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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000337-ME
AND
NO. 2004-CA-000684-ME

DIANA KOHLER AND
JOHN KOHLER — APPELLANTS

v.

APPEALS FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 01-CI-00201

LAURIE MCDONALD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

SCHRODER, JUDGE: These are consolidated appeals by grandparents who have sole custody of minor child from orders denying their motions to transfer jurisdiction and to dismiss mother's motions to modify custody and hold them in contempt. The grandparents

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

argue that the state of Georgia, where they and the child have lawfully resided for over seven months, is now the proper forum for jurisdiction under the Uniform Child Custody Jurisdiction Act ("UCCJA"). From our review of the totality of the circumstances and the UCCJA, we adjudge that the Livingston Circuit Court properly exercised jurisdiction in this case. Hence, we affirm.

Appellants, Diana and John Kohler ("the Kohlers"), are the maternal grandparents (mother and stepfather of child's mother) of L.Q., born November 11, 1999. In December of 2001, while still residing in Kentucky, the Kohlers filed a petition for permanent custody of L.Q. After an evidentiary hearing, the Livingston Circuit Court applied the best interest standard and awarded permanent custody of L.Q. to the Kohlers in an order dated April 2, 2002. The court based its decision on the following findings: the child's father had neglected and abandoned L.Q.; the child's mother, Laurie McDonald, had severe alcohol and anger control problems which caused her to lose custody of her other two children; the Kohlers have had custody of the child for a big part of her life; in December of 2000, L.Q. was removed from McDonald's custody by the Cabinet for Families and Children ("CFC") based on a determination of abuse and neglect as a result of McDonald's alcohol problems; L.Q. returned to McDonald's home for two months and was thereafter

removed again in September of 2001; the Kohlers possess adequate parenting skills to care for L.Q.; L.Q. has adjusted well to the Kohlers' home, and her mental and physical condition has steadily progressed while in their care; and McDonald and the Kohlers do not have a relationship conducive to joint decision-making regarding the child. However, the court felt that a relationship with the natural mother should still be maintained. Thus, the court ordered visitation by McDonald for a minimum of four hours a week as directed and scheduled by Diana Kohler and specifically provided that "the visitation may evolve into overnight and unsupervised visitation as the petitioner/grandmother deems appropriate." There was no language in the court's order prohibiting the Kohlers from moving to another state with L.Q.

Subsequently, McDonald failed to comply with the visitation schedule and the Kohlers filed a motion to eliminate McDonald's visitation and for her to show cause why she should not be held in contempt for failing to comply with the visitation order. McDonald filed a motion for review of the visitation schedule established pursuant to the April 2, 2002 order. On March 31, 2003, the court entered an order denying the Kohlers' motion to hold McDonald in contempt, specifically finding that there was nothing to be gained by holding McDonald in contempt. As for McDonald's motion for review of the

visitation schedule, the court ordered a new home study by the CFC of McDonald's home because she had remarried, and further modified visitation to allow for McDonald to visit L.Q. two hours per week at the CFC office in Smithfield, Kentucky.

It is undisputed that on April 18, 2003, the Kohlers moved with L.Q. to Marietta, Georgia to help take care of John's ailing father. On April 30, 2003, McDonald moved to have the Kohlers found in contempt for failure to present L.Q. for visitation in Kentucky per the March 31, 2003 order. On June 10, 2003 the court entered an order holding the Kohlers in contempt and directing the Kohlers to purge the contempt by making L.Q. available for visitation at the CFC office in Smithfield, Kentucky on or before June 12, 2003. On June 19, 2003, the Kohlers filed a motion to modify visitation in order to "accommodate the goals of this court while permitting Petitioners to meet their personal obligations in Georgia." In an order entered July 22, 2003, the court granted the motion for modification and indicated that the parties had reached an agreement that McDonald could have unsupervised visitation with L.Q. on specific dates in July, every other week in Kentucky and every other week in Georgia if McDonald's work schedule permitted. On August 18, 2003, the court entered an order setting visitation again every other week in Kentucky and every other week in Georgia. On October 17, 2003, McDonald again

moved the court to require the Kohlers to show cause why they should not be held in contempt for not producing the child for visitation in Kentucky. However, the certificate of service on said motion was not signed by McDonald or her attorney. Consequently, the court entered an order passing on the matter, subject to re-notice.

On November 26, 2003, McDonald filed a motion to modify the previous custody order of April 2, 2002, seeking to regain custody of the child. The Kohlers filed a response to this motion on December 3, 2003 and also filed a motion to transfer jurisdiction of the case to Georgia on grounds that the Kohlers and L.Q. had been residing in Georgia since April 18, 2003. In this motion the Kohlers argued that under state and federal law, Georgia was now the appropriate jurisdiction to determine any matters pertaining to L.Q.'s custody. Thereafter on January 5, 2004, the Kohlers filed in the Livingston Circuit Court a notice that they had filed a petition to domesticate a foreign judgment in the Cobb County Circuit Court in Marietta, Georgia since the child had resided in the state of Georgia beyond the statutory time required for the state of Georgia to exercise jurisdiction. The Kohlers next filed a motion to dismiss McDonald's motions to modify custody and to hold them in contempt on grounds of lack of jurisdiction.

A hearing on all the motions pending in the case in the Livingston Circuit Court was held on January 8, 2004. On January 14, 2004, the Livingston Circuit Court entered an order denying the Kohlers' motions to dismiss and denying McDonald's motion to modify custody and hold the Kohlers in contempt. In this order, the court maintained permanent custody with the Kohlers, but modified the visitation schedule to allow McDonald to visit with L.Q. one long weekend a month, on designated holidays, and four weeks during the summer. The court directed that the parties shall equally divide the transportation responsibilities by meeting halfway between the homes in Kentucky and Georgia to exchange the child.

As for the motion to transfer the case to Georgia, Judge Cunningham of the Livingston Circuit Court and the judge from the Cobb County (Georgia) Circuit Court conferred and determined that the Livingston Circuit Court was the more appropriate forum and thus continued to have jurisdiction over the matter. Accordingly, on March 18, 2004, the Livingston Circuit Court entered an order also denying the Kohlers' motion to transfer the case to the state of Georgia. The Kohlers now appeal from the January 14, 2004 and March 18, 2004 orders.

At the outset, we shall address appellee's motion to dismiss appellants' appeal. Upon review of this motion, we adjudge that it is without merit and thus should be denied.

The Kohlers first argue that the Livingston Circuit Court did not have jurisdiction to hear McDonald's motion to modify the previous custody order. In January and March of 2004, the Uniform Child Custody Jurisdiction Act ("UCCJA"), KRS 403.400 – 403.620, governed custody determinations as between a party in Kentucky and a party in another state.[2] KRS 403.420(1) provided:

> A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state is the home state of the child at the time of the commencement of the proceeding, or had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
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> (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
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> . . .

[2] Effective July 1, 2004, the UCCJA was repealed and replaced by the Uniform Child Custody Jurisdiction and Enforcement Act, KRS 403.800 – 880.

> (d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

"Home state" was defined in KRS 403.410(5) as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old the state in which the child lived from birth with any of the persons mentioned." Pursuant to the undisputed evidence that L.Q. has lived with the Kohlers in Georgia since April 18, 2003, it is clear that Georgia was the home state of L.Q. at the time the motions were filed, heard and ruled on in this case. However, the home state of the child is not always the sole or controlling factor in determining jurisdiction under the UCCJA. "Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine . . . custody." KRS 403.420(3); Gullett v. Gullett, 992 S.W.2d 866, 870 (Ky.App. 1999). The other factors establishing jurisdiction under KRS 403.420(1) are the best interest of the child when: the child and his parents or one contestant have significant connections with Kentucky and there

is substantial evidence regarding the child's present or future care, protection, training, and personal relationships in Kentucky; or another state has declined jurisdiction on the ground that Kentucky is the more appropriate forum. KRS 403.420(1)(b) and (d). In Pike v. Aigner, 828 S.W.2d 674, 676-77 (Ky.App. 1992), this Court stated the following regarding UCCJA determinations:

> [A]n approach to the exercise of jurisdiction in which the totality of the circumstances is evaluated is preferable to the mechanical application of the statute to deprive a court of jurisdiction when the greater part of the evidence pertaining to the child's interest is present in the state whose jurisdiction is invoked.

Diana Kohler testified that she and her husband moved to Georgia with L.Q. to help take care of John's ill father. There was some evidence presented at the hearing attempting to show that the Kohlers moved to Georgia to escape the jurisdiction of Kentucky and thus evade the visitation order. However, the Livingston Circuit Court found that said evidence fell short of establishing an improper motive for the Kohlers' move to Georgia with the child, and we shall defer to this finding. Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986). The evidence established that L.Q. now has a doctor, is in preschool, and has some family (relatives of John Kohler) in Georgia. While Diana testified that their home in Kentucky was

listed for sale at the time of the hearing, she did not state that they intended to stay in Georgia permanently or what they intended to do in the event John's father recovered.

L.Q. resided in Kentucky from birth until 2003, and at the time of the hearing in this case, had lived in Georgia for less than nine months. The natural mother of L.Q., with whom she still has visitation, continues to reside in Kentucky. The mother is remarried and her current husband has two young daughters who also reside in Kentucky. The evidence established that L.Q. has a good relationship with these stepsisters. With the exception of the motions filed in the Cobb County (Georgia) Circuit Court after the Kohlers moved to Georgia, all of the litigation regarding the custody of L.Q. has been in the Livingston Circuit Court. The Livingston Circuit Court has heard many motions and made numerous rulings regarding the custody and visitation of L.Q. since the petition for permanent custody was first filed in 2001. It is apparent from our review of the proceedings and the record in this case that the Livingston Circuit Court has taken a lot of time and effort to closely monitor the case to insure the best interests of the child. And most significantly, the Georgia court declined jurisdiction in this case, deferring to the Livingston Circuit Court as the more appropriate forum.

From our review of the totality of the evidence and the UCCJA, we believe the Livingston Circuit Court continued to properly assume jurisdiction in this case under KRS 403.420(1)(d). The state of Georgia explicitly declined jurisdiction in this case on grounds that Kentucky is the more appropriate forum, and we believe that, at least as of the time of the hearing and orders in this case, it remained in the best interest of L.Q. for the Livingston Circuit Court to continue to assume jurisdiction. As in Gullett, 992 S.W.2d at 870, the Kohlers failed to set forth a case showing that it was not in the best interest of L.Q. that the Livingston Circuit Court continue to have jurisdiction or that the best interests of L.Q. would be better served by litigating child custody issues in Georgia.

The Kohlers next argue that the Livingston Circuit Court could only have continuing jurisdiction over the contempt proceeding, but could not have jurisdiction over the modification motion, citing Brighty v. Brighty, 883 S.W.2d 494 (Ky. 1994), for the proposition that the UCCJA is only invoked once a motion for modification of custody is filed, but does not apply to contempt or enforcement proceedings. Here, however, even when the UCCJA is applied (because a motion for modification of custody had been filed), Kentucky still properly

had jurisdiction over matters regarding the custody of L.Q., as discussed above.

Finally, the Kohlers argue that the Livingston Circuit Court improperly exercised jurisdiction in this case because it was an inconvenient forum under KRS 403.460. Under KRS 403.460(1):

> A court which has jurisdiction under KRS 403.420 to 403.620 to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(emphasis added).

Pursuant to KRS 403.460(3), the court shall consider "if it is the interest of the child that another state assume jurisdiction," taking the following factors, among others, into account:

> (a) If another state is or recently was the child's home state;
> (b) If another state has a closer connection with the child and his family or with the child and one (1) or more of the contestants;
> (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
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> . . .

> (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in KRS 403.400.
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> KRS 403.460(4) provided:
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> Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

First, the language of KRS 403.460(1) is permissive, not mandatory. Secondly, as stated earlier, the judge from the Cobb County, Georgia court and Judge Cunningham of the Livingston Circuit Court did communicate and determine that Kentucky was the more appropriate forum in this case, presumably considering the above factors. For the same reasons discussed earlier, we agree that Kentucky was the appropriate forum in this case. Accordingly, the Livingston Circuit Court did not err in refusing to decline jurisdiction pursuant to KRS 403.460.

For the reasons stated above, the motion to dismiss appellants' appeal is denied and the orders of the Livingston Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Lisa A. DeRenard Benton, Kentucky	Stuart C. Peek Smithland, Kentucky