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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000192-ME

MICHAEL SANTISE APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY DIVISION
HONORABLE DENISE BROWN, JUDGE
ACTION NO. 10-CI-502974

ERIN SANTISE (NOW GILLESPIE) APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: The single issue in this appeal is whether the Jefferson Family Court erred in refusing to cede its continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to the Superior Court of the State of New Jersey. In denying appellant's (Father's) motion to transfer, the family court held that after considering the factors set out in Kentucky Revised

Statute (KRS) 403.834, it was unable to conclude that Kentucky had become an inconvenient forum or that New Jersey was a more appropriate forum for resolving issues concerning custody, parenting time, and support of the parties' minor children. We affirm.

There is no substantial dispute as to the facts. Incorporated into the 2011 decree dissolving the parties' marriage was a marital settlement agreement which awarded the parties joint custody of their two minor children; designated Father as the primary residential custodian; provided Appellee (Mother) reasonable parenting time with the children; and permitted Father to relocate with the children. Shortly after entry of the decree, Father and the two children did relocate to New Jersey where they continue to reside with Father and his parents. At the time of the hearing on transfer of jurisdiction, the children were eleven and twelve years old. The children have always attended school in New Jersey and have been under the care of the same pediatrician since they moved to New Jersey in 2011. Mother has consistently exercised parenting time with the children in Kentucky during school breaks and one-half of their summer vacation.

In January 2012, Mother moved to modify the parenting schedule and her child support obligation. After the matter was referred to mediation, the parties reached an agreement without a hearing in the family court. In July 2013, Mother moved to hold Father in contempt; to return the children's primary residence to

Kentucky; and to require Father to pay child support to Mother. Father responded by moving to transfer the case to New Jersey on the basis that it was the more convenient forum. The family court denied Mother's contempt motion, the motion for the children to reside in Kentucky, and her motion for support, as well as Father's motion to transfer jurisdiction to New Jersey.

After the denial of these motions, the case remained dormant until early 2017 when Mother again moved for a modification of the parenting schedule and to reduce her child support obligation. The family court referred the matter to mediation which proved unsuccessful. Mother thereafter moved the family court to appoint a friend of the court, to restrain Father from relocating from the state of New Jersey, and to modify her summer parenting time. Father filed a notice stating that he had no intention of moving the children from the state of New Jersey and subsequently moved the family court to transfer jurisdiction to that state. Father thereafter filed a civil action in New Jersey asking the superior court to accept jurisdiction and hear the case.

Meanwhile, the Jefferson Family Court issued an order modifying the parenting schedule so that the parties split time with the children in the summer months, setting a holiday schedule, and directing the parties to select a qualified mental health provider for the children. In March 2018, Mother asked the family court to enjoin transfer of the case to New Jersey. On April 11, 2018, the New

Jersey court entered an order indicating that it would accept jurisdiction over the case and custody matters related to the children. On May 8, 2018, the Jefferson Family Court issued a *sua sponte* order setting out the following:

> 36. Upon receiving notice of the conflicting New Jersey case, this court contacted the judge from the New Jersey case to discuss the issue of jurisdiction. It was the understanding of this court that New Jersey was declining jurisdiction of the case based upon the pending matters before this court.
>
> 37. On April 13, 2018, this court was provided a courtesy copy of [an] order entered on April 11, 2018 by the Monmouth County Family court. In the order, New Jersey declared itself as having jurisdiction over this matter. The order states jurisdiction should properly follow the children to where they reside after six (6) months. The order did not provide any law supporting this assertion and this court is unaware of any provision in the UCCJEA that automatically transfers jurisdiction after six months.

The family court then temporarily granted Mother's motion to enjoin transfer of jurisdiction to New Jersey pending a hearing on May 14, 2018, on the issue of whether New Jersey was a more convenient forum for this action. As Father notes in his brief, the May 8, 2018, order fully explained the factors and rationale underpinning the family court's conclusion that a hearing on jurisdiction was warranted:

> Further, this court concludes the UCCJEA, as codified in KRS 403.824, grants Kentucky exclusive, ongoing jurisdiction over the determination. Specifically, the court concludes the children in this

> action and [Mother] continue to have a significant connection with this state and substantial evidence remains available in this state concerning the children's care, protection, training and personal relationships. [Mother] continues to reside in Kentucky and the children regularly have parenting time here, during which [Mother] is in charge of the children's care and protection, including forming personal relationships with members of [Mother]'s family that reside in this state, such as her husband. Further, both parties and the children have continued to have significant contact with this court. Since [Father] and the children moved to New Jersey, this case has been before this court on approximately fifteen (15) separate motions and three (3) hearings, not including the upcoming hearing. This also does not include numerous motion hour proceedings at which [Mother] was present in person and [Father] participated telephonically. The court has had extensive interactions with the parties, with the case coming before the court an average of one (1) time a month for the past sixteen (16) months. The court has met with the children. The court has appointed a Friend of Court who has spoken with the children and the parties numerous times, including meeting with the children in person during their last visit in preparation for the upcoming hearing.

At the May 14 hearing, Father appeared telephonically representing himself. Mother's counsel and the friend of the court also appeared at the hearing during which the parties discussed several matters related to their ongoing difficulties with parenting.

On July 14, 2018, the family court entered an order declining to relinquish jurisdiction on the basis that no proof on the issue of jurisdiction had been presented at the May 14 hearing and inviting Father to refile his motion in the

future should he so choose. Shortly thereafter, Father retained counsel and refiled his motion to transfer jurisdiction to New Jersey. In his August 2018 motion, Father fully articulated the reasons the family court should cede jurisdiction, arguing that the children's connections with New Jersey far outweighed their increasingly attenuated connection to Kentucky and asserting that New Jersey had already indicated that it would accept jurisdiction under the UCCJEA if invited.

In October 2018, the family court conducted a hearing on Father's most recent motion to transfer at which it heard testimony from Mother, Father, and the appointed friend of the court. On December 7, 2018, the family court entered the order precipitating this appeal. After outlining the children's significant connections to New Jersey, the family court clearly explained its basis for declining to relinquish jurisdiction:

> Under KRS 403.834, this court may decline to exercise its jurisdiction if it determines it is an inconvenient forum under the circumstances and that another state is a more appropriate forum. Having specifically considered the factors set out in the statute, the court is unable to conclude that Kentucky is an inconvenient forum under the circumstances and that New Jersey is a more appropriate forum.
>
> This court recognizes [Father] and the children have resided in New Jersey for over seven (7) years and the majority of witnesses and records necessary for a hearing on modification of custody or a significant modification of parenting time are in New Jersey. However, there are currently no motions pending regarding any such modification. Rather, the majority of issues in this case revolve around the ongoing

> enforcement of existing orders, with [Father] being the party that is most often interfering with the execution of its orders. Further, although there is a significant distance between New Jersey and Kentucky, this court has regularly accommodated [Father] throughout this litigation by allowing him to participate telephonically. [Father] also has the financial resources to come to Kentucky for a hearing, if that is ever necessary. Finally, this court, including the appointed Friend of Court, has an extensive history with this family and an understanding of the dynamics at issue, while the New Jersey court has had only minimal interactions with the parties.

The court then specifically concluded that given the totality of the circumstances, the enforcement nature of the proceedings, the court's familiarity with the family, and Father's ability to participate in the proceedings with minimal inconvenience, Kentucky remained the most convenient forum for the custody action. After the denial of Father's motion to alter, amend, or vacate the judgment, this appeal ensued.

Prior to addressing the issues Father advances in this appeal, we acknowledge the standards by which appellate courts review rulings under the UCCJEA. We start with the Supreme Court of Kentucky's instruction that "[j]urisdiction is a question of law which we review *de novo*." *Addison v. Addison*, 463 S.W.3d 755, 764 (Ky. 2015) (citing *Grange Mutual Insurance Company v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004)). *Addison* also provides guidance as to the factors upon which our review of jurisdiction must be based:

> The original decree state retains continuing, exclusive jurisdiction if the child and the parent (or person acting as a parent) remaining in this state have significant connections. *Biggs v. Biggs*, 301 S.W.3d 32, 33-34 (Ky. App. 2009). *Biggs* holds that if the parent remaining in the original decree State exercises at least some visitation with the child in that state, significant connections exist.

Id. at 765. As was the case in *Addison*, the instant case is on all fours with *Biggs*. Thus, there cannot be, nor is there in this case, any serious dispute that Kentucky retains continuing, exclusion jurisdiction in this case.

Given our *de novo* conclusion concerning the existence of jurisdiction to proceed, the question thus becomes whether the family court abused its substantial discretion in refusing to decline jurisdiction in favor of New Jersey. This Court in *Robinson v. Robinson*, 556 S.W.3d 41 (Ky. App. 2018), held that "[b]ecause the UCCJEA vests the trial court with the discretion to decline to exercise its jurisdiction if it finds Kentucky is not a convenient forum, its decision will not be reversed absent a showing that it abused that discretion in either accepting or declining jurisdiction." *Id*. at 45 (citing *Williams v. Frymire*, 377 S.W.3d 579, 589 (Ky. App. 2012) (which applied the abuse of discretion standard of review to a trial court's determination as to whether Kentucky was an inconvenient forum)).

To reiterate, whether a family court has jurisdiction to exercise continuing jurisdiction in modification matters is a question of law which we

review *de novo*. *Biggs*, 301 S.W.3d at 33. Upon concluding that the family court acted within its jurisdiction, we review its decision to decline or retain its jurisdiction under the UCCJEA for abuse of discretion. The Kentucky test for abuse of discretion is "'whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Fraley v. Rice-Fraley*, 313 S.W.3d 635, 639 (Ky. App. 2010) (quoting *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

In applying those standards to this case, our primary focus necessarily falls upon KRS 403.834(2), which delineates the factors courts must consider in determining whether a forum is inconvenient:

> Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and **shall consider all relevant factors, including**:
>
> (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (b) The length of time the child has resided outside this state;
>
> (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (d) The relative financial circumstances of the parties;

> (e) Any agreement of the parties as to which state should assume jurisdiction;
>
> (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(Emphasis added). Contrary to Father's argument that the family court failed to properly consider or weigh these factors, the order in question clearly addressed the length of time the children have resided in New Jersey; the distance between Louisville and the superior court of New Jersey; the relative financial circumstances of Mother and Father; the fact that the children have always attended school in New Jersey; that their pediatrician and the oldest child's orthodontist and the youngest child's therapist are in New Jersey; that the children participate in gymnastics and baseball in New Jersey; that the children have extended family in New Jersey, including Father's parents with whom Father and the children reside; that Mother regularly exercises parenting time with the children in Kentucky, including one-half of their summer vacation; that a friend of the court appointed in Kentucky has frequently met with and/or spoken with the parents and the children, as well as submitted reports and attended hearings

regarding the children; that the court has accommodated Father by allowing him to participate in hearings and at motion hour telephonically; that the majority of the issues which arise between the parties concern enforcement of the family court's orders; and that the family court is familiar with the family, family dynamics, and the issues arising therefrom. In our view, it would be difficult, if not impossible, to demonstrate a more thorough and appropriate application of the statutory factors to the facts of this case. Absolutely nothing in this record would allow us to conclude that the family court's order is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

We turn again to *Addison* in which the Supreme Court rather summarily rejected a complaint virtually identical to that which Father raises in this appeal:

> We are not persuaded by Lydia's argument that the trial court did not consider the factors set forth in KRS 403.834. **The trial court specifically stated it was retaining jurisdiction based on the length of time the case was pending before it and its familiarity with the issues of the case. We find no error.**

463 S.W.3d at 765 (emphasis added). Neither do we find any error in the detailed and well-reasoned decision of the family court in this case.

Finally, we address the dissent's contention that this Court lacks jurisdiction to consider Father's appeal because the order in question is purely interlocutory. On May 8, 2018, the family court temporarily granted Mother's

motion to enjoin transfer of the case to New Jersey pending a hearing on inconvenient forum, stating that it would refuse to recognize any order of the New Jersey court pending its final decision whether to retain its exclusive continuing jurisdiction. In its July 14, 2018, order settling a myriad of disputes between the parties, the family court again declined to relinquish jurisdiction stating that no proof on the issue of jurisdiction had been presented at a hearing on inconvenient forum. The family court then invited Father to refile his motion in the future.

After obtaining Kentucky counsel, Father did file a new motion to transfer citing the provisions of the Kentucky UCCJEA and supported by an order of the New Jersey superior court which 1) granted Father's motion to designate New Jersey as having exclusive jurisdiction on the basis that jurisdiction follows the children after six months; 2) denied without prejudice several of Father's motions concerning support and time-sharing arrangements; and 3) denied Mother's motions to continue jurisdiction in Kentucky and for attorney's fees. In its "statement of reasons," the New Jersey court stated that although it would "not interfere with any current matters pending in Kentucky filed before this application of February 5, 2018," it would address any matters subsequent to that date. On December 7, 2018, the Jefferson Family Court entered the order which precipitated this appeal and noted in that order that there were no other pending motions regarding issues of custody or parenting time.

Contrary to the dissent's contention that the order of December 7, 2018, did not resolve any claim or dispute between the parties, there was competing litigation in both Kentucky and New Jersey concerning the application of the UCCJEA (which had been adopted in both states) and concerning the parties' respective claims as to the proper application of KRS 403.834 in particular. The December 7, 2018, order represented the culmination of UCCJEA litigation that had been ongoing throughout most of 2018.

Under the dissent's view, the parties would be denied appellate review of the application of the UCCJEA until such time as it could be tied to some routine enforcement matter which would constitute a more concrete claim. The May 8, 2018, order could not be appealed because the family court stated that its decision concerning the application of the UCCJEA was merely temporary pending a hearing with proof as to the KRS 403.834 factors. The July 14, 2018, ruling which presumably would fit the dissent's finality criteria in terms of disposing of "claims" could not be appealed because it lacked finality language and would have been futile as the refusal to relinquish jurisdiction was based upon a failure of proof concerning application of the UCCJEA. Citing *Danaher v. Hopkins*, 449 S.W.3d 765 (Ky. App. 2014), the dissent insists that the December 7, 2018, order cannot be appealed for lack of finality.

We view the holding in *Danaher* as distinguishable from the situation here. The appellee in *Danaher* claimed that the "order did not adjudicate the rights of all the parties and did not contain the requisite finality language, and therefore, the order was not final or appealable." *Id.* at 770-71. The Warren Family Court had issued two separate orders on September 6, 2013. The first denied Danaher's motion to register a North Carolina custody order on the basis that North Carolina did not satisfy the criteria to be designated the child's home state under the UCCJEA. The second order determined that Kentucky was the child's home state and directed that the custody action proceed. In dismissing the second order, this Court stated, "unlike the order denying Danaher's petition to register the foreign child custody order, this order did not state that it was a final and appealable order." *Id*. at 768. While the *Danaher* opinion did note that the second order did not resolve all the claims of either party, it was fundamentally decided on the lack of Kentucky Rule of Civil Procedure (CR) 54.02 recitations. Although the order in question here contains the CR 54.02 recitations, we do not view that to be a critical distinction because the family court stated that there were no other matters currently pending (a pending motion to compel had been resolved by agreement of the parties). In fact, due to the inclusion of the finality recitations, Father might have risked waiver of his appellate remedy by failing to timely appeal the December 7 order.

Where "Kentucky law is sparse in construing our counterpart of the UCCJEA, we have looked to sister states for guidance." *Biggs*, 301 S.W.3d at 33. Our research on this point has uncovered but a single opinion addressing head-on the question of whether the denial of a motion to relinquish jurisdiction under the UCCJEA is final and appealable. In *Meadows v. Meadows*, 18 Neb. App. 333, 337, 789 N.W.2d 519, 522 (2010), the Nebraska Court of Appeals specifically held that "overruling a motion to decline jurisdiction under § 43-1244 [the Nebraska enactment of the UCCJEA] on the ground of inconvenient forum does not affect a substantial right and is not a final, appealable order[.]" However, our research did disclose opinions from numerous other jurisdictions which decided orders ruling solely on jurisdiction under the UCCJEA without questioning finality. Of particular pertinence is the following statement by a California appellate court in *In re Marriage of Nurie*, 176 Cal. App. 4th 478, 490, 98 Cal. Rptr. 3d 200, 211 (2009), an appeal of an order refusing to register a Pakistani custody order:

> Thankfully, it is not our task to decide all of the hotly contested factual issues between these warring parties. We are, however, asked to decide between two core concepts in child custody jurisdiction that appear to compete in this case, namely "home state" jurisdiction and "exclusive, continuing" jurisdiction. (§§ 3421, 3422.) We conclude the method for resolving any conflict between these legal principles is dictated by the UCCJEA, and decide the case accordingly.

We conclude by noting that the enforcement stage of custody proceedings does not naturally lend itself to the kind of finality issues raised by the dissent, in particular with regard to the application of the jurisdictional provisions of the UCCJEA. While prior to the entry of an initial custody order, it may be prudent to delay appeal of jurisdictional issues until after a final custody order is entered, that is not the case after custody has been finally decided. When jurisdictional issues arise in the enforcement stage of the proceedings, there seems to be no reason to require the losing party to wait to seek appellate review of the decision until it can be tied to resolution of another claim, nor a logical point at which to do so. It is clear in this case that competing jurisdictions are issuing orders concerning support, medical treatment, reimbursement for that treatment, and parenting time. Under these circumstances, it is inimical to both the letter and the spirit of the UCCJEA to deny appellate review of a claim that the statute has not been properly applied, especially where that denial results in duplication of litigation in two states.

Accordingly, the judgment of the Jefferson Family Court is affirmed.

GOODWINE, JUDGE, CONCURS.

KRAMER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KRAMER, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion because this appeal is taken from an interlocutory order. Hence, there is not a final order for this Court to review; accordingly, this appeal should be dismissed on that basis.

As the majority notes in the opening paragraph, "[t]he single issue in this appeal is whether the Jefferson Family Court erred in refusing to cede its continuing jurisdiction . . . ." On its face, this is an interlocutory matter. *See, e.g.*, *Danaher v. Hopkins*, 449 S.W.3d 765, 771 (Ky. App. 2014) (In specifically reviewing a transfer under the UCCJEA, the Court held, "We agree with Hopkins that the second order was not a final and appealable order. The order did not adjudicate the rights of either party, and did not grant either parent custody."); *see also Banks v. Combs*, No. 2007-CA-001657-ME, 2008 WL 1921632, at *1 (Ky. App. May 2, 2008) ("The order appealed from in this case dealt solely with the issue of venue. Therefore, it is interlocutory by its very nature despite the inclusion of finality language and must be dismissed.").[1]

For these reasons, I respectfully dissent and would dismiss this appeal because it was taken from a non-final order.

[1] Cited for illustrative purposes only.

BRIEFS FOR APPELLANT:

Louis P. Winner
Joseph R. Schwamb
Louisville, Kentucky

BRIEF FOR APPELLEE:

James K. Murphy
Louisville, Kentucky