

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JEAN KELLY CUNNINGHAM
Shelbyville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD K. STORM,)
)
Appellant-Petitioner,)
)
vs.)
)
TRACY S. SISSOM, Deceased,)
)
Appellee-Respondent,)
)
and)
)
REBECCA SANDLIN and)
SHELLEY SULLIVAN (FEZATTE),)
)
Appellees-Intervenors.)

No. 30A01-0912-CV-593

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Richard D. Culver, Judge
Cause No. 30C01-0010-DR-524

May 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Richard Storm (“Father”) sought transfer of his child custody modification case to Kentucky on the ground the Indiana court is an inconvenient forum, and his motion was denied. We reverse.

FACTS AND PROCEDURAL HISTORY

Father and Tracy Sissom (“Mother”) divorced in 2001 and were given joint legal custody of their two children by the Hancock Circuit Court. When Mother died in 2004, Father agreed to joint legal custody with the children’s maternal grandmother and aunt (“the Intervenors”). The Hancock Circuit Court approved an agreement whereby Father was to have physical custody of the younger child and Intervenors would have physical custody of the older child.¹ In 2006, Father and the younger child moved to Kentucky, where they continue to reside.

In 2009, both parties petitioned for a change in custody of the younger child – Father in Kentucky and the Intervenors in the Hancock Circuit Court. In response to Intervenors’ petition, Father asked the Indiana court to transfer the case to Kentucky:

[T]his Court will become an inconvenient forum as all the facts, for substantial change in circumstance, are located in Shelbyville Kentucky, a[sic] 175 miles away. Shelbyville is were [sic] the child goes to school, church, doctor and friends and neighbors would be located for the testimony as to the relationship of the child and the father for which this petition for modification of custody is against.

(App. at 28.)

The court denied his motion in November 2009. It did not explain the reason for its

¹ The older child is now an adult and her custody is not at issue in these proceedings.

denial, but noted Father has custody of the younger child and lives in Kentucky, while the Intervenor had custody of the older child and live in Indiana. The court stated in its order that it would not set a hearing on other pending motions until Father has an opportunity to appeal the denial of transfer.

DISCUSSION AND DECISION

The Intervenor filed no brief. When an appellee does not submit a brief we need not undertake the burden of developing an argument on the appellee's behalf. Rather, we will reverse the judgment if the appellant's brief presents *prima facie* error. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). *Prima facie* error in this context means "at first sight, on first appearance, or on the face of it." *Id.* Where an appellant is unable to meet this burden, we will affirm. *Id.*

Jurisdiction to decide custody matters having interstate dimensions is governed by the Uniform Child Custody Jurisdiction Act ("UCCJA"). *Westenberger v. Westenberger*, 813 N.E.2d 343, 344 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 979 (Ind. 2004). The court must first determine in such cases whether it has jurisdiction and, if it does, whether to exercise it. *Id.* We review determinations on such matters for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.* at 344-45.

Under the UCCJA, the court that first enters a custody decree on a matter has exclusive jurisdiction over child custody matters until the child and all parties have left the state. *Id.* at 345. Father acknowledges the Intervenor still reside in Indiana. Therefore the

Hancock Circuit Court, which entered the original custody order over these children, still has jurisdiction over this matter.

Nevertheless, a court with jurisdiction under the UCCJA may decline to exercise its jurisdiction if it finds it is an inconvenient forum for a custody determination under the circumstances of the case and “a court of another state is a more appropriate forum.” Ind. Code § 31-21-5-8(a). If a court finds it is an inconvenient forum and a court of another state is a more appropriate forum, it

- (1) shall stay the proceedings on condition that a child custody proceeding be promptly commenced in another designated state; and
- (2) may impose any other condition the Indiana court considers just and proper.

Ind. Code § 31-21-5-8(c).

Factors a court may consider in determining whether another state is a more appropriate forum for deciding a child custody matter include:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state is best able to protect the parties and the child.
- (2) The length of time the child has resided outside Indiana.
- (3) The distance between the Indiana court and the court in the state that would assume jurisdiction.
- (4) The relative financial circumstances of the parties.
- (5) An agreement of the parties as to which state should assume jurisdiction.
- (6) The nature and location of the evidence required to resolve the pending litigation, including the child’s testimony.
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

Ind. Code § 31-21-5-8(b).

It appears from the record that evidence concerning custody modification is more readily available in Kentucky than in Indiana. Modification of child custody is governed by Indiana Code § 31-17-2-21, which provides a court may not modify a child custody order unless the modification is in the best interest of the child and there is a substantial change in one or more of the factors the court may consider under Ind. Code § 31-17-2-8. Those factors are (1) the age and sex of the child; (2) the wishes of the child's parent or parents; (3) the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen years old; (4) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (5) the child's adjustment to her home, school, and community; (6) the mental and physical health of all individuals involved; and (7) evidence of a pattern of domestic violence by either parent. *Bryant v. Bryant*, 693 N.E.2d 976, 978 (Ind. Ct. App. 1998), *reh'g denied*, *trans. denied* 706 N.E.2d 976 (Ind. 1998).

The home of the only minor child is in Shelbyville, Kentucky, some 175 miles from Hancock County, Indiana, so evidence concerning matters required to show a substantial change in circumstances warranting a change in custody, specifically the child's adjustment to her home, school, and community, is presumably more readily ascertainable in Kentucky than in Indiana. As the other factors about which the parties provided evidence do not favor either state, Kentucky would be a more appropriate forum for determining whether custody should be modified. *See, e.g., Westenberger*, 813 N.E.2d at 346 (Arkansas, not Indiana, is in "best position to determine the best interests of the children" when they moved with

agreement of non-custodial parent and had lived there two years, such that “substantial evidence of the children’s care, education, and personal relationships” is in Arkansas). Therefore, Father has made a *prima facie* case and his motion to transfer the case to Kentucky should have been granted.

We reverse the denial of Father’s motion to transfer.

Reversed.

BAILEY, J., and BARNES, J., concur.