

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001725-ME

DAVID NELSON

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 98-FC-001313

REBECCA NORYS

APPELLEE

OPINION AND ORDER
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES, MILLER, SENIOR JUDGE.¹

KNOPF, JUDGE: This is an expedited appeal from an order of the Jefferson Family Court relinquishing jurisdiction over pending motions involving enforcement and modification of the court's prior child-custody determinations. We agree with the trial court that Kentucky no longer has jurisdiction to modify the custody determinations because the parties and the child now

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

reside outside of Kentucky. However, in the absence of any pending action in another jurisdiction, we conclude that the family court retains jurisdiction to enforce its existing custody orders through its contempt powers. Hence, we affirm in part, reverse in part, and remand for further proceedings.

David Nelson and Rebecca Norys were married in September 1996, and separated nine months later. They have one child, Tyler, who was born prior to their marriage. David filed a petition for dissolution of the marriage in 1998. Thereafter, the parties entered into a settlement agreement which provided, among other things, for joint custody of Tyler with each party having the child an equal amount of time. The trial court adopted the settlement agreement in its dissolution decree entered on June 10, 1998.

The parties had a number of disagreements regarding their shared-parenting time. Consequently, in 2000, both David and Rebecca moved the court to set a specific parenting schedule. The parties shared custody under several temporary orders over the next two years, during which period there were unsuccessful attempts at mediation.

Finally, the matter came before the trial court for a custody hearing on May 29, 2002. At that hearing, David informed the trial court that he was temporarily relocating to Charleston, South Carolina to attend culinary school. The parties agreed

that Rebecca would be designated as Tyler's residential custodian, with David given extended parenting-time during the summer and school breaks.

Shortly after entry of that order, Rebecca re-located to Lee County, Florida, along with Tyler and her new husband. Despite the move, both parties continued to bring before the trial court disputes over parenting time, child support, access to Tyler's medical records, and payment of medical expenses. While several of these disputes were pending before the trial court, Rebecca moved to "transfer" the action to Lee County, Florida, where both she and Tyler reside. David opposed the motion, noting that Tyler still has significant ties to Kentucky even though neither the child nor his parents reside here.

At the time Rebecca filed this motion, David had pending motions to set the 2004 summer parenting schedule, for a judgment against Rebecca for her share of transportation expenses, and to hold Rebecca in contempt for her failure to provide him with Tyler's medical records as previously ordered by the court. The motions came before the trial court for a hearing on July 8, 2004. Following that hearing, the trial court entered an order relinquishing jurisdiction over custody and access issues to Lee County Florida. In a separate order, the trial court granted David's motion that Tyler spend the rest of the summer with him and ordered Rebecca to pay Tyler's transportation

costs to return to Florida. The court did not rule on David's contempt motion.

Thereafter, David filed a motion to alter, amend or vacate² the July 8 order relinquishing jurisdiction to Florida. In an order entered on August 4, 2004, the trial court denied the motion, holding that it is no longer in the child's best interests for Kentucky to exercise jurisdiction. This appeal followed.

There are several matters which complicate our review of this case. First, in most similar cases, there are simultaneous custody proceedings in multiple jurisdictions. The primary question concerns the Kentucky court's decision to retain jurisdiction or to allow the matter to proceed in another jurisdiction. In this case, there is nothing in the record to indicate that there is any pending action in Lee County, Florida. The clear implication of the trial court's order is that David must bring an action there if he wants to enforce or modify custody.

Furthermore, the status of the applicable law presents an additional problem for our review of this case. At the time of the hearing, July 8, the trial court's jurisdiction was

² CR 59.05.

governed by the Uniform Child Custody Jurisdiction Act (UCCJA).³ But as of July 13, 2004, the UCCJA was repealed and superseded by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).⁴ The trial court held, correctly, that the law in effect at the time of Rebecca's motion governs this case.

Nevertheless, both Acts' provisions regarding initial and modification jurisdiction are consistent. Under both the UCCJA and the UCCJEA, a Kentucky court has jurisdiction to make a child-custody determination by initial or modification decree if: (1) Kentucky is or has been the child's home state for six months prior to the commencement of the proceeding; or (2) the child and at least one of the parents have a significant connection with Kentucky and substantial evidence is available in Kentucky concerning the child's care, protection, training and personal relationships.⁵ In this case, neither the child nor any of the parties live in Kentucky. David has not lived in Kentucky since June, 2001, and Rebecca and Tyler moved to Florida in March 2003.⁶

³ KRS 403.400 *et seq.*

⁴ KRS 403.800 *et. seq.*

⁵ *Compare former* KRS 403.420(1)(b) to KRS 403.822(1)(b).

⁶ David asserts that Rebecca acted in bad faith by moving Tyler to Florida in derogation of their 2001 agreement and without prior leave of court. But in Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003), the Kentucky Supreme Court emphasized that a

David argues that Tyler still has significant connections with Kentucky - the child's grandparents live in Kentucky and Rebecca has brought Tyler back to Kentucky for some medical care. The trial court found that most of the evidence concerning Tyler's best interests is now in Florida. This conclusion is supported by substantial evidence of record and will not be disturbed on appeal. Furthermore, under either Act, Kentucky would not retain modification jurisdiction simply because the jurisdiction of the Florida courts has not been invoked. Therefore, the trial court did not err by declining to exercise jurisdiction over David's pending motions to modify custody. Rather, any future motions to modify custody or parenting time should be brought in Florida.⁷

custodial or residential parent is not required to obtain prior approval before relocating with the child. Rather, when a primary residential custodian gives notice of his or her intent to relocate with the parties' child, the burden is then upon any party objecting to file a custody-modification motion within a reasonable time. If no motion is filed within a reasonable time, the primary residential custodian may relocate with the parties' child. *Id.* at 786. Because David failed to raise any timely objection to Rebecca's decision to move, her actions in relocating to Florida with Tyler cannot be considered in bad faith.

⁷ The tendered order entered by the trial court on July 8, 2004 lists the street address for the Circuit Court of Lee County, Florida. However, that court's official web-site lists a separate mailing address. http://www.leeclerk.org/General_Info.asp?VisText=GeneralText# We would suggest that the parties confirm the proper addresses prior to filing an action in that court.

However, the trial court's continuing jurisdiction to enforce a custody decree presents a different question. In interpreting the UCCJA, Kentucky recognizes a distinction between modification jurisdiction and enforcement jurisdiction with respect to child custody disputes.⁸ Kentucky retains jurisdiction to enforce an original custody decree until the decree is superceded by a custody-modification order properly entered by a court with jurisdiction. Thus, even after a Kentucky court loses jurisdiction to modify its prior custody order, a Kentucky court retains contempt jurisdiction and the ability to enforce its own validly entered orders until another state with superior jurisdiction acts.⁹

Under the UCCJEA, KRS 403.824 expressly sets out that a Kentucky court has exclusive, continuing jurisdiction over its prior custody determination until:

- (a) 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
- (b) A court of this state or a court of another state determines that the child, the child's parents, and any other person acting

⁸ Brighty v. Brighty, 883 S.W.2d 494, 496 (Ky. 1994).

⁹ Id. at 496-97.

as a parent do not presently reside in this state.

(2) 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 KRS 403.822.

The language used in KRS 403.824 suggests that a Kentucky court retains exclusive, continuing jurisdiction only until the child and both parents leave the state or no longer have a significant connection with the state. Under this reading, enforcement jurisdiction would also pass automatically to another jurisdiction once a Kentucky court relinquishes modification jurisdiction. The trial court apparently followed this approach.

However, this interpretation ignores the effect of KRS 403.808, which provides:

A child custody determination made by a court of this state that had jurisdiction under KRS 403.800 to 403.880 binds all persons who have been served in accordance with the laws of this state or notified in accordance with KRS 403.812 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

When KRS 403.808 and 403.824 are read together, a court entering an initial custody determination retains authority to enforce that decree by contempt proceedings until a further

custody determination is made by another court having jurisdiction.¹⁰ In this case, the trial court clearly had initial jurisdiction to enter a child custody determination, the parties had submitted to the jurisdiction of the court, and no other court had been asked to exercise jurisdiction. Consequently, it appears that, under the UCCJEA, the trial court would retain enforcement jurisdiction until an action is brought in Florida.

We need not decide this question because the UCCJA remains applicable to this case. We find that the trial court clearly retained jurisdiction over David's pending motions to hold Rebecca in contempt for her alleged failure to comply with the court's prior orders. Therefore, the trial court erred by declining to rule on these motions.

Accordingly, the order of the Jefferson Family Court is affirmed insofar as it relinquished jurisdiction over the pending motions to modify custody and visitation, but is reversed insofar as it declined to rule on the pending contempt motions. This case is remanded for further proceedings on the merits of any enforcement motions which were pending as of July 8, 2004.

¹⁰ See In re Marriage of Pritchett, 80 P.3d 918 (Colo. App., 2003); and In re Marriage of Medill, 179 Or. App. 630, 40 P.3d 1087 (Or. App., 2002).

Appellant has filed motions for intermediate and emergency relief. Due to the potential immediate and irreparable injury asserted in the emergency motion, this Court has determined that the ten-day notice provision in CR 76.16(1) must be waived and an Opinion and Order must be entered immediately. It is further ordered that the appellant's motions for emergency and intermediate relief are DENIED as moot due to the rendition of this opinion.

ALL CONCUR.

ENTERED: July 29, 2005

/s/ Wm. L. Knopf
JUDGE, COURT OF APPEALS

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