DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, JUDGE

CA05-971

April 26, 2006

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[DR-01-197]

HONORABLE JIM D. SPEARS, CIRCUIT JUDGE

AFFIRMED IN PART; REVERSED IN PART

MARTHA LUGINBILL
APPELLANT

V.

ANDY LUGINBILL
APPELLEE

Appellant, Martha Luginbill, and appellee, Andy Luginbill, were divorced by decree entered on October 25, 2001, in the circuit court of Sebastian County, Arkansas. As part of the decree, appellant was awarded custody of the couple's only child, Lauren, subject to appellee's reasonable visitation rights. Appellee started attending pharmacy school in Oklahoma in 2002 and was still living there awaiting his graduation and "doing his rotations" at the time of these proceedings. In late March 2004, Lauren was diagnosed with a malignant brain tumor, and she and appellant traveled from Fort Smith, Arkansas, to Memphis, Tennessee, for treatment, where they have remained. On December 8, 2004, appellee filed an "Emergency Motion for Christmas Visitation" in the Sebastian County Circuit Court. The filing of that motion precipitated the events leading to this appeal.

On April 1, 2005, appellant filed in a court in Tennessee, a "Petition to enroll foreign decree of divorce; for modification of final decree; and for contempt." On or

about April 8, 2005, appellant filed a "Motion to Stay All Proceedings" in the Arkansas trial court, informing it that she had filed an action in Tennessee seeking to enroll the decree and averring that her residence had changed to Tennessee and asking the Arkansas trial court to stay the matter and communicate with the Tennessee court to determine the proper forum. A hearing in the matter was held on April 27, 2005, in Fort Smith, Arkansas, with both parties present. In an April 29, 2005 letter, the Arkansas judge wrote to the Tennessee judge, stating in pertinent part:

> It was a pleasure talking with you yesterday. This is to confirm the substance of our discussion. Following a hearing in Fort Smith this court determined that Mr. Luginbill was an Oklahoma resident and that Mrs. Luginbill established residence in Tennessee in December 2004. This court retains jurisdiction of the matter and all pending motions filed before June 30, 2005. This is in accordance with the UCCJEA. The court will entertain a motion to transfer following that time. I will favor the court with a copy of the order from the hearing for entry in TN upon its filing with the office of the Circuit Clerk. Once again thank you for your kind reception.

In a May 12, 2005 order, the Arkansas trial court found in pertinent part that it had jurisdiction of the subject matter and the parties; that appellee, not appellant, was the prevailing party concerning the court's jurisdiction; and that appellee should be awarded $3,912 in attorney fees. In a May 24, 2005 order, the trial court additionally found in pertinent part that "Andy Luginbill is a resident of and domiciled in the State of Oklahoma [and] Martha Luginbill has been a resident and domicile of the State of Tennessee since December 21, 2004."

In this one-brief case, appellant challenges the trial court's exercise of jurisdiction and its award of attorney's fees to appellee. We affirm the trial court's exercise of jurisdiction in this matter, although on a different basis than that asserted by the trial court, but reverse its award of attorney's fees.

Jurisdiction under UCCJEA

In *Weesner v. Johnson*, ____ Ark. App. ____, ____, ____ S.W.3d ____, ____ (Jan. 19, 2005), our court explained:

> Our supreme court set forth an overview of the UCCJEA in *Arkansas Department of Human Services v. Cox*, 349 Ark. 205, 82 S.W.3d 806 (2002), recognizing that the purpose of adopting the UCCJEA was to prevent jurisdictional conflicts like those that arose under its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA). It also determined that child-custody jurisdiction is a matter of subject-matter jurisdiction. *Moore v. Richardson*, 332 Ark. 255, 964 S.W.2d 377 (1998); *see also Dorothy v. Dorothy*, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 1, 2004). It subsequently stated that the UCCJEA is the exclusive method for determining the proper forum in child-custody proceedings involving other jurisdictions. *Greenhough v. Goforth*, 354 Ark. 502, 126 S.W.3d 345 (2003). We can raise *sua sponte* the question of whether the lower court lacked subject-matter jurisdiction, and if we conclude that the lower court was without jurisdiction, dismissal is an appropriate disposition of the case. *Tyler v. Talburt*, 73 Ark. App. 260, 41 S.W.3d 431 (2001).

The standard of review in this case is *de novo*, but we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *West v. West*, ____ Ark. ____, ____ S.W.3d ____ (Nov. 3, 2005).

Here, in its order of May 24, 2005, the trial court made the following pertinent findings: 1) that appellee is a resident of and domiciled in Oklahoma and 2) that appellant has been a resident of and domiciled in the State of Tennessee since December 21, 2004. Under the UCCJEA, Arkansas Code Annotated section 9-19-102 (Repl. 2002) defines "child-custody proceeding" and "home state." A "child-custody proceeding" includes one in which visitation with respect to a child is an issue. § 9-19-102(4). "Home state" means the state in which a child *"lived* with a parent . . . for at least six (6) consecutive months immediately before the commencement of a child-custody proceeding." § 9-19-102(7). (Emphasis added.)

Arkansas Code Annotated section 9-19-202 (Repl. 2002) provides the criteria for determining *exclusive, continuing* jurisdiction:

> (a) Except as otherwise provided in § 9-19-204, a court of this state which has made a child-custody determination consistent with § 9-19-201 or § 9-19-203 has exclusive, continuing jurisdiction over the determination *until*:
>
> (1) a court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; *or*
>
> (2) *a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.*
>
> (b) A court of this state which has made a child-custody determination and *does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under § 9-19-201.*

(Emphasis added.) Because the trial court in the instant case specifically found that, at least the parents, and by inference the child, did not *presently* reside in Arkansas, it appears that, according to section 9-19-202(a)(2), it thereby did not have "exclusive, continuing jurisdiction." That then takes us to subsection (b) of section 9-19-202. Under subsection (b) the only way the trial court could modify its child-custody determination if it no longer had exclusive, continuing jurisdiction under section 9-19-202(a) was to once again be able to show that it had "jurisdiction to make an initial determination under § 9-19-201."

Arkansas Code Annotated section 9-19-201 (Repl. 2002) provides the criteria for determining whether a state has jurisdiction to make an *initial* child-custody determination:

> (a) Except as otherwise provided in § 9-19-204, a court of this state has jurisdiction to make an initial child-custody determination *only if*:
>
> (1) 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;
>
> (2) a court of another state does not have jurisdiction under subdivision (a)(1) of this section, 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 § 9-19-207 or § 9-19-208, and:

(A) the child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(3) all courts having jurisdiction under subdivision (a)(1) or (2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under § 9-19-207 or § 9-19-208; *or*

(4) no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (2), or (3) of this section.

(b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

(Emphasis added.) We can conclude from the Arkansas judge's April 29, 2005 letter that Tennessee declined to exercise jurisdiction in this case. Therefore, the Arkansas trial court established its jurisdiction to hear this matter pursuant to subsection (a)(3) of section 9-19-201.

In addition, Arkansas Code Annotated section 9-19-206(b) (Repl. 2002), which deals with simultaneous proceedings, provides:

(b) Except as otherwise provided in § 9-19-204, a court of this state, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to § 9-19-209. If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and *communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.*

(Emphasis added.) Again, the Arkansas court communicated with the Tennessee court, and in view of the fact that the Tennessee court did not exercise jurisdiction, the Tennessee court apparently determined that Arkansas was a more appropriate forum. We hold, therefore, that the Arkansas court's exercise of jurisdiction in this matter was appropriate under the UCCJEA.

Attorney's fees

For her second and final point of appeal, appellant contends that the trial court erred in granting appellee attorney's fees "when appellee could not be reasonably found to be the prevailing party pursuant to Ark. Code Ann. § 9-19-312(a)." We find merit in the argument.

Arkansas Code Annotated section 9-19-312(a) (Repl. 2002) provides:

> (a) The court shall award the *prevailing party*, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, *attorney's fees*, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, *unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.*

(Emphasis added.)

Appellant contends that the trial court's award of attorney's fees in this case is "clearly inappropriate" because appellee "cannot be said to have prevailed in this matter" because: (1) the emergency motion that started everything was not an emergency and was ruled moot by the end of the proceedings; (2) the trial court determined that appellee could have "pushed forward" to exercise visitation more frequently, that each time appellee had previously tried to exercise his visitation he was able to do so, and that it was appellee's lack of effort, not appellant's actions, that had prevented more frequent visits; (3) the trial court ruled that both parties were residents of states other than Arkansas; and (4)

the trial court ruled that appellant was not to be required to transport Lauren to Ft. Smith for appellee to exercise his biweekly standard visitation and that appellee was required to travel to Memphis for his regular biweekly visitation in the event he wished to do so. In addition, appellant points out that she "has devoted all of her time, resources and energy to caring for the parties' critically ill child with very little financial or other help from appellee and that to uphold an award of attorney's fee against her under these circumstances is not only clearly inappropriate and erroneous, but unconscionable." We agree.

Appellant established that an award of fees to appellee in this case was clearly inappropriate. We, therefore, hold that the trial court erred in making the award and reverse the portion of the trial court's order that awarded attorney's fees to appellee.

Affirmed in part; reversed in part.

HART and ROBBINS, JJ., agree.