IN THE COURT OF APPEALS OF IOWA

No. 2-913 / 12-1178
Filed February 27, 2013

IN RE THE MARRIAGE OF SHALLON AMBER PEREAULT AND BRIAN PEREAULT

Upon the Petition of
SHALLON AMBER PEREAULT,
Petitioner-Appellant,

And Concerning
BRIAN PEREAULT,
Respondent-Appellee.

Appeal from the Iowa District Court for Mitchell County, Dedra Schroeder, Judge.

Shallon Pereault appeals the district court's grant of Brian Pereault's motion to dismiss a child custody petition. **AFFIRMED.**

James P. McGuire of McGuire Law, P.L.C., Mason City, for appellant.

Mark L. Walk of Walk & Murphy, P.L.C., Osage, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

Shallon Pereault appeals the decision of the district court which granted Brian Pereault's motion to dismiss Shallon's petition for custody of the parties' child on the ground the court did not have jurisdiction under Iowa Code chapter 598B (2011). Shallon argues the district court erred in finding that Washington, not Iowa, was the child's home state under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). We affirm.

I. Background Facts and Proceedings.

Shallon and Brian Pereault were divorced in Illinois in 1999. In May 2000, the parties' child, K.P., was born in Minnesota. K.P. resided with Shallon in Minnesota; Brian resided in Washington. In 2003, an administrative consent order was entered in Washington establishing Brian's child support obligation for the child. In 2004 or 2005, K.P. began spending the summers with Brian in Washington.

In 2007, K.P. and Shallon moved to Iowa. K.P. started elementary school in Iowa, but still spent the summers in Washington with Brian. In 2010, at K.P.'s request, Shallon and Brian agreed K.P. would live with Brian for the summer and through the 2010-11 school year. In June 2010, K.P. moved to Washington.

On December 21, 2010, Brian filed a petition in Washington for modification of the child support consent order, expressing the parties' agreement that he pay "0—Zero" for child support because "K.P. has been residing with me since June 2010 and will continue to do so through the school year." Shallon mailed a letter to Brian dated September 1, 2010 concerning

K.P.'s living with Brian which stated, "K.P. has my permission to stay this school year with [the] father Brian Pereault. She will be returning to me [the] mother at the end of this school year."

Brian's intent to have K.P. reside with him temporarily changed when he "learned of Ms. Pereault's criminal issues and [he began to have] growing concerns with K.P.'s placement with [the] mother." On December 2, 2010, the Mitchell County Sheriff's Department (Iowa) along with the Austin Police Department (Minnesota) executed a search warrant at Shallon's residence concerning several burglaries that had taken place in Austin, Minnesota. One stolen item was found.[1] During the course of the search, officers also found a glass methamphetamine pipe. Shallon admitted the pipe was hers, and was found guilty of possession of drug paraphernalia. Shallon was also charged with possession of a controlled substance when the residue in the pipe later tested positive for methamphetamine. Shallon admitted she had used methamphetamine, but alleged she had stopped using drugs "years ago."[2]

On May 20, 2011, Brian filed a petition for custody in Washington under the UCCJEA. At that time, there was no order in place with regard to the custody of K.P. in any state; accordingly, this was to be an initial custody determination.

On July 11, 2011, the Washington court entered a temporary custody and child support order granting custody of K.P. to Brian. On July 26, 2011, Shallon,

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[1] Shallon's paramour, Dwight Jorgenson, alleged he allowed a tenant to store a camper on their property for a fee. According to Jorgenson, unbeknownst to him and Shallon, the tenant was storing stolen property in the camper.

[2] The methamphetamine charge has not been adjudicated.

through a Washington attorney, filed an answer to the custody petition and a motion to dismiss on jurisdictional grounds with the Washington court.

On July 29, 2011, Shallon initiated the instant case by filing a petition for custody in Iowa. Brian filed an answer and motion to dismiss, alleging "Washington has exclusive jurisdiction of this matter" and "Iowa shall not exercise its jurisdiction, if at the time of the commencement of the proceedings, a proceeding concerning the custody of the child has been commenced in a Court of another state." *See* Iowa Code chapter 598B.

On August 26, 2011, the Washington court issued an order directing Shallon to participate in a hair follicle drug test. On October 28, 2011, the Washington court again ordered Shallon to participate in a hair follicle drug test. On November 4, 2011, the Washington court determined Shallon had "intentionally violated the Court's prior requirements for her to participate in a hair follicle test." Shallon was considered "dirty" for all drug test results.

On November 4, 2011, the Washington court denied Shallon's motion to dismiss on subject matter jurisdiction. The court's order stated in part:

> Washington State is the home state for the minor child, K.P. Since K.P. was residing in the State of Washington for at least six (6) months prior to the Petition being filed in the State of Washington no other state has jurisdiction. However, Iowa may initiate a UCCJEA telephone conference with the State of Washington if they deem it appropriate.

After the Washington court determined it had jurisdiction, various hearings were held. Shallon was represented by an attorney. A Washington family court investigator filed an eleven-page report with the court recommending Brian "be designated the primary residential parent of K.P.," and that Shallon's contact with

K.P. be limited "until she provides a clean hair follicle to the court . . . and she has had at least six (6) months of documented sobriety."

In April 2012, after a final hearing, the Washington court ordered custody of K.P. with Brian. The Washington court set forth its "basis for jurisdiction over the child" as follows:

> a. This state is the home state of the child because:
> i. The child lived in Washington with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of this proceeding.
> b. The child and the parents or the child and at least one parent or person acting as a parent, have significant connection with the state other than mere physical presence; and substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships; and
> i. The child has no home state elsewhere.
> c. No other state has jurisdiction.

Shallon did not appeal that ruling.

On May 23, 2012, in the Iowa court, Brian filed a notice of additional filings, which included the final parenting order filed by the Washington court. On May 25, 2011, following a hearing, the Iowa court granted Brian's motion to dismiss on subject matter jurisdiction. As the district court found:

> The issue of jurisdiction has been litigated in the State of Washington, and the State of Washington has determined that it has jurisdiction of custodial matters regarding this child. . . .
> K.P. has lived in the State of Washington since June of 2010. Washington has assumed jurisdiction of this child. No action was pending in Iowa prior to K.P. leaving, or within six months of the child being absent from this State.

Shallon appeals.

II. Discussion.

Although Shallon's decision not to appeal the Washington court's custody ruling disposes of this case, we will address the merits of her claim concerning the parties' intent per their original agreement. Shallon argues the Iowa district court erred in dismissing her petition "when K.P. was only absent from Iowa on a temporary visit" and argues the court should have found "that Iowa was the home state." Brian counters "[t]here was never any Iowa court action with regard to custody of K.P. prior to the Washington case," and "Iowa Courts have refused to exercise jurisdiction when another Court has assumed jurisdiction."

Our UCCJEA, Iowa Code chapter 598B, sets forth the jurisdictional requirements for an Iowa court to make a child-custody determination. *See* Iowa Code §§ 598B.201 (listing the exclusive circumstances under which a court of this state has jurisdiction to make an initial child-custody determination); 598B.102(3) (defining "child-custody determination"); 598B.102(8) (defining "initial determination"). Iowa Code section 598B.201 provides:

> 1. [A] court of this state has jurisdiction to make an initial child-custody determination only if any of the following applies:
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> a. 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 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.
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> b. A court of another state does not have jurisdiction under paragraph "a" . . . .

Iowa Code section 598B.102(7) defines "home state" as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding . . . . A

period of temporary absence of any of the mentioned persons is part of the period." Whether the jurisdictional requisites of the UCCJEA have been met is a question of subject matter jurisdiction, of which we conduct a de novo review. *See In re Jorgensen*, 627 N.W.2d 550, 554-55 (Iowa 2001).

K.P. moved to Washington with Brian in June 2010. The parties originally intended K.P.'s absence from Iowa to be temporary; they agreed K.P. would return to Shallon in Iowa in May 2011. In November or December 2010, however, Brian's intent changed. Brian learned of Shallon's "criminal issues," had "growing concerns" in regard to K.P.'s placement with Shallon in Iowa, and decided he wanted K.P. to remain with him in Washington permanently. On May 20, 2011, Brian filed a petition for custody in Washington. As there was no order in place with regard to the custody of K.P. in any state, from any state, this was to be an "initial determination" regarding K.P.'s legal custody. *See* Iowa Code § 598B.102(3), (8).

Shallon filed her petition for custody in Iowa on July 29, 2011. Shallon argues Iowa should have asserted jurisdiction because she never intended for K.P.'s absence to be anything but temporary and "[b]y filing the petition in Iowa in July of 2011, it was well within the six months prior to when K.P. was to be returned to her home state of Iowa."

While we agree that intent is a significant consideration in determining whether an absence is a "temporary absence," we do not believe the significance of intent can or should be restricted to the intent existing at the time of leaving. If it were so restricted, then an absence that began with intent to return would

remain a "temporary absence" even long after a decision had been reached for the child to permanently relocate. We believe instead that an absence from a state is no longer "temporary" once the intent is formed for the child to reside permanently in another state and is in fact doing so with such intent.

In this case, we conclude when Brian filed a petition for custody in Washington in May 2011, K.P. was no longer temporarily absent from Iowa. Further, at the time Brian filed his petition, there was no order in place with regard to the custody of K.P. in any state. And again, we observe Shallon was represented by counsel in the Washington proceedings and did not appeal the Washington court's ruling establishing custody. We agree with the district court that Washington, not Iowa, was the child's "home state" when Shallon filed her petition for custody. Therefore, under the UCCJEA the Iowa court did not have jurisdiction to make an initial child-custody determination.

Moreover, although the primary question on appeal is one of jurisdiction, the underlying action involves child custody and, consequently, equitable principles apply. *In re Marriage of Cervetti*, 497 N.W.2d 897, 899 (Iowa 1993). In dealing with the UCCJEA, "[t]he fundamental question of which state is best suited to resolve custody quickly, permanently, and on the merits, is decided by us anew." *Id*. Under these circumstances, Washington was the state "best suited to resolve custody quickly, permanently, and on the merits." *See id.*

III. Attorney Fees.

Brian contends the district court erred in failing to order Shallon to pay his attorney fees. "[A]ttorney fees are not awarded as part of the costs unless clearly

authorized by statute." *Keeney v. Iowa Power & Light Co.*, 96 N.W.2d 918, 920 (Iowa 1959). The UCCJEA includes a statutory provision for attorney fees:

> 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 fees, investigative fees, expenses for witnesses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

Iowa Code § 598B.312(1). We find Brian should have been awarded $500 in trial attorney fees.

Brian also requests an award of appellate attorney fees. We award Brian $500 in appellate attorney fees. Additional costs of appeal are assessed to Shallon.

AFFIRMED.