

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000458-ME

DENISE MARIE FOX

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DONNA L. DELAHANTY, JUDGE  
CONSOLIDATED ACTION NOS. 05-CI-504431 & 09-CI-504206

THOMAS C. MINA

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: Denise Marie Fox appeals the Jefferson Family Court's order declining to exercise jurisdiction in favor of another forum, New York, with regard to custody proceedings. She also appeals the court's order denying her motion to alter, amend, or vacate its initial order. Denise claims that the court erred by

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<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

failing to apply and make specific findings with respect to each of the factors enumerated in KRS<sup>2</sup> 403.834.

Denise Marie Fox and Thomas Mina's relationship commenced in New York. The parties never married, and their relationship ended shortly after Denise became pregnant with the parties' child, Pasqualina. Denise moved to Kentucky after finding out that she was pregnant. Thomas remained in New York, where he still resides. Pursuant to a court order dated April 8, 2001, Denise retained custody of Pasqualina until October 24, 2005, at which time the court awarded temporary custody to Denise's sister. The court then awarded custody of Pasqualina to Thomas on September 1, 2006.<sup>3</sup> Pasqualina thereafter left Kentucky and began residing with Thomas in New York.

Thomas later filed, in Jefferson Family Court, a petition for sole custody of Pasqualina and a motion requesting the court to decline jurisdiction in favor of the State of New York. Thomas submitted an affidavit along with his petition to the court indicating that Thomas and Pasqualina have "significant connection with [New York], that all of the teachers of the minor child are in the State of New York, that all mental and physical health professionals are in the State of New York, and the majority of the witnesses concerning the child's present and future care, protection, training, and personal relationships are

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<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> Denise appealed the award of custody to Thomas. On appeal, the Kentucky Supreme Court and Court of Appeals remanded the case finding that reversal was necessary because Thomas had failed to file an affidavit, as required by KRS 403.350. The case was remanded to the Jefferson Family Court for the court to fashion an appropriate arrangement. From the record, Thomas was awarded temporary custody, and this was the status of custody at the time proceedings were brought which resulted in this appeal.

available in the State of New York.” The affidavit also stated that Pasqualina has resided with Thomas since July 2007,<sup>4</sup> is “doing well in school, and is thriving in a nurturing environment.”

The court determined that Kentucky was an inconvenient forum and that New York was a more appropriate forum. Therefore, the court granted Thomas’s motion and declined jurisdiction in favor of New York. Denise filed a motion to amend, alter, or vacate this order, which the court denied. Denise thereafter filed a timely notice of appeal.

After she filed her notice of appeal, Denise filed a motion with this Court for intermediate relief; a motion panel of this Court denied same. Attached to Denise’s motion were orders from the New York court, evidencing that an action is currently pending in New York regarding custody of Pasqualina. As of March 12, 2010, the New York court had ordered that Thomas shall continue to exercise temporary sole custody of Pasqualina.

On the merits of her appeal, Denise argues that the family court erred by failing to apply and make factual findings regarding the factors enumerated in KRS 402.834(2) when it determined that Kentucky was an inconvenient forum for deciding issues of custody. Finding that the family court did not err in declining jurisdiction, we affirm.

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<sup>4</sup> The order granting custody to Thomas was entered on September 1, 2006. His affidavit accompanying his motion for custody filed on November 23, 2009, indicates that the order was not effectuated until on or about July 2007. Thus, it is unclear exactly when Pasqualina went to live with Thomas in New York, but it is apparent that she has been there for at least three to four years.

In Kentucky, interstate child custody jurisdiction disputes are governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). This Act was codified in KRS 403.800 *et seq.* KRS 403.834(1) provides that “a court . . . may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.” In making such a determination, the court must consider all relevant factors, including:

- (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) The length of time the child has resided outside this state;
- (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (d) The relative financial circumstances of the parties;
- (e) Any agreement of the parties as to which state should assume jurisdiction;
- (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

KRS 403.834(2).

In this case, Denise relies upon *Biggs v. Biggs*, 301 S.W.3d 32 (Ky. App. 2009) for the proposition that the family court must consider these factors when determining whether Kentucky is an inconvenient forum. In addition to indicating that it had considered *Biggs* in making its determination, the court listed several of the factors in KRS 403.834(2) as a basis for its determination. The court considered the fact that Pasqualina had been residing in New York for at least three years and that all of the information regarding the child's welfare is now located in New York. The court also noted that Denise had exercised very little parenting time and that any visits must be supervised pursuant to court order. In addition to considering these factors, the court had for its review Thomas's affidavit stating that Pasqualina's significant contacts were in the State of New York.

As noted earlier, the court may also consider any other factors it deems relevant to its determination. KRS 403.834(2). The court had the record in prior proceedings of this case at its disposal. We agree with language in this Court's order denying Denise's appellant motion for intermediate relief, wherein our Court stated that "the family court specifically referenced its review of the extensive record in this case, **including the appellate record**, in deciding that the State of New York is the more appropriate forum to resolve the issues of custody and visitation."

It is apparent that the family court weighed heavily the fact that the child has resided in New York for at least three years and has much extracurricular and family involvement there. This alone would indicate that several of the factors

lean heavily toward declining jurisdiction in favor of New York. Additionally, Pasqualina has had very little contact with her mother, which appears to have been her only contact with Kentucky for several years.

Denise also argues that the family court erred by evaluating the facts of this case in light of KRS 403.824, instead of focusing on the factors delineated in KRS 403.834. We find that an analysis under this statute also favors declining jurisdiction in favor of New York.

KRS 403.824(1)(a) provides that a state will have continuing exclusive jurisdiction until:

A court of this state determines that neither the child, nor the child and one (1) parent . . . have 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 . . . .

Here, the family court determined that, based upon Pasqualina's having resided in New York for at least three years, all the while having very little contact with her mother in Kentucky, that she no longer had any significant connection with Kentucky. The court also determined that all of the evidence regarding the "child's care, protection, training and personal relationships" exists in the state in which she has resided for a number of years. Additionally, New York has since exercised its jurisdiction regarding the custody and visitation issues involving Pasqualina.

As such, the family court did not err in declining to exercise jurisdiction. Accordingly, the orders of the Jefferson Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert C. Bishop  
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

R. Dale Warren  
Louisville, Kentucky