



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 4, 2019

LETTER OPINION

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Counsel for Defendant

Re: *Syed Hyat v. Afshan Hina*
Case No. CL-2018-4681

Dear Counsel:

This cause comes on for consideration of whether this Court has jurisdiction to enter a child custody order within the confines of a pending divorce action when the subject child and mother have resided in another state for more than six months next preceding the filing of the divorce, the father, while a resident at the time of such filing,

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has also thereafter decamped to Washington, D.C., and there is a prior order from the Fairfax Juvenile and Domestic Relations District Court determining child custody entered within six months after the child left the Commonwealth. This Court holds it is without jurisdiction to entertain entry of a child custody order in the divorce action for the following reasons: 1) the Court is not contemplating modification of one of its own orders, thereby not satisfying the continuing jurisdiction requirements of Virginia Code § 20-146.13, which would in any case require at least one parent or the child remain present in the Commonwealth; and 2) there are two bars to exercise of the Court's jurisdiction pursuant to Virginia Code § 20-146.12(B), namely, Virginia was not the state of residence of the child at or within six months before the time of filing of the Complaints for Divorce, and neither parent currently resides in the Commonwealth.

Consequently, and in application of the principles aforesaid, this Court finds it lacks subject matter jurisdiction to consider entry of a child custody order within the confines of the pending divorce action, and shall enter a separate order incorporating the holding of this Letter Opinion.

BACKGROUND

The Court has before it a divorce action between Mr. Syed Hyat ("Plaintiff" or "Father") and Ms. Afshan Hina ("Defendant" or "Mother"), wherein the parties seek the Court enter a custody order respecting their minor child. Father and Mother separated on or about March 3, 2017. The Mother and child moved from Virginia to Maryland on or about August 11, 2017. On December 21, 2017, the Fairfax Juvenile and Domestic Relations District Court ("JDR Court") entered an "Agreed Custody and Visitation Order"

respecting the subject child. On March 7, 2018, Father filed with the JDR Court a Motion to Modify the December 21, 2017 order. Father thereafter filed his Complaint for Divorce in this Court on March 23, 2018, and then an Amended Complaint on May 14, 2018, in each requesting this Court determine child custody. On April 4, 2018, the JDR Court entered an order finding that Court was divested of jurisdiction over the pending child custody modification action in favor of the Circuit Court divorce action before this Court. Each divorce complaint alleged the child was a resident of Maryland, but incorrectly averred that he had resided in Virginia within the preceding six months. See Comp. ¶ 10; Amend. Comp. ¶ 35. Mother, in her June 29, 2018 Answer to the Amended Complaint, admitted the allegation that the child resided in Maryland but denied this was during the six months next preceding the filing of the Amended Complaint. Father is currently a resident of Washington, D.C., having moved there on or about August 26, 2018.

Both Maryland and Virginia have adopted the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”). On April 17, 2018, the Circuit Court of Anne Arundel County, Maryland, acting upon request of the Mother, entered an order confirming registration of the foreign child custody determination of the JDR Court pursuant to the Maryland UCCJEA, Md. Code Ann., Fam. Law §§ 9.5-101–9.5-318.

ANALYSIS

This Court’s jurisdiction to enter a child custody order is governed by Virginia’s enactment of the UCCJEA. Va. Code §§ 20-146.1–20-146.38. The Court has not previously entered a custody order respecting the child who is the subject of this cause. The Court must therefore first determine whether the requested relief amounts to an

"initial child custody determination." Second, the Court must analyze whether the jurisdictional impact is different for a court sitting in modification of a prior custody order if any order issued by this Court is determined not to be an initial determination. Finally, this Court must decide whether there is a jurisdictional difference between a lower court that is modifying its order and the Circuit Court entering a new, distinct order of custody for the first time within the confines of a divorce action.

If this Court is called upon to "make an initial custody determination" in the context of the facts of this case, it may do so only if:

1. This Commonwealth is the home state of the child on the date of the commencement of the proceeding, or *was the home state of the child within six months* before the commencement of the proceeding and the child is absent from this Commonwealth but *a parent* or person acting as a parent *continues to live in this Commonwealth*;

Va. Code § 20-146.12 (emphasis added). In the instant case, the child was not living in Virginia within six months next preceding the filing of either the Complaint or Amended Complaint for Divorce. Moreover, neither parent currently resides in the Commonwealth, though the Father did reside in Virginia at the time of the filing of the divorce. Thus, in the absence of other applicable statutory exceptions, the factual conditions precedent for the jurisdiction of this Court to make an initial custody determination are not met. *See Behnke v. Behnke*, Va. Ct. App. No. 0005-03-1, 2003 WL 22433324, at *4 (Va. Ct. App. Oct. 28, 2003) (holding the Circuit Court was without authority to enter an initial custody determination in a divorce action, wherein the father was present in the Commonwealth but the mother and child had departed the state more than six months preceding the filing of the complaint).

However, the Code defines an “initial determination” to be “the first *child custody determination* concerning a particular child.” Va. Code § 20-146.1 (emphasis added). A “child custody determination” includes “a permanent, temporary, initial or *modification order*.” *Id.* (emphasis added). Therefore, this Court could conclude the JDR Court made the initial child custody determination by its order of December 21, 2017. In such a case this Court must look at its authority to modify that order. “‘Modification’ means a child custody determination that changes, replaces, *supersedes*, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.” *Id.* (emphasis added). Because the JDR Court order of December 21, 2017, would be superseded by any order of this Court, it appears at first blush that Virginia Code § 20-146.12(A)1 is not a jurisdictional bar to this Court proceeding to make a superseding modification of the JDR Court order, thus a “child custody determination.”

Next, the Court considers what jurisdiction the JDR Court possessed at the time Father filed his Motion to Modify Custody on March 7, 2018, and before he filed his divorce action herein. This analysis is of consequence because subject matter jurisdiction over a child custody determination cannot be logically inconsistent depending merely on whether the matter is filed in the JDR Court or in this Circuit Court. At the time Father filed for modification of the prior JDR Court order, *that court* had jurisdiction because the Father continued to reside in Virginia, even though the child had been absent from the state for more than six months.

A. Except as otherwise provided in § 20-146.15, a court of the Commonwealth *that has made a child custody determination* consistent with § 20-146.12 or 20-146.14 *has exclusive, continuing jurisdiction* as long

as the child, a *parent* of the child, or any person acting as a parent of the child *continues to live in the Commonwealth.*

Va. Code § 20-146.13 (emphasis added).

However, the *exclusive continuing* jurisdiction of the JDR Court ceased upon the Father relocating to Washington, D.C., on or about August 26, 2018. On such date, the JDR Court was dispossessed of such jurisdiction to modify its order. Nevertheless, the JDR Court could still have jurisdiction if it maintained “jurisdiction to make an initial determination under § 20-146.12.” Va. Code § 20-146.13(B). As already discussed herein-above, however, such was not the case given the requirements of Virginia Code § 20-146.12(A)1, because the child became a resident of Maryland on or about August 11, 2017, more than six months preceding the filing of the Motion to Modify.

The jurisdictional bar of Virginia Code § 20-146.13 seemingly only applies to “a court of the Commonwealth which has made a child custody determination,” in this case, the JDR Court. The custody matter is new to the Fairfax Circuit Court. Thus, determining whether the jurisdictional bar also applies to this Court requires further analysis. The Court is left to harmonize what is an apparent incongruity, namely that the JDR Court, which issued the original child custody order of December 21, 2017, lacked jurisdiction to modify its order after August 26, 2018, from which date neither parent resided in Virginia. Yet, jurisdiction to modify that same order was invoked in a parallel case in this Court on March 23, 2018, by the filing of this divorce action. This raises the question whether this Court could maintain jurisdiction over the child custody matter under the circumstances where the JDR Court was factually barred from so doing, by “piggybacking” jurisdiction over the child custody matter onto the jurisdiction for entry of a divorce. The parties both

urge the Court find it has the jurisdiction to proceed. Father filed his first Complaint in this Court on March 23, 2018. Father thereafter moved the JDR Court divest itself of jurisdiction in favor of the divorce action, to which motion Mother, acting *pro se*, did not object. The JDR Court entered its divesting order on April 4, 2018. Consent by the parties to the jurisdiction of this Court, or even referral thereto by the JDR Court, is however, of no consequence to the herein analysis for this Court may not accord itself authority it does not possess. In doing otherwise, the Court would do little more than enter an illusory order which is void *ab initio*. It has been a long settled principle that the Court's jurisdiction

cannot be changed by any one of the parties, nor by a combination between both of the parties, and every effort so to do has been held to be in fraud of the law. The [Court] cannot, under any pretext of acquiescence of the parties, take jurisdiction beyond the limit fixed by law. [The Court's] jurisdiction is given by law alone, and is, in every case, what the law fixes it at. The consent of the parties cannot enlarge it. In the history of this state the efforts of the [courts] to extend [their] jurisdiction beyond the limits prescribed by law have been checked by the mandate of the higher courts in the form of the writ of prohibition.

See *James v. Stokes*, 77 Va. 225, 228–29 (1883).

At the time of the divorce filing, Maryland and not Virginia was the child's "home state." See Va. Code § 20-146.1. Thus, preliminarily, the Court cannot find it is a convenient forum in contemplation of Virginia Code § 20-146.18, if it has not first acquired jurisdiction over the child custody issue. See *Prizzia v. Prizzia*, 58 Va. App. 137, 149 (2011); Cf. *Parris v. Doctor*, Va. Ct. App. No. 0081-11-1, 2011 WL 4916293, at *3 (Va. Ct. App. Oct. 18, 2011). A possibility for exercise of jurisdiction by this Court would be to hold that application of Virginia Code § 20-146.13 bars jurisdiction only with respect to the original issuing court (the JDR Court), and that Virginia Code § 20-146.12 prevents the jurisdiction of this Circuit Court only if there has been no prior JDR Court order to

supersede. Such statutory construction would, however, be in error. Virginia Code § 20-146.12 has the title “Initial child custody jurisdiction,” enticingly suggesting the statute applies in limitation only to “initial child custody determinations.” However,

the headline of a Code section is not part of the statutory language and does not have the force of law. Code § 1–217; *see also Thurston Metals & Supply Co. v. Taylor*, 230 Va. 475, 484, 339 S.E.2d 538, 543–44 (1986) (differentiating between the title of a statute and the headline of a Code section).

Butler v. Fairfax Cnty. Sch. Bd., 291 Va. 32, 38 (2015). Thus, the headline of the statute supplies no limitation to the statute’s application.

The Virginia Code harmonizes the jurisdictional bars, which seemingly herein apply only to the JDR Court sitting in review of its order, or to this Court considering only an “initial custody determination,” by application of § 20-146.12(B), which states, “Subsection A is the *exclusive jurisdictional basis* for making a child custody determination by a court of this Commonwealth.” (Emphasis added). Therefore, in the instant case, *this Court only has jurisdiction if* adjudicating an “initial custody determination” under Virginia Code § 20-146.12(A)(1) or modifying one of its *own* orders pursuant to Virginia Code § 20-146.13. Because the conditions precedent to jurisdiction of either statutory provision do not apply, *this Court’s* jurisdiction to determine child custody is barred, whether the order would supersede a prior order of another court, or merely amount to a wholly new ruling without a preexisting custody order.¹ This Court

¹ Under the factual circumstances of this case in application of the Code sections herein discussed, the JDR Court Order of Divestiture of April 4, 2018, was in error because it was predicated on the assumption the Fairfax Circuit Court had subject matter jurisdiction over the child custody component of the prayer in the Divorce Complaint when as is made clear herein, this Court never acquired such jurisdiction. Until the Father relocated to Washington, D.C., on or about August 26, 2018, the JDR Court retained exclusive continuing jurisdiction to revise its order of December 21, 2017, while this Court had no jurisdiction to supersede such order having never acquired jurisdiction to enter a custody decree.

never had subject matter jurisdiction to issue a child custody determination at the time of filing of the Complaints for Divorce, whether initial or superseding of a prior order of the JDR Court. Such jurisdiction is separate and distinct from the Court's jurisdiction to consider the subject matter of the divorce case, inasmuch as the latter is specifically based on separate statutory authority which does not require the parties continued residence in Virginia after the filing of the Complaint. Va. Code § 20-97; *see also Behnke*, Va. Ct. App. No. 0005-03-1, 2003 WL 22433324, at *4. The Court's jurisdiction over child custody, whether part of a divorce action or independent thereof, is exclusively delimited by the provisions of the Virginia UCCJEA already discussed herein-above, which in this case bar the jurisdiction of this Court over the child custody matter. See Va. Code §§ 20-146.1–20-146.38.

CONCLUSION

This Court has considered whether it has jurisdiction to enter a child custody order within the confines of a pending divorce action when the subject child and mother have resided in another state for more than six months next preceding the filing of the divorce, the father, while a resident at the time of such filing, has also thereafter decamped to Washington, D.C., and there is a prior order from the Fairfax Juvenile and Domestic Relations District Court determining child custody entered within six months after the child left the Commonwealth. This Court holds it is without jurisdiction to entertain entry of a child custody order in the divorce action for the following reasons: 1) the Court is not contemplating modification of one of its own orders, thereby not satisfying the continuing jurisdiction requirements of Virginia Code § 20-146.13, which would in any case require

at least one parent or the child remain present in the Commonwealth; and 2) there are two bars to exercise of the Court's jurisdiction pursuant to Virginia Code § 20-146.12(B), namely, Virginia was not the state of residence of the child at or within six months before the time of filing of the Complaints for Divorce, and neither parent currently resides in the Commonwealth.

Consequently, and in application of the principles aforesaid, this Court finds it lacks subject matter jurisdiction to consider entry of a child custody order within the confines of the pending divorce action, and shall enter a separate order incorporating the holding of this Letter Opinion.

AND THIS CAUSE CONTINUES.

Sincerely,

A solid black rectangular box redacting the signature of the judge.

David Bernhard
Judge, Fairfax Circuit Court