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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002487-MR

LEAH TUSSEY (NOW FOSTER)

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 02-CI-00620

CHRISTOPHER MARTIN TUSSEY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

WINE, JUDGE: This is an appeal from an order of the Jessamine Circuit Court retaining jurisdiction over pending motions involving transportation of the parties' three children to and from visitation and modification of said visitation schedule so that one party is not solely responsible for transporting the children. We conclude that Kentucky properly retains jurisdiction to modify the custody determinations in this case. Thus, we affirm the

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

trial court's order denying Appellant's, Leah Tussey (now Foster) ("Leah"), exceptions to the commissioner's report.

The marriage between Leah and the Appellee, Christopher Tussey ("Christopher"), was dissolved by a decree entered by the trial court on April 4, 2003. The decree incorporated the parties' separation agreement, which gave the parties joint custody of their three children and designated Leah as the residential custodian. On September 19, 2003, Christopher filed a motion to modify parenting time. On November 5, 2003, Leah filed a response and counter-motions requesting the trial court's permission to relocate the couple's three children to Tennessee. In the motion, Leah stated that she was about to remarry and her new husband resided in Dandridge, Tennessee. Leah asserted that she and her new husband would be able to provide an ideal home environment for the children, and that her relocation would not negatively affect Christopher's timesharing, as the parties were currently exercising it, on an every other weekend basis. Further, Leah agreed to meet Christopher at a mid-way point to exchange the children on his weekends.

Subsequently, Christopher filed a motion to set aside the parties' decree and separation agreement pursuant to CR 60.02. Christopher claimed that the terms of the separation agreement were expressly negotiated with a shared understanding that both parties would remain in Kentucky. Christopher contends that he agreed Leah would be the residential custodian based upon the understanding that the parties would stay in the

Lexington area. Christopher argued that allowing Leah to move to Tennessee with the children would drastically limit his joint custodial rights.

The domestic relations commissioner, on December 19, 2003, recommended that the decree be set aside. However, the trial court rejected the commissioner's finding that the separation agreement did not anticipate relocation of the parties. The trial court found that it was foreseeable that Leah would not stay in Kentucky, since she was originally from Louisiana and only came to Kentucky as a result of the parties' marriage. The trial court also noted that the separation agreement did not prohibit either party from relocating. And finally, the trial court pointed out that modern society is mobile and indicated that it is unreasonable to expect an ex-spouse to remain in one area for the entire time the children are minors. Thus, the trial court held that Christopher put forth insufficient evidence of mistake, inadvertence, surprise or excusable neglect to set aside under CR 60.02, citing *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003). Consequently, the trial court rejected the commissioner's recommendation to set aside the decree.

In 2003, Leah and the parties' three children moved to Tennessee. Nevertheless, pursuant to the parties' agreement, Leah continued to travel the 800 miles to drop the children off to Christopher for his visitation. In June of 2005, Leah filed a petition in the Circuit Court of Jefferson County ("Tennessee court") to enroll the Kentucky decree. Leah asserted that Tennessee was the proper forum for her cause because she and the minor children had lived in the state for longer than six months

pursuant to T.C.A. 36-6-202. Leah further argued to the Tennessee court that she had remarried and her and her children's ties to Tennessee were substantial as the children's health, education and welfare information exists there. Leah requested the Tennessee court modify the parties' parenting agreement regarding the exchange of the transportation of the children for visitation with their father. Leah is currently responsible for transporting them approximately 800 miles every other weekend to drop them off with Christopher. Leah requested the Tennessee court require each party to travel an equal distance for the exchange of the children.

On July 18, 2005, Christopher filed a motion in the trial court seeking findings and recommendations pursuant to KRS 403.824. He argued that the trial court retains jurisdiction because he is still a resident of Kentucky and the children have significant contacts with him in Kentucky throughout the year. The commissioner agreed. The commissioner found that Leah's request for the trial court to reallocate the responsibility for travel time to be a change in personal convenience and preference, not an issue of custody. Thus, the commissioner recommended that Kentucky retain jurisdiction in the matter. The trial court agreed, finding that "[i]ssues of parenting time and travel responsibility could, under certain circumstances, be considered issues of custody under KRS 403.800. However, the issues presented in this case are clearly defined and do not require evidence outside the knowledge of the parties themselves." (Record, Vol. I, pg. 120). This appeal followed.

In reviewing a child custody award, the appropriate appellate standard of review is whether the factual findings of the trial court are clearly erroneous. *B.C. v. B.T.*, 182 S.W.3d 213 (Ky.App. 2005). “A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person.” *Id.* “[T]he test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.” *Id.* at 219-20.

The primary question concerns the Kentucky court’s decision to retain jurisdiction and not allow the matter to proceed in Tennessee. At the time of the hearing in August of 2005, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as codified in KRS 403.800, *et seq.*, applied to modifications of child custody determinations. We disagree with the trial court’s conclusion that Leah’s motion did not involve an issue of custody. In her petition, Leah specifically requested that “the parenting agreement between the parties should be modified so as to place equal travel distance . . . [between the parties].” For purposes of the UCCJEA, “modification means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.” KRS 403.800(11) . Leah’s motion to modify the travel arrangements clearly involves an issue of custody under the UCCJEA.

Nevertheless, under the UCCJEA, a Kentucky court which has made an initial child custody determination has exclusive, continuing jurisdiction over the determination until: (1) a Kentucky court determines that neither the child nor at least one parent have a significant connection with the state and substantial evidence is no longer available in Kentucky concerning the child's care, protection, training and personal relationships; or (2) a Kentucky court or another court determines that the child and his parent do not presently reside in Kentucky. KRS 403.824(1)(a)(b).

There is no question that Leah and the children have established residence in Tennessee. Leah and the kids moved to Tennessee in 2003 and have resided there ever since. However, in *Reeves v. Reeves*, 41 S.W.3d 866, 867 (Ky.App. 2001), this Court stated that continuing jurisdiction was a function of "whether the child has a 'significant connection'" to Kentucky. While Leah asserts that most of the evidence concerning the children's care, training, and personal relationships is in Tennessee, the statute requires "significant connections" not *the most* significant connections.

Currently, the children stay with their father in Kentucky every other weekend and six weeks in the summer as dictated by the original decree. The children receive health care when in Kentucky via insurance provided by Christopher's employer. Christopher testified that the children's paternal grandparents reside in Florence, Kentucky, and maintain a significant relationship with the children. The children have an aunt and uncle that live in Cincinnati who visit them on a regular basis when they are in Florence.

Based on this evidence, the trial court found that the children still have sufficient ties to Kentucky to warrant Kentucky's retention of jurisdiction over this matter. Furthermore, the record is devoid of evidence that Tennessee is a better venue to rule in this matter. Obviously, Leah may file in Jessamine Circuit Court any motion seeking to modify the transportation arrangements previously agreed to by the parties. Thus, the trial court's findings were not clearly erroneous, and the court did not abuse its discretion by retaining modification jurisdiction in this case.

Therefore, we affirm the decision of the Jessamine Circuit Court to retain jurisdiction in this case.

ALL CONCUR.

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