

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERRY A. LARSEN,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE LISA
BROWN, DISTRICT JUDGE, FAMILY
COURT DIVISION,

Respondents,

and

RENE Q. FLORES,
Real Party in Interest.

No. 41659

FILED

JUL 15 2003

JY *[Signature]*
JANETTE A. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

This is an original petition for a writ of mandamus or prohibition challenging the district court's determination that Nevada has jurisdiction over a child custody proceeding under the Uniform Child Custody Jurisdiction Act (UCCJA)¹ and its order granting real party in interest temporary physical custody of the child.

Petitioner Sherry Larsen and real party in interest Rene Flores were never married and have one minor child. The child was born in Utah in 1998. In 1999, Sherry and the child moved to Pennsylvania, where they currently reside. At that time, no court had entered an order determining child custody.

¹NRS 125A.050.

In January 2002, Rene, proceeding in proper person, moved the Nevada district court to establish custody. Sherry, through counsel, moved the district court to dismiss the motion for lack of jurisdiction under the UCCJA. The matter was scheduled for a hearing, but neither Sherry nor her attorney was present on the scheduled day. Consequently, the matter was taken off the district court's calendar and rescheduled for April 2002.

During the April hearing, the district court concluded that it had emergency jurisdiction under the UCCJA, since no other state had assumed jurisdiction and because Sherry had not filed a motion regarding custody in Pennsylvania. The parties were referred to mediation. Thereafter, the parties appear to have reached a partial parenting plan concerning visitation for Rene with the child. A subsequent hearing was conducted in July 2002. The court minutes reveal that the parties' agreement was offered in open court for the district court's approval. The court orally affirmed and adopted the visitation agreement.²

In January 2003, Rene moved the district court to hold Sherry in contempt for failing to comply with the visitation arrangement. Moreover, he sought temporary physical custody. Sherry's counsel was served with notice of the hearing, but never informed Sherry of the

²The documents attached to the petition do not contain a copy of a formal written order from the district court adopting the parties' stipulation.

hearing. Neither Sherry nor her attorney was present at the hearing. The district court awarded Rene temporary physical custody of the child.³

Thereafter, Sherry moved the Pennsylvania court to determine child custody. The Nevada and Pennsylvania courts communicated concerning jurisdiction and agreed that Nevada was the proper court to decide the custody issue.

Sherry retained new Nevada counsel, and again moved the district court to dismiss the proceedings for lack of subject matter jurisdiction. A hearing was conducted on Sherry's motion, and the Nevada district court declined to relinquish jurisdiction to Pennsylvania.

In June 2003, Rene moved the district court to hold Sherry in contempt for failing to comply with the earlier visitation agreement. Rene also seeks sole legal and physical custody of the child. This matter is scheduled for hearing on July 17, 2003. Sherry has filed the instant writ petition and an emergency motion for stay.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station,⁴ or to control an arbitrary or capricious exercise of discretion.⁵ On the other hand, a writ of prohibition is the proper remedy to restrain a

³The documents before this court do not include a district court order regarding temporary custody.

⁴NRS 34.160.

⁵Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

district court from exercising a judicial function without or in excess of its jurisdiction.⁶ In either case, the writ may be issued only where "there is not a plain, speedy and adequate remedy in the ordinary course of law."⁷

The UCCJA provides that a court of this state has jurisdiction to make a child custody determination if this state is the home state of the child or the child has lived in this state for six months before the proceedings commenced.⁸ In addition, a Nevada court may assume jurisdiction over child custody proceedings, where it is in the best interest of the child, there is a significant connection with the state and there is substantial evidence concerning the child's present or future care, protection, training and personal relationships.⁹ Moreover, if it appears that no other state would have jurisdiction under the above provisions, and it is in the best interest of the child that a Nevada court assume jurisdiction, then the district court may assume jurisdiction over the

⁶Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991); see also NRS 34.320.

⁷NRS 34.170; NRS 34.330.

⁸NRS 125A.050(1)(a). The term "home state" means "the state in which the child immediately preceding the time involved lived with . . . a person acting as parent . . . for at least 6 consecutive months." NRS 125A.040(5).

⁹NRS 125A.050(1)(b).

proceedings.¹⁰ The parties cannot consent to or waive jurisdiction under the UCCJA.¹¹

Here, the child briefly lived in Nevada when she was an infant, but has resided with her mother in Pennsylvania since 1999, approximately three years before Rene filed his motion for custody. The child has significant connections with Pennsylvania. The fact that Sherry did not initially move the Pennsylvania court to determine custody, and that Sherry agreed to a partial parenting plan with approval from the Nevada court, does not waive the subject matter jurisdiction requirement under the UCCJA.¹² Pennsylvania is the child's home state, and the Nevada court lacks jurisdiction to make the child custody determination.

Additionally, the district court erroneously assumed emergency jurisdiction after noting that Sherry had not filed a motion regarding custody in Pennsylvania and that no other state had assumed jurisdiction. Emergency jurisdiction is proper under the UCCJA when the

¹⁰NRS 125A.050(1)(d).

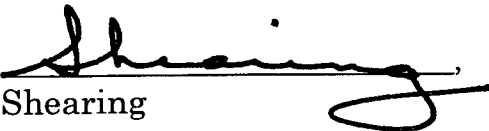
¹¹See In re Powers, 974 S.W.2d 867, 871 (Tex. App. 1998) (recognizing that “[s]ubject matter jurisdiction cannot be conferred by consent, waiver or estoppel at any stage of the proceeding”).

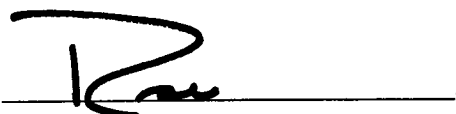
¹²C.G.O. v. R.A.O., 801 A.2d 938, 942 (Del. Fam. Ct. 2002) (noting that while the mother could consent to personal jurisdiction, neither parent had “the ability to confer subject matter jurisdiction” on the court); Koshetz v. Lamberti, 693 N.Y.S.2d 610, 611 (N.Y. App. Div. 1999) (stating that the subject matter requirements of the UCCJA “cannot be waived by the parties by agreement”).


child is physically present in the state and has been abandoned,¹³ or is subject to abuse, neglect, or domestic violence.¹⁴ The documents before this court demonstrate that the child was in Pennsylvania at the time that Rene filed his initial child custody motion, and there is no evidence that the child was abandoned or in danger of harm. Thus, the district court erred when it assumed emergency jurisdiction, and its subsequent orders are void.

Accordingly, we grant the petition, and direct the clerk of this court to issue a writ of prohibition instructing the district court to refrain from enforcing its void orders and from conducting any further proceedings in District Court Case No. D278795.

It is so ORDERED.¹⁵

 J.
Shearing

 J.
Rose

 J.
Becker

¹³NRS 125A.050(1)(c)(1).

¹⁴NRS 125A.050(1)(c)(2)(I) and (II).

¹⁵In light of this order, we deny as moot petitioner's June 30, 2003 emergency motion for stay.

cc: Hon. Lisa Brown, District Judge, Family Court Division
Douglas C. Crawford
Rene Q. Flores
Clark County Clerk