

2010

Marco A. Donjuan v. Gabrielle McDermott : Brief of Appellant

Utah Supreme Court

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Larry S Jenkins; Richard J. Armstrong; Lance D. Rich; Wood Crapo LLC; Attorneys for Appellee.
Jennifer D. Reyes; Dale M. Dorius; Dorius and Reyes; Attorneys for Appellant.

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DEC 10 2010

IN THE SUPREME COURT OF THE STATE OF UTAH

MARCO A. DONJUAN

Appellant,

vs.

GABRIELLE McDERMOTT

Appellee.

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APPELLANT'S SUPPLEMENTAL
BRIEF

Appellate Court No. 201000012-CA

LARRY S. JENKINS
RICHARD J. ARMSTRONG
LANCE D. RICH
WOOD CRAPO LLC
Attorneys for Appellee
500 Eagle Gate Tower
60 East South Temple
Salt Lake City UT 84111
Telephone (801) 366-6060
Facsimile (801) 366-6061

JENNIFER D. REYES #9004
DALE M. DORIUS # 0903
DORIUS & REYES
Attorneys for Appellant
P. O. Box 895
29 South Main
Brigham City, UT 84302
Telephone (435) 723-5219
Facsimile (435) 723-5210

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“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...”

FURTHER ISSUE PRESENTED AND STANDARD OF REVIEW

1. Whether the mandates imposed upon a biological father in Utah Code Ann. § 78B-6-121(3) are, in certain circumstances, due to jurisdictional issues, preempted by the federal Parental Prevention and Kidnaping Act.

Standard of Review: Whether federal law preempts state law is a question of law which is reviewed de novo. *In re Adoption of A.B.*, 2010 UT 55 (2010).

In addition, the interpretation of a statute is a question of law, which we review for correctness, giving no particular deference to the lower court's conclusions. *In re H.J.*, 1999 UT App 238, ¶ 15, 986 P.2d 115.

Preservation of the Issue: The conflict between the PKPA and Utah Code Ann. 78B-6-121(3) creates a jurisdictional issue. This issue was not presented to the trial court, but the question of jurisdiction can be raised at any time. *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah t. App. 1987).

SUPPLEMENTAL ARGUMENT

I. THE MANDATES IMPOSED UPON BIOLOGICAL FATHERS IN UTAH CODE ANN. § 78B-6-121(3) ARE IN CERTAIN CIRCUMSTANCES, PREEMPTED BY THE FEDERAL PARENTAL PREVENTION AND KIDNAPING ACT.

The federal Parental Kidnaping Prevention Act “PKPA” precludes a state from exercising jurisdiction over a proceeding for custody or visitation determinations during the time another state has a pending proceeding to make a custody or visitation determination. Specifically, 28 U.S.C. § 1738(A)(g) states:

“A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation 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 or visitation determination.” *id.*

Utah Code Ann. § 78B-6-121(3) requires a biological father to initiate a proceeding in a District Court of the State of Utah to establish paternity in order to preserve the right of the father to consent to the adoption of his child. Utah Code Ann. § 78B-6-121(3).

The PKPA and Utah Code Ann. § 78B-6-121(3) are conflicting in situations, like the present case, wherein the biological father has commenced an action in another state prior to the birth of his child to determine issues relating to the minor child including custody, yet, according to Utah law, the biological father must submit to the jurisdiction

of Utah and commence a Utah proceeding despite his ongoing efforts in another state.

The Supreme Court has recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. *Gordon Case & Co. v. West*, 125 P.3d 894 (Utah 2005). These scenarios of implied preemption have acquired their own labels and have become known as "field preemption" and "conflict preemption," respectively. *id.*

This case involves conflict preemption. Conflict preemption occurs "where it is impossible . . . to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Electric Company*, 496 U.S. 72 (1990).

The PKPA precludes a state from exercising jurisdiction over a proceeding for custody or visitation determinations during the time another state has a pending proceeding to make a custody or visitation determination. However, Utah Code Ann. § 78B-6-121(3) requires a biological father to initiate a Utah proceeding to preserve his rights to the child regardless of the fact he may have already commenced an action in another state pertaining to the minor child.

Here, on May 19, 2009, the biological father, Marco Donjuan filed a proceeding in his home state of Georgia where the child was conceived and where the birth mother also

resided. (R. 9). The Georgia proceeding included a specific request for custody of the minor child and a standing Domestic Relations Order issued by the Georgia Court which states,

“DO NOT REMOVE CHILDREN - each party is hereby enjoined and restrained from unilaterally causing or permitting the minor child(ren) to be removed from the jurisdiction of this Court without permission of the Court, except in an emergency affecting the health, safety, or welfare of the child(ren) which has been created by the other party to this action.” (R. 104-107; R. 124-127).

Applying the PKPA to the instant case, no other state could obtain jurisdiction to make determinations regarding custody or visitation of the minor child at issue during the pendency of the Georgia action. The Georgia paternity action, including the birth father’s request for custody is still pending in Georgia as only the legitimation portion of the Georgia filing was dismissed. (R. 148-149).

The Utah state law found in Utah Code Ann. 78B-6-121(3) is in conflict with federal law, specifically the PKPA as it requires a biological father to commence an action in Utah even though another state is exercising jurisdiction over a matter involving the minor child at issue. This Court has previously recognized on more than one occasion that “as a federal jurisdictional state, the PKPA establishes a policy of federal

preemption in the area of custody jurisdiction”. *Curtis v. Curtis*, 789 P.2d 717, 721 n. 8 (Utah Ct. App., 1990). Therefore, the requirements of Utah Code Ann § 78B-6-121(3) are preempted by the PKPA and therefore, the trial Court was in error to assume jurisdiction over the matter and make determinations regarding the rights of the biological father, Marco Donjuan.

A. THE MAY 19, 2009 GEORGIA PETITION FILED BY THE NATURAL FATHER QUALIFIES AS “ANY PROCEEDING FOR A CUSTODY OR VISITATION DETERMINATION” FOR PURPOSES OF THE PKPA.

In the state of Georgia, a paternity proceeding may be commenced prior to the birth of a child and the Georgia Court issued a specific finding evidencing this fact in their Order on Defendant’s Motion to Dismiss. (R. 148-149).

The May 19, 2009 verified Petition To Legitimate and for Custody & Support does address the issue of custody as clearly indicated in the title of the pleading. Count Two (2) of the Petition, Paragraph Seven (6) requests that the biological father be granted primary physical and legal custody of the minor child. (R. 104-107)

Also, the prospective adoptive parents knew about the biological father’s request for custody as the search with the Utah State Register of Vital Statistics confirmed there had been a paternity filing in Utah prior to the consent of the birth mother and counsel for the prospective adoptive parents obtained a copy of the Petition filed by the biological father, Marco Donjuan.

Here, the verified Petition for Legitimation, Custody and Child Support filed in the state of Georgia on May 19, 2009 qualifies as “any proceeding for a custody or visitation

determination” for purposes of the PKPA, 28 U.S.C. § 1738A(g) including, but not limited to the foregoing reasons:

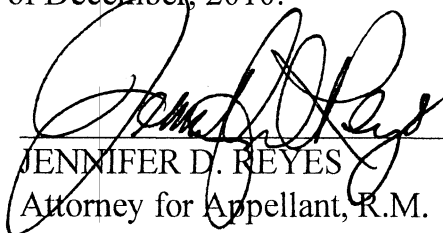
1. The Georgia Court was exercising jurisdiction over the paternity matter as of May 19, 2009, over two months prior to the consent of the birth mother being taken;
2. The Georgia Court continues to exercise jurisdiction;
3. The Georgia matter addressed the issues of custody and requested the Georgia Court to make determinations regarding custody;
4. Birth Mother was served with the Domestic Relations Action Standing Order which enjoined and restrained the parties, mother and father, from removing the child from the state of Georgia without the consent of the Court absent an emergency.

Therefore, the Georgia action qualifies as a proceeding for a custody or visitation determination for purposes of the PKPA.

CONCLUSION

The PKPA operates to divest the Courts of Utah of jurisdiction to hear this case. The state of Georgia is the proper forum for any custody determinations.

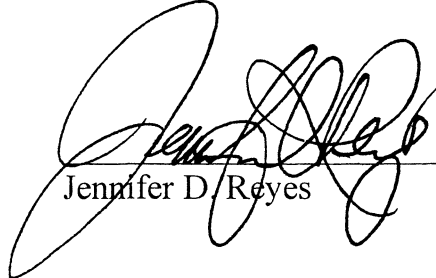
RESPECTFULLY SUBMITTED, this 10th day of December, 2010.


JENNIFER D. REYES
Attorney for Appellant, R.M.

CERTIFICATE OF SERVICE

I hereby certify on December ~~10~~³, 2010, I caused a true and correct copy of the foregoing APPELLANT'S SUPPLEMENTAL BRIEF through the U.S. Mail, postage pre-paid and via facsimile to the following:

Larry S. Jenkins
Lance D. Rich
Attorneys for S.B. and J.B.
500 Eagle Gate Tower
60 E. South Temple, #500
Salt Lake City UT 84111
Facsimile (801)366-6061



Jennifer D. Reyes