Stylos v. Slattery

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UNPUBLISHED

At issue in this appeal is the propriety of an order of a family law commissioner that declined to exercise jurisdiction in this case. We hold that Washington does not have jurisdiction to hear this matter. Accordingly, we dismiss the appeal.

Leigh Stylos and Timothy Slattery were married and lived in Massachusetts. They ended their marriage in 1987. The Massachusetts decree granted Stylos physical custody of the children and Slattery reasonable visitation rights. There are two children born of the marriage, and they are now 16 and 13 years old, respectively.

In 1988, Stylos moved to Washington with the children after obtaining approval from the Massachusetts court. In 1993, the parties modified the visitation provisions of the Massachusetts decree. Under the modification, the children continued to reside with Stylos in Washington during the school year, but resided with Slattery in Massachusetts during the summer.

At the end of the 1998 summer, while the children were with him in Massachusetts, Slattery commenced an action there to further modify the 1993 modified custody decree. On August 11, 1998, he obtained an ex parte order of physical custody in the Massachusetts proceeding. In an affidavit supporting his motion, Slattery detailed Stylos' alleged lack of proper medical care of the children and physical abuse of them by Stylos' boyfriend. Slattery served Stylos in Washington with the order and other documents on August 29.

Nine days prior to service of the ex parte order and other documents on Stylos, she petitioned the King County Superior Court to enforce the 1993 Massachusetts modified decree. She represented herself during the initial stages of the proceeding.

Stylos moved for an order of contempt, alleging that Slattery failed both to return the children to her in Washington and to pay child support. On October 19, an ex parte hearing on the contempt order was held. The family law commissioner, apparently unaware of the Massachusetts action, entered the contempt order that day.

On October 20, 1998, the family law commissioner sua sponte vacated its contempt order of the previous day after conferring with the Massachusetts judge hearing Slattery's action. Over a month after the October 20, 1998 order of the family law commissioner, Stylos moved to vacate that order

and requested that the Washington court assert jurisdiction. A superior court judge denied the motion as untimely.

Stylos then moved to either have the Washington court assert jurisdiction or grant relief from the October 20, 1998 order under CR 60(b). The family law commissioner denied the motion, and a superior court judge denied the motion for revision in a letter ruling.

Stylos appeals.

Parental Kidnapping Prevention Act

Both parties focus their briefing on the October 20, 1998 order of the family law commissioner. And they extensively discuss the extent to which the Parental Kidnapping Prevention Act of 1980 (PKPA)[1] applies to this case.

Stylos asserts that the family law commissioner erred by declining to enforce the 1993 Massachusetts custody decree. We reject Stylos' argument and conclude that the commissioner was correct to decline exercising jurisdiction.

Courts have inherent jurisdiction to construe statutes to determine whether they have jurisdiction.[2] The PKPA is a full faith and credit statute that directs states to enforce a child custody determination entered by a court of another state if the determination is consistent with the provisions of the Act.[3] Its chief purpose is to avoid jurisdictional competition and conflict between State courts.[4] Where there is a conflict between a state's Uniform Child Custody Jurisdiction Act (UCCJA) and the PKPA, the PKPA preempts state law under the supremacy clause.[5] The PKPA does not establish national standards for conferring subject matter jurisdiction over state child custody proceedings.[6] A court must consider the PKPA when asked to determine which of two or more states has jurisdiction to decide a custody dispute.[7]

Under the PKPA, Washington could not exercise jurisdiction over a child custody determination commenced during the pendency of a proceeding in Massachusetts if Massachusetts was exercising jurisdiction "consistently with" the PKPA. The provisions of 28 U.S.C. sec. 1738A(g) dictate this result:

A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

A fair reading of the PKPA makes clear that the August 11 temporary order entered by the Massachusetts court is a child "custody determination." The provisions of the PKPA expressly

include such an order as one of several types of custody determinations.[8]

The question is whether Massachusetts was exercising jurisdiction "consistently with the provisions of this section {28 U.S.C. sec. 1738A}"[9] when it issued its temporary order. We hold that it was exercising its jurisdiction consistently with the PKPA.

Under 28 U.S.C. sec. 1738A(c), Massachusetts exercises jurisdiction "consistent with" the PKPA only if:

(1) such court {Massachusetts} has jurisdiction under the law of such state {Massachusetts}; and

(2) one of the following conditions is met:

. . . (C) the child is physically present in such State {Massachusetts} and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse.{[10]}

The above bracketed and italicized provisions are the focal points for our analysis of the October 20, 1998 order. We first determine whether, at the time Washington entered its order, Massachusetts had jurisdiction under its laws so that we may decide whether sec. 1738A(c)(1) was satisfied. We then determine whether sec. 1738A(c)(2) was satisfied.

Notwithstanding Stylos' argument to the contrary, we conclude that Massachusetts had jurisdiction under its own laws to modify the 1993 custody decree by the August order. Under the Massachusetts Child Custody Jurisdiction Act (MCCJA),[11] jurisdiction may only be exercised pursuant to one of four subsections of Massachusetts General Laws c. 209B, sec. 2(a).[12]

The relevant subsection here, G.L. c. 209B, sec.2(a)(3), provides for emergency jurisdiction:

(a) Any court which is competent to decide child custody matters has jurisdiction to make a custody determination by initial or modification judgment if:

(3) the child is physically present in the commonwealth and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child from abuse or neglect or for other good cause shown, provided that in the event that jurisdictional prerequisites are not established pursuant to any other paragraph of this subsection and a court of another state shall be entitled to assert jurisdiction under any other subparagraph of this paragraph then a court exercising jurisdiction pursuant to this clause of paragraph (3) may do so only by entering such temporary order or orders as it deems necessary unless the court of the other state has declined to exercise jurisdiction, has stayed its proceedings or has otherwise deferred to the jurisdiction of a court of the commonwealth; . . . {[13]}

Here, the children were physically present in Massachusetts at the time of the 1998 proceeding for custody modification. Thus, the first of the above italicized provisions was satisfied. There was also evidence in the record from which the Massachusetts court could have found that the children were at risk for "abuse or neglect" had they returned to Washington. That satisfied the second prong under the Massachusetts statute for asserting jurisdiction on an emergency basis.

We note that under this emergency provision for a temporary order, notice and opportunity to be heard before entry of the order is not required under Massachusetts law.[14] And the Massachusetts law provides that the temporary order will remain effective for only a limited time if the courts of another jurisdiction assert jurisdiction.[15]

We conclude that because Massachusetts had jurisdiction under its own laws to enter the temporary custody order, 28 U.S.C. sec. 1738A(c)(1) was satisfied. But to determine whether Massachusetts exercised jurisdiction "consistently with" the PKPA, we must also decide whether sec. 1738A(c)(2) was satisfied. We hold that it was.

The first requirement, that the children be physically present in Massachusetts at the time of the order, is met. And Slattery appears to have made the necessary showing to the Massachusetts court that the children needed to be protected against "mistreatment or abuse." Thus, the requirements of 28 U.S.C. sec. 1738A(c)(2) were satisfied.

Relying on 28 U.S.C. sec. 1738A(a),[16] Stylos argues that the court below was required to enforce the provisions of the 1993 modified custody decree. But the proper starting point under the circumstances of this case is sec. 1738A(g), not sec. 1738A(a), the subsection that deals with enforcement of prior decrees. That is because at the time of Stylos' petition for relief in Washington, Massachusetts was exercising its emergency jurisdiction consistent with its own laws and the PKPA. That emergency jurisdiction ripened into full jurisdiction once the Washington court declined to exercise jurisdiction because of the Massachusetts proceeding.

On the basis of our analysis above, the question of whether Washington is the "home state" of the children as grounds for the Washington court to assert jurisdiction is irrelevant. Equally irrelevant is whether Massachusetts exercises continuing jurisdiction over its custody decrees. Citing Umina[17] and MacDougall,[18] Stylos argues that the Massachusetts court's exercise of emergency jurisdiction is limited to issuing temporary orders only. But both cases are distinguishable because the competing jurisdictions did not decline to exercise jurisdiction.[19] Here, the Washington court expressly declined to exercise jurisdiction on October 20, 1998. Thus, the limitation in Mass. Gen. L. ch. 209B, sec. 2(3)(ii) that custody determinations made under it are restricted to temporary orders no longer applied after Washington declined jurisdiction. The Massachusetts court was entitled to proceed with the custody modification.

The Massachusetts court did proceed by its November 5, 1998 order providing for Stylos' visitation

rights.[20] While there is nothing in the record before us indicating any action in the Massachusetts court after the November 5, 1998 order, Stylos has not argued that any further action beyond the November 5 order was needed for us to properly address the jurisdictional question now before us.

Having concluded that Washington properly declined exercising jurisdiction under the PKPA, we need not address Stylos' argument that Washington is the best forum to litigate the merits of the case. In short, it was proper for the family law commissioner to decline to exercise jurisdiction over this proceeding by its October 20, 1998 order.

Motion to Dismiss

At oral argument, Slattery first moved to dismiss this appeal on the basis that the October 20, 1998 order of the family law court commissioner was a final order that was not the subject of a timely notice of appeal. We agree.

A party has 30 days within which to file a notice of appeal.[21] Here, the October 20, 1998 order that declined jurisdiction was appealable under RAP 2.2(a)(3)[22] as a decision that discontinues the action. Stylos never appealed the October 20 order that is at issue here. Notwithstanding the fact that she was then acting pro se, she is held to the same standards for observing the applicable rules as are attorneys.[23]

Because we also dismiss this appeal on the basis of RAP 2.2, we need not address Stylos' arguments that the denial of the CR 60(b) motion was an abuse of discretion and that the trial court erred when it refused to vacate the October 20 order. Likewise, we need not address the argument that the August 11, 1998 order violated the notice provisions of 28 U.S.C. sec. 1738A(e). Finally, we need not address Slattery's motion to dismiss on the basis of lack of personal jurisdiction over Slattery.

After oral argument, Stylos made two motions, one seeking leave to amend the notice of appeal and the other for us to take judicial notice of certain matters under RAP 9.11. We deny both motions.

Because we dismissed the appeal under RAP 2.2, we decline to grant her leave to amend the notice of appeal. We also decline to take judicial notice because Stylos does not present argument with respect to the six factors that must be shown before judicial notice is taken under RAP 9.11.[24]

Attorney Fees

Stylos and Slattery both request their attorney fees and costs for appeal. RAP 18.1(a) authorizes an award of attorney's fees if "applicable law grants to a party the right to recover reasonable attorney fees." RCW 26.09.140 states that:

" . . . Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to

the other party of maintaining the appeal and attorney's fees in addition to statutory costs."

In exercising its discretion, an appellate court properly considers the arguable merit of the issues on appeal and the parties' financial resources.[25] Because Slattery did not file a financial affidavit, we are unable to determine his need. Moreover, Stylos clearly has no ability to pay according to the financial affidavit that she filed. Accordingly, there is no basis to award fees to either party under RCW 26.09.140. Slattery also requests attorney fees under RCW 4.28.185[26] for responding to suit under the long-arm statute. We deny the request because this case does not fall within any of the enumerated causes of action in RCW 4.28.185 allowing such fees.

We dismiss the appeal.

WE CONCUR:

1. 28 U.S.C. sec.1738A.

2. In re Personal Restraint Petition of Johnson, 131 Wn.2d 558, 564, n. 3, 933 P.2d 1019 (1997) (citing Stikes Woods Neighborhood Ass'n v. City of Lacey, 124 Wn.2d 459, 465, 880 P.2d 25 (1994)).

3. Thompson v. Thompson, 484 U.S. 174, 175-176, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988).

4. Thompson, 484 U.S. at 177.

5. In re Marriage of Murphy, 90 Wn. App. 488, 495, 952 P.2d 624 (1998).

6. Murphy, 90 Wn. App at 496.

7. In re Marriage of Greenlaw, 123 Wn.2d 593, 604, 869 P.2d 1024 (1994); In re Thorensen, 46 Wn. App. 493, 497, 730 P.2d 1380 (1987)).

8. 28 U.S.C. sec. 1738A(b)(3) defines "custody determination" as "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." (Italics ours.)

9. The bracketed portion of the quotation has been read to mean that "this section" refers to all of sec. 1738A. See Thorensen, 46 Wn. App. at 498, n. 4.

10. 28 U.S.C. sec. 1738A(c)(1)-(2) (Italics ours.).

11. Custody of Brandon, 407 Mass. 1, 5, 551 N.E.2d 506, 508 (1990).

12. Guardianship of Zeke, 422 Mass. 438, 441, 663 N.E.2d 815, 818 (1996).

13. Mass. Gen. L. ch. 209B, sec.2(a) (italics ours).

14. Mass. Gen. L. ch. 209B, sec.5(a) states that: Reasonable notice in conformity with section six and an opportunity to be heard shall be given to the contestants . . . provided that in the event a court of the commonwealth assumes jurisdiction pursuant to clause (ii) of paragraph (3) of subsection (a) of section two, then the court may waive such notice requirement for such period as may be allowed under applicable court rules. (Italics ours.)

15. Mass. Gen. L. ch. 209B, sec.2(a) (3); MacDougall v. Acres, 427 Mass. 363, 370, 693 N.E.2d 663, 668 (1998).

16. 28 U.S.C. sec. 1738A(a) states that: The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

17. Umina v. Malbica, 27 Mass. App. Ct. 351, 538 N.E.2d 53 (1989).

18. MacDougall v. Acres, 427 Mass. 363, 693 N.E.2d 663 (1998).

19. Umina, 27 Mass.App.Ct. at 359 (record does not indicate that Colorado declined jurisdiction); MacDougall, 427 Mass. at 370 (Louisiana explicitly stated that it has not declined jurisdiction).

20. Clerk's Papers at 167.

21. RAP 5.2(a).

22. RAP 2.2(a) states that: Unless otherwise prohibited by the statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions: . . . (3) Decision Determining Action. Any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action. (Italics ours).

23. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

24. Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 221, 936 P.2d 1163 (1997).

25. In re Marriage of Jacobson, 90 Wn. App. 738, 746, 954 P.2d 297, review denied, 136 Wn.2d 1023 (1998).

26. RCW 4.28.185(5) states that "{i}n the even the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees."