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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001705-ME
AND
NO. 2004-CA-001948-ME

HARRY HAMILTON, AN INTERESTED PARTY — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 96-CI-01880

MICHAEL WASHINGTON; JANICE WASHINGTON (NOW WARREN); AND SHERRILYN WASHINGTON-HAMILTON, AN INTERESTED PARTY — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Harry Hamilton, pro se, has appealed from the July 23, 2004, order of the Hardin Family Court modifying a

[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 Kentucky Revised Statutes (KRS) 21.580.

Pennsylvania custody decree and terminating Harry's visitation rights with his niece, Shiann Washington. Having concluded that the family court failed to properly determine whether Kentucky or Pennsylvania had jurisdiction, and that the family court's findings regarding Shiann's best interests were not sufficient, we vacate the order terminating visitation and remand this matter for further proceedings.

Shiann, the minor child involved in this appeal, was born on October 23, 1995, to Michael Washington and Janice Washington. On August 22, 1996, the Superior Court of Liberty County, Georgia, entered a divorce decree between Michael and Janice. Custody of their five minor children (including Shiann) was awarded to Michael.

From May 1996 to August 1996, the five children lived in Pennsylvania with their paternal aunt, Sherrilyn Washington-Hamilton, and her husband, Harry Hamilton.[2] In August 1996 the children left Pennsylvania to live with Michael in Kentucky. However, in September 1996, Shiann returned to Pennsylvania, and lived with Sherrilyn and Harry for the next four years. The other children remained with Michael.

[2] Harry and Sherrilyn were married in June 1996.

On December 18, 1996, Michael filed a petition in the Hardin Family Court[3] to recognize and modify the divorce decree entered in Georgia. In the petition, Michael asked the family court to restrict Janice's visitation and to order her to pay child support. On September 1, 1998, the family court determined that Janice, who lived in South Carolina, had not been properly served, and that it lacked personal jurisdiction over Janice. The family court accordingly dismissed the petition. The matter was reopened and restored to the docket on July 14, 1999.[4]

On November 1, 1999, Harry sent a letter to the Domestic Relations Commissioner, Deborah Shaw, asking that he and Sherrilyn be found as de facto custodians of Shiann, and stated that he "should be included and should receive all pleadings and Notices [sic] and do hereby submit [to the] personal jurisdiction [of] the Court for that purpose." He also requested that the family court determine whether Kentucky had jurisdiction, since Shiann had lived in Pennsylvania since September 1996.

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[3] In some, but not all family courts, a Domestic Relations Commissioner initially hears the action. The Commissioner makes a recommendation to the trial judge as to the appropriate findings of fact and conclusions of law. After a ten-day period in which the parties may file exceptions, the family court, at its discretion, may then reject, modify, or adopt the Commissioner's recommendations.

[4] Eventually, Janice was located in Kentucky and service of process was completed.

The Commissioner noted in her findings that Shiann resided in Pennsylvania and that the "matter really concern[ed] the four older children." Subsequently, the family court entered an order on December 22, 1999, granting Janice visitation with the four older children. Shiann was not mentioned in the order. Subsequently, an agreed order was entered on May 25, 2000, addressing Janice's visitation rights, again mentioning only the four older children.[5]

While the litigation concerning the four older children was ongoing in Kentucky, litigation concerning the custody of Shiann was simultaneously taking place in Pennsylvania. On July 8, 1999, the Court of Common Pleas in Centre County, Pennsylvania, granted temporary custody of Shiann to Harry and Sherrilyn and awarded visitation rights to Michael. On December 3, 1999, the Pennsylvania court modified its custody order[6] and gave specific visitation rights to Michael. The order noted that Michael had stipulated that "all issues of custody, as it relates [sic] to the minor child, SHIANNE [sic] WASHINGTON, shall be properly resolved in the state of

[5] While Kentucky exercised jurisdiction pertaining to the custody of the four older children, the immediate action concerns only Shiann. Kentucky had not exercised jurisdiction over matters concerning Shiann until the family court modified the Pennsylvania custody decree.

[6] It is unclear from the record whether this modification applied to the order of temporary physical custody, or a subsequent custody determination. We mention it here only to show the Pennsylvania court's exercise of jurisdiction over the matter.

Pennsylvania, and that jurisdiction of this issue shall lie solely with the Court of Common Pleas of Centre County in that regard[.]"

On September 13, 2000, the Pennsylvania court awarded Michael primary custody of Shiann, ordered that Shiann live with Michael in Kentucky, and awarded visitation to Sherrilyn. On September 2, 2003, the Pennsylvania court granted "partial physical custody"[7] to Harry and Sherrilyn and awarded them visitation.[8]

Michael, who was in the United States military and was stationed in Georgia from June 2002 to April 2004, filed a petition in the Georgia court to terminate Harry's and Sherrilyn's visitation rights. On November 17, 2003, the Georgia court held a hearing and determined that Sherrilyn was a "'person acting as a parent'" and that only Pennsylvania had jurisdiction over the matter. On January 6, 2004, the

[7] Despite the term "partial physical custody," the order did not create a joint custody relationship. The term employed by the Pennsylvania court simply means that Harry and Sherrilyn were permitted to take Shiann out of Michael's physical possession for periods of time as specified by the order, rather than simply visit Shiann while in the physical possession and control of Michael. See 23 Pa.Cons.Stat. § 5302 (2003). Joint custody necessarily involves shared decision-making authority on issues relative to the child's best interests. Aton v. Aton, 911 S.W.2d 612, 614 (Ky.App. 1995); Chalupa v. Chalupa, 830 S.W.2d 391, 393 (Ky.App. 1992). The order of the Pennsylvania court does not grant shared decision-making authority in any way. We therefore consider it to be, in effect, a visitation order, and will treat it accordingly.

[8] Though the September 13, 2000, order mentions only Sherrilyn, the September 2, 2003, order specifically grants partial physical custody to both Sherrilyn and Harry.

Pennsylvania court determined that it no longer had exclusive and continuing jurisdiction over matters involving Shiann, and that the Georgia court would be a more convenient forum. The Pennsylvania court accordingly ordered that the case be transferred to the Georgia court.

Michael returned to live in Kentucky in April 2004. On June 2, 2004, he filed a motion in the Hardin Family Court to modify the Pennsylvania order and to terminate Harry's and Sherrilyn's visitation privileges.[9] The motion was filed under the original Kentucky action in which Michael had petitioned to have the Georgia divorce decree recognized and modified. The family court scheduled a hearing for June 8, 2004. On the day of the hearing, Sherrilyn sent a letter to the family court, via facsimile, indicating that on the preceding day she had received the notice and motion of the hearing, and asked for a continuance. Harry also faxed a letter to the family court on June 8, 2004, indicating that he had just learned that day of the proceedings. In his letter, Harry objected to the family

[9] Michael's motion did not expressly state which Pennsylvania order he sought to modify. In his brief, Harry asserts that the order Michael sought to modify was the September 2, 2003, order. It appears however, that Michael's motion was to terminate all visitation, which necessarily includes the original September 13, 2000, order. If the September 13, 2000, order were the only order for which Michael sought modification, Harry would have no standing to challenge the modification, because he is not named in the September 13, 2000, order granting visitation to Sherrilyn. However, since the modification of the September 13, 2000, order effectively terminated and modified the September 2, 2003, order, Harry does have standing to challenge the modification, because it terminated his rights as granted in the September 2, 2003, order.

court's jurisdiction in the matter, and notified the court of ongoing proceedings in the Pennsylvania court. The family court granted a continuance, and rescheduled the hearing for July 9, 2004.

On July 9, 2004, neither Harry nor Sherrilyn appeared at the hearing. Michael presented the deposition of Ronald Everson, a marriage and family therapist and counselor, who had met with Shiann on several occasions.[10] The family court noted that there appeared to be a "reasonable basis [that] it would be in the best interests of the child to terminate the visitation," and "based upon the evidence in the deposition" the family court found that it was in the best interests of Shiann to terminate visitation. Accordingly, the family court entered an order on July 23, 2004, terminating Harry's and Sherrilyn's[11] visitation rights.

On July 28, 2004, Harry filed a motion to alter, amend, or vacate the family court's order terminating

[10] In a letter received from Harry, which was received by the family court on July 9, 2004, Harry complained that he had received notice of the deposition only after the date and time for the deposition had occurred. Harry reiterated this complaint in his written objections following the hearing held on August 4, 2004. However, Harry's failure to appear at the July 9, 2004, hearing resulted in his waiving any objection to the deposition.

[11] It is unclear from the record whether Harry and Sherrilyn are cooperating in this appeal. In his notice of appeal, Harry named Sherrilyn as an appellee. Furthermore, Harry and Sherrilyn have used different addresses in their correspondence with the family court. However, our holding in this case is not dependent upon this fact, as this appeal concerns only Harry's rights. Sherrilyn has not appeared before the family court or submitted an appeal before this Court, and has thus failed to preserve her rights to litigate this issue.

visitation, and the family court conducted a hearing on the matter on August 3, 2004. At the hearing, Harry appeared and told the family court that proceedings were pending in Pennsylvania, and that the Pennsylvania court was still exercising jurisdiction on the matter. The family court entered an order on August 19, 2004, denying Harry's motion to alter, amend, or vacate the July 23, 2004, order. This appeal followed.[12]

Harry claims the following five specific assignments of error: (1) Harry should have been named as a party, either by the filing of a new action or by naming him as a real party in interest; (2) the family court erred in modifying the custody order because such modification did not comply with KRS[13] 403.340 and KRS 403.350; (3) Harry was given neither proper service nor notice of the hearing in the family court; (4) the family court should not have exercised jurisdiction to modify the Pennsylvania custody order; and (5) the family court failed to make sufficient specific findings regarding the child's best

[12] On August 23, 2004, Harry timely filed a notice of appeal of the family court's July 23, 2004, order terminating visitation. On September 21, 2004, Harry filed a separate notice of appeal, appealing the August 19, 2004, order denying his motion to alter, amend, or vacate. Harry filed motions for intermediate relief in both appeals, which were denied. Harry also filed a motion in this Court for emergency relief, which was denied on December 30, 2004. By order entered January 13, 2005, this Court ordered, sua sponte, that the appeals be consolidated. Harry moved for reconsideration of the consolidation, which was also denied by order entered April 6, 2005.

[13] Unless otherwise noted or context so indicates, all references herein to KRS sections are to the statutes as current through the 2003 regular season, as in effect at the time the order appealed from was entered.

interests. We find no merit in Harry's first three assignments of error, and will discuss them only briefly. However, we find the final two arguments persuasive.

First, Harry asserts that he is a real party in interest and that Michael's failure to either commence a new action or to name him as a real party in interest renders the order of the family court void. However, we do not think it was improper for the family court to allow the motion to terminate visitation to proceed under the original action filed in 1996, because that action dealt in part with the custody of Shiann.

Harry argues in the alternative that he should have been named as a real party in interest. CR[14] 24.01 and CR 24.02 provide a mechanism for an interested party to intervene in an action,[15] and CR 24.03 requires that a party wishing to intervene

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[14] Kentucky Rules of Civil Procedure.

[15] CR 24.01 addresses intervention of right, and states in part as follows:

> [U]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

CR 24.02 addresses permissive intervention, and allows a person to be permitted to intervene in an action when they have a statutory conditional right to intervene, or "when the applicant's claim or defense and the main action have a question of law or fact in common." We make no determination as to whether Harry would prevail under either of these sections, but discuss them here to show that Harry had a remedy and that he did not pursue that remedy.

file a motion in order to do so.[16] Harry at no time filed such a motion. Nonetheless, Harry has been allowed to proceed in the action as though he were a party, including the filing of motions, the filing of this appeal, and even proceeding pro se. All relevant documentation was sent to Harry during the pendency of the action. This Court finds no basis to conclude that he has been prejudiced by Michael's failure to name him as a party to the action, and thus we find no merit in this argument.

Second, Harry argues that Michael's motion to terminate visitation did not meet the requirements of KRS 403.340 and KRS 403.350. Section (2) of KRS 403.340 states as follows:

> No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:
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> (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or
>
> (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

In turn, KRS 403.350 requires that an affidavit accompany a motion for temporary custody or a modification of a custody decree. Harry's reliance on these statutes is

[16] Stovall v. Ford, 661 S.W.2d 467, 470 (1983).

misplaced. Harry argues that Fenwick v. Fenwick,[17] "established that modification falls exclusively within the purview of KRS 403.340 and KRS 403.350." Fenwick held that a joint custody decree was a "custody decree" and was thus subject to the modification requirements of those statutes.[18] However, it did not hold that a visitation order was a custody decree, nor that modification of a visitation order was subject to KRS 403.340 and KRS 403.350.[19]

The interpretation of the statutes argued by Harry would create a direct conflict with the text of KRS 403.320, which allows a court to "modify an order granting or denying visitation rights whenever modification would serve the best interests of the child" [emphasis added]. Statutes should be construed so that no part of them becomes meaningless or ineffectual,[20] and in doing so, a court must give effect to the

[17] 114 S.W.3d 767 (Ky. 2003).

[18] Fenwick, 114 S.W.3d at 783.

[19] It is also important to note that in 2001 subsection (1) was added to KRS 403.340, defining the term "custody" as both joint and sole custody. Before this change was made, some cases had held that KRS 403.340 applied only to sole custody awards, and not to awards of joint custody. While the addition of the definition expressly extended the statute to joint custody, it has not been applied to visitation privileges. Furthermore, although KRS 403.410 defines a custody determination as "a court decision and court orders and instructions providing for the custody of a child, including visitation rights[,]" by its terms, that definition applies only to KRS 403.420 through KRS 403.620.

[20] Commonwealth v. Phon, 17 S.W.3d 106, 108 (Ky. 2000); Allen v. McClendon, 967 S.W.2d 1, 3 (Ky. 1998).

Legislature's intent.[21] It is clear from the text of the statutes that the Legislature intended KRS 403.320 to apply to modification of visitation orders, and for KRS 403.340 and KRS 403.350 to apply to modifications of actual custody. Neither KRS 403.340 nor KRS 403.350 contemplates modification of visitation in any way. There is no overlap between the sections.[22]

In addition, KRS 403.340 and KRS 403.350 apply only to modification of permanent awards of custody.[23] The September 2, 2003, order of the Pennsylvania court is not a permanent award of custody, but only orders "partial physical custody" be given to Harry and Sherrilyn, and directs the parties to set dates for visitation in accordance with the earlier September 13, 2000, order. The September 13, 2000, order is a permanent award of custody, and it is this order to which KRS 403.340 and KRS 403.350 would apply; but only if modification of the actual custody were sought.[24] KRS 403.320 is the applicable statute

[21] Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., 983 S.W.2d 493, 500 (Ky. 1998).

[22] See Crossfield v. Crossfield, 155 S.W.3d 743, 745 (Ky.App. 2005) (noting that whether KRS 403.320 or KRS 403.340 through KRS 403.350 apply depends on whether the modification sought is that of visitation or custody).

[23] Shifflet v. Shifflet, 891 S.W.2d 392, 393 (Ky. 1995).

[24] Michael's motion did not seek a modification of custody, but of visitation, and thus KRS 403.320 is still the applicable statute.

when modifying visitation, and KRS 403.340 and KRS 403.350 are not applicable to this case.

Third, Harry argues that he did not receive proper service of process and notice of the proceedings in the family court. The purpose of service is to make the party served aware of the proceedings instituted or about to be initiated against that party, and is satisfied when a party appears with knowledge of the proceedings and participates in them.[25] Service upon a party may be made by mailing to his last known address.[26]

The record shows that a copy of the motion to terminate visitation and notice of the hearing thereon were mailed to Harry's and Sherrilyn's last known address on June 2, 2004, the same day the notice and motion were filed with the family court. Therefore, service was proper.

Implicit in this argument is that Kentucky lacked personal jurisdiction over Harry. However in Johnson v. Holt's Adm'r,[27] it is stated as follows:

> [A]n appearance of the defendant in court for any purpose other than to object to the sufficiency of the service of summons by a motion to quash or other appropriate proceedings will be treated as a general appearance to the action. . . . If he goes into court and invokes its action for any

[25] Messer v. Commonwealth, 754 S.W.2d 872, 874 (Ky.App. 1988).

[26] CR 5.02.

[27] 235 Ky. 518, 521-22, 31 S.W.2d 895, 897 (1930).

> purpose incompatible with the theory that the court has no power or jurisdiction on account of defective service of process, he thereby submits himself to the jurisdiction of the court for all purposes, and cannot insist thereafter that the court had no jurisdiction.

A party appearing generally, rather than specifically, to challenge exercise of personal jurisdiction cannot later argue that the court had no jurisdiction over him.[28] A defense of lack of personal jurisdiction is waived if not raised by motion or responsive pleading.[29]

Harry did not raise any objection to the family court's exercise of personal jurisdiction in his letters to the family court or when he appeared at the August 4, 2004, hearing. Instead, he appeared generally and argued the merits of the case. Furthermore, in his November 1, 1999, letter to Commissioner Shaw, Harry expressly stated "I [ ] do hereby submit personal jurisdiction to [Hardin Family Court]." Harry cannot now argue that the family court lacked personal jurisdiction.

Harry stated in his facsimile letter to the family court on June 8, 2004, that he had learned of the proceedings on that day, and thus had received actual notice of the motion to

[28] Williams v. Indiana Refrigerator Lines, Inc., 612 S.W.2d 350, 351 (Ky.App. 1981).

[29] CR 12.08.

terminate his visitation rights. On July 9, 2004, the day of the rescheduled hearing, the family court received another letter from Harry. Harry's correspondence with the family court is further evidence of a continuing familiarity with the proceedings in the family court. The family court found that notice of the proceedings was mailed to Harry, and that his correspondence with the family court was evidence that he had notice of the proceedings. We agree.

Fourth, Harry challenges the family court's exercise of jurisdiction. Whether Kentucky may properly exercise jurisdiction must be evaluated through a three-part inquiry: (1) does Kentucky have jurisdiction under the law of this Commonwealth;[30] (2) do the Uniform Child Custody Jurisdiction Act (UCCJA)[31] and the Parental Kidnapping Prevention Act (PKPA)[32] allow Kentucky to exercise jurisdiction; and (3) is Kentucky the most appropriate forum?[33]

For a Kentucky court to have jurisdiction in a child custody proceeding, it must have jurisdiction under the UCCJA.

[30] KRS 403.420.

[31] The UCCJA, found at KRS 403.400 through KRS 403.620, was in effect at the time the family court entered its order modifying the Pennsylvania decree. The Legislature subsequently repealed the UCCJA and enacted Kentucky's version of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), which took effect on July 13, 2004. While the UCCJA is applicable to this case, neither our reasoning nor our holding would be different under the UCCJEA.

[32] 28 U.S.C. § 1738A (1980 & Supp. 2005).

[33] KRS 403.460.

Kentucky's version of the UCCJA found at KRS 403.420(1) allows jurisdiction as follows:

> (a) This state is the home state of the child at the time of 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[.]

As used in KRS 403.420, "'[h]ome state' means 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[.]"[34] Kentucky was not the home state of Shiann at the time Michael filed the motion to terminate visitation. Michael was stationed in Georgia from

[34] KRS 403.410(5). Also, see David Carl Minneman, J.D., Annotation, Home State Jurisdiction of Court Under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 A.L.R.5th 1, 36-39 (1992) for a discussion of cases deciding that for purposes of determining the six-month period, the immediate action (for modification, enforcement, etc.) is the one in question, not the original decree. Otherwise, a court in Georgia, the state entering the divorce decree, would have perpetual home state jurisdiction, allowing it to exercise jurisdiction until it determined that it no longer wished to do so.

June 2002 to April 2004.[35] The immediate action was filed in the Hardin Family Court on June 2, 2004; only two months later. Thus, Shiann and Michael had not lived in Kentucky for the requisite six months immediately preceding the commencement of the action and Kentucky does not have home state jurisdiction.

However, we hold that Kentucky does have jurisdiction under the UCCJA, pursuant to KRS 403.420(1)(b). Since both Shiann and Michael now live in Kentucky, we conclude that the facts support a finding that "substantial evidence concerning [Shiann's] present or future care, protection, training and personal relationships"[36] is available in Kentucky. For these reasons, we hold that Kentucky has jurisdiction under the UCCJA, even though Kentucky was not Shiann's home state at the time Michael filed the motion to terminate visitation.

But even if a state does in fact have jurisdiction, both the UCCJA and the PKPA place restrictions on a state's exercise of that jurisdiction. Thus, while a court of Kentucky may actually have jurisdiction under KRS 403.420, that court may be prohibited from exercising that jurisdiction under the UCCJA, the PKPA, or both. Under the UCCJA, Kentucky may not exercise

[35] We presume, though it is not clear from the record, that Shiann lived in Georgia with her father at that time. Furthermore, even if Shiann lived in Kentucky in the absence of her father, there is no evidence that she lived with a "parent, or a person acting as a parent" during that time, as required by KRS 403.410(5).

[36] KRS 403.420(1)(b).

its jurisdiction to modify another state's custody decree "if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with KRS 403.420 to 403.620, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons."[37]

The PKPA similarly forbids a state from exercising jurisdiction if the proceeding is "commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination."[38] In addition, both the UCCJA and the PKPA favor continuing and exclusive jurisdiction by the state entering a custody decree by forbidding other states from modifying that decree unless the state entering the decree either (1) no longer has jurisdiction, or (2) has declined to exercise its jurisdiction to modify that decree.[39]

It appears that after the Pennsylvania court's January 6, 2004, order finding Georgia to be the more appropriate forum, Harry sought special relief and a stay of that order on June 15,

[37] KRS 403.450(1).

[38] 28 U.S.C. § 1738A(g).

[39] 28 U.S.C. § 1738A(a) and (h); KRS 403.530(1).

2004. Several courts have held that for the purposes of the UCCJA, where a lower court renders an adverse decision, an action is still pending in that state if it is before the appellate court; this applies if the time period in which the appeal must be filed has not run, regardless of whether the party has actually filed that appeal.[40] Harry informed the family court that Pennsylvania was still exercising jurisdiction over the matter, even providing the family court with the specific case numbers for the pending matters. Unfortunately, the record[41] does not reflect that the family court made any effort to determine whether proceedings were pending in either Georgia or Pennsylvania, and if so, what those proceedings were. Such an inquiry is required by the UCCJA.[42] Furthermore, the

[40] Foster v. Stein, 454 N.W.2d 244 (Mich.App. 1990); Levinson ex rel. Levinson v. Levinson, 512 A.2d 14 (Pa.Super. 1986). See also Williams v. Richardson, 281 S.E.2d 777 (N.C.App. 1981) (holding that a proceeding was no longer pending where time for appeal from adverse decision in Virginia had not run, but instead a petition to modify was filed in North Carolina. The filing of the action in North Carolina was evidence of the intent to abandon the right to an appeal in Virginia).

[41] Under the UCCJA, a court is required to preserve "pertinent documents" in any custody decree. KRS 403.600. Undoubtedly, documents requested from courts of other states under KRS 403.610 or the other pertinent provisions of Kentucky's UCCJA would qualify as "pertinent documents." Subsequently, in enacting the UCCJEA to replace the UCCJA, this requirement was embodied even more explicitly in KRS 403.816, which requires a court to keep a record of all substantive communications with a court of another state.

[42] KRS 403.450(2) requires that "[i]f the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state." In addition, KRS 403.450(3) states as follows:

> If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state

UCCJA requires that a Kentucky court considering modification of another court's decree must request copies of and consider the record in that other state.[43] Upon request, a court is required to furnish a court of another state with any and all parts of the record so requested.[44] This practice of requesting pertinent

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> before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with KRS 403.580 to 403.610. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum [emphases added].

[43] KRS 403.530(2) states as follows:

> If a court of this state is authorized . . . to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with KRS 403.610.

In turn, KRS 403.610 provides:

> If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this state, the court of this state upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in KRS 403.600.

[44] In this case, the pertinent provision would be under Pennsylvania law, because it would be a Pennsylvania court which was required to provide a Kentucky court with documents. Therefore, that requirement would be created specifically by Pennsylvania law. While not imperative to the determination of this case (since the Hardin Family Court was required under Kentucky law to at least request the documents), it is important to note that had the family court actually requested documents from the Pennsylvania court, Pennsylvania's version of the UCCJA, like Kentucky's, would mandate the Pennsylvania court to furnish those documents to the family court. Both KRS 403.600 and 23 Pa.Cons.Stat. § 5362 (2003) provide that "[u]pon appropriate

documents from the court of another state has been implemented in order to advance the underlying purposes of the UCCJA, which are, inter alia, to avoid jurisdictional competition between states, to promote cooperation between states in custody determinations, and to avoid re-litigation of custody determinations.[45] It does not appear that the family court made such an inquiry in this case.

Even if a Kentucky court has jurisdiction under KRS 403.420, and neither the UCCJA nor the PKPA prevents the court from exercising that jurisdiction, a further inquiry is required. KRS 403.460 allows a court to decline to exercise its jurisdiction if it finds that a court of another state is a more appropriate forum. In determining the most convenient forum, a court must consider the interests of the child, and it may take into account such factors as whether another state is or was recently the child's home state, whether another state has a closer connection with the child and a contestant and/or the child's family, and whether the parties have agreed upon another forum.[46] In determining whether Kentucky is the most appropriate

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request of the court of another state, the court shall forward to the other court certified copies of any or all such documents."

[45] See KRS 403.400.

[46] KRS 403.460(3).

forum, a court is again encouraged to communicate with courts of other states.[47]

Furthermore, even when a Kentucky court is informed that a proceeding was commenced in another state after Kentucky has assumed jurisdiction, it is required to communicate with the court of that other state, so that the issues may be litigated in the more appropriate forum.[48] Thus, even after Kentucky has properly exercised jurisdiction, when a party initiates a proceeding in another state, a court of this state must conduct an inquiry to determine whether it should continue to exercise that jurisdiction, or whether it should dismiss or stay the proceedings.[49] Once again, the family court failed to perform its duties under the UCCJA when it failed to conduct an inquiry regarding the proceedings in the Pennsylvania court.

Finally, we deal with Harry's claim regarding specific findings of fact relative to the best interests of Shiann. When determining whether to modify an existing visitation order, a

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[47] KRS 403.460(4) provides as follows:

> 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.

[48] KRS 403.450(3).

[49] KRS 403.460(5).

court must take into account the best interests of the child.[50] Without a finding that a change in visitation is in the best interests of the child, a court may not modify an order granting visitation.[51] The standards for modifying a visitation order to terminate visitation are no less stringent than the standards for denying a change in visitation at the outset of the case.[52]

We hold that the family court's finding that the best interests of the child were served by terminating Harry's and Sherrilyn's visitation was not supported by sufficient evidence or the appropriate findings. While KRS 403.320 does not specifically list the factors a court must consider in determining whether visitation is in the best interests of the child, the list of factors found in KRS 403.270 (addressing custody) is exemplary. It is clear that in determining custody, the court must base its determination of the best interests of the child on the statutory factors, and not merely on psychological evaluations.[53] We hold that a determination of the best interests of the child in deciding visitation privileges is

[50] KRS 403.320.

[51] See Hornback v. Hornback, 636 S.W.2d 24, 26 (Ky.App. 1982).

[52] Hornback, 636 S.W.2d at 26.

[53] Reichle v. Reichle, 719 S.W.2d 442, 445 (Ky. 1986).

no different. The court must consider any and all factors that are relevant to that determination.[54]

This Court's holding in Vibbert v. Vibbert,[55] dealing with grandparent visitation rights, provides further support for such a holding. This Court stated the appropriate test under KRS 405.021 as follows:

> [T]he courts must consider a broad array of factors in determining whether the visitation is in the child's best interest, including but not limited to: the nature and stability of the relationship between the child and the grandparent seeking visitation; the amount of time spent together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation would have on the child's relationship with the parents; the physical and emotional health of all the adults involved, parents and grandparents alike; the stability of the child's living and schooling arrangements; the wishes and preferences of the child.[56]

Accordingly, we hold that the family court's findings that there was a "reasonable basis it would be in the best interests of the child to terminate the visitation," and that "based upon the evidence in the deposition" it was in the child's best interests to terminate the visitation, were

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[54] While we recognize that Harry's and Sherrilyn's failure to appear before the family court on July 9, 2004, prevented the family court from considering evidence which Harry and Sherrilyn may have introduced at that time, this does not allow the family court to enter what is in effect a default judgment in determining the child's best interests.

[55] 144 S.W.3d 292 (Ky.App. 2004).

[56] Vibbert, 144 S.W.3d at 295.

insufficient grounds to support the termination. Just as it is improper in a custody determination to rely solely on psychological evaluations, it was likewise improper for the family court to base its determination of the best interests of the child solely upon the deposition of a single counselor.

Therefore, for the foregoing reasons, the order of the Hardin Family Court terminating Harry's visitation rights is hereby vacated and this matter is remanded with instructions that the family court (1) communicate with the Court of Common Pleas in Centre County, Pennsylvania as required by Kentucky's version of the UCCJA, (2) determine what proceedings, if any, were pending in Pennsylvania at the time the immediate action was filed, and whether those proceedings would restrict its exercise of jurisdiction under the UCCJA and/or the PKPA, and (3) determine, in consultation with the Court of Common Pleas in Centre County, Pennsylvania, whether that court or the Hardin Family Court would be the more appropriate forum. Finally, should the family court determine that it is proper for it to exercise jurisdiction, it is instructed to conduct further proceedings for the purpose of obtaining the necessary evidence to make a proper determination of Shiann's best interests, based upon a consideration of all relevant factors, and to make sufficient findings in support of the determination.

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