

IN THE COURT OF APPEALS OF IOWA

No. 1-109 / 90-735

FILED

MAY 29 1991

CLERK SUPREME COURT

RUBY ADAMS and RUSSELL ADAMS,

Appellees,

vs.

FERN WHIPKEY and DOUGLAS WHIPKEY,

Appellants.

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Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Grandparents appeal an Iowa district court ruling denying enforcement of their Texas custody decree, and granting custody to children's maternal grandparents living in Iowa. **REVERSED; PETITION FOR MODIFICATION DISMISSED; REMANDED WITH DIRECTION.**

Duane E. Hoffmeyer of Vakulskas & Hoffmeyer, P.C.,
Sioux City, for appellants.

No appearance for appellees.

Considered by Donielson, P.J., and Schlegel and Hayden,
JJ.

HAYDEN, J.

This case involves two children, boys born in 1980 and 1981. They have the same mother but different fathers. All three biological parents have basically abandoned the children. The present custody dispute is between the children's maternal grandparents, Ruby and Russell Adams, and the paternal grandparents of one of the children, Fern and Douglas Whipkey.

The parents and the paternal grandparents all reside in Texas. Prior to the Texas custody order, the children also resided in Texas. It is unclear from the record whether the Adamses were subject to Texas's jurisdiction at the time of the custody order.

The children have lived with their maternal grandparents, Ruby and Russell Adams, since May 1986. In July 1986 the Whipkeys obtained a Texas decree awarding them physical custody of the children. At the time of the decree, the children were residing with the Adamses in New Mexico. The Adamses apparently allege they never had notice of the Texas custody order.

Shortly after the Texas proceedings, the children came to Iowa to reside with their mother's sister, Debra DeForrest. Debra filed for guardianship of the children on September 23, 1986. Ms. Whipkey entered an appearance, challenging jurisdiction. The guardianship petition was dismissed on November 25, 1986, because the children were no longer in Iowa.

Following dismissal of the Iowa guardianship petition, the mother filed a petition in her Texas divorce challenging jurisdiction and custodial issues. Her appeal was decided adversely to her on April 15, 1987. In re C.R.G. and D.J.W., No. 07-87-0044-CV (Tex. App. 7th Dist. Apr. 15, 1987).

On March 18, 1987, the Whipkeys filed under the UCCJA to enforce their Texas custody decree in Iowa. On June 16, 1987, a stipulation and order was entered, joined by Debra DeForrest and her husband, Troy. The stipulation and order stated the children had left Iowa; however, if they ever returned and were in the DeForrests' possession, the DeForrests would consent to the children's removal.

Meanwhile, the Adamses filed guardianship proceedings in New Mexico on April 15, 1987. The guardianship petition was dismissed on January 18, 1988, for lack of jurisdiction. Following the dismissal, the Adamses with the children allegedly moved to Elko, Nevada, and later to another locale in Nevada.

The Whipkeys filed a writ of habeas corpus in Texas in May 1988. The writ brought the mother and the mother's maternal grandmother into court, seeking to determine the location of the children. They indicated to the Texas court they had not seen the children in two and a half years. However, the mother had been in continual contact with the Adamses and had known and approved of their various moves.

Finally, in 1988 the Adamses and the children moved to Sioux City, Iowa, where they have since remained. On October 24, 1989, the Whipkeys filed the present petition in the Iowa district court seeking to enforce the 1986 Texas decree which effectively awarded them custody.

The Adamses subsequently filed their application for modification. Both cases were apparently heard together as a single action.

After a hearing, the Iowa court entered a "jurisdictional order" declining to enforce the Texas decree. The Iowa court found it had jurisdiction over the case under Iowa Code section 598A.3(1)(b) of the Child Custody Jurisdiction Act (UCCJA), because the children and their actual custodians resided in Iowa.

The Iowa court then concluded the children's best interests would be served by leaving them in the Adamses' custody. The Iowa court found the Adamses had provided the children the only stable and permanent home they had ever known, the Adamses had cared for the children well and had provided a suitable environment, and the children had relatively little contact with the Whipkeys.

The trial court also expressed the belief the Texas decree had been "obtained under duress and fraud." The court's belief was based on evidence showing the father put out the mother's eye just prior to her signing the Texas custody stipulation. The Iowa court declined to enforce the Texas decree. It ordered the children remain in the

Adamses' care "during the pendency of this custody dispute:" It enjoined all parties from removing the children from Iowa without prior court order.

The Whipkeys have appealed from the Iowa court order described above. The Whipkeys challenge the conclusion the Iowa court has jurisdiction over this case under the UCCJA.

Our review is de novo. Iowa R. App. P. 4.

I. Jurisdiction.

The starting point of our inquiry is whether Iowa has subject matter jurisdiction. The jurisdictional issue in this case is governed by the Uniform Child Custody Jurisdiction Act, Iowa Code Chapter 598A. This act is recognized both in Iowa and Texas. See Tex. Code Ann. Fam. §§ 11.51 to 11.75 (Vernon 1986).

As the opposing parties in this action are both grandparents, we must determine if the act applies to them. The UCCJA states: "'Contestant' means a person, including a parent, who claims a right to custody or visitation rights with respect to a child." Iowa Code § 598A.2(1). Thus both parties are "contestants" and covered by the UCCJA.

Our study of the leading Iowa cases demonstrates a two-track analysis must be made. First, the court must determine if the state which issued the original custody decree (Texas) still has jurisdiction. Second, the court must determine if the state in which the modification

petition is filed has jurisdiction. Finally, if both have jurisdiction, the court must determine which is the proper state to assume jurisdiction under section 598A.3.

The Iowa Supreme Court has already spoken on this issue. We quote from the leading Iowa cases.

Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings belong. When a court acts without legal authority to do so, it lacks jurisdiction of the subject matter. The court's jurisdiction of the subject matter however may be raised at any time and is not waived even by consent. We will determine subject matter jurisdiction even though not raised in the appellate briefs of either party. Also, we will examine the grounds for jurisdiction on our own motion before proceeding further. If we determine subject matter jurisdiction is absent, an order dismissing the petition is the only appropriate disposition. We therefore must determine whether the district court of Iowa lacked subject matter jurisdiction on any grounds.

Pierce v. Pierce, 287 N.W.2d 879, 881-82 (Iowa 1980) (citations omitted; quoted with approval in St. Clair v. Faulkner, 305 N.W.2d 441, 445 (Iowa 1981)).

A. Modification Jurisdiction.

Initial jurisdiction is determined by the guidelines of [section 598A.3], which point to the state with the closest connections to the child and to information about his present and future well-being. Modification jurisdiction is perhaps best viewed as an extension of the recognition and enforcement provisions of the Uniform Child Custody Jurisdiction Act. California is not effectively enforcing the New York decree if it modifies the decree as soon as the child has spent six months within its borders.

In re Marriage of Leyda, 398 N.W.2d 815, 819 (Iowa 1987) (emphasis in original).

When dealing with a modification of a child custody decree of another state, the court must first consider the provisions of section 598A.14. That section in pertinent part 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 under section 598A.14 must be met before an Iowa district court can modify a custody decree from another state. First, the court that rendered the decree cannot now have jurisdiction under jurisdictional prerequisites substantially in accordance with chapter 598A or the court that rendered the decree has declined to assume jurisdiction to modify the decree. Second, the district court of Iowa must have jurisdiction. Pierce, 287 N.W.2d at 882.

B. Continuing Jurisdiction of Original Forum.

We now must examine whether Texas retains continuing jurisdiction over its original decree on the date the modification petition was filed, November 1, 1989. The record does not show Texas at any time declined to assume jurisdiction to modify its custody decree. See Pierce, 287 N.W.2d at 882.

We must determine whether Texas, which rendered the decree to be modified, does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with chapter 598A. Id.; Iowa Code § 598A.14. The term "now" as used in section 598A.14 refers to the time of the filing of the petition requesting modification. Pierce, 287 N.W.2d at 882. In the case before us that date is November 1, 1989.

Courts rendering a custody decree normally retain continuing jurisdiction to modify the decree under local law. In order to achieve greater stability of custody arrangements and avoid forum shopping, the Iowa courts defer to the continuing jurisdiction of the court of another state so long as that state has jurisdiction under the standards of Chapter 598A. Id. In other words, all petitions for modification should be filed in the prior state if that state has sufficient contact with the case to substantially satisfy section 598A.3. Uniform Child Custody Jurisdiction Act § 14 note.

We first consider if Texas had jurisdiction on November 1, 1989, under section 598A.3(1)(a), as the "home state." Section 598A.2(5) provides:

"Home state" means the state in which the child, immediately preceding the time involved, lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period.

The children have not resided in Texas for at least six consecutive months immediately preceding this action. Therefore, Texas cannot be considered the "home state" of the children on November 1, 1989. However, "home state" status is not the sole criteria for continuing jurisdiction.

Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.

Leyda, 398 N.W.2d at 819 (emphasis ours).

Texas is the original decretal state. It has not declined jurisdiction. The Whipkeys continue to reside there. Whipkeys are contestants in this action. The children have spent most of their lives there. Substantial evidence exists in Texas concerning the children's present and future well-being. It is clear Texas retains continuing jurisdiction over the custody decree.

C. Jurisdiction of State where Modification Filed.

We must now determine if Iowa has modification jurisdiction under one of the alternate jurisdictional provisions of section 598A.3. In In re Marriage of Leyda, the Iowa Supreme Court considered a case analogous to this one.

In Leyda, the child resided with her mother in Florida for over a year. Thus, Florida could be the "home state." Id. at 818. However, Iowa was the original decretal state. The father remained a resident of Iowa. The Iowa Supreme Court held Iowa retained continuing jurisdiction to modify the custody decree and Florida lacked jurisdiction over the case. Id. at 819-20.

In Leyda, the father had custody of the parties' child. Id. at 817. The mother moved with the child to Florida. Id. There she filed to modify the custody decree. The Florida court entered an order finding Florida was the home state of the child and awarded temporary custody to the mother. Id.

The father returned with the child to Iowa for a visit. When he refused to return the child to the mother in Florida, the mother sought a writ of habeas corpus in the Iowa courts. Id. The supreme court reversed the grant of the writ. Id. at 818-20. It held the Iowa court had jurisdiction over the previous custody action. Id. at 820.

The supreme court proceeded in a detailed analysis of both Florida and Iowa claims to jurisdiction in Leyda. We have followed the guidelines of Leyda in our analysis here.

D. Federal Parental Kidnapping Act.

Federal law also must be considered in determining which states have jurisdiction. Id. at 819-20. The

Federal Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1983) indicates a congressional intent the act be applied in all interstate custody disputes.

The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section [that that court has jurisdiction under its own law] continues to be met and such State remains the residence of the child or of any contestant.

28 U.S.C. § 1738A(d) (emphasis added).

State courts considering the question have held the federal legislation preempts state law in determining when jurisdiction may be exercised in interstate custody matters. Leyda, 398 N.W.2d at 819-20. We determine the federal law supports holding Texas, and not Iowa, has jurisdiction over the present case.

II. Analysis.

In the present case, the Whipkeys obtained a Texas custody decree for the two children involved here in 1986. At that time Adamses resided with the boys in New Mexico. However, it appears the Texas courts had jurisdiction over them.

It is unclear whether the Adamses had notice of the pending custody action. Further, it is unclear whether the Adamses even had a right to notice under the Texas statutes. However, that is a question of Texas state law, to be determined by the courts of Texas. The Adamses have

not seen fit to file an appellees' brief nor appear for scheduled oral arguments, so we do not have the benefit of their view on these subjects.

There is some evidence the father of the children obtained the mother's consent to the stipulation granting custody to the Whipkeys by means of coercion. Allegedly he physically abused her, apparently including injuring her eye and causing blindness. However, this again is a matter which must be brought to the attention of the Texas court in an action to set aside its original decree on the grounds of fraud and coercion. We will not assume the courts of our sister state of Texas are incapable of granting the parties full justice. Indeed, we are obligated by our federal Constitution to grant full faith and credit to judgments of our sister states. See Struebin v. State of Illinois, 383 N.W.2d 516 (Iowa 1986).

The Whipkeys remain residents of Texas. They have attempted to enforce their custody decree in several different states, including one time previously here in Iowa. The Adamses appear to have moved just often enough to evade the various legal actions. We cannot determine from the record the reason for their moves. We will not infer without evidence the Adamses were attempting to evade the Texas order. However, we do determine the Whipkeys' continuous attempts to enforce their decree shows they have not waived their claim under it. Under these circumstances, the only way Iowa could interfere with the

Texas custody decree is in case of abandonment or emergency. See Iowa Code § 598A.3(d). Neither of these contingencies is present here.

There is evidence the two young children love and enjoy the company of both the Adamses and the Whipkeys. We regret the circumstances have progressed this far without firm resolution. This case must be resolved for the sake of the children. It is incumbent on those having custody of these children to see the custody issue is finally resolved.

The UCCJA was enacted to resolve cases like this. We are mandated to enforce this legislation. Proper enforcement of this statute is essential to equitable settlement of these claims with due respect to judgments of our sister states. Only in this manner can we avoid the trouble sought to be remedied in the Federal Parental Kidnapping Act: custodians taking children across state lines to seek a readjudication of custody rights.

We determine Texas retains continuing jurisdiction over this case. Unless and until Texas declines to exercise its jurisdiction, or all the parties move from that state, Texas is the proper jurisdiction for the resolution of these issues. Iowa therefore lacks subject matter jurisdiction in this case.

In the future, Iowa district courts faced with similar conflicting claims under the UCCJA should take steps to effectively communicate with their counterparts on the

district court benches of other states. The example of the trial court in S.R., by M.J.V. v. M.R., 401 N.W.2d 221, 223 (Iowa App. 1986), provides valuable guidance on a proper method of communication. We do not imply this is the only way to communicate. See Iowa Code §§ 598A.19 to 598A.22. The trial court should be creative and thorough in its application of the UCCJA. Cooperation and communication are essential both for correct application of the law and for the well-being of the children involved. The UCCJA was designed to facilitate that cooperation. See Pierce, 287 N.W.2d at 884. Iowa's courts are required to implement the statute accordingly.

III. Conclusion.

We reverse the trial court and dismiss the Adamses' petition for modification due to lack of subject matter jurisdiction. We remand the case to the district court with direction to implement the Texas custody decree in accordance with this opinion and Iowa's UCCJA. We suggest the district court communicate with its sister court in Texas to determine the appropriate procedure in compliance with this decision.

REVERSED; PETITION FOR MODIFICATION DISMISSED; REMANDED WITH DIRECTION.

Schlegel, J., concurs; Donielson, P.J., specially concurs.

DONIELSON, J. (specially concurring)

I concur in the result. I believe In re Marriage of Leyda, 398 N.W.2d 815 (Iowa 1987), requires a finding that Iowa does not have jurisdiction to modify the Texas decree because Texas has continuing jurisdiction. The Iowa district court was required to follow the procedures set forth in Iowa Code chapter 598A when presented with the Whipkeys' effort to enforce their Texas custody decree.