University of Colorado Law School
Colorado Law Scholarly Commons

Colorado Supreme Court Records and Briefs Collection

8-20-1976

Brown v. District In and For City and County of Denver

Follow this and additional works at: https://scholar.law.colorado.edu/colorado-supreme-court-briefs

Recommended Citation
"Brown v. District In and For City and County of Denver" (1976). *Colorado Supreme Court Records and Briefs Collection*. 1056.
https://scholar.law.colorado.edu/colorado-supreme-court-briefs/1056

This Brief is brought to you for free and open access by Colorado Law Scholarly Commons. It has been accepted for inclusion in Colorado Supreme Court Records and Briefs Collection by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

SUPREME COURT
OF THE STATE OF COLORADO
AUG 20 1976
Richard D. Tinelli

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 27284

PAUL WILSON BROWN, Petitioner, v. DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, and JOHN BROOKS, JR., DISTRICT COURT JUDGE, Respondents.	ORIGINAL PROCEEDING Error To The District Court In And For The City And County Of Denver Honorable John Brooks, Jr. Judge

REPLY BRIEF IN SUPPORT OF PETITION FOR RELIEF IN THE NATURE OF PROHIBITION AND ORDER

COMES NOW the Petitioner, Paul Wilson Brown [hereinafter, Petitioner], by and through his attorneys, the Law Offices of John W. McKendree, and submits the following Reply Brief in Support of his Petition for Relief in the Nature of Prohibition and Order.

ARGUMENT

RELIEF IN THE NATURE OF PROHIBITION IS APPROPRIATE BECAUSE (1) THE FIRST ISSUE PRESENTED FOR REVIEW HEREIN RAISES THE QUESTION OF THE DISTRICT COURT'S AUTHORITY TO PROCEED WITH CHILD CUSTODY DETERMINATIONS AND (2) THE SECOND AND THIRD ISSUES PRESENTED FOR REVIEW RAISE THE QUESTION OF ABUSE OF DISCRETION BY THE DISTRICT COURT.

The Respondents' Brief of Respondents in Response to Petitioner's Petition for Relief in the Nature of Prohibition [hereinafter, Response Brief] addresses itself only to whether the within matter is appropriately before the Court in an original proceeding in the nature of prohibition. It fails to respond in a substantive fashion to any of the Petitioner's arguments concerning the first issue presented for review and, as to the second and third issues presented for review, merely contends that the Respondents' actions were not an abuse of discretion under the facts presented. The Petitioner submits that, in each instance, the Respondents' contentions are manifestly without merit.

A. The First Issue Presented for Review

The first issue presented for review reads:

> "Did the District Court properly exercise its jurisdiction, if any, over Civil Action No. D-58433 under the Uniform Child Custody Jurisdiction Act [hereinafter, Uniform Act], 1973 C.R.S. §14-13-101 et seq.; i.e., did the Court act in contravention to §§14-13-107 and 115 of the Uniform Act by temporarily terminating Petitioner's visitation rights under the September 4, 1976 Order of the Circuit Court, County of St. Louis, Missouri [hereinafter, St. Louis County Circuit Court]?"

The Respondents devote the bulk of their Response Brief to the contention that the District Court had jurisdiction under the Uniform Act and that, as a consequence, this matter is improperly before the Court upon a petition for relief in the nature of prohibition. They rely chiefly upon Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).[1]

Initially, it should be noted that the Petitioner's domicile is presently in the State of Missouri and has, as reflected in the record before this Court, so been since at least April 1, 1976. Thus, the affidavit submitted by the Petitioner in connection with his Brief in Support [Petitioner's] Motion to Dismiss was notarized in the City and County of St. Louis, State of Missouri, on April 1, 1976 and indicates that Petitioner's address at such time was 208 Baker, Webster Groves, Missouri.[2] As indicated in Paragraph 1 of the Petition herein, the Petitioner was residing at such address on the date the within original proceeding was initiated. Therefore, even assuming arguendo as correct the contention of counsel for the Respondents that, at some time after September 4, 1975, Petitioner resided in the State of California for some period, it nonetheless reamins true that he presently resides in Missouri and has so resided for a substantial period of time.[3] It should also be noted that, as of September 25,

1. The Respondents cite several decisions in support of their contention that the District Court was possessed of jurisdiction to make a child custody determination under the Uniform Act, McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444 (1945); Evans v. Evans, 136 Colo. 6, 314 P.2d 391 (1957); Kraudel v. Benner, 148 Colo. 525, 366 P.2d 667 (1961); Schee v. District Court, 147 Colo. 265, 363 P.2d 1059 (1961). The Petitioner would note that these cases, all of which arose prior to Colorado's enactment of the Uniform Act, are inapposite, for the reasons cited, to any issue presently before the Court. Section 14-13-104 sets forth those jurisdictional standards applicable to "custody determinations," as defined in §14-13-103(2). However, as discussed below, the issue herein is not merely whether the District Court was possessed of technical jurisdiction over the matter below, but whether such jurisdiction, even if arguably present, was exceeded in view of the restrictions contained in §§14-13-107 and 115.
2. The affidavit and the Brief in Support of [Petitioner's] Motion to Dismiss are annexed to the Petition in this matter as Exhibits J and K.
3. See Paragraph 3 of Exhibit K of the Petition.

1975 when Civil Action No. D-58433 was commenced below, Petitioner was a resident of the State of Missouri.[4] The above has been reiterated to negative any bona fide contention that, at the present time or at any other time material hereto, Missouri did not retain its real and substantial interest in the custody proceeding before the District Court.[5]

The threshold question in the first issue presented for review, and one not spoken to by the Respondents, is that date on which the jurisdiction of the District Court to make a child custody determination should be ascertained. This question, as discussed in the Petitioner's Opening Brief at p. 5, involves in part a construction of the term "now" as used in §14-13-115(1). If such term were construed to mean the date on which Civil Action No. D-58433 was commenced, there would be no doubt that the St. Louis County Circuit Court would be possessed of the requisite authority to modify the "STIPULATION FOR CONSENT MODIFICATION OF DECREE OF DISSOLUTION GRANTED MARCH 4, 1975" [hereinafter, Consent Modification Stipulation] within the jurisdictional parameters of §14-13-104(1)(a) and that, as a consequence, the District Court would be without authority to modify the Consent Modification Stipulation as incorporated by Order of the St. Louis County Circuit Court dated September 4, 1975. See Opening Brief at pp. 5-7. A similar result would obtain even if a date subsequent to September 25, 1975 were chosen for those reasons noted at pp. 7-10 of the Petitioner's Opening Brief.

4. See Paragraph 8 of Exhibit E to Petition.

5. The Court's attention is directed to the first paragraph on p. 9 of the Petitioner's Brief in Support of Petition for Relief in the Nature of Prohibition and Order [hereinafter, Opening Brief] which read:

> "As developed above, there seems little doubt that, at the time of the St. Louis County Circuit Court's Order of September 4, 1975, that Court was possessed of jurisdiction under the prerequisites contained in §14-13-104. Moreover, at the time of the District Court Order herein the Petitioner resided in Missouri; the children involved had, prior to their removal to Colorado, spent at least the preceding five years in Missouri; the marriage of the Petitioner and Mrs. MacMaster was dissolved in Missouri; and pursuant to a St. Louis County Circuit Court Order Mrs. MacMaster was given custody rights over the children and, under the September 4, 1975 Order, Mrs. MacMaster was given the specific right to retain custody in Denver, Colorado; under the September 4, 1975 Order the Petitioner may, if he so desires, remove the children to Missouri for approximately two months of each year; and almost all those facts upon which Mrs. MacMaster relied in her Motion to Terminate and Amendment to Motion to Terminate involve questions concerning the home life of the Petitioner in Missouri. All these facts establish a 'significant connection' between the State of Missouri, the Petitioner and the involved children within the purview of §14-13-104(1)(b)."

The second question attendant to the first issue presented for review was whether §14-13-107 barred the District Court from proceeding further with this matter. The Petitioner's position in this regard is based upon the text of the St. Louis County Circuit Court's Order dated September 4, 1975. Contrary to the assertion of the Respondents, the Petitioner's contention concerning the possible applicability of §14-13-107 was and is raised in good faith. The Respondents suggest no reason why the September 4, 1975 Order should not be literally construed, which literal construction would indicate that motions are presently pending before the St. Louis County Circuit Court.

The above indicates with clarity that real and substantial questions are presented by the Petition as to whether the District Court has authority to proceed with the custody proceedings in Civil Action No. D-58433. In City of Aurora v. Congregation Beth Medrosh Hagodol, 140 Colo. 462, 345 P.2d 385, 387-88 (1959), the Court noted the fundamental purpose of the writ of prohibition:

> "In simplest terms the office of the writ of prohibition is preventive in that it restrains excessive or improper assumption of jurisdiction by a tribunal possessing judicial or quasi-judicial powers. The writ is not one of right, but calls upon the sound, cautious discretion of the petitioned court, and wrapped up in the exercise of this discretion is the existence or absence of other adequate relief....
>
> When a writ of prohibition is presented to the court its only inquiry is 'whether the inferior judicial tribunal is exercising a jurisdiction it does not possess, or, having jurisdiction over the subject-matter and the parties, has exceeded its legitimate powers.' ...Such is the traditional radius of the writ of prohibition in which this court operates...." [citations omitted; emphasis supplied]

The Court has thus restrained District Courts from proceeding further in a given manner when their actions were in excess of their authority even though jurisdiction as a threshold matter was present. See, e.g., Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902); Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); City of Colorado Springs v. District Court, 184 Colo. 177, 519 P.2d 519 (1975); P.F.M. v. District Court, 184 Colo. 393, 520 P.2d 742 (1974); Fry v. Ball,

___ Colo. ___, 544 P.2d 402 (1975); cf., Wheeler v. District Court, ___ Colo. ___, 526 P.2d 658 (1974); Colorado Nat. Bank of Denver v. District Court, ___ Colo. ___, 542 P.2d 853 (1975). These decisions hold generally that, while the Court will not allow a writ of prohibition to substitute for an appeal, it will examine in an original proceeding allegations that a court has exceeded its proper jurisdiction or authority and that no plain and speedy remedy is available to the petitioner. See generally, McInerney v. City of Denver, 17 Colo. 302, 29 P. 516, 517 (1892); Fitzgerald v. District Court, 177 Colo. 29, 493 P.2d 27, 29 (1972).

There can be no dispute instantly that, as to the first issue presented for review, a clear question as to whether the District Court exceeded its authority under the Uniform Act exists. Thus, §§14-13-107 and 115 speak in mandatory terms which ringingly proscribe courts of this state from interfering with custody decrees or proceedings of other states except under specified circumstances. The Petitioner submits that such specified circumstances are not present herein. In contrast, the Respondents have ignored Petitioner's contentions in this regard and rely only on their contention that Colorado courts have jurisdiction under the Uniform Act. Nonetheless, as indicated in Fry v. Ball, supra, an original proceeding to enjoin a District Court from exercising jurisdiction under the Uniform Act may be maintained.

The merits of Civil Action No. D-58433 are not before the Court. The Petitioner does not seek to evade adjudication of further motions to modify the September 4, 1975 St. Louis County Circuit Court Order; he does object to such litigation taking place outside of that jurisdiction most integrally connected with such Order and with the evidentiary detail which he may be required to summon in response to such motions. The nature of the harm accruing to the Petitioner is apparent and is entirely analogous to that accruing to individuals forced to litigate in an improper forum. As noted in Lackey v. District Court, supra, 69 P. at 600:

> "...If the respondent court is permitted to proceed with the trial of this cause, the relator, if he wishes to present his defense, must be [sic] at the expense of traveling from the county of his residence to a distant one, as well as defraying expenses of witnesses on his behalf as well as that of the plaintiff, and in the end, if the judgment should be adverse, would be entitled to have it reversed solely upon the one question of the

> error of the court in refusing a change of place of trial to the county of his residence. Whether or not the judgment against him on the merits might be correct would be immaterial, or, even if it was, it could not stand. It is manifest, therefore, in the circumstances of this case, that the relator has no plain, speedy, and adequate remedy of law to correct the errors already committed, and which the trial court will further commit by proceeding to try the questions involved in the divorce proceedings on the merits...."

Thus, in Fry, supra, 544 P.2d at 402, the Court aptly noted that, "[g]enerally, in a child custody proceeding the petitioner is at a distinct advantage, not due to any bias but because of the unbalanced presentation of evidence before the judge....The out-of-state respondent frequently cannot muster his sources of information before the custody court due to the expense of transportation over long distances." The potential harm herein is palpable and cannot be denied; indeed, even the Respondents do not suggest an absence of such harm or the presence of a "plain, speedy and adequate remedy" available to Petitioner other than the within original proceeding..

It is submitted, therefore, that the within matter is entirely appropriate for disposition in an original proceeding in the nature of prohibition under C.A.R. 21. The Respondents have, as noted above, cited only Prinster v. District Court, supra, in support of their position. The Respondents apparently believe that Prinster establishes a legal principle under which a respondent(s), to defeat an original proceeding in the nature of prohibition, need only show a District Court's jurisdiction over the subject matter and the parties. However, aside from the inconsistency of such a contention in view of those cases cited above, Prinster itself does not support the Respondents' argument. Prinster arose from complex water law litigation in which 18 of 39 defendants instituted an original proceeding after a District Court denied their motion to dismiss. The dissenting opinion of Justice Moore indicates that the controlling issue before the court was "...whether the doctrine of appropriation...is applicable to nontributary underground waters." Id., 325 P.2d at 942. It is thus clear that the primary issue in Prinster was not whether the District Court exceeded its prescribed

authority but whether its decision as to a pivotal question of law bound up in the merits of the litigation was correct. The distinction between Prinster and the within matter is, therefore, apparent. Instantly, there exists a well-defined question of whether the Respondents should be permitted to make custody determinations in alleged contravention of §§14-13-107 and 115. As developed above and unlike Prinster, the issue herein is unrelated to the merits of Civil Action No. D-58433 and focuses only on whether the Respondents have exceeded their authority under the Uniform Act by assuming jurisdiction to modify the September 4, 1975 Order of the St. Louis County Circuit Court. Further, the Prinster majority was concerned that, should the show cause rule be made absolute, the rights of party plaintiffs and defendants in the action below, who were not participating in the original proceeding, would be adjudicated and, conceivably, prejudiced. Id., 325 P.2d at 941. Such a ruling, the court noted, would create an "anomalous situation indeed." Ibid. Presently, of course, no such possibility exists.

Consequently, the Petitioner submits that the Respondents have posited no substantial grounds or decisional authority negativing the propriety of an original proceeding in the nature of prohibition herein. Rather, it is evident that substantial case precedent exists for the use of such an original proceeding including, most particularly, Fry.[6]

B. The Second and Third Issues Presented for Review

The Respondents argue that, as to the second and third issues presented for review, there exists no abuse of discretion, and hence review in an original proceeding is inappropriate. The Respondents suggest further that the temporary termination of visitation rights

6. The Respondents suggest that the September 4, 1975 Order of the St. Louis County Circuit Court, incorporating by reference the Consent Modification Stipulation of that date, constitute "acquiescence" on the part of the St. Louis County Circuit Court to the jurisdiction of Colorado courts because Mrs. MacMaster was granted leave to retain custody of the minor children and to establish residence in Colorado. See Response Brief at p. 3. Such an argument is, of course, far-fetched in view of clear Missouri decisional law holding that Circuit Courts have continuing jurisdiction in such matters. In Re Wakefield, 274 S.W.2d 345, 347 (Mo.App. 1955); C v B, 358 S.W.2d 454, 461 (Mo.App. 1967); Glaves v. Glaves, 523 S.W.2d 169, 172 (Mo.App. 1975).

and the ordering of a home study investigation of, inter alia, the Petitioner is permitted "by virtue of the court's discretion in acting on behalf of the best interests of the minor children...," and because "[such relief] could have been entered by the court based upon the verified Affidavits [sic] of Mrs. MacMaster on an ex parte basis." [Response Brief at 12-13].

It is unclear from a review of the Response Brief upon what factual basis the Respondents seek to sustain the temporary termination of the Petitioner's visitation rights under the September 4, 1975 Order of the St. Louis County Circuit Court. They note that the District Court "was advised" that the Petitioner had purportedly contacted "Mrs. MacMaster's residence" and stated that he would not exercise his "visitation" rights during the summer of 1976.[7] The District Court "was further advised that on one prior occasion, the last occasion of visitation where the Petitioner removed the children from the State of Colorado, it was necessary that Mrs. MacMaster proceed by Writ of Habeas Corpus to obtain the return of the children."[8] The Respondents also note that the relief requested by Mrs. MacMaster was that previously requested in the Amendment to the Motion to Temporarily Terminate Visitation of which Petitioner had notice.

At the outset, it should be noted that, aside from the issue of whether the District Court should involve itself in any custody proceeding involving the September 4, 1975 St. Louis County Circuit Court Order, the Petitioner is not herein concerned with the District Court's Order requiring a home study investigation. As the second and third issues presented for review indicate, the Petitioner has contested the temporary termination of his visitation and temporary custody

7. The District Court was so "advised" by Mrs. MacMaster's attorney. Aside from the impropriety of such an unverified statement of fact to the Court and even assuming arguendo its dubious accuracy, such a statement by the Petitioner would hardly constitute cause for temporarily terminating his temporary custody and visitation rights under the September 4, 1975 Order. Rather, such a "fact" should have precisely the opposite result by indicating that the minor children would not be exposed to the several harms posited in Mrs. MacMaster's Motion to Temporarily Terminate Visitation and Amendment to Motion to Temporarily Terminate Visitation attached, respectively, as Exhibits N and E to the Petition.

8. This reference is to a Writ of Habeas Corpus filed prior to the September 4, 1975 St. Louis County Circuit Court Order and the incorporated Consent Modification Stipulation. See Paragraph 3 of Exhibit E to the Petition.

rights under the September 4, 1975 Order. The Respondents do not contravene the contention of Petitioner that the June 30, 1976 hearing was scheduled solely to hear the Petitioner's Motion to Dismiss or that Petitioner had no expectation that Mrs. MacMaster would orally move for relief similar to that requested in the Amendment to Motion to Temporarily Terminate Visitation. The mere fact that Petitioner had notice of the Amendment to Motion to Temporarily Terminate Visitation is manifestly of no moment since, quite obviously, he had no notice that Mrs. MacMaster would so move in a hearing unrelated to such motion and after a hearing date on such motion had been previously selected.[9] There can, therefore, be no reasonable dispute that Mrs. MacMaster, in so moving, failed to comply with the notice provisions of §§14-13-105 and 106 or with fundamental notions of due process of law.

The Respondents do not contest that §§14-13-105 and 106 were not satisfied in this matter. They simply state that temporary termination of visitation rights was a discretionary act of the District Court and that there existed a sufficient factual basis for such action. The Petitioner believes that such arguments misapprehend the facts of this matter and §§14-13-105 and 106. While the District Court may have the equitable discretion to temporarily terminate visitation or temporary custody rights where the minor children are, or may be, subject to immediate harm, there was manifestly no such showing instantly. Mrs. MacMaster's Amendment to Motion to Temporarily Terminate Visitation did not request emergency relief but, instead, requested a hearing on whether such rights should be temporarily terminated which hearing, as noted, was apparently set for December 8, 1976. As further indicated in the Response Brief, no other possible basis for emergency relief was probatively, or otherwise, adduced. Thus, in the absence of emergency circumstances, the Petitioner submits that the District Court does not have the "discretion" to ignore §§14-13-105 and 106. Rather, these provisions are mandatory in their terms and cannot be ignored under a claim of judicial discretion. Cf., City of Colorado Springs v. District Court, supra.

9. As noted in Petitioner's Opening Brief at p. 12n.4, such hearing was set for December 8, 1976 -- or substantially after the District Court would render a decision concerning whether it could or would proceed further with Civil Action No. D-58433

The Respondents attempt to rebut the Petitioner's arguments based upon the due process clause of the Fifth Amendment as incorporated into the Fourteenth Amendment to the United States Constitution by further reference to the District Court's discretionary powers "based upon the facts and evidence presented...." Response Brief at p. 13. Again, the Petitioner would note that the bounds of discretion are limited and one such limitation are those requirements of notice and opportunity to be heard arising under the due process clause. As developed above, there existed no cognizable emergency herein which could otherwise dilute ordinary and normal due process notions. The Petitioner is thus puzzled by a contention that the District Court's "discretion" encompassed the temporary termination of visitation rights now at issue. To sustain the Respondents' arguments in this regard would be to grant a court carte blanche authority to "temporarily" terminate visitation and custody rights upon the most flimsy of verified and unverified allegations. Not unexpectedly, Respondents cite no authority of any kind in support of their position and fail to respond to those cases cited in the Petitioner's Opening Brief. It is, rather, clear that the District Court's temporary termination of visitation rights was effected without those strictures imposed by the due process clause and constituted an abuse of discretion upon which review by a writ of prohibition will lie.

CONCLUSION

The Petitioner respectfully requests this Honorable Court to grant his Petition for Relief in the Nature of Prohibition and Order.

Respectfully submitted,

LAW OFFICES OF JOHN W. McKENDREE

By _____
Clay R. Smith #6460
Attorneys for Petitioner
1050 Seventeenth St., Suite 2500
Denver, CO 80202
Telephone: (303)572-8585

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR RELIEF IN THE NATURE OF PROHIBITION AND ORDER, by depositing same in the U.S. Mail, postage prepaid, this 20 day of August, 1976, addressed as follows:

Bruce A. Matas, Esq.
1110 Capitol Life Center
1600 Sherman Street
Denver, CO 80203