jurisdiction Act. When this question is resolved, many of the allied problems will rise or fall with that decision.

The governing code section is Iowa Code 598A.3. This section provides in pertinent part:

1. A court of this state which is competent to decide child custody matters has jurisdiction to make a custody determination by initial or modification decree if:

a. This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of 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

b. It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one 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; or

c. The child is physically present in this state, and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

d. It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraph "a", "b", or "c", or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

Brenda contends Ohio still has jurisdiction over the parties. With regard to this argument, section 598A.14 of the Iowa Code provides:

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 this chapter, or has declined to assume jurisdiction to modify the decree, and the court of this state has jurisdiction.

Two requirements exist under section 598A.14: that Ohio does not have, or has declined, jurisdiction, and that Iowa does have jurisdiction. The first prerequisite is met: none of the parties have lived in Ohio since 1983. It is clear Ohio has no contacts with the family and keeping this in mind, it is evident the state no longer has jurisdiction. See Slidell v. Valentine, 298 N.W.2d 599, 604 (Iowa 1980).

Brenda next argues that if Ohio no longer has jurisdiction, then New York would be the proper jurisdiction in which to debate the custody issue. However, Brenda fails to supply this court with any evidence which would support this contention.

On many occasions throughout the course of the district court proceedings, Brenda claimed she and her children were residents of the State of New York. However, the record indicates she and her children have been living in Germany for an extended period of time. The children had not been living in New York prior to the time they came to visit their father in Iowa. There is no evidence indicating that the children have any significant connections at all with the State of New York.

The mother contends her children were going to come back to New York after the summer with their father and go to school in New York. In reality, however, the intention

was to take the children back to Germany to live with her and her husband. The only contact seems to be in Germany.

Frank contends that his children have resided in Iowa for a sufficient amount of time to give Iowa jurisdiction. We disagree. Section 598A.3(1)(a) requires the child be in the state for six months. The children had only been in Iowa for under three months at the time Frank filed his modification petition. We conclude jurisdiction cannot be conferred based upon this subsection.

Frank next claims jurisdiction can be conferred based upon subsection (1)(c). While there is some evidence with regard to the alleged abuse of Carl by his stepfather, we are not convinced based upon the record, that Frank has carried his burden to enable Iowa to assume jurisdiction under that section.

The section that appears to be most applicable is subpart (1)(d) provided in full above. From our de novo review of the record, we conclude that no other state has jurisdiction pursuant to the Uniform Child Custody Act. According to this subsection, this is sufficient to grant Iowa jurisdiction over the modification matter. We therefore find that Iowa does have jurisdiction over the matter and a full hearing should be held with regard to Frank's petition for modification. Until the modification action is resolved, we see no reason to disturb the court order relating to the return of the children to their mother.

Having determined that Iowa has jurisdiction over respondent-appellant's modification action, we remand this cause for trial on the merits of that petition. We decline to disturb the court's ruling that ordered the return of the children to Brenda. We, therefore, affirm in part and reverse in part. We sustain that part of the writ that is consistent with this ruling and annul those parts that are inconsistent. We assess costs one-half to respondent-appellant and one-half to petitioner-appellee in the modification action and one-half to the plaintiff and the other one-half to the defendant in the certiorari proceedings. A variety of other issues were raised by both parties. Because of the result reached, it is unnecessary for us to address those issues that remain.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED; THAT PART OF WRIT CONSISTENT WITH THIS OPINION IS SUSTAINED.