

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

IN RE: THE MARRIAGE OF

DAVID ROSEN,

Petitioner/Appellee,

v.

CASE NO.: 06-D-164
Judge Russell M. Clawges, Jr.

KATHLEEN ROSEN,

Respondent/Appellant.

ORDER DENYING THE PETITION FOR APPEAL

On this day, the Court has reviewed the Appellant, Kathleen Rosen's (hereinafter, "Appellant"), Petition for Appeal (hereinafter, "Petition"), filed September 7, 2006. In addition, the Court has considered the Appellee, David Rosen's (hereinafter, "Appellee"), Memorandum of Law in Response to Petition for Appeal Regarding Jurisdiction of Child Custody Issues, filed September 25, 2006, as well as the Order Retaining Child Custody Jurisdiction, entered by the Family Court of Monongalia County, West Virginia (hereinafter, "Family Court") on August 9, 2006. A hearing has not been held in this matter, but the Court has reviewed the Petition for Appeal as well as the entire record before the Family Court.

FACTS and PROCEDURAL HISTORY

In her Petition, the Appellant alleges three grounds of error committed by the Family Court. First, she cites as error that the Family Court failed to give full faith and credit to an order entered

1394

EXD

by the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio (hereinafter, "Ohio Court"). In addition, the Appellant suggests that the Family Court's interpretation of the Uniform Child Custody and Jurisdiction Enforcement Act (hereinafter, "UCCJEA") was erroneous. And, finally, the Appellant charges the Family Court with error for failing to communicate directly with the Ohio Court in reaching its decision.

The Appellee disagrees with the Appellant's reading of the Family Court's order. He suggests that the Family Court did not violate the Full Faith and Credit clause of the United States Constitution because the UCCJEA permitted the Family Court to ignore the order entered by the Ohio Court. Moreover, the Appellee contends that the Family Court correctly interpreted what is meant by "home state" under the UCCJEA and, therefore, its Order of August 9, 2006 was not error. Finally, the Appellee observes that the UCCJEA does not make mandatory the communication between the Family Court and the Ohio Court in this instance. Hence, he argues that the Appellant's Petition should be denied and the Family Court's order be enforced.

The parties do agree to the basic facts supporting the Petition. The parties lived, together with their children, in Monongalia County, West Virginia, from approximately 1992 until December 1, 2005. At the beginning of December, 2005, the Appellant moved to Ohio with three (3) of the couple's four (4) children.¹ In late March, or early April, 2006, the Appellant filed for divorce in the Ohio Court. Subsequently, the Appellee filed a Petition for Divorce with the Family Court on April 27, 2006. On May 12, 2006, the Appellee filed a Motion to Dismiss the divorce case pending in the Ohio Court, while the Appellant filed a similar motion with the Family Court on May 22, 2006. By

¹ One of the children of this marriage is emancipated and was, at the time of this move, attending Pennsylvania State University.

order dated June 6, 2006, the Ohio Court noted that it was retaining jurisdiction over the child custody issues in this case, finding its forum more convenient to the issues of child custody and that the Appellee had waived his rights under the Ohio UCCJEA by purportedly agreeing to the Appellant's relocation.

On May 26, 2006, the Family Court heard arguments from the parties to this action and took the matter under advisement. At the hearing, the Family Court noted that it intended to confer with its counterpart in the Ohio Court. On August 9, 2006, the Family Court entered an order retaining jurisdiction over child custody issues in this case. The Family Court's decision was based upon its interpretation of the West Virginia UCCJEA, West Virginia Code § 48-20-101, *et seq.* The Family Court concluded that the UCCJEA clearly established West Virginia as the "home state" for the child custody matters in this case. Moreover, the Family Court noted that it was not required to confer with the Ohio Court, but that it had, in good faith, attempted to do so without avail.

DISCUSSION

Any party may file a Petition for Appeal with the circuit court within thirty days following the entry of a final order of the Family Court. W.Va. Code § 51-2A-11. "The circuit court may refuse to consider the petition for appeal, may affirm or reverse the order, may affirm or reverse the order in part, or may remand the case with instructions for further hearing before the family court judge." W.Va. Code § 51-2A-14(a). "The circuit court shall review the findings of fact made by the family court judge under the clearly erroneous standard and shall review the application of the law to the facts under an abuse of discretion standard." W.Va. Code § 51-2A-14(b). Upon due consideration of the Petition, as well as the record before the Family Court, the Court is of the opinion to, and hereby does, DENY the Petition and does AFFIRM the Order of the Family Court

of Monongalia County.

The Family Court's analysis of the UCCJEA was not an abuse of discretion, nor was its application to the fact of this case clearly erroneous. The UCCJEA defines the "home state" for child custody determinations as follows:

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

W.Va. Code § 48-20-102(g) (2006).

As the Family Court noted, the last domicile in which the children of this marriage lived with either parent for a period of six (6), consecutive months and prior to the filing for divorce was Monongalia County, West Virginia; hence, West Virginia is the "home state" of the children. As such, for purposes of child custody, jurisdiction was correctly retained by the Family Court. Moreover, though the Family Court is permitted to confer with the Ohio Court in arriving at its decision, the UCCJEA by no means requires such conference. As the West Virginia Code states, "A Court of this state *may* communicate with a court in another state concerning a proceeding arising under this chapter." W.Va. Code § 48-20-110(a) [emphasis added]. Finally, the Family Court properly afforded the requisite amount of deference the Ohio Court's order was due in reaching its decision. In actuality, it was the Ohio Court that should have deferred to the Family Court's, as the home state, decision to retain jurisdiction or decline it. *See* W. Va. Code § 48-20-201(a)(2).

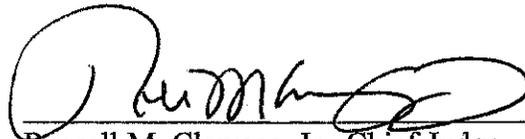
CONCLUSION

Therefore, the Petition for Appeal is DENIED and the Order of the Family Court of

Monongalia County is AFFIRMED. The Court further ORDERS the Monongalia County Circuit Clerk's Office to distribute certified copies of this Order to the Family Court Judge and all counsel of record.

IT IS SO ORDERED.

Entered this 24 day of October 2006,



Russell M. Clawges, Jr., Chief Judge
17th Judicial Circuit, Division II.

ENTERED Oct 24, 2006
DOM. REL ORDER BOOK 48 PAGE 143
JEAN FRIEND, CLERK