

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-00391-MR

KESHA COLLINS

APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE ALAN R. BERTRAM, JUDGE
ACTION NO. 06-CI-00122

MARIANO PEREZ SANTIAGO

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Keshia Collins (“Collins”) appeals the Green Circuit Court's Order granting joint custody to herself and Mariano Santiago (“Santiago”) of their two minor children. We affirm.

The parties gave birth to their first child on August 14, 2003 and their second child on March 24, 2005. At all times, after the birth of the children, the parties

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

and the children have resided in Kentucky. Paternity was acknowledged by Santiago, for both children, in a paternity and child support action filed in 2004. The parties have never been married.

On August 28, 2006, Santiago filed a petition for custody of the children. In response, Collins moved to dismiss, citing Santiago's lack of standing, based on his alleged immigration status. The motion to dismiss was overruled and the Green Circuit Court eventually entered a final Child Custody and Visitation Order granting Santiago joint custody and visitation of the parties' children. This appeal followed.

Collins contends that Santiago should not have been allowed to bring this action because he is in the United States illegally. There are no findings of fact in the Circuit Court Record which reflects Santiago's immigration status. Nor did Collins move for a hearing to determine such. We are not a trial court and thus it is not our position to make such findings. Therefore, we take the position that Santiago's immigration status has not been determined. However, with the issue of Santiago's immigration status aside, we recognize that the issue of an illegal alien being able to file a custody issue is an important one and one that may emerge again. Hence, we will address the issue herein.

Collins first argues that the Green Circuit Court did not have jurisdiction over this custody matter. She bases her argument on KRS 403.836 (1), which states:

Except as otherwise provided in KRS 403.828, or by other law of this state, if a court of this state has jurisdiction under KRS 403.800 to 403.880 because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:(a) The parents and all

persons acting as parents have acquiesced in the exercise of jurisdiction; (b) A court of the state otherwise having jurisdiction under KRS 403.822, 403.824, and 403.826 determines that this state is a more appropriate forum under KRS 403.834; or (c) No court of any other state would have jurisdiction under the criteria specified in KRS 403.822, 403.824, and 403.826.

We do not believe this statute to be applicable to the case at hand. It is uncontested that the children of the parties have lived in Kentucky all their lives. Therefore Kentucky courts have jurisdiction over this matter by means of KRS 403.822, which states, in part:

(1) Except as otherwise provided in KRS 403.828, a court of this state shall have jurisdiction to make an initial child custody determination only if: (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state . . . (2) Subsection (1) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

According to KRS 403.836, jurisdiction shall be declined only when jurisdiction is present because of the unjustifiable conduct of an individual seeking to invoke jurisdiction. That is not the case here. In this case, jurisdiction exists because Kentucky is the home state of the children, under KRS 403.822 . Furthermore, we do not believe that being an illegal alien is the type of unjustifiable conduct considered by the legislators when drafting KRS 403.836(1). Rather, the unjustifiable conduct that would

set this statute into motion would be a parent or guardian moving a child across state lines solely in an effort to invoke jurisdiction, an act known as “forum shopping.”

Collins next argues that by allowing Santiago to bring a custody action, the trial court is facilitating an illegal act – illegal immigration. While the jurisdiction of Kentucky's family courts are very broad, it does not encompass immigration issues. It is not the role of the Circuit Court to address Santiago's immigration status, except in his capacity to care and provide for his children. No evidence has been offered to show that his status renders him incapable of these duties.

The United States Constitution provides Due Process for all persons.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.A.Const. Amend. 14, §1. “Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.” *Plyler v. Doe*, 457 U.S. 202 (1982). “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57 (2000). We are not in the business of depriving children of the benefit of two parents based solely on the

immigration status of either. To do so would have adverse effects on our children and community alike.

For the foregoing reasons, the order of the Green Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jonathan R. Spalding
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BRIEF FOR APPELLEE:

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