

IN THE SUPREME COURT OF OHIO

STATE EX. REL.)
VICTORIA K. BELTOWSKI,)
)
Appellant - Relator)

Case No. 2013-0636

vs.)

On Appeal from the
Sandusky County Court
of Appeals, Sixth
Appellate District
Case No. S-13-001

BRADLEY J. SMITH, JUDGE)
SARA JO SHERICK, MAGISTRATE)
SANDUSKY CTY. JUVENILE COURT)
)
Appellees (Respondent).)

MERIT BRIEF OF
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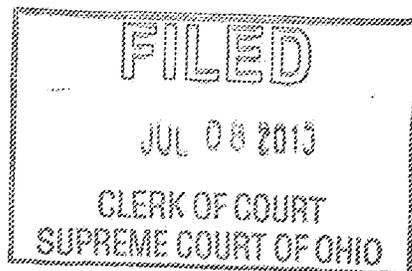
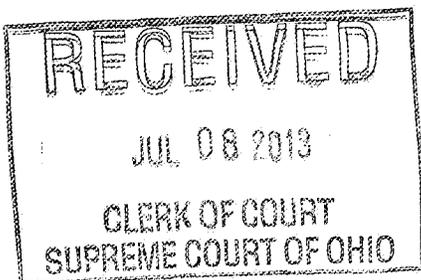


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STATEMENT OF FACTS AND CASE

The Appellees accept the Appellant's Statement of Case and Facts for purposes of this appeal with the addition of the fact that Appellant never filed any order from the State of Arizona with the Sandusky County Juvenile Court. In fact the Appellant in the Statement of Facts alleges that the registration of the prior order in Arizona was not contested which statement is not accurate. After a hearing, the Arizona court has determined that it does not have jurisdiction in this matter. (See Appendix A)

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. I

FAILURE OF AN OHIO COURT WITH ORIGINAL JURISDICTION TO IMMEDIATELY COMMUNICATE WITH A NEW "HOME STATE" AFTER BEING INFORMED OF THE COMMENCEMENT OF A CUSTODY ACTION IN THE NEW "HOME STATE" PURSUANT TO R.C. 3127.18(D) SUBSEQUENTLY VOIDS ANY ATTEMPT BY THE OHIO COURT TO ASSERT CONTINUING JURISDICTION FOR THE PURPOSES OF EFFECTIVELY RENDERING THE NEW "HOME STATE" AN INCONVENIENT FORUM DUE TO THE LAPSE OF TIME.

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, hereinafter referred to as "UCCJEA", R.C. 3127.16 provides as follows in regards to the continuing jurisdiction of the court that has made a custody determination:

"Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state that has made a child custody determination consistent with section 3127.15 or 3127.17 of the Revised Code has exclusive, continuing jurisdiction over the determination until the court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state." (Emphasis added.)

Revised Code Section 3127.18 provides as follows:

- (A) A court of this state has temporary emergency jurisdiction if a child is present in this state and either of the following applies:
 - (1) The child has been abandoned.
 - (2) It is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
- (B) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.
- (C) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or until the period expires.
- (D) A court of this state that has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, shall immediately communicate with the other court. A court of this state that is exercising jurisdiction pursuant to sections 3127.15 to 3127.17 of the Revised Code, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of another state under a

statute similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. (Emphasis added.)

It is undisputed that on November 19, 2012 at the time of the filing of a motion in the Sandusky County Juvenile Court seeking a custody order that the Appellant had not commenced any action in Arizona. In the present case, it is undisputed that the original custody determination was made in the Sandusky County Juvenile Court and further that the child was present in Sandusky County at the time of the commencement of the underlying action.

Revised Code Section 3127.35 provides as follows:

- (A) Subject to sections 2101.022 and 2301.03 of the Revised Code, the clerk of a juvenile court or other court with appropriate jurisdiction may register a child custody determination issued by a court of another state, with or without a simultaneous request for enforcement, on receipt of all of the following:
 - (1) A letter or other document requesting that the child custody determination be registered;
 - (2) Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that, to the best of the knowledge and belief of the person seeking registration, the order has not been modified;
 - (2) Except as otherwise provided in section 3127.23 of the Revised Code, the name and address of the person seeking registration and any parent who is designated the residential parent and legal custodian of the child or to have parenting time with respect to the child or any person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered;
 - (3) An advance deposit or fee established by the court.
- (B) On receipt of the documents and information required by division (A) of this section, the registering court shall do both of the following:
 - (1) Cause the child custody determination to be filed as a foreign judgment together with one copy of any accompanying documents and information, regardless of their form;

- (2) Serve notice of the registration request on the persons named pursuant to division (A)(3) of this section, and provide them with an opportunity to contest the registration in accordance with this section.
- (C) The notice required by division (B)(2) of this section shall state all of the following:
 - (1) That the registered child custody determination is enforceable as of the date of the registration in the same manner as a child custody determination issued by a court of this state;
 - (2) That a hearing to contest the validity of the registered determination must be requested within thirty days after service of notice;
 - (3) That failure to contest the registration shall result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.
- (D) A person seeking to contest the validity of a registered order shall request a hearing within thirty days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes one of the following circumstances:
 - (1) The issuing court did not have jurisdiction under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.
 - (2) The child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.
 - (3) The person contesting registration was entitled to notice of the child custody proceeding for which registration is sought, but notice was not given in accordance with the standards of section 3127.07 of the Revised Code or a similar statute of another state.
- (E) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served in accordance with division (B)(2) of this section must be notified of the confirmation.
- (F) Confirmation of a registered child custody determination, whether by operation of law or after notice and hearing, precludes further contest of the determination with respect to any matter that could have been asserted at the time of registration.

The Appellees have followed the provisions of the UCCJA and indicated that it would

relinquish jurisdiction at such time as an order is received from Arizona indicating that it has accepted jurisdiction.

In the case of State ex rel. Hemsley v. Unruh, 128 Ohio St.3d 307, 2011-Ohio-226, this Court held at page 310 that:

“...Dismissal of the prohibition complaint for failure to state a claim upon which relief can be granted is appropriate if, after presuming the truth of all factual allegations of the complaint and making all reasonable inferences in Hemsley's favor, it appears beyond doubt that he can prove no set of facts entitling him to the requested extraordinary writ of prohibition.”

The facts alleged in the Appellant's complaint, if assumed true, do not show any evidence that would entitle her to a writ of prohibition. Therefore, the Appellees properly considered the factors before it to determine that the Sandusky County Juvenile Court has jurisdiction at this time until the Appellant has complied with R.C. 3127.35. For these reasons, the Appellant's first proposition of law should be denied and the decision of the court of appeals affirmed.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. II

THE DICTATES OF R.C, 3127.22(A) ARE MANDATORY AND THE EXERCISE OF JURISDICTION BY AN OHO COURT ON BEHALF OF A PARTY WHO ENGAGES IN UNJUSTIFIABLE CONDUCT IS *VOID AB INITIO*.

Revised Code Section 3127.22 (A) provides as follows:

- (A) Except as otherwise provided in section 3127.18 of the Revised Code or another law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless one of the following applies:
 - (1) The parents and all persons acting as parents have agreed to the exercise of jurisdiction.

- (2) A court of the state otherwise having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code determines that this state is a more appropriate forum under section 3127.21 of the Revised Code or a similar statute of the state.
- (3) No court of any other state would have jurisdiction under the criteria specified in sections 3127.15 to 3127.17 of the Revised Code. (Emphasis added.)

In the underlying matter, the Juvenile Court has determined that there is probable cause to believe the allegations in the motion filed for emergency custody on November 19, 2012. Until such time as there is a full hearing on the merits of this case, there is not sufficient information to determine if the movant engaged in unjustifiable conduct. The Appellant's second proposition of law should be denied.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. III

AN APPEAL AFTER THE CONCLUSION OF THE EXERCISE OF JURISDICTION BY AN OHIO COURT OVER A CHILD WHOSE HOME STATE LIES IN ANOTHER STATE THEREBY CONTRAVENING THE UCCJEA IS NOT AN ADEQUATE REMEDY AT LAW.

A writ of prohibition is an extraordinary writ issued to prevent a court from proceeding in a manner in which it seeks to exercise its jurisdiction that it does not have under the law. State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas (1996), 77 Ohio St.3d 40. It is not an appropriate remedy to correct errors or a remedy to prevent a court from making an erroneous decision if it has jurisdiction over the case. See State ex rel. Winnefield v. Butler Cty. Common Pleas Court (1953), 159 Ohio St. 225. This Court has held that "A writ of prohibition is an extraordinary remedy that is granted in limited circumstances with great caution and restraint." See State ex rel. Corn v. Russo (2001) 90 Ohio St. 3d 551. These writs should not be granted easily or routinely. See State ex ret.

Barclays Bank PLC v. Court of Common Pleas of Hamilton County (1996), 74 Ohio St. 3d 536, 540. The right to a writ of prohibition "must be clear, and in a doubtful or borderline case its issuance should be refused." State ex rel. Merion v. Court of Common Pleas of Tuscarawas County (1940), 137 Ohio St. 273, 277.

This Court in Commercial Savings Bank v. Wyandot Cty. Common Pleas Court (1988) 35 Ohio St.3d 192, 193 specified the requirements for issuing a writ of prohibition as follows:

“In order for a writ of prohibition to issue, Appellants must establish: (1) that the court or officer against whom it is sought is about to exercise judicial or quasi-judicial power, (2) that the exercise of such power is unauthorized by law, and (3) that the refusal of the writ will result in injury for which no other adequate remedy exists.”

The first prong of the test is met since the trial court has been exercising jurisdiction over the issues pertaining to the custody of the minor child in the granting of the ex parte motion for emergency temporary custody on November 19, 2012. Appellant has challenged the jurisdiction of the trial court to resolve these issues. This Court in State ex rel. Stefanick v. Marietta Mun. Court (1970), 21 Ohio St.2d 102, 104-105 made clear that:

“Prohibition is a preventative writ rather than a corrective remedy and is designed to prevent a tribunal from proceeding in a matter which it is not authorized to hear and determine. It cannot be used to review the regularity of an act already performed.”

The Appellant has not met the second prong of the test for a writ of prohibition because the trial court is fully empowered to resolve the custody issues. “The rule is firmly established that the Court of Common Pleas is a court of general jurisdiction and, as such, possesses the authority initially to determine its own jurisdiction over both the person and

subject matter in an action before it.” See Ruessman v. Flanagan (1992), 65 Ohio St.3d 464, 466. Here the Juvenile Court determined it had jurisdiction to enter an order on the motion for emergency temporary custody since the child was within the county, the court had originally entered an order and no action had been commenced in another state.

Finally, the Appellant cannot satisfy the third prong of the test - that they have no other remedy at law. Appellant will be able to present her testimony and evidence concerning the pending complaint for custody and in the event that Appellant would disagree with the Appellee’s ruling on these issues, her remedy is to file an appeal after final judgment. As this Court has made clear, "in the absence of a patent and unambiguous lack of jurisdiction, a court having general subject matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal."

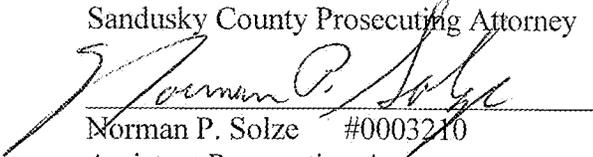
State ex rel. Estate of Hards v. Klammer (2006) 110 Ohio St.3d 104, 106.

CONCLUSION

For the reasons stated herein, the Appellant’s propositions of law should be denied and the judgment of the court of appeals should be affirmed. Further, this matter seems to be moot considering the state of Arizona’s determination. .

Respectfully submitted,

THOMAS L. STIERWALT #0021544
Sandusky County Prosecuting Attorney



Norman P. Solze #0003210
Assistant Prosecuting Attorney
Attorney for Appellees

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief was sent by ordinary U.S. mail to John J. Schneider, Attorney for Appellant, 2800 Euclid Avenue, Suite 320, Cleveland, Ohio 44115 this 5th day of July 2013.



Norman P. Solze #0003240
Assistant Prosecuting Attorney
Attorney for Appellees

April 12, 2013

TONY L. NELSON, Clerk

A. Creamer

Deputy

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DANIELLE B. LIWSKI

CASE NO. DC20120040

COURT REPORTER: John Bouley
Courtroom - 780

DATE: April 10, 2013

VICTORIA BELTOWSKI
Petitioner

Melissa Lynn Solyn, Esq. counsel for Petitioner

and

KYLE BEAMER
Respondent

In Proper Person telephonically

MINUTE ENTRY

HEARING TO DETERMINE JURISDICTION/PETITIONER'S MOTION TO ENFORCE CUSTODY ORDER WITH REQUEST FOR IMMEDIATE ORDER FOR POSSESSION

Both parties are present.

As to the Motion to Enforce,

Ms. Solyn makes statements regarding service in this matter.

THE COURT FINDS that the respondent has been properly served in this matter.

As to jurisdiction,

Ms. Solyn and the respondent make arguments to the Court regarding jurisdiction in this matter.

Petitioner's Exhibit 1, being a copy of a Magistrate's Order from Court of Common Pleas of Sandusky County, Ohio Juvenile Division dated 12/19/2012, is identified and admitted.

Petitioner's Exhibit 2, being a copy of Motion to Dismiss from The Court of Appeals of Sandusky County, Ohio Sixth Appellate District, is identified.

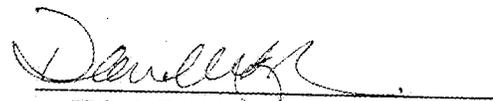
Petitioner's Exhibit 3, being a copy of Decision and Judgment from The Court of Appeals Of Ohio Sixth Appellate District Sandusky County dated 3/6/2013, is identified.

THE COURT FINDS that the State of Ohio is the proper forum for jurisdiction in this matter.

IT IS ORDERED that the State of Ohio shall retain jurisdiction in this matter.

As to the Motion to Enforce and jurisdiction,

IT IS FURTHER ORDERED that the Motion to Enforce is denied due to the jurisdiction lying within the State of Ohio.


HON. DANIELLE B. LIWSKI

Angela Creamer
Deputy Clerk

MINUTE ENTRY

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Date: April 10, 2013

Case No.: DC20120040

cc: Hon. Danelle B. Liwski
Melissa Lynn Solyn, Esq.
Kyle Beamer
Hon. Sara Sherick, 100 N Parke Ave Suite 310, Fremont, OH 43420

Angela Creamer
Deputy Clerk