

CASE NOTE

Apenyo v. Apenyo, No. 1461, September Term, 2010, 1 MFLM Supp. 3 (2012)

By: Kelly E. Davis
Shulman, Rogers, Gandal, Pordy & Ecker, P.A.

I. Issue

Did the trial court commit an abuse of discretion when it dismissed Wife's divorce case because a divorce and custody action was already pending in Ghana, where Husband had relocated with both of the parties' children?

II. Conclusion

No.

III. Facts

Wife and Husband were married in Ghana in 1995, and a son and daughter were born to them there. In 2002, the family moved to Harford County, Maryland. After only one year, the parties sent their daughter back to Ghana to live with relatives, while their son remained with them in the United States. The parties became naturalized citizens of the United States.

On July 1, 2009, Husband returned to Ghana, taking the parties' son with him. He subsequently filed for divorce and custody in Ghana on August 31, 2009. Wife was served in Ghana while visiting for her father's funeral. On September 6, 2009, wife moved to have the divorce petition in Ghana dismissed based on lack of jurisdiction. The Ghana court found that Husband intended to make Ghana his permanent home when he relocated with both of his children, and therefore, Ghana was his domicile. The court found it had jurisdiction over the divorce and custody action and denied Wife's motion to dismiss.

Upon her return to the United States, Wife filed for divorce and custody in Maryland on September 28, 2009. Husband was served in Ghana on October 28, 2009. He then moved to dismiss Wife's complaint on March 26, 2010, on the ground that the pending divorce action in Ghana took precedence over Wife's later filed divorce action. The Maryland court granted Husband's motion to dismiss and Wife appealed. The Court of Special Appeals affirmed the dismissal.

IV. Analysis

The Court couched this case from the outset as a matter of comity and described comity as follows: "Far from being a precise legal precept, comity is essentially a flexible philosophical approach or psychological attitude that must adapt itself to the varying configurations of at least a dozen significantly different types of jurisdictional collision." The Court characterized comity as

not only a set of legal rules, but also a mood.

Comity has two applications: 1) in the post-trial context, where one court defers to the finally litigated judgments and decisions of another court; and 2) in the pre-trial context, where there is an accepted order of precedence when there are parallel proceedings in two different courts. The Court addressed this case as involving the latter form of comity.

The Court also made clear that it was not Wife's attorney and that it was only going to respond to the precise arguments made by Wife in her nine-page appellate brief rather than engaging in a comprehensive analysis of all the complicated and overlapping jurisdictional issues at play.

Wife first argued that the pending Ghana action was not entitled to comity because Husband had served her in an underhanded manner. Husband was the one who informed her that her father was dying, inducing her to travel to Ghana. She was then served as she left the mortuary following her father's death. The Court was unpersuaded by this argument. The Court pointed out that Husband's report of the father's illness was true, and that "[t]he behavior of the Husband in serving process on his Wife as she stood by her father's bier might be considered, by English cricket standards, to be insensitive, ungallant, and unsporting, but it is not, by American legal standards, fraudulent. . . . To be opportunistic is not, *ipso facto*, to be fraudulent."

The Court next analyzed the separate but intertwining and potentially conflicting jurisdictional issues involved in the divorce and custody matters. Unfortunately for her, the wife focused on the divorce claim with less attention paid to the custody claim in arguing that Maryland was the proper forum to address the parties' divorce and custody matters. It did not help her argument that the case law she cited addressed comity in the context of post-trial matters rather than pending matters. The Court clearly found that this was an issue involving comity where "two competing jurisdictions break out of the starting gate at roughly the same time," and that the case law Wife cited was inapposite.

The decision to either to stay or dismiss a case due to the pendency of a prior parallel proceeding in a different state or foreign country is generally within the sound discretion of the trial court, and such discretion is normally accorded great deference. "In deciding to dismiss a case on the ground of international comity, a court should normally consider whether an adequate forum

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exists in the objecting nation; whether the foreign court abides by fundamental standards of procedural fairness; and whether the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum.”

Based on the facts of this matter, including the fact that Wife was served in Ghana and had an attorney enter an appearance on her behalf in Ghana, the Court was persuaded to defer to the Ghana court based on the general rule that “once a court takes jurisdiction over a particular subject matter, another court of concurrent jurisdiction generally should abstain from interfering with the first proceeding.”

The Court seemed persuaded in large part by the fact that custody was an issue in this case, with both children already living in Ghana, one of them for six years prior to Husband filing for divorce and custody. Jurisdiction in this context was a bit more clear-cut. In analyzing the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), which addresses jurisdiction in custody matters, the Court found Maryland could not be the home state of the daughter and thus, Maryland had no jurisdiction to address custody of her. For the son, the Court found that Maryland was his last home state and Maryland could exercise jurisdiction to address custody of him, but that the UCCJEA also provided that Maryland should decline jurisdiction when a proceeding is already pending in another state and that forum is more convenient. Such was the circumstance in this case. As jurisdiction over the custody matter clearly resided in Ghana and was closely intertwined with the divorce, it made more sense to have the whole case resolved in Ghana rather than bifurcate the issues and have the divorce go forward in parallel proceedings.

Wife’s final argument was that Ghana’s legal system was inadequate. The first problem with this argument was that she did not raise it at the trial court level, and thus, it was not preserved on appeal. Second, Wife proffered no evidence of the Ghana’s legal system’s inadequacy. The presumption is that the law of Ghana is in substantial conformity with Maryland law, and it was Wife’s burden to rebut this presumption. She failed to meet her burden.

Adoption Subsidies...

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Code Ann, Fam. Law § 5-403. Courts should attempt to determine which of the six factors contribute to the child’s receipt of the subsidy. If a minor child is awarded an adoption subsidy for any of the first three criteria for eligibility (physical or mental disability; emotional disturbance; or recognized high risk of physical or mental disease), the possibility that courts will deviate from guidelines should be slim, depending on the cost associated with the child’s particular disability, disturbance or disease. The reason deviation should be less likely in that event is because the first three eligibility requirements suggest that the basic cost of raising a child with such infirmities would be in excess of the basic needs already taken into consideration by the child support guidelines.

On the other hand, when a minor child is awarded an adoption subsidy solely due to any of the three remaining criteria for eligibility (age; sibling relationship; or racial or ethnic factors), courts should consider the reasonableness and unfairness of the recommended child support more closely. The granting of an adoption subsidy due to any of these last three criteria is based more upon the child’s circumstances which make an adoption more difficult, rather than on circumstances which make raising the adoptive child more costly.

Therefore, if a Maryland court is convinced, based on the assessment of the enumerated factors, that there are special circumstances in any given case that require a minor child to use his adoption subsidy for extraordinary expenses not considered in the basic child support calculations, then a deviation from the guidelines should be less likely. If, however, the court is convinced that there are no special circumstances which require a minor child to spend his income on extraordinary expenses, then the Court should consider the child’s income as a factor which could diminish the basic needs of the child, and thus permit a downward deviation of the recommended child support.

In summary, allowing courts to consider an adoption subsidy as income to a child, and in certain circumstances consider that fact as a reason to deviate from the guidelines, is the most equitable way to consider an adoption subsidy when calculating child support. By doing so, courts are able to balance their desire to meet a child’s basic needs with a non-custodial parent’s need to meet his or her financial responsibilities. In some instances, such as when a non-custodial parent incurs additional expenses in order to maintain a better household for extended access, a *downward* deviation from guidelines may in fact be the most appropriate way to serve the best interest of an adopted child.

Master William M. Dunn has served in the Circuit Court for Baltimore City since 2008, and is one of two Masters to whom complex child support matters are specially assigned in that jurisdiction.

