IN THE SUPREME COURT
THE STATE OF FLORIDA

KAREN CHADDICK *f/n/a*
KAREN MONOPOLI
Petitioner,

V

JOSEPH MONOPOLI,
Respondent.

S.Ct. Case Number: 88,648
5th DCA Case No.: 95-1328

ON DISCRETIONARY REVIEW
OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

BRIEF OF PETITIUNER ON THE MERITS

Donald P. Sluder, Esq.
Fla. Bar Number 0149210
Attorney for Petitioner
118 Sandy Key Court
Ocoee, Florida 34761
407/877-9277
On Behalf Of:
Karen Chaddick *f/n/a*
Karen Monopoli,
Petitioner.

ORIGINAL

TABLE OF CONTENTS

TABLE OF CITATIONS, STATUTES, AND OTHER AUTHORITIES

Laws and Statutes

Cases Cited

STATEMENT OF THE CASE AND OF THE FACTS

A. NATURE OF THE CASE

This is a post initial decree, dissolution of marriage/child custody proceeding.

The operative issues in controversy are the proper exercise of jurisdiction pursuant to the diverse UCCJA's[1] and the PKPA[2], and the concomitant duty of a court to decline recognition of another court's ostensible exercise of jurisdiction, if such ostensible exercise ofjurisdiction **IS NOT** in substantial compliance with the diverse UCCJA's and the PKPA.

The initial decree granting state of the divorce which is the subject of this controversy was the Commonwealth of Massachusetts. That decree awarded custody to the children's mother, the petitioner herein, with reasonable visitation in the respondent father.

The home state of the minor children had become the State of Florida when the present proceedings arose. The state purporting to modify the child custody provisions of the initial decree is the Commonwealth of Virginia.

The Commonwealth of Virginia assumed jurisdiction while the children were on their extended summer visitation with their father, in Virginia, from their home state, Florida, in August of 1993.

After Virginia's assumption of jurisdiction, the petitioner sought to have her Massachusetts divorce decree recognized in Florida pursuant to Florida Statute § 61.1328

The trial court summarily dismissed the petitioner's petition, apparently in that the Commonwealth of Virginia was then asserting jurisdiction over the minor children of the parties.

Petitioner asserts that Virginia's assumption ofjurisdiction, and any acts, judgments, and/or decrees growing out of that assumption of jurisdiction was not and is not in substantial compliance with Florida's UCCJA, the diverse UCCJA's of the union, nor the PKPA, and that the State of Florida is forbidden by its own statutory mandate and the mandate of the PKPA to recognize such acts, judgments, and or decrees of the Commonwealth of Virginia involving child custody and not in substantial compliance with

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[1]Uniform Child Custody Jurisdiction Acts of the diverse states of the union. The State of Florida's UCCJA is at Section 61.1302, *et.seq.* Florida Statutes (1991)

[2]U.S.C. Title 28, Section 1734 A (Federal Parental Kidnaping Prevention Act ["PKPA"])

the diverse UCCJA's or the PKPA.

B. COURSE OF THE PROCEEDINGS

On April 19th, 1995 petitioner filed a petition in the Circuit Court of the Ninth Judicial Circuit of Florida., Orange County, Florida. This petition sought to have recognized by Florida the petitioner's original, initial divorce decree granted by the Commonwealth of Massachusetts. Authority for such recognition is provided by Florida Statute $6 1.1328 under Florida's Uniform Child Custody Jurisdiction Act.

In the Uniform Child Custody Jurisdiction Act affidavit required to be filed with such petitions, petitioner duly disclosed that there was then pending litigation with regard to child custody ongoing in the Commonwealth of Virginia, Charlottesville, Virginia.

C. DISPOSITION IN THE LOWER TRIBUNAL

At the trial level, the lower tribunal summarily dismissed the petition of petitioner to recognize and enforce her Commonwealth of Massachusetts divorce decree.

The Court of Appeal, Fifth District of Florida, in an en banc decision upheld the trial court by a margin of five jurist to three jurist.

SUMMARY ARGUMENT

Following a divorce granting child custody to one of the parents of a failed marriage, the non custodial parent may not then lure the minor children of the failed marriage out of the jurisdiction of the minor children's home state and once having them physically present in the non custodial parent's residential state then seek in that foreign or "asylum" state to change custody.

This has become the law of this nation and its several sister states and has been codified in the PKPA and the diverse UCCJA's of the sister states.

To insure uniformity, the acts have embraced a concept of a checks and balances, calling upon the diverse sister states of this union to deny recognition to any act or decree of a sister state that has been undertaken inconsistently with the import of the general rule.[3]

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[3]**The language used to effect this requirement reads: "in accordance with jurisdictional standards substantially similar to those of this act." F.S.§61.1328 In other words, Florida Courts are mandated to recognize foreign judgments, acts, and decrees ONLY IF they have been undertaken "in accordance with jurisdictional standards substantially similar to those of this act.** ***(i.e. Florida's UCCJA)***

In the present case, our Courts have been unable sustain the general rule. Whether it be the concept of *res judicata*, the concept ofjudicial deferment, the concept of Full Faith and Credit, or, the concept of the "second bite of the apple", quite simply the posture of this case at this moment stands for the proposition that one, a non custodial parent may indeed lure the minor children of a failed marriage from the children's home state and while the children are in the "physical jurisdiction" of the non custodial parents residential state, not the home state of the minor children, effectively change custody and defeat the general rule.

This was accomplished under the auspices of the exceptions embodied in the acts as to emergency powers over minors..

No one questions the inherent jurisdictional propriety of all courts of this nation to entertain emergency jurisdiction over minors.

However, this exception cannot be used as a device to circumvent the general rule. As stated in *Nussbaumer* v. *Nussbaumer 442* So.2d 1094 (Fla. 5th DCA 1983) at page 1097:

> **"The emergency jurisdiction provision of the Uniform Child Custody Jurisdiction Act is not designed to confer jurisdiction to make a permanent custody decree based upon allegations that a child would be subject to mistreatment or abuse if returned to the custody of the other parent." citing** *Nelson v. Nelson, 433* **So.2d 1015 (Fla. 3d DCA 1983).**

However, the matter before us is that none of these points or issues have been heard on the merits.

> **'When a foreign state decree or judgment is sought to be enforced in Florida and a party contests the foreign court's exercise of jurisdiction, the Florida court is required to hear evidence and determine whether foreign court jurisdiction was exercised in accordance with the UCCJA,"** ***Walt*** **v.** ***Walt,*** **574 So.2d 205 (Fla. 1st DCA 1991)**

The trial court in the present case, on its on motion, after a telephone call with the judge of a Virginia Court, out of the presence of the petitioner and not "on the record", summarily dismissed the petitioners action.

This is the judicial error complained of by your petitioner and such a proceeding is indirect conflict with *Burkhalter v. Burkhalter, 634* So.2d 761 (Fla. 1st DCA 1994) and *Walt v. Walt, 574* So.2d 205 (Fla. 1'" DCA 1991).

ARGUMENT

The events and the course of proceedings of this case must be observed in the context of an initial event.

That event was the ostensible exercise of jurisdiction over the subject matter of this controversy by the Commonwealth of Virginia.

Quite simply, that ostensible exercise of jurisdiction was in error. The assumption ofjurisdiction by the Commonwealth of Virginia was not in "substantial compliance" with the federal PKPA, the UCCJA of the State of Florida, nor the diverse UCCJA's of the nation.

It is difficult to ascertain from looking at what record we do have as to the existence of facts sufficient to justify the Commonwealth of Virginia's ostensible exercise of jurisdiction.

The majority below hypothesized that ***"[t]he Virginia court, under the "Best Interest Doctrine, " could have properly assumed jurisdiction upon finding that the children and one of the parents had a significant connection with that state "***

The minor children had no significant connection with the Commonwealth of Virginia. Prior to this initial event, the minor children involved in the controversy had been living with their mother in St. Cloud, Florida. Florida had become their home state as defined by the PKPA and the UCCJA.

They were enrolled in school in St. Cloud and were doing very well, academically, physically, and emotionally. Evidence which is not a part of the record would disclose the depositions of all school teachers, principals, and guidance counselors. Their testimony attest to the fact of their excellent well being. Their school physician, also deposed, supported this fact.

This valuable and operative testimony is not part of the record however, because the Florida procedure was summarily dismissed.

The visitation to Virginia had been only the children's second summer visitation to the Commonwealth of Virginia.

This valuable and operative testimony is not part of the record however, because the Florida procedure was summarily dismissed.

Upon a full hearing, evidence would have been introduced to show that the Virginia action was brought by the respondent in retaliation for the wife's institution of child support enforcement proceedings in Florida,

This valuable and operative testimony is not part of the record however, because the Florida procedure was summarily dismissed.

The Virginia Court failed to ascertain any information from Florida, such as school records, health records, doctors opinions, and etc. Such does not support a "Best Interest of the Children" inquiry. As set forth in *Hickey v. Baxter*, 461 So.2d 1364 (Fla. 1st DCA 1984) at page 1369:

> **"When the courts of more than one state have jurisdiction, priority in time of filling ordinarily controls which state shall proceed with the action so long as the court having such priority is "exerciseing jurisdiction substantially in conformity withthisact" . . .Whether the Florida court erred in exercising jurisdiction in this case depends on whether the Virginia court is exercising its jurisdiction in conformity with the act. . . .¶the incomplete record on appeal is not sufficient for us to determine whether Virginia is exerciseing its jurisdiction "substantially in conformity" with the UCCJA. . , ,[A] final determination of this question must be made by the trial court on remand after it communicates with the Virginia court and acquires the pertinent information required by the applicable statutes discussed above, , . [W]hether an appropriate home study has been made in Virginia and Florida pursuant to sections 61.134 and 61.1342 Florida Statutes (1983), and sections 20-142 and 20-143, Virginia Code (Cum.Supp. 1982); and whether the judgment of the Virginia court purports to be based on competent, substantial evidence concerning the minor children's present and future care, protection, training, and personal relationships in both locations.**

However, this valuable and operative testimony is not part of the record because the Florida procedure was summarily dismissed.

The District Court's reliance upon Siegel v. Siegel, 575 So. 2d 1267 (Fla. 1991), in its majority opinion appears to be inapposite in that in ***Siegel*** there had been a factual determination that the sister state was exercising jurisdiction pursuant to the UCCJA after ***an evidentiary hearing thereon.***

The concurring opinion of the learned Judge Charles M. Harris focuses on the

notion that "[a]ppellant has had her day in court on her issue ofjurisdiction. . .".

> **"Subject matter jurisdiction is a power that arises solely by virtue of law, It is conferred upon a court by a constitution or a statute, and cannot be created by waiver, acquiescence or agreement of the parties. . . ,Because the court lacked subject matter jurisdiction, its awards of visitation and custody are void. , ."*Chapoteau v. Chapoteau*: 659 So.2d 1381, at 1384 (Fla. 3rd DCA 1995)**

Finally, any inclination to defer Florida's home state responsibilities under the UCCJA and the PKPA to a foreign states' emergency jurisdictional powers must be scrutinized in light of Nelson *v. Nelson,* 433 So.2d 1015 (Fla. 3rd DCA 1983). As stated therein:

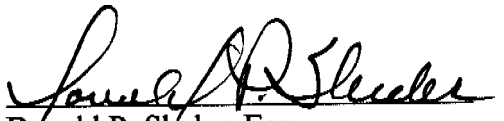
> **". . .[W]e think that to allow the non-custodial parent . . . who has gained physical custody and control of the children , . . through visitation, to vest jurisdiction in , . .[the asylum state's court] . . . by alleging past mistreatment and abuse in the domicile state on the part of the custodial parent would be to allow the emergency provision of Section 61.1308(1)(c)2 to subsume all other jurisdictional provisions in total disregard of the purposes of the Uniform Child Custody Jurisdiction Act.** *See Hricko v. Stewart,* 99 Misc.2d 266,415 N.Y.S.2d 747 **(1979) (emergency jurisdictional provision of Act should not be misused so as to defeat the purposes or objectives of the Act.) Id., at 1017-1018**

However this scrutiny was not exercised by the lower trial court because the Florida procedure was summarily dismissed.

CONCLUSION

Embracing the intent of the diverse UCCJA's as a whole, and the operable events of this cause in their entirety, the dissenting opinion of the Honorable W .J. Sharp below best sets forth the operation and application of the law as it ought to be. The majority appellate decision reviewed by these proceedings should be reversed and the cause remanded for development not inconsistent with the authorities cited herein and the dissenting opinion of the Honorable W. J. Sharp below with this Court granting such other and further relief as shall seem right and proper to the Court..

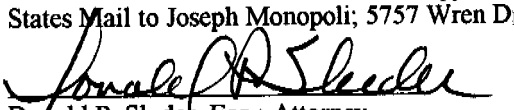
Respectfully Submitted:



Donald P. Sluder, Esq.
Fla. Bar Number 0149210
Attorney for Petitioner Karen M. Chaddick *f/k/a* Karen M. Monopoli
118 Sandy Key Court
Ocoee, Florida 34761
Telephone: (407) 877-9277 FAX: (407) 877-9277

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed, bu regular first class United States Mail to Joseph Monopoli; 5757 Wren Drive; Charlottesville, Virginia this 19th day of May, 1997.



Donald P. Sluder, Esq.; Attorney
Fla. Bar Number 0149210