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Preemption

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SUPREME COURT, APPELLATE DIVISION THIRD DEPARTMENT

C.R.-C. v. R.C.[1]
(decided September 1, 1999)

In April of 1998, R.C. filed a petition with the Family Court in Rockland County, New York, seeking permission to relocate with his child, K.C., to Bucks County, Pennsylvania.[2] R.C. had joint custody of K.C. with C.R.-C., and the court decided that the application should be denied.[3] Shortly thereafter, R.C. moved with K.C. to a New Jersey location, which was far closer than the requested move to Bucks County, Pennsylvania. K.C. remained in the same New York school, continued seeing the same health care providers, and continued the same custody and visitation schedule with both parents.[4]

In August of 1999, C.R.-C. filed a petition to modify the custodial visitation schedule in her 1995 New York divorce judgment. The respondent, R.C., filed an affirmation in opposition and an attorney's affirmation raising the jurisdictional issue in which he asserts that, since the child's home state is New Jersey, the New York court is without jurisdiction.[5] This case presents the question of whether New York State Family court jurisdiction under Domestic Relations Law § 75-d(1)(b)[6] is pre-empted by 28 USCA § 1738A,[7] the Federal Kidnapping Prevention Act.

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[1] C.R.-C. v. R.C., 695 N.Y.S.2d 911 (1999 N.Y. Fam.Ct.), *application to dismiss denied.*

[2] *C.R.-C.*, 695 N.Y.S.2d at 911.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] N.Y. DOM. REL. LAW § 75-d(1) (McKinney 1998). The statute states in pertinent part:

> A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree only when: . . . (b) it is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his

When Congress legitimately exercises its legislative power, conflicting state legislation may be invalidated via the Preemption Doctrine.[8] The Supremacy Clause[9] mandates that federal legislation override any state legislation that conflicts with the federal legislation, to the extent that both cannot stand.[10] In recent years, Congress has enacted legislation, which sometimes conflicts with legislation traditionally in the domain of the states.[11] When a federal law does not expressly take the field, such legislation comes under judicial review to determine whether the state

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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 . . . .

Id.

[7] 28 U.S.C. § 1738A(c) (1994). The statute states in pertinent part:

A child custody determination made by a court of a State is consistent with the provisions of this section only if . . . (2)(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, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training and personal relationships[.]

Id.

[8] JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW § 12.1 at 62 (2d ed. 1992).

[9] U.S. CONST. art. VI, cl. 2. The Preeemption Doctrine derives from this article which states in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

[10] *Id.* at 62, 63.

[11] *Id.* at 63.

legislation is actually in conflict with the federal legislation and, therefore, subject to preemption.[12]

Before deciding the instant case, the court assumed the jurisdictional authority for the case. The court made the assumption that:

> [t]his child and at least her mother have a significant connection with the State of New York and that there is within the jurisdiction of the court substantial evidence concerning the child's present or future care, protection, training and personal relationships. Therefore, for the purpose of deciding this application the court is assuming that it is in the best interests of the child for a court of this state to assume jurisdiction.[13]

The court then considered whether it had jurisdiction under Domestic Relations Law § 75-d(1)(b) to decide the issue of visitation. The court acknowledged that the Appellate Divisions are not in agreement on the issue and "a definitive answer will have to be given by the Court of Appeals."[14]

The court examined the decisions made by the First, Second, Third and Fourth Departments. The most recent of these decisions is *Hahn v. Rychling*,[15] decided by the Third Department in early 1999.[16] *Hahn* decided that New York State's Domestic Relations Law[17] must be read, by virtue of the Supremacy Clause, as

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[12] *Id.*

[13] *C.R.C.-C.*, 695 N.Y.S.2d at 912 (adding that the respondent retains the right to contest this assertion of jurisdiction, if he so chooses). *Id.*

[14] *Id.*

[15] 686 N.Y.S.2d 136, (3d Dep't 1999).

[16] *Id.* (holding that New York courts lacked jurisdiction to modify a New York court's order where Michigan had become the four year old child's "home state" due to the fact that he had resided in Michigan for ten months immediately preceeding the proceeding). *Id.* at 139.

[17] N.Y. DOM. REL. LAW § 75-d(1) (McKinney 1998). The statute states in pertinent part:

> A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree only

incorporating the additional limitation set forth in the Parental Kidnapping Prevention Act (PKPA),[18] which precludes jurisdiction unless "it appear[s] that no other state would have jurisdiction under [28 U.S.C. §1738A (c)(2)(A)], i.e. that no other state is the "home state" of the child . . . ."[19] The *C.R.-C.* court reasoned that the Third Department had adopted a clear test to establish jurisdiction, which hinges on whether another "home state" would preclude an assertion of jurisdiction by a New York court.[20]

However, in the instant case, the court looked to *Hahn* for the logic of the dissenting argument, which is validated by the decisions of the other three Appellate Departments. The court points out that the dissenting opinion in *Hahn v. Rychling* explored a "crucial point" that the majority failed to recognize.[21] This crucial point centers on the pertinence of subdivision (d) of 28 U.S.C. §1738A, which states that "[t]he jurisdiction of a court of a State which has made a child custody 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

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> when: . . . (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[.]

Id.

[18] 28 U.S.C. § 1738A(c) (1994). The statute states in pertinent part:

> A child custody determination made by a court of a State is consistent with the provisions of this section only if . . . (2)(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, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training and personal relationships[.]

Id.

[19] *Id.*

[20] *C.R.-C.*, 695 N.Y.S.2d at 913.

[21] *Id.*

and such State remains the residence of the child or of any contestant."[22] The *Hahn* dissent points out that the cases relied upon by the majority (*Warshawsky v. Warshawsky,*[23] *Matter of Perri v. Mariarrossi,*[24] *Matter of Michael P. v. Diana G.*[25]) sought not to modify prior custody determinations, but to obtain them in the first instance.[26] Therefore, §1738A (d) is applicable.[27]

The dissent further argues that §1738A (d) exempts proceedings which seek modification of a prior custody determination of that same jurisdiction from the "no other state" requirement of §1738A (c)(2)(B).[28] The *Hahn* dissent reads §1738A (d) with emphasis on its specific reference to subsection (c)(1) of that statute, while the majority reads it as referring to §1738A (c) in its entirety.[29]

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[22] 28 U.S.C. § 1738A (d).

[23] 226 A.D.2d 708, (2d Dep't 1996) (holding that the PKPA precludes New York State from asserting jurisdiction only where no state satisfies the "home state" analysis, but that the lower court erred in declining jurisdiction pursuant to DOM. REL. LAW § 75-d(1)(b) because no other "home state" existed on the facts presented).

[24] 172 A.D.2d 671, *lv. denied,* 79 N.Y.S.2d 757, 583 N.Y.S.2d 193, 592 N.E.2d 801 (2d Dep't 1991) (dismissing an action in a visitation dispute because Florida met the "home state" criteria after the mother fled to that state with her children in order to protect them from their father's "bizarre" behavior).

[25] 156 A.D.2d 59, *lv. denied,* 75 N.Y.2d 1003, 557 N.Y.S.2d 308, 556 N.E.2d 1115 (1st Dep't 1990) (dismissing an action initiated by the child's father while the child was visiting from her "home state" of Wisconsin as defined by N.Y. DOM. REL. LAW § 75-c as "the state in which the child at the commencement of the custody proceeding, has resided with his parents, a parent, or a person acting as a parent for at least six consecutive months").

[26] *Hahn,* 686 N.Y.S.2d 136 at 140.

[27] *Id.*

[28] *Id.*

[29] 28 U.S.C. § 1738A (c) reads, in pertinent part:

> A child custody 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

The interpretation of the importance of the word "and" at the end of subsection (c)(1) determines whether the conditions in (c)(2)(B) should be included or excluded in the exception provided by §1738(d).[30] The *Rychling* dissent reasons that if the word "and" is important, as the majority had "erroneously" determined, then (c)(2)(B) allows jurisdiction if it appears that no other State would have jurisdiction. If, on the other hand, "and" is unimportant to subsection (d), then (c)(1) rightly prevails and "such court has jurisdiction under the law of such State."[31]

The *C.R.-C. v. R.C.* court embraces the dissenting argument of *Rychling* and finds it consistent with case law from the First, Second and Fourth Departments.[32] That case law which is seemingly consistent with the majority decision of *Rychling* is distinguishable by the difference between those petitioners seeking a modification order and those bringing a de novo custody petition.

In the Fourth Division, a modification proceeding was allowed to continue in the case of *Clark v. Boreanaz,*[33] even though New York was not the child's home state.[34] The court held that the PKPA did not preempt New York from exercising jurisdiction in modifying its prior custody determination because one of the contestants still resided in New York and because jurisdiction might be proper under New York state law.[35] The court reinstated the petition and remitted the case to the state supreme court to determine whether Domestic Relations Law §75-d (1)(b) would allow New York to assert jurisdiction.[36]

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appears that no other State would have jurisdiction under subparagraph (A).

Id.

[30] *C.R.-C.*, 695 N.Y.S2d at 913.

[31] *Id.*

[32] *C.R.-C.*, 695 N.Y.S.2d at 914.

[33] 159 A.D.2d 981, 552 N.Y.S.2d 760 (4th Dep't 1990).

[34] *Id.*

[35] *Id.*

[36] *Id.*

The court found three First Department decisions which appear to support the *Rychling* majority (*Croskey v Taylor,*[37] *Rosenberg v. Rosenberg,*[38]and *Michael P. v. Diana G.*[39]), but none of those petitions involved a modification of a prior New York order.[40] Therefore, as the *Rychling* dissent allowed, § 1738A, subsection (d) did not apply to permit New York to assert jurisdiction because a home State other than New York precluded jurisdiction under the PKPA.[41]

Finally, the court reviewed a number of Second Department decisions that distinguished between a de novo custody petition and a petition for modification of a prior New York custody order.[42] The court noted the significance of the decisions of the Second Department, which reinforce the *Rychling* dissent under a variety of circumstances.

The court allowed the assertion of New York jurisdiction in *Heitler v. Hoosin,* [43] holding that the PKPA was not violated by an assertion of jurisdiction under Domestic Relations Law § 75-d (1)(b), even though there was another home State of the child. The court affirmed the Family Court's assertion of jurisdiction to modify the parties' New York divorce judgement.[44]

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[37] 183 A.D.2d 680 (1st Dep't 1992) (upholding the dismissal of an action because the child did not fit any of the criteria which would indicate that New York is the child's "home state").

[38] 160 A.D.2d 327 (1st Dep't 1990) (upholding a New York State cause of action after California declined to assert jurisdiction because the father and his children had been in New York for six months and intended to remain there).

[39] 156 A.D.2d 59 (1st Dep't 1990) (holding that the father's withholding of his daughter from her custodial parent is exactly the type of behavior the PKPA was intended to prevent so the PKPA preempts DOM.REL. LAW § 75 and precludes New York State jurisdiction).

[40] *C.R.-C.,* 695 N.Y.S.2d at 915.

[41] *Id.*

[42] *Id.*

[43] Heitler v. Hoosin, 143 A.D.2d 1018, 1019, 533 N.Y.S.2d 600 (2d Dep't 1988) (concluding that although New York has jurisdiction over the proceeding, it is in the best interest of the child for New York to decline jurisdiction because Illinois is the more appropriate forum, as substantial evidence concerning the child's present and future care is more readily available there).

[44] *Id.* at 1019, 533 N.Y.S.2d at 601.

In *Irwin v. Schmidt,*[45] the appellate court of the Second Department held that the Family Court properly exercised jurisdiction to modify its prior custody order, even though Florida was the "home State" of the children.[46] The evidence indicated that the children had a strong connection to New York both before they relocated to Florida and after their mother was granted temporary custody by a Florida court.[47]

Where there was no indication that the petitioner was seeking a modification of a prior New York custody order, the Second Department determined that New York could not assert jurisdiction in the application for visitation in *Perri v. Mariarossi.*[48] The appellate court also precluded an assertion of jurisdiction by a New York court when New York was the home state of the child. Kansas had issued the initial custody order in *Capobianco v.*

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[45] 236 A.D.2d 401, 653 N.Y.S.2d 627 (2d Dep't 1997).

[46] *Id.* at 402, 653 N.Y.S.2d 627 at 628.

[47] *Id.*

[48] 172 A.D.2d 671, 568 N.Y.S.2d 637 (2d Dep't 1991) (holding that the mother had relocated to protect the children from the sometimes violent behavior of their father, who was diagnosed as suffering from a mental illness, and not for any reasons of avoiding an adverse custody determination which would invoke jurisdiction under DOM.REL.LAW § 75-b(1) (e), and the existence of a "home State" other than New York precluded assertion of jurisdiction under § 75-d(1)(b)).

Willis,[49] and the Second Department held that the Kansas Statutes §38-1303(a)(1)(1988), which is identical to New York Domestic Relations Law §75-d(1)(a), retains jurisdiction over modification of its initial judgment.[50]

This court re-states the analysis of the *Rychling* dissent in determining that the Parental Kidnapping Prevention Act does not preclude a New York court from asserting jurisdiction to modify its own prior custody determination. Subsection (d) of 28 U.S.C §1738A does not require that subsection (c) be read in its entirety, but means exactly what it says in directing the reader to apply subsection (c)(1).

Roger Moran

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[49] Capobianco v. Willis, 171 A.D.2d 834, 567 N.Y.S.2d 770 (2d Dep't 1991) (holding that even though New York could claim jurisdiction, the Parental Kidnapping Prevention Act required New York to defer jurisdiction to the Kansas courts since Kansas had not declined to exercise jurisdiction).

[50] *Id.* at 836, 567 N.Y.S.2d at 771.