[Cite as *State ex rel. Burnett v. Dewey*, 2011-Ohio-4678.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Alan L. Burnett, II

Relator

v.

Honorable Judge John P. Dewey
and Caren C. Burnett

Respondents

Court of Appeals No. S-11-021

DECISION AND JUDGMENT

Decided: September 14, 2011

* * * * *

Reese M. Wineman, for relator.

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for respondent
Honorable Judge John P. Dewey.

Ronald R. Smith, for respondent Caren C. Burnett.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Relator, Alan L. Burnett, II, has filed a petition for a writ of prohibition against respondents Judge John P. Dewey of the Sandusky County Court of Common Pleas and Caren C. Burnett, relator's estranged wife. In the petition, relator requests that

this court issue a writ prohibiting respondent Judge Dewey from the further exercise of jurisdiction over any and all matters involving the custody of Burnett's minor children in Sandusky County Common Pleas case Nos. 10 DR 628 and 10 DR 853. In addition to the petition, relator has filed a motion for default judgment, respondents have each filed motions to dismiss, and relator has filed a memorandum in opposition to the motions to dismiss.

{¶ 2} We will first address relator's motion for a default judgment. Relator contends that because, as of July 25, 2011, respondents had not filed an answer or otherwise appeared in this action, he is entitled to a default judgment. 6th Dist.Loc.App.R. 6 provides in relevant part that the respondent need not file an answer until directed by the court of appeals to do so. In a decision and judgment of July 26, 2011, we directed respondents to file an answer to the petition, pursuant to Civ.R. 8(B), or a motion to dismiss the petition, pursuant to Civ.R. 12 within 14 days of the date they were served with the alternative writ. As noted above, respondents have both filed timely motions to dismiss. Relator's motion for default judgment is therefore denied.

{¶ 3} In order to fully address the merits of relator's petition and the pending motions, a full understanding of the appeal presently pending in *Burnett v. Burnett*, 6th Dist. No. S-10-050, is essential. That appeal was filed from the September 28, 2010 consolidated judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, in Sandusky County Common Pleas case Nos. 10 DR 628 and 10 DR 853. In case No. 10 DR 628, respondent herein, Caren Burnett, filed a petition for

a civil protection order ("CPO") against her husband, relator herein, Alan Burnett. The trial court issued an initial ex parte protection order naming Caren and the parties' children as protected persons, granted Caren Burnett custodial rights, and set the matter for further hearing. In case No. 10 DR 853, Carol Burnett filed a complaint for legal separation with a motion for temporary custody. Alan Burnett then filed a motion to dismiss the separation complaint for lack of personal and subject matter jurisdiction. He also appeared in the CPO case and objected to the issuance of a final order.

{¶ 4} The parties' residency status is somewhat ambiguous. The parties lived together in Michigan for most of their marriage. The trial court, however, in finding that it had personal jurisdiction over the parties, determined that Caren Burnett resided in Ohio for more than 90 days, from March 29, 2010, through July 30, 2010, before filing her complaint for legal separation. The court further determined that it had jurisdiction in the CPO case given the tortious nature of text messages Caren had been receiving from Alan Burnett while she was a resident of Ohio. The court, therefore, issued a full civil protection order for a one year period in case No. 10 DR 628 and denied the motion to dismiss the legal separation complaint for lack of jurisdiction in case No. 10 DR 853. That is the consolidated judgment from which relator filed a notice of appeal in *Burnett*.

{¶ 5} In *Burnett*, we issued an order requiring the parties to file memoranda addressing the issue of whether the trial court's judgments being appealed were final appealable orders. In a decision and judgment dated February 3, 2011, we concluded that while we had jurisdiction to hear the appeal of the trial court's issuance of the CPO, we did

not have jurisdiction to hear the appeal from the trial court's denial of the motion to dismiss for lack of jurisdiction. We based our decision on the well-established principle that in general, an order denying a motion to dismiss for lack of jurisdiction is not a final appealable order. We further determined, however, that the trial court had conducted a forum nonconveniens analysis under R.C. 3127.21 and held that the trial court's denial of the motion to dismiss on that basis was a final appealable order. Accordingly, the appeal that is presently before this court in *Burnett* challenges the final order in the CPO action and the court's order denying Alan Burnett's motion to dismiss for forum nonconveniens. The remainder of case No 10 DR 853 remains in that court.

{¶ 6} Relator now challenges the subject matter jurisdiction of Judge Dewey to continue to preside over Sandusky County Common Pleas case Nos. 10 DR 628 and 10 DR 853. Relator cites a judgment entry from Judge Dewey, dated April 13, 2011, in case No. 10 DR 853, in which Judge Dewey granted the motion of Caren Burnett to continue the temporary support and child custody orders the court filed on August 25, 2010, and journalized on September 3, 2010, as evidence of Judge Dewey's intent to continue to exercise jurisdiction over those cases. Relator contends that pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), R.C. Chapter 3127, and *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, Judge Dewey patently and unambiguously lacks jurisdiction over any child custody matters in the actions filed by Caren in the Sandusky County Court of Common Pleas, Domestic Relations Division.

{¶ 7} A writ of prohibition "* * * is an extraordinary writ, the purpose of which is to challenge the jurisdiction of a court to act." *State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas, Juv. Div.* (1996), 76 Ohio St.3d 1203, 1203. The writ will be issued only if a petitioner can prove: "(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." *State ex rel. Starner v. DeHoff* (1985), 18 Ohio St.3d 163, 164. However, "[i]n those cases where jurisdiction is patently and unambiguously lacking, the requirement of the lack of an adequate remedy at law need not be proven, because the availability of alternate remedies like appeal is immaterial." *Rosen*, supra, at ¶ 18, citing *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, ¶ 16.

{¶ 8} Respondents Judge Dewey and Caren Burnett have filed motions to dismiss pursuant to Civ.R. 12(B)(6), alleging that relator's petition fails to state a claim upon which relief can be granted. Dismissal of a petition for a writ of prohibition for failure to state a claim upon which relief can be granted is appropriate if, after presuming that all of the factual allegations in the complaint are true and making all reasonable inferences in favor of relator, it appears beyond doubt that relator can prove no set of facts entitling him to the extraordinary writ of prohibition. *Rosen*, supra, at ¶ 13.

{¶ 9} With regard to respondent Caren Burnett, it is undisputed that she is not a court or officer who is about to exercise judicial or quasi-judicial power. Accordingly,

relator can prove no set of facts entitling him to relief and Caren Burnett's motion to dismiss is found well-taken and is granted.

{¶ 10} Regarding the first prong of the test set forth above, we will assume for purposes of this action that Judge Dewey intends to continue to exercise judicial power in case No. 10 DR 853, particularly given that the only issue before this court on appeal in that case is the trial court's denial of relator's motion to dismiss for forum nonconveniens. With regard to case No. 10 DR 628, however, the appeal from the trial court's final judgment entry is presently before this court. Accordingly, Judge Dewey does not have jurisdiction in that case to act in any way that would interfere with our ability to affirm, reverse or modify the judgment that is before us on appeal. Relator, however, has not established that Judge Dewey intends to exercise jurisdiction in that case. Rather, the order that he cites in support of his assertion that Judge Dewey intends to exercise jurisdiction in the two cases, was only filed in case No. 10 DR 853. Accordingly, we will confine our discussion to that case, which was initiated on July 30, 2010, when Caren Burnett filed a complaint for legal separation.

{¶ 11} Judge Dewey and the Sandusky County Court of Common Pleas, Domestic Relations Division, have basic statutory jurisdiction to determine child custody matters. *McGhan v. Vettel*, 122 Ohio St.3d 227, 2009-Ohio-2884, ¶ 18. Nevertheless, the UCCJEA sets forth procedures for determining jurisdiction in interstate custody disputes. R.C. 3127.15 provides in relevant part:

{¶ 12} "(A) Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state has jurisdiction to make an initial determination in a child custody proceeding only if one of the following applies:

{¶ 13} "(1) This state 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 state but a parent or person acting as a parent continues to live in this state.

{¶ 14} "(2) A court of another state does not have jurisdiction under division (A)(1) of this section or a court of the home state of the child has declined to exercise jurisdiction on the basis that this state is the more appropriate forum under section 3127.21 or 3127.22 of the Revised Code, or a similar statute of the other state, and both of the following are the case:

{¶ 15} "(a) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

{¶ 16} "(b) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships."

{¶ 17} A "home state" is defined by R.C. 3127.01(B)(7) as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of a child custody proceeding * * *. A period of temporary absence of any of them is counted as part of the six-month or other period."

Although the statute seems to require courts to look to the six-month period "immediately preceding" the filing of a child custody proceeding, the Supreme Court of Ohio in *Rosen*, supra, determined that the appropriate inquiry is, where had the children lived for six consecutive months ending within the six months before the child custody proceeding was commenced. Id. at ¶ 41-42.

{¶ 18} Relator contends that based on the Information for Parenting Proceeding affidavits that Caren Burnett was required to file in both the CPO case and the separation action, Ohio is not the home state of the parties' minor children and, therefore, respondent does not have jurisdiction to make a custody determination regarding the children.

{¶ 19} The affidavits Caren Burnett filed in those actions are inconsistent. The affidavit filed in the CPO action states that the children lived from their births until the end of March 2010, in Michigan, from April 1, 2010, to May 1, 2010, in Ohio, from May 3, 2010, to May 19, 2010, in Florida, and then from May 21, 2010, until June 3, 2010, the date the complaint was filed in Ohio. The affidavit filed with the complaint for legal separation states that the children lived from their births until March 28, 2010, in Michigan, from March 29, 2010, until May 30, 2010, in Ohio, from June 3, 2010, to June 26, 2010, in Florida, and from June 27, 2010, until July 30, 2010, in Ohio. Regardless of the inconsistencies in the affidavits, what is clear is that on the dates that both complaints were filed, the only state that could qualify as the home state under R.C. 3127.15(A)(1) was Michigan. Nevertheless, our inquiry does not end there.

{¶ 20} R.C. 3127.15(A) begins with the statement: "[e]xcept as otherwise provided in section 3127.18 * * *." R.C. 3127.18(A)(2) provides that "[a] court of this state has temporary emergency jurisdiction if a child is present in this state and * * * [i]t 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." Pursuant to this statute, Judge Dewey clearly obtained jurisdiction to make an initial child custody determination in the CPO case filed on June 3, 2010. Indeed, the court in that case determined that Caren Burnett had been subjected to tortious threats by relator. The court was also extremely troubled by an attempt by relator's mother and uncle to kidnap the children from Detroit Metro Airport. R.C. 3127.18(B) then provides in relevant part: "If * * * a child custody proceeding has not been commenced in a court of a state having jurisdiction under [R.C.] 3127.15 * * * [i.e. the child's home 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 [i.e. the child's home state] * * *."

{¶ 21} There is nothing before this court to indicate that a child custody proceeding has been initiated in the children's home state, Michigan. Accordingly, Judge Dewey obtained jurisdiction pursuant to R.C. 3127.18(A) to make a child custody determination in the CPO case and has yet to be divested of it. Because relator has not established that Judge Dewey is patently and unambiguously without jurisdiction in case No. 10 DR 853, he can prove no set of facts entitling him to relief and Judge Dewey's motion to dismiss must be granted.

{¶ 22} Relator's petition for a writ of prohibition is hereby dismissed at relator's costs.

{¶ 23} The clerk is directed to serve upon all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DENIED.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J.
CONCUR. _____
JUDGE