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Outside Counsel

IN CUSTODY CASE, THIRD DEPARTMENT DEPARTS FROM PRIOR NEW YORK CASE LAW

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THE APPELLATE Division, Third Department recently held that New York Courts lack jurisdiction to modify a prior custody order when New York is no longer the child's "home state." The court in reaching this decision overlooked substantial case law that recognized that when New York is no longer the "home state" of a child, the Parental Kidnapping Prevention Act (PKPA) permits a state court to exercise continuing jurisdiction to modify its prior custody as long as the court has jurisdiction under state law and one of the contestants reside in this state.

In Hahn v. Rychling , [FN1] a 4-1 decision written by Justice D. Bruce Crew III, the mother, Sherri Hahn sought modification of a prior custody determination in New York, which awarded custody to the child's paternal grandfather. The grandfather moved back to Michigan with the child while the mother remained in New York for ten months, while receiving treatment for her substance abuse.

The petition was denied on two grounds: (1) New York lacked jurisdiction under the New York Domestic Relations Law >75-d (1)(b), to hear this petition and (2) no other state could have jurisdiction under PKPA, 28 USC >1738A Copr. (2)(A)-- and the New York version, the Uniform Child Custody Jurisdiction Act (UCCJA)-- or be the "home state" because the child resided in Michigan for at least six months immediately preceding the commencement of the underlying proceeding.

Ms. Hahn properly argued that New York courts have jurisdiction to make or modify a custody determination under New York Domestic Relations Law >75-d (1)(b). To show jurisdiction petitioner must demonstrate that it is in the best interest of the child that courts of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is within the jurisdiction of the court substantial evidence

concerning the child's present or future care, protection, training, and personal relationships.

The majority relied on the holding in Matter of MacAdam v. Hosmer [FN2] to find Michigan to be the "home state" of this child. In MacAdam the petitioner was seeking to gain full custody of her child, who at the time of commencement resided in New Hampshire with her biological father. The petition was dismissed because it failed to meet the statutory requirements under New York Domestic Relations Law >75-d(1)(b)(ii). The court found that New Hampshire was the proper forum for a custody hearing because the child was recently admitted into a psychiatric hospital in New Hampshire, on concerns that she was suicidal.

At the time of commencement of the proceeding the child was receiving care, protection and training in New Hampshire. Also the personal relationships of the child were more readily available in New Hampshire, as was all of the relevant information concerning the child's present social adjustment and therapeutic needs would best be provided by witnesses from New Hampshire.

Different Facts

The Hahn case can be distinguished from MacAdam , in that there was substantial evidence that the child's present and future well-being is found within New York, in the form of (1) evidence relating to the mother's full recovery from substance abuse and her improved ability to care for her son, and (2) the child's pediatrician, who resides in New York, would testify about the mother's allegations of neglect against the grandfather. Ms. Hahn also contended that the child's preschool and Head Start teachers may not be able to testify about these allegations if the proceedings took place in Michigan.

The child in MacAdam had a stronger tie to the foreign state--New Hampshire--than the child in Hahn had to Michigan. The child in Hahn lived in New York until he was four and then moved to Michigan for only ten months. The ten-month stay in Michigan included two trips by the child to visit his maternal grandmother in New York. The visits were for one week and four weeks, respectively. Along with the maternal grandmother the child's sister and other extended family and close friends reside in New York.

These facts arguably establish that mother and child have a significant connection with New York, and that there is substantial evidence of the child's well-being within New York. It is in the child's best interest for Family Court to assume jurisdiction and satisfy New York Domestic Relations Law >75-d (1)(b).

The court, though, found that Michigan was the "home state" of the child using language from the PKPA, 28 USC >1738A Copr.(2)(A), which, in regard to determining a child's home state, provides that:

Such state (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a

contestant continues to live in such State.

The child resided in Michigan for at least six months immediately preceding the commencement of the underlying proceeding. The court relied upon the PKPA because it preempts the UCCJA due to the Supremacy Clause of the U.S. Constitution.

Mikoll's Dissent

Dissenting Justice Ann T. Mikoll pointed out that the majority failed to recognize that where the proceeding seeks modification of a prior custody order made by a court of this state, New York may exercise jurisdiction pursuant to subdivision (d) of 28 USCA >1738, upon a finding that the criteria enumerated in Domestic Relations Law >75-d(1)(b) have been met and New York continues to be the state of residence of the child or any of the contestants. The majority relied upon a prior Third Department determination, where the petitioner sought an original custody determination, not a modification of the original custody determination.

The majority cited Noland v. Noland , [FN3] which held that jurisdiction cannot be invoked under Domestic Relations Law >75-d(1)(b) if another state is the "home state" of the child. In Noland the respondent obtained a divorce against petitioner in Indiana, not New York. The Indiana divorce judgment directed that respondent would have custody of the child. The Third Department properly dismissed this case because petitioner was unable to establish that New York had jurisdictional basis under the Domestic Relations Law to seek custody of her child.

The facts in Noland can be distinguished from those in Hahn . In Hahn the custody proceedings took place in New York and petitioner was not seeking an original custody determination but instead was seeking to modify a prior determination. Justice Mikoll noted that even where New York is no longer the "home state" of a child, the PKPA has permitted modification of a prior custody determination as long as the court has jurisdiction under state law and one of the contestants resides in New York.

In Noguera v. Noguera [FN4] the Third Department held that because a New York state court had previously made the custody determination and the petitioner has continued to reside in New York, although her child had a different "home state," the New York Family Court had jurisdiction under 28 U.S.C. >1738A to modify the prior custody determination. The court also found that it had jurisdiction under Domestic Relations Law >75-d(1)(b) to hear this proceeding due to sufficient evidence that the child's best interests would be served if the hearing was in New York.

The Second Department [FN5] and the Fourth Department [FN6] have each held respectively, that New York can modify a prior custody proceeding if New York has jurisdiction to hear the proceeding and either the child resides in New York or one of the contestants to the action still resides in New York.

The facts in this case suggest that New York should have been the proper venue to determine the modification of the child custody agreement in Hahn v. Rychling . In

cases similar to Hahn , two out of the four Departments have held that New York was the proper venue for modification of a prior custody determination. Petitioner presented enough proof that the hearing should have taken place in New York because it was in the best interest of the child to have it there and also that New York should have had jurisdiction to make this determination.

FN(1) Hahn v. Rychling , 1999 WL 104731 (N.Y.A.D. 3d Dept.).

FN(2) MacAdam v. Hosmer , 244 A.D. 2d 665, 664 N.Y.S. 2d 156 (1997).

FN(3) Noland v. Noland , 200 A.D. 2d 922, 607 N.Y.S. 2d 450 (1994).

FN(4) Noguera v. Noguera, 129 A.D.2d 906, 514 N.Y.S. 2d 542 (1987).

FN(5) Heitler v. Hoosin , 143 A.D. 2d 1018, 533 N.Y.S. 2d 600 (1988).

FN(6) Clark v. Boreanaz , 159 A.D. 2d 981, 552 N.Y.S. 2d 760 (1990).

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