LAW AND THE FAMILY

"Custody Modification Jurisdiction"

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ASSUME THAT three years after the parties were awarded joint legal custody by the Supreme Court, New York County, the child moved with his mother, from Manhattan to Hoboken, N.J. The son continued to attend school in Manhattan, even after his relocation, commuting to school across the Hudson River by water taxi.

One year later, after New Jersey became the childs "home state [FN1]," the mother advised the father that she was moving to Warren, N.J., some 30 miles west of Hoboken and that the son would have to change schools. This child and his father have a significant connection with New York and there is within the jurisdiction of the New York court substantial evidence concerning the child's present or future care, protection, training and personal relationships. The father consults you. He wants to file an application in the Supreme Court for modification of the prior New York order to grant sole custody to him based upon the upcoming relocation. Does New York still have jurisdiction to modify the New York custody order? The answer depends upon which rule the First Department will follow.

Case Law

The Second and Fourth Departments have held that New York courts continue to have jurisdiction under DRL 75-d(l)(b) when a modification of a prior New York order is sought and one of the contestants continues to reside here even when the child's home state is not New York.

The Third Department has held that jurisdiction to modify a prior New York custody order cannot be invoked under DRL 75-d(1)(b) if another state is the "home state" of the child.

In Hahn v. Rychling [FN2] the mother ht modification of a prior New York custody order that awarded custody of the child to his paternal grandfather, who resided in Michigan. The Family Court dismissed the petition based on lack of subject matter jurisdiction. The Fourth Department affirmed, holding that Michigan, where the child had resided for 10 months prior to the filing of the petition, was the child's "home state" for purposes of the federal Parental Kidnaping Prevention Act (PKPA) and the New York version of the Uniform Child Custody Jurisdiction Act (UCCJA), so that the New York court lacked jurisdiction over matter. It stated that under the PKPA, which preempts state law [FN3], the jurisdiction of the relevant state court continues, provided such court has not "lost" jurisdiction in the interim and either the child or one of the contestants continues to reside there. In Hahn, petitioner needed to demonstrate that New York has jurisdiction under its own laws [FN4] and that either she or the child continued to reside here. As there was no dispute that petitioner resided in New York, the issue was whether New York had jurisdiction under the UCCJA to entertain petitioners' modification application. The Third Department held that jurisdiction cannot be invoked under DRL 75-d (1)(b) if another state is the "home state" of the child, and that Petitioner, in contending that New York acquired jurisdiction under DRL 75-d (1)(b), overlooked the critical distinction that exists between that section and its federal counterpart under the PKPA. Although 28 U.S.C.A. 1738A (c)(2)(B) contains much of the same "best interest," "significant connection" and "substantial evidence" language found in DRL 75-d (1)(b), it also requires that "it appear[...] that no other State would have jurisdiction under [28 U.S.C.A. 1738A (c)(2)(A)]," i.e., that no other state is the "home state" of the child or had been for the six months immediately preceding the commencement of the underlying proceeding. As the PKPA preempts the UCCJA by virtue of the Supremacy Clause of the U.S. Constitution, DRL 75-d (1)(b) must be read as incorporating the additional limitation set forth in 28 U.S.C.A. 1738A (c)(2)(B). Inasmuch as the record reflected that the child had resided in Michigan for the 10 months immediately preceding the commencement of this matter, Michigan qualified as the home state of the child and, accordingly, New York could not acquire jurisdiction under Domestic Relations Law 75-d (1)(b).

'Hahn' Implements U.S. Code

The decision in Hahn involves the interpretation of the PKPA, which is found at 28 USC 1738A. The pertinent language of that section provides:

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant. 28 USCA 1738A(d).

This section refers the court to 1738A(c), which reads as follows:

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if (1) such court has jurisdiction under the law of such state; and (2) one of the following conditions is met; (A) 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; (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and

his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; (C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse; (D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; ...

The majority in Hahn read the reference to subdivision (c)(1) in 28 USC 1738A(d) to include the "and" contained at the end of section (c)(1). By including the "and," subdivision (c)(2)(B) comes into the equation. Since (c)(2)(B) begins with the statement that "... it appears that no other state could have jurisdiction under subparagraph (A), ..." it precludes utilizing subdivision (c)(2)(B) as a basis for jurisdiction in any case where there is another home state. Under this interpretation of 28 USC 1738A, whenever New York is not the home state and there exists another home state, New York may not exercise jurisdiction to modify a prior New York custody order. Since the PKPA preempts the UCCJA, DRL 75-d(1)(b) is not available as a basis for jurisdiction if there is another home state. DRL 75-(d)(1)(b) allows New York to have jurisdiction where (b) it is in the best interest of the child that a court 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. This language in the New York statute does not have the limiting language found in 28 USC 1738A(c)(2)(3)(i). This latter statutory reference is where the requirement is found that "it appears no other state would have jurisdiction under subparagraph (A)" (referring to the home state language).

The Second Department has rejected the rule of the Fourth Department. It holds that where a modification of a prior New York custody order is sought, when New York is no longer the child's home state, and one contestant resides here, jurisdiction to modify the order is retained by the New York court subject to forum non conveniens grounds.

In Heitler v. Hoosin [FN5] the child's home-state was Illinois where she had resided for eight months preceding the commencement of the proceeding. The court found that New York had jurisdiction under DRL 75-d(1)(b) holding that the PKPA was not violated, even though another state was the home state of the child. It held that even though New York is no longer the children's home state, the PKPA permits a state to exercise continuing jurisdiction to modify its custody determinations as long as the court has jurisdiction under state law and one of the contestants resides in the state.

'Irwin v. Schmidt'

In Irwin v. Schmidt, [FN6] Florida was now the child's home state. The proceeding involved modifying a separation agreement which had been incorporated but not merged in a New York divorce judgment. The Appellate Division agreed with the

lower court in holding that it had jurisdiction under DRL 75d(1)(b) consistent with the PKPA.

In Capobianco v. Willis, [FN7] a modification proceeding was brought in New York, which was now the home state. Kansas issued the initial custody order and one of the contestants continued to reside in there. The court noted that the Kansas statute involved was identical to New York's provisions of the UCCJA. In affirming the dismissal of the proceeding, even though New York was the home state, the court held that the PKPA, which preempts the UCCJA under the Supremacy Clause, required the New York court to defer to the jurisdiction of the Kansas courts, since under the PKPA, the New York court may not exercise jurisdiction to modify the Kansas judgment unless the Kansas court no longer has jurisdiction or declines to exercise that jurisdiction. It pointed out that the PKPA provides that the state that issued a judgment awarding custody continues to have jurisdiction if its own laws provide for continuing jurisdiction and one of the contestants continues to reside in that state. It noted that under the relevant provision of Kansas Statute, the Kansas court retained jurisdiction over modification of the father's visitation rights. [FN8]

The Fourth Department has taken the same approach. In Clark v. Boreanaz, [FN9] it allowed a modification proceeding to continue in New York under DRL 75-d(1)(b), even though New York was not the child's home state, finding that the PKPA did not preempt it from modifying its prior order where one of the contestants resided in New York and New York had jurisdiction under state law.

'Matter of Schumaker'

In the Matter of Schumaker v. Opperman, [FN10] the same court held that New York had jurisdiction to entertain a petition for modification of a prior New York custody order, where the parties had been divorced in 1986 and sole custody was given to the plaintiff. In 1988, the parties stipulated in Supreme Court to joint custody and that the Supreme Court would have continuing exclusive jurisdiction over custody. In 1989, the plaintiff moved with to Michigan. In December 1991, the defendant petitioned in Supreme Court for custody. The court held that although Michigan was the home state of the children "they and plaintiff lived in New York for the four months immediately before this proceeding was begun. Because defendant has continued to reside in New York and because Supreme Court made a prior custody determination, the court had jurisdiction to entertain defendants' petition (* * *)."

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FN(1) DRL 75-c 5 provides, in part: "Home state" means the state in which the child at the time of the commencement of the custody proceeding, has resided with his parents, a parent, or a person acting as parent, for at least six consecutive months.

FN(2) 258 A.D.2d 832, 686 N.Y.S.2d 136 (3d Dept. 1999).

FN(3) Enslein v. Enslein, 112 AD2d 973.

FN(4) see, 28 U.S.C.A. 1738A [c][1].

FN(5) 143 AD2d 1018.

FN(6) 236 AD2d 401.

FN(7) 171 AD2d 834.

FN(8) See also Donna D. v. Steve A.P., 186 Misc2d 71, 715 NYS2d 306; CR-C v. RC, 181 MISC2D 906, 695 NYS2d 911.

FN(9) 159 AD2d 981.

FN(10) 187 AD2d 1033.

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