

STATE OF MICHIGAN
COURT OF APPEALS

NANCY DIERKER,

Plaintiff-Appellant,

v

WILLIAM J. NABHOLZ, III,

Defendant-Appellee.

UNPUBLISHED

February 24, 1998

No. 204700

Oakland Circuit Court

LC No. 97-538275 DC

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

In this case involving the modification of a Missouri court order involving the custody of a child, plaintiff appeals as of right the Oakland Circuit Court's order that declined to exercise jurisdiction in this matter and deferred the matter to the Missouri court. We affirm.

In 1989, the parties were divorced in Missouri. The Missouri divorce decree awarded the parties joint legal custody of their child with physical custody to plaintiff, the child's mother, and visitation to defendant, the child's father. In January, 1996, plaintiff and the child moved to Michigan where plaintiff is employed as an airline pilot with Northwest Airlines. In April, 1996, the Missouri court entered an order that set forth an agreement entered into by the parties. This agreement reaffirmed the basic custodial framework contained in the divorce decree but modified defendant's visitation schedule to provide, in part, that defendant would have visitation with the parties' child every third weekend. On appeal, plaintiff represents to this Court that the agreed upon visitation schedule became unworkable because the frequent trips to Missouri caused severe stress to the child and significant disruption in his life.

On February, 11, 1997, plaintiff filed a complaint in Oakland Circuit Court, requesting that the court assume jurisdiction and modify the visitation portions of the April, 1996, order to, in part, eliminate weekend visitation. At the time plaintiff filed her Michigan complaint, defendant's motion for a contempt order to compel plaintiff to comply with the April, 1996, order was pending in the Missouri court. (Defendant had apparently filed his motion in the Missouri court in approximately December, 1995.)

Two days later, on February, 13, 1997, the Missouri court entered an order providing that plaintiff give defendant seven additional days of visitation during Summer, 1997, as “compensatory visitation” and that defendant dismiss his motion for contempt upon plaintiff’s compliance in giving the compensatory visitation. The order further provided that the failure of either party to comply with the order would result in a finding of contempt and the issuing of appropriate orders.

In June, 1997, the Oakland Circuit Court declined to exercise jurisdiction and deferred the matter to the Missouri court. Plaintiff appeals this decision.

On appeal, plaintiff contends that the trial court erred in failing to exercise jurisdiction over this case pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), MCL 600.651 *et seq.*; MSA 27A.651 *et seq.* We disagree.

Section 664 of the UCCJA provides the circumstances under which a Michigan court can modify a foreign custody decree:

If the court of another state has made a custody decree or judgment, a court of this state *shall not* modify that decree or judgment unless it appears to the court of this state that the court which rendered the decree or judgment does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with section 651 to 673 or has declined to assume jurisdiction to modify the decree or judgment and the court of this state has jurisdiction. [MCL 600.664(1); MSA 27A.664(1). (emphasis supplied)]

In determining that it would not exercise jurisdiction in this case, the Oakland Circuit Court stated on the record that it had conferred with the Missouri court and that the Missouri court had indicated that it did not want to relinquish jurisdiction. We conclude that the Oakland Circuit Court expressly found that the Missouri court had not declined to assume jurisdiction. We find no error in this regard. The Oakland Circuit Court implicitly assumed that the Missouri court had jurisdiction under the UCCJA at all relevant times. Again, we find no error in this regard. MCL 600.653(1)(b); MSA 27A.653(1)(a); Mo Rev Stat § 452.440 *et seq.* Accordingly, under the mandate contained in § 664 of the UCCJA, the Oakland Circuit Court could not, and properly did not, modify the Missouri court’s April, 1996, order.¹ *Loyd v Loyd*, 182 Mich App 769, 777-778; 452 NW2d 910 (1990); see also *In re Danke*, 169 Mich App 453; 426 NW2d 740 (1988).

In addition, although not raised by either party, we further conclude that enforcement of the Missouri court’s April, 1996, order is also required by the federal Parental Kidnapping Prevention Act² (PKPA), 28 USC 1738A. See, generally, *In re Clausen*, 442 Mich 648, 659; 502 NW2d 649 (1993).³

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski

¹ Moreover, we note that § 656(1) of the UCCJA provides that a Michigan court is precluded from exercising jurisdiction if a custody proceeding is pending in another state at the time the custody petition is filed in Michigan. See MCL 600.656(1); MSA 27A.656(1). In *In re Clausen*, 442 Mich 648, 666-668; 502 NW2d 649 (1993), our Supreme Court rejected the argument that ongoing proceedings to enforce a final custody order do not constitute “pending” custody proceedings under § 656(1) of the UCCJA. Thus, it also appears that the Oakland Circuit Court properly declined to exercise jurisdiction under § 656(1) of the UCCJA because at the time plaintiff filed her Michigan complaint contempt proceedings seeking compliance with the Missouri court’s April, 1996, custody and visitation order were pending in the Missouri court.

² Although the PKPA refers to parental kidnapping, it applies to any custody determination. *Clausen, supra* at 664, n 20. Thus, we do not imply that plaintiff committed any wrongdoing in this case. Rather, we note that the parties’ divorce decree provided that plaintiff had the right to leave Missouri with the child and reside in another jurisdiction on a permanent basis without first obtaining written consent from the Missouri court or prior approval from defendant. Moreover, the April, 1996, order specifically authorized plaintiff to move to Michigan because of her employment.

³ In holding that enforcement of a foreign custody decree was required by the PKPA, our Supreme Court in *Clausen* specifically rejected the third-party custodians’ reliance on *Danke, supra*, a case involving modification of a foreign custody order under the UCCJA, on the ground that *Danke* did “not mention the PKPA.” *Clausen, supra* at 668, n 23.