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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000763-ME

TRAVIS ALAN BROCKMAN

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 17-CI-00101

AMBER ROSE BROCKMAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

GOODWINE, JUDGE: Travis Alan Brockman appeals from the findings of fact, conclusions of law, and decree of dissolution of marriage, entered by the Washington Circuit Court on April 12, 2018. Travis argues that the trial court

lacked subject matter jurisdiction¹ to enter a divorce decree or make a custody determination under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)² and committed palpable error when it allowed the guardian *ad litem* (“GAL”) to argue and make recommendations on behalf of the minor child. After careful review, finding no error, we affirm.

BACKGROUND

Appellant, Travis Alan Brockman, and Appellee, Amber Rose Brockman, were married on March 24, 2011 in Jacksonville, North Carolina.³ They separated on June 3, 2017. Amber filed her petition for dissolution of marriage on August 16, 2017, stating that she resided in Kentucky, and had been residing here, for 180 days prior to filing the petition. Also, she stated that Travis was a resident of Richlands, North Carolina.

Travis responded to Amber’s petition and denied her residency in Kentucky for 180 days prior to her filing the petition. Travis stated that Amber resided in Pennsylvania at the time she filed her petition. In his prayer for relief, Travis requested the trial court “to enter a decree of dissolution of marriage . . . and

¹ Although Travis alleges lack of subject matter jurisdiction, he is challenging the court’s personal jurisdiction due to residency of the parties. *Infra* Standard of Review.

² KRS 403.800, *et seq.*

³ Travis was an E5 Sergeant in the United States Marine Corps and stationed at Camp Lejeune, North Carolina.

award custody to the parties.” One week later, he filed a separate motion seeking temporary custody of their minor child. On October 16, 2017, the trial court heard the motion.

On the morning of the hearing, Amber filed for an emergency protective order. Both parties consented to the trial court hearing the proof on Amber’s emergency petition. In her petition, Amber alleged Travis was physically abusive in the marriage and recently threatened to stab her with a knife.

During the hearing, the trial court questioned both parties regarding issues of jurisdiction. Amber testified that she had been staying in North Carolina for only two months prior to the hearing. She explained that due to Travis’s military service in the United States Marine Corps, they had moved from state to state during their marriage but had maintained permanent residency in Kentucky.⁴ Amber testified that while in Kentucky, she became aware that Travis was tracking her location through her cell phone. Fearing he would locate her at her parents’ house, she left Kentucky, went back to Pennsylvania for a short period of time, and relocated back to North Carolina two months prior to the hearing.

In sum, the parties testified that from the date of their marriage on March 24, 2011 until March of 2015, they lived in North Carolina, where their

⁴ Travis is a native of Taylor County, Kentucky. Amber is a native of Washington County, Kentucky. Each had a valid Kentucky driver’s license and filed their most recent tax returns in Kentucky.

child was born on June 20, 2013. From March of 2015 until May of 2017, they, and their minor child, resided in Camp Hill, Pennsylvania. Once again in June of 2017, Travis relocated to North Carolina. The parties separated on June 3, 2017.

After leaving North Carolina, Amber returned to Kentucky for approximately two weeks. She moved two additional times before obtaining her current residency.⁵ Travis confirmed his relocations were a direct result of his military service and that at the time of the October 16, 2017 hearing, he was stationed in North Carolina. For the 180 days preceding the filing of her divorce petition, Amber and their minor child lived in North Carolina, Kentucky, and Pennsylvania.

On October 19, 2017, the trial court entered an order: (1) granting temporary custody to Amber; (2) ordering Travis to pay child support;⁶ and (3) ordering visitation. It also granted Amber's motion for emergency relief and entered a civil restraining order on her behalf. The restraining order did not include the minor child. However, based on numerous allegations of child abuse

⁵ At the time of the final hearing, Amber and their minor child resided in Catawba County, North Carolina with a married couple.

⁶ Travis filed a motion to alter, amend, or vacate said order but only addressed the issue of child support.

and, at Travis's specific request,⁷ the trial court appointed a GAL to represent the minor child and scheduled a final hearing for March 22, 2018.

In the meantime, Travis initiated domestic violence proceedings in North Carolina against Amber and two other individuals on behalf of their minor child. The emergency petition did not include a request for temporary custody. The North Carolina court granted, *ex parte*, the requested emergency relief. And, it ordered Travis to return the minor child to Amber on December 3, 2017, but he failed to do so. The court conducted an evidentiary hearing and dismissed the emergency petitions. Thereafter, Travis returned the minor child to Amber.

Amber filed a motion in Washington County, Kentucky to hold Travis in contempt for failing to return the minor child. The trial court conducted an evidentiary hearing, entering its findings of fact and an order on December 18, 2017.

On March 8, 2018, Travis obtained new counsel who filed a motion to dismiss for lack of subject matter jurisdiction or, in the alternative, to continue the final hearing on March 22, 2018. The trial court denied said motions on March 14, 2018, with handwritten notations on the docket sheet without explanation.⁸

⁷ Travis' counsel electronically filed a motion to appoint guardian *ad litem* on November 14, 2017.

⁸ Video record of said hearing, if any, was not designated on appeal.

The trial court held its final hearing on March 22, 2018, and, once again, heard the parties' residency issue. The parties testified consistent with their testimony at the October 16, 2017 hearing that: (1) Amber had always maintained her residency in Kentucky; (2) each of the parties had a Kentucky driver's license; and (3) each of them had filed their income taxes in Kentucky. Travis's Kentucky tax return was filed during the hearing. It is undisputed, however, that at the time of the hearing, Amber and the minor child resided in North Carolina, albeit not with Travis.

The GAL did not testify, nor did she proffer to the court any facts outside of the evidence. Rather, she simply advocated on behalf of the child, questioned witnesses, and made arguments as to what she believed would be in the best interest of the child. The GAL argued that Travis should have no contact with the minor child until he completed assessments and counseling related to domestic violence.

While the trial court agreed with the GAL's assessment, it did not accept the GAL's recommendation of no contact. Rather, the trial court ordered Travis continue visitation despite his failure to complete assessments pursuant to the trial court's prior orders. Travis did not object during the GAL's remarks to the court or at any time thereafter.

On April 12, 2018, the trial court entered findings of fact, conclusions of law, and decree of dissolution of marriage, finding and concluding that: (1) Amber had been a legal resident of the state of Kentucky for 180 days preceding the filing of the petition; (2) the parties had been separated for a period exceeding 60 days; (3) their marriage is irretrievably broken; and, (4) all jurisdictional requirements to finalize this divorce were satisfied. This appeal followed.

STANDARD OF REVIEW

Subject matter jurisdiction is “the court’s power to hear and rule on a particular type of controversy.” *Nordike v. Nordike*, 231 S.W.3d 733, 737 (Ky. 2007). Subject matter jurisdiction of a dissolution action is automatically conferred to the family court via Kentucky Revised Statutes (KRS) 23A.100. Personal jurisdiction, on the other hand, is “the court's authority to determine a claim affecting a specific person.” *Id.* (Citation omitted). *See, generally, Maggi v. Maggi*, No. 2013-CA-000377-MR, 2014 WL 1685926 (Ky. App. April 25, 2014).

KRS 403.140(1)(a) confers personal jurisdiction in a dissolution action, which requires a finding that one of the parties, at the time the action was commenced, resided in the state for 180 days immediately preceding the filing of the petition. Personal jurisdiction may be waived; however, “subject matter

jurisdiction cannot be waived or otherwise conferred by the parties. It either exists or it is absent.” *Fehr v. Fehr*, 284 S.W.3d 149, 152 (Ky. App. 2008).

Ordinarily, jurisdiction is a question of law, “meaning that the standard of review to be applied is *de novo*.” *Harrison v. Park Hills Bd. of Adjustment*, 330 S.W.3d 89, 93 (Ky. App. 2011) (quoting *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53-54 (Ky. 2007)).

A determination of whether the trial court properly exercised jurisdiction over both the dissolution proceeding and the custody determination requires that we interpret KRS 403.140, KRS 402.822 and KRS 403.828. “When interpreting a statute, the intent of the legislature is paramount and controls. And, words are afforded their ordinary meaning unless a contrary intent is apparent.” *Wahlke v. Pierce*, 392 S.W.3d 426, 429-30 (Ky. App. 2013) (internal citations omitted).

Additionally, Travis alleges the trial court committed palpable error by allowing the GAL to present findings and make recommendations. Travis did not object at the time of the hearing nor any time afterwards. Thus, the issue is not properly preserved for our review. We will review the case to determine if manifest injustice resulted from the error that affected Travis’ substantial rights. *Herndon v. Herndon*, 139 S.W.3d 822, 827 (Ky. 2004) (citing CR⁹ 61.02).

⁹ Kentucky Rules of Civil Procedure.

An appellate court may set aside a lower court's findings made under CR 52.01 "only if those findings are clearly erroneous." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). In determining whether findings of fact are clearly erroneous, the reviewing court must decide whether the findings are supported by substantial evidence.

"[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion' and evidence, that when 'taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men.'" Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted).

ANALYSIS

On appeal, Travis incorrectly argues that the trial court lacked subject matter jurisdiction, based on the parties' lack of residency in Kentucky for 180 days prior to Amber filing the petition for dissolution of their marriage. As previously stated, subject matter jurisdiction is automatically conferred to the family court by statute. KRS 23A.100. By contrast, the personal jurisdiction

statute enforces residency requirements. KRS 403.140(1)(a). The trial court properly denied Travis's motion to dismiss the action for lack of subject matter jurisdiction.

Travis argues that the court lacked jurisdiction because neither party resided in Kentucky for 180 days prior to the filing of the petition for dissolution as required by KRS 403.140(1)(a). The current statute broadens the language, which permits jurisdiction to one of the parties who "resided in this state . . . for 180 days next preceding the filing of the petition." However, there is an exception to the general rule "when the divorcing parties' absence from the state is temporary in nature." *McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky. App. 1983).

Appellant also argues that the court lacked jurisdiction because neither party had resided in Kentucky for 180 days prior to the filing of the petition for dissolution as required by KRS 403.140(1)(a). Ordinarily, as appellant points out, actual residence in the state for the requisite statutory period is required before a dissolution action may be maintained. However, there is an exception to that rule when the divorcing parties' absence from the state is temporary in nature. Here, the parties left Kentucky so that appellant could receive advanced training in oral surgery. However, they used appellee's parents' Daviess County address as their permanent address, registered and insured their car in Kentucky, and kept Kentucky drivers' licenses. They also indicated that they hoped to return to Kentucky when appellant completed his training if he could find work here. Thus, the evidence showed that, at the time the parties left, they only intended to be temporarily absent from this jurisdiction. Therefore, we cannot say that the court's finding that the 180 day residence requirement had been

met was erroneous. Further, appellant's contention that venue of this action did not lie in Daviess County is also without merit.

Id. at 222-23 (internal citations omitted).

Military service qualifies as a temporary absence. *Weintraub v. Murphy*, 244 S.W.2d 454, 455 (Ky. 1951) (citing *Radford v. Radford*, 26 Ky. L. Rptr. 652, 82 S.W. 391, 392 (1904)). Travis introduced no evidence whatsoever showing that Amber relinquished legal residency. He simply argues that she cannot rely on or maintain her temporary residency status for six years. However, that is contrary to law. “[A] change in legal residence or domicile requires a physical act coupled with the intent to abandon the domicile previously established.” *Hunter v. Mena*, 302 S.W.3d 93, 96 (Ky. App. 2010). Travis argues that long after their separation, Amber lived in three different states and at the time of the final hearing was residing back in North Carolina, albeit, not with him.

At the final hearing, Amber testified that she wished to return to Kentucky. It was undisputed that the parties possessed current Kentucky drivers' licenses and filed Kentucky state income taxes. Also, they frequently returned to Kentucky with the minor child to visit both sets of grandparents. Amber's intent to stay in Kentucky, paired with the evidence proffered, supports a finding that Kentucky was, indeed, her legal residence. Therefore, based on our review of the

law, the trial court properly exercised jurisdiction over the parties' divorce proceedings.

Next, Travis contends the trial court lacked jurisdiction in making a final custody determination. In 2004, the General Assembly adopted the UCCJEA, KRS 403.800 *et seq.* “[T]he fundamental purpose of the UCCJEA remains the avoidance of jurisdictional competition and conflict with other states in child custody matters[.]” *Wallace v. Wallace*, 224 S.W.3d 587, 589 (Ky. App. 2007).

Kentucky law defines the home state of the minor child as the state in which the child lived with a parent, or a person acting as a parent, for at least six months immediately prior to the filing of the action. KRS 403.800(7). Here, the minor child resided in three different states, including Kentucky, during the 180 days prior to the commencement of this divorce action.

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:

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[.]

KRS 403.822(1)(a). Thus, Kentucky cannot be the home state. Having established that no state has jurisdiction under subsection (a), we now turn to subsection (b). KRS 403.822(1)(b) states:

A court of another state does not have jurisdiction under paragraph (a) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under KRS 403.834 or 403.836[.]

(Emphasis added). Neither Pennsylvania nor North Carolina can be the home state under Section (1)(b).

Kentucky has jurisdiction under Section (1)(b) because “the child and at least one (1) parent . . . **have a significant connection with this state other than mere physical presence.**” (Emphasis added). The parents clearly have a significant connection to Kentucky, beyond physical presence, as Kentucky is their legal residence. The child made frequent trips to visit both sets of grandparents in Kentucky. Thus, substantial evidence is available in Kentucky “concerning the child’s care, protection, training, and personal relationships.” KRS 403.822(1)(b)(2).

No other state meets the statute’s jurisdictional requirements. We find that jurisdiction is proper in Kentucky; therefore, the trial court correctly found that

it had jurisdiction to make a child custody determination under subsection (b) of the statute.¹⁰

Lastly, Travis alleges the trial court committed palpable error by allowing the GAL to argue on behalf of the child and make findings and recommendations. Travis did not object during the GAL's remarks to the court nor at any time thereafter. The GAL did not testify, nor did she proffer to the court any facts outside of the evidence. Rather, she simply advocated on behalf of the child, questioned witnesses, and made arguments as to what she believed would be in the best interest of the child.

The GAL argued that Travis should have no contact with the minor child until he completed assessments and counseling related to domestic violence. While the trial court agreed with the GAL's assessment, he did not accept the GAL's recommendation of no contact. Rather, the trial court ordered that Travis continue visitation, despite his failure to comply with its prior orders, and clearly stated its reasons for doing so in its well-reasoned opinion. Travis continued visitation with the minor child with Amber. Thus, manifest injustice affecting

¹⁰ We note that the safe harbor exception carved out in KRS 403.828 provides another avenue for jurisdiction. Amber fled to Kentucky to avoid domestic violence. The circuit court conducted a hearing on Amber's motion for temporary emergency relief and found that Travis had, in fact, committed acts of domestic violence. As a result, the circuit court had temporary emergency jurisdiction, if jurisdiction had not been established otherwise.

Travis's substantial rights cannot be found. *Herndon*, 139 S.W.3d at 827 (citing CR 61.02).

CONCLUSION

Based on the foregoing analysis, we affirm the Washington Circuit Court's findings of fact, conclusions of law and decree of dissolution.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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