

In The
Court of Appeals of Virginia

Record No: 2405-08-4

Lisa Miller,

Appellant,

v.

Janet Jenkins,

Appellee.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

While contradicting herself, Appellee misstates and confounds the facts and holdings of the prior litigation between the parties to obfuscate the never-before decided questions that are before this Court. Namely, Appellant’s complaint sought a declaration that (i) the Virginia Code and Constitution prohibited *enforcement* of a Vermont custody order arising out of a same-sex relationship treated as marriage; (ii) the Virginia Constitution prohibited registration of the custody order; and (iii) Virginia could not register or *enforce* a foreign custody order that violates Appellant’s federal procedural due process guarantees.

Because Appellee admits that there is an enforcement exception to the full faith and credit requirement and the record is clear that the enforcement question has not been argued or decided in prior litigation between the parties (because Appellee never previously sought enforcement of the foreign orders), as discussed below, Appellee has essentially conceded that the Circuit Court erred in dismissing Appellant’s complaint with respect to, at a minimum, the question of whether Virginia must *enforce* a child custody order arising out of a same-sex relationship.

I. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL.

An appeal as of right lies in this Court with respect to a final order from a circuit court “involving” custody, control or disposition of a child, or any other domestic relations matter arising under Title 20. With no case law to support her position, Appellee disingenuously maintains that this suit, which she accurately describes as “an interstate child custody dispute,” does not involve custody or the control of disposition of a child. (Response Brief at 4). Plainly, it does. Moreover, Appellant’s request for declaratory relief concerning Virginia’s obligation to register and enforce the foreign custody order directly involves Title 20 sections 146.26 and 146.27 (explaining the registration and enforcement process). As such, this Court has appellate jurisdiction. To the extent this Court

determines that it does not, however, the appropriate remedy is not dismissal but, rather, transfer to the Virginia Supreme Court for a case involving an appeal of a “final judgment in any other civil case.” Va. Code 8.01-670; *see also* Va. Code § 8.01-677.1 (“no appeal which was otherwise properly and timely filed shall be dismissed for want of jurisdiction solely because it was filed in either the Supreme Court or the Court of Appeals and the appellate court in which it was filed thereafter rules that it should have been filed in the other court”); *The Mattaponi Indian Tribe v. Com.*, 43 Va. App. 690, 601 S.E.2d 667 (Va. Ct. App. 2004) (transferring, pursuant to Va. Code § 8.01-677.1, an appeal improperly filed in Court of Appeals rather than Supreme Court).¹

II. THE CIRCUIT COURT ERRED WHEN IT DISMISSED APPELLANT’S COMPLAINT ON THE BASIS THAT THE ISSUES RAISED HAD PREVIOUSLY BEEN LITIGATED BETWEEN THE PARTIES.

The Circuit Court plainly erred when it dismissed Appellant’s complaint “[b]ecause the issues raised by Plaintiff have previously been litigated between the parties.” Order at ¶2. As Appellant explained in her Opening Brief, there should be no dispute that the enforcement question was *not* a

¹ Contrary to Appellee’s suggestion, Appellant did not file this declaratory judgment action to gain any tactical advantage or to delay matters. (Response Brief at 23-25). Rather, Appellant sought a quick resolution to the question that directly impacts the custody and well-being of her six year old daughter – whether Virginia would enforce a Vermont custody order arising out of a same-sex relationship treated as marriage. Insofar as the visitation provisions in the Vermont custody order in place when Appellant filed suit in June 2008 were to expire in August 2008, Appellant had reason to believe that any decision concerning enforcement would be delayed several months. Indeed, Appellee did not seek to register or enforce the Vermont order in the Juvenile and Domestic Relations court until November 2008, after the Vermont court had entered a new custody order.

On January 14, 2009, the J&DR court entered an order directing the Vermont order to be registered and enforced. On March 2, 2009, the Circuit Court, after oral argument, affirmed the order, explaining that while the court believed the order could not be enforced under Virginia law, it reserved to this Court a determination of that question. Although the prior litigation did *not* involve enforcement, the court nevertheless felt constrained by this Court’s prior decisions to enforce the order. *Appellant intends to appeal that decision and requests that the two appeals be consolidated or, at a minimum, heard together.*

subject of any prior litigation.² *See* Opening Brief at 9. In fact, the enforcement question has never been decided in this, or any other case, in the country.³ Appellee misstates the holdings of the prior litigation when she argues that the prior litigation decided the enforcement question.⁴

III. VIRGINIA CAN NOT ENFORCE THE VERMONT ORDER.

At the outset, **Appellee concedes, as she must, that *Baker* sets forth an enforcement exception concerning the time, manner, and mechanisms of enforcing judgments.**⁵ (Response Brief at 13, n.9). What she disputes, however, is whether Virginia’s mandate that all orders arising out of a same-sex relationship be treated as void and unenforceable applies to the time, manner, and mechanisms for enforcing foreign custody orders. Insofar as Virginia law does not carve out any exceptions to the mandate that all orders arising out of same-sex relationships be treated as void and

² Nor have the parties litigated the questions of registration as a result of the Marriage Amendment or enforcement of a facially unconstitutional foreign custody order. *See* Opening Brief at 15-19 & *infra* Part V.

³ Appellee argues that Appellant’s enforcement argument has no merit because no case has squarely addressed the enforcement question with respect to the PKPA in the context of a child custody order arising out of a same-sex relationship. The lack of case law to support either party’s position merely reflects the fact that this case is one of first impression *in the nation*. The numerous cases cited by Appellee stating that the PKPA preempts conflicting state laws concerning custody issues between heterosexual couples who are both biological or adoptive parents to the child are readily distinguishable from this case. *See* Response Brief at 16-17, n.12.

⁴ *See* Opening Brief at 8-9; *see, e.g.*, Oct. 25, 2005 Brief of Janet Jenkins to the circuit court on appeal from J&DR Registration order, at 1 (“The sole question before the J&DR Court was whether the Vermont Order could be properly registered by the J&DR court – ***not whether it could be enforced . . .***” (emphasis added)). For that reason, the March 2006 Circuit Court Order, April 17, 2007 Court of Appeals Order, and June 6, 2008 Supreme Court Order all speak only to registration, not enforcement.

⁵ *See* Opening Brief at 10 (explaining the enforcement exception, which distinguishes between full faith and credit (which requires res judicata effect be given) and enforcement (which is subject to the even-handed control of the forum state’s laws).

unenforceable, the plain reading of Virginia law leads to the inevitable conclusion that at no *time*, in any *manner*, or by any *mechanism* is a custody order arising out of same-sex relationships to be enforced in Virginia. Thus, the full faith and credit obligation *might* require that Virginia courts acknowledge the Vermont custody determination as evidence for *res judicata* purposes.⁶ The Vermont order, however, can only be executed in Virginia as Virginia’s “laws may permit.” *Id.* at 242.

Two recent federal court decisions highlight the distinction. *See Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (involving recognition of out of state same-sex adoption); *Adar v. Smith*, ___ F. Supp. 2d ___, 2008 WL 5378130 (E.D. La. Dec. 22, 2008) (same). In *Finstuen*, the court addressed the question of whether a state law that refused to “*recognize* an adoption by more than one individual of the same sex from any other state or foreign jurisdiction” was constitutional. 496 F.3d at 1141-42 (emphasis added). Although the Tenth Circuit held that Oklahoma’s statute prohibiting *recognition* of out of state same-sex adoptions violated the Full Faith and Credit Clause, that decision is entirely consistent with *Baker’s* enforcement distinction. Following the logic of *Baker*, the Oklahoma non-recognition statute in *Finstuen* was constitutionally defective because it impermissibly created an exception to recognition (*res judicata*), rather than refusing to enforce an out of state adoption on the same terms as it would refuse to enforce such an adoption within the state. *Finstuen*, 496 F.3d 1155-56 (“The Doels do not seek to *enforce* their adoption order”; “At issue here is a state statute providing for categorical non-recognition”). Since the statute refused to

⁶ Appellant does not concede that the Full Faith and Credit Clause requires recognition of what would be an illegal order in Virginia. In fact, she maintains that *Baker* incorrectly (i) refused to recognize a general public policy exception and (ii) seems to require recognition of orders that directly contravene a state’s express public policy.

even give *res judicata* effect to sister state orders, consistent with *Baker*, the *Finstuen* court held that it was directly contrary to the Full Faith and Credit Clause. *Id.* ***As further evidence of the recognition/enforcement distinction***, the *Finstuen* Court explained that the full faith and credit obligation is not violated if the state applies its law to deny adoptees the right to inherit land or attain similar state rights and privileges. *Id.* (citing *Hood v. McGehee*, 237 U.S. 611, 615 (1915)). Citing the Supreme Court’s explanation of the Full Faith and Credit clause in *Baker*, as well as the provision in RESTATEMENT(SECOND) OF CONFLICT OF LAWS § 99 (1969) that “the local law of the forum determines the methods by which a judgment of another state is enforced,” the Tenth Circuit emphasized that the Full Faith and Credit Clause does not strip states of their ability to enforce their own laws. *Finstuen*, 496 F.3d at 1154. In other words, if the Oklahoma statute had both prohibited recognition and enforcement, the result would have been different.

The Tenth Circuit explained that Oklahoma’s argument that it could refuse to recognize the same-sex adoption “conflates Oklahoma’s obligation to give full faith and credit to a sister state’s judgment with its authority to apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment.” *Id.* at 1153. If Oklahoma had no statute providing for the issuance of a supplemental birth certificate for adopted children, then the plaintiffs could *not* invoke the Full Faith and Credit Clause to compel Oklahoma to issue a new birth certificate. *Id.* However, since Oklahoma did have such a statute it already had the necessary mechanism for enforcing the adoption judgment as requested. Therefore, the plaintiffs were merely asking Oklahoma to apply its own law to their adoption order. *Id.* The *Finstuen* Court explained: “Oklahoma continues to exercise authority over the manner in which adoptive relationships should be enforced in Oklahoma and the rights and obligations in Oklahoma flowing from an adoptive relationship.” *Id.*

A federal District Court reached the same result, following the same *Baker* logic, in a very similar case. In *Adar*, the court concluded that Louisiana had to recognize an out of state same-sex adoption even though same-sex adoptions were not permitted in Louisiana. Although Louisiana did not have a statute expressly stating that it refused to recognize out of state same-sex adoptions, its recent constitutional amendment expressly stated that “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.” La. Const. § 15. As in *Finstuen*, the ban only spoke of the state’s refusal to *recognize*; it was not a refusal to *enforce*.⁷ After discussing the *Baker* distinction between recognition and enforcement, it concluded that Louisiana had to recognize the out of state adoption. 2008 WL 5378130, at *4 (“Defendant . . . confuses the issues of Louisiana’s obligation to give full faith and credit to a valid out-of-state adoption decree and Louisiana’s right to apply its own laws in deciding what rights flow from that judgment.”) (citing *Finstuen*).

Unlike the plaintiffs in *Finstuen* and *Adar*, Appellee is seeking to *enforce* the Vermont order, which would contravene, not apply, Virginia law. Unlike *Finstuen*, Appellee is not asking this Court to apply Virginia’s laws on the issue but is asking the Court to condone a *violation* of state law and the state Constitution. Virginia retains the authority to apply its own state laws concerning *enforcement* of a foreign order that grants Appellee visitation with Appellant’s biological child based almost exclusively on the fact that Appellee was in a same-sex civil union with Appellant at the time Appellant gave birth to Isabella in Virginia. See *Miller-Jenkins*, 2006 VT 78, ¶ 56 (“[m]any factors are present here that support a conclusion that Janet is a parent, including, **first and foremost**, that

⁷ In addition, *Finstuen* is distinguishable from the case before this Court because Virginia law declares void, unenforceable, and invalid, rights arising out of same-sex unions.

Janet and Lisa were in a valid legal union at the time of the child’s birth”; “the couple’s legal union at the time of the child’s birth is *extremely persuasive* evidence of joint parentage” (emphasis added)).

The outcome under Virginia law is clear. Unlike the laws in Louisiana and Oklahoma that only spoke to non-recognition, Virginia’s expressly declares rights arising out of a same-sex union as “void” and states they are “unenforceable.” Va. Code § 20-45.3.⁸ Thus, while *Baker* would require Virginia to recognize (given *res judicata* effect to through registration), it affirms Virginia’s sovereign right to refuse to enforce the order because Virginia does not enforce any orders, including child custody orders, arising out of same-sex civil unions.

IV. THE PKPA DOES NOT, AND CONSTITUTIONALLY CAN NOT, MANDATE ENFORCEMENT

United State Supreme Court decisions directly contradict Appellee’s argument that the PKPA mandates enforcement of child custody orders arising out of same-sex relationships treated as marriage.⁹ The United States Supreme Court has already explained the purpose and scope of PKPA, specifically undermining Appellee’s argument that the PKPA is somehow exempt from the enforcement exception to the full faith and credit obligation.¹⁰ *See Thompson v. Thompson*, 484 U.S.

⁸ The Marriage Amendment also makes clear that “only a union between one man and one woman may be a marriage *valid in* or recognized by this Commonwealth.” Va. Const. § 15-A (emphasis added).

⁹ It bears emphasis that while Appellee correctly states that the PKPA, because it is a federal law, generally preempts conflicting state laws, no court in this nation has yet held that the PKPA preempts language like that contained in the Marriage Affirmation Act or Marriage Amendment, which prohibits recognition and enforcement of all orders arising out of same-sex relationships. To the contrary, this Court specifically stated that it did not reach that question. *See Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 102, 637 S.E.2d 330, 337 (2006).

¹⁰ It bears repeating that Appellee has conceded that the enforcement exception exists but merely disputes whether it applies in the context of a child custody order. (Response Brief at 13 & n. 9).

174 (1988). In *Thompson*, the Court stated:

The PKPA, 28 U.S.C. § 1738A is an addendum to the full faith and credit statute, 28 U.S.C. § 1738. This fact alone is strong proof that the Act is intended to have the *same* operative effect as the full faith and credit statute. . . . [I]t seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738.

484 U.S. at 183 (emphasis added). The Court further explained that “[b]ecause Congress’ chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations” *Id.* In light of the Supreme Court’s clear statements that Congress enacted the PKPA to ensure that child custody orders were treated the *same* as other final orders, Appellee’s argument that the PKPA is exempt from the enforcement exception explained in *Baker* must fail. *See* Response Brief at 11-14.

Thompson also explains the history behind inclusion in the PKPA of language stating that “[t]he appropriate authorities of every State shall *enforce* according to its terms, *and shall not modify* . . . any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.” 28 U.S.C. § 1738A(a) (emphasis added). “Because courts entering custody orders generally retain the power to modify them, [before passage of the PKPA] courts in other States were no less entitled to change the terms of custody according to their own views of the child’s best interest.” 484 U.S. at 180. The PKPA sought to prevent a second state from assuming jurisdiction over the foreign custody order for purposes of modifying it, rather than giving effect to the terms contained therein as adjudicated by another state. Nothing in the PKPA states that Congress intended to break with longstanding full faith and credit clause precedent.

In fact, to the extent the PKPA is interpreted as mandating *enforcement* in addition to full

faith and credit, it is unconstitutional. The United States Constitution states that “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effects thereof.” U.S. Const. Art. IV. Consistent with that authority, Congress enacted the Full Faith and Credit Act, which explains how a foreign order is authenticated and that once authenticated, it “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such States” 28 U.S.C.

§ 1738. The Supreme Court has explained the scope of the full faith and credit obligation:

A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.

* * *

Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of the forum law.

Baker v. General Motors Corp., 522 U.S. 222, 233, 235 (1998).

Because the Constitution requires states to give full faith and credit (which the Supreme Court has expressly stated means *res judicata* effect, *not enforcement*), and the Constitution grants Congress authority to provide the manner in which foreign orders shall be proved for purposes of that full faith and credit obligation, Congress lacks constitutional authority to mandate enforcement of foreign orders. Appellee’s interpretation of the PKPA must be rejected to avoid rendering the PKPA unconstitutional.

V. VIRGINIA CAN NOT REGISTER OR ENFORCE A FOREIGN CUSTODY ORDER THAT VIOLATES FEDERAL *PROCEDURAL* DUE PROCESS GUARANTEES

Appellee confuses the nature of Appellant's due process claim. In this action, Appellant does not ask the Court to render a decision contrary to Vermont with respect to Appellant's parental rights claim. Rather, Appellant asked for a declaration that Virginia cannot *enforce* an order that facially violates the federal procedural due process protections guaranteed to her in a case that implicates parental rights. The distinction is significant. Appellee incorrectly argues that Appellant is asking Virginia to apply its own law to determine who is a parent to Isabella. (Response Brief at 22, n. 15). Instead, Appellant maintains that the federal constitution requires certain procedural guarantees in any case that adjudicates parentage rights and that because Vermont failed to afford those minimum procedural guarantees, Virginia can not *enforce* the Vermont orders. *See* Opening Brief at 18-21 (citing case law for the proposition that a judgment obtained in violation of procedural due process is not entitled to full faith and credit).

CONCLUSION

For these reasons, Appellant respectfully requests that this Court reverse the circuit court order dismissing Appellant's complaint.

Respectfully submitted,

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