RENDERED: FEBRUARY 25, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002412-ME

KRISTIN QUEEN — APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 03-CI-00265

MICHAEL MCCOY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Kristin Queen appeals from an order of the Knott Circuit Court that denied her request to transfer the parties' ongoing child-custody

[1] Senior Judge Joseph E. Lambert 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.

case from Kentucky to Indiana because of an alleged lack of jurisdiction and/or inconvenient venue. For reasons that follow, we affirm.

The parties have one child, C.M.,[2] who was born out of wedlock in 2003. Soon after C.M. was born, the parties initiated court proceedings in the Knott Circuit Court to establish custody, child support, visitation, and other relevant matters regarding the child. Appellant was given sole custody of the child, while Appellee was allowed regular visitation. Years of legal sniping regarding these issues – primarily visitation – followed, and the parties' relationship can fairly be described as acrimonious.

Appellant and her child moved to Fort Wayne, Indiana in September 2008. Appellant claims to have filed a motion on October 22, 2009 asking the circuit court to transfer the case to Indiana because of an alleged lack of jurisdiction and, in the alternative, because Knott County was an improper and inconvenient venue. We say "claimed" because the record does not contain a copy of this motion; however, the record does reflect that the circuit court denied a request to transfer the case in an order entered on November 5, 2009. Although the order does not elaborate on the decision, the circuit court indicated in a hearing held on October 27, 2009 that the motion was being denied because of the court's lengthy history with the case and familiarity with the record. Appellant claims to have filed a motion to alter, amend, or vacate on November 6, 2009, but – again –

[2] Because the child is a minor, his name has been withheld to assure confidentiality.

the record before us does not contain this motion. In any event, the motion was summarily denied by the circuit court. This appeal followed.

The immediate issue with which we are faced is that the record does not contain a copy of Appellant's motion to change jurisdiction/venue (or the grounds for such), nor does it contain Appellant's subsequent motion to alter, amend, or vacate. The only related item that our review of the record has uncovered is Appellant's response to a motion to change venue (to Pike County, Kentucky) that was filed by Appellee on April 6, 2009. In that response, which was filed on April 15, 2009, Appellant requested rather that the case be transferred to a court in Fort Wayne, Indiana because "[t]he minor child herein has resided in Fort Wayne, Indiana in excess of six (6) months & has permanently established his legal residence therein, thus vesting legal jurisdiction there." No other grounds for the request were provided. Appellant subsequently filed another response on April 21, 2009, in which she specifically requested that the case *not* be transferred because of a lack of grounds for the transfer and because the circuit court had comprehensive knowledge of the case. This second response made no mention of moving the case to Indiana.

It does not appear that these were the pleadings addressed by the circuit court during the hearing of October 27, 2009. As noted, Appellant claims to have filed a motion to transfer the case on October 22, 2009, but the record does not contain this motion nor does it contain the subsequent motion to alter, amend, or vacate Appellant claims to have filed. In any event, we are authorized to

consider Appellant's jurisdictional argument even if it was not preserved below. *Schuttemeyer v. Commonwealth*, 793 S.W.2d 124, 127 (Ky. App. 1990). Whether a trial court acts within its jurisdiction is a question of law; therefore, our review is *de novo*. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

Appellant first claims that the trial court erred in denying her request to transfer this case to Indiana because Kentucky now lacks jurisdiction in light of her move to Fort Wayne. In Kentucky, interstate child-custody jurisdiction disputes are governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJEA was adopted in 2004 to avoid "jurisdictional competition and conflict with other states" in custody matters. *Wallace v. Wallace*, 224 S.W.3d 587, 589 (Ky. App. 2007). The act is codified in KRS 403.800 through 403.880.

Pursuant to the UCCJEA, the state making an initial custody determination – in this case, Kentucky – retains "exclusive, continuing jurisdiction over the determination" until:

> [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[.]

KRS 403.824(1)(a). In *Biggs v. Biggs*, 301 S.W.3d 32 (Ky. App. 2009), we relied upon the following comment to UCCJEA § 202 in explaining what constitutes a "significant connection" for purposes of KRS 403.824:

> [E]ven if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction . . . If the relationship between the child and the person remaining in the State . . . becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

Id. at 33. It has been held that "a significant connection exists if 'one parent resides in the state and exercises at least some parenting time in the state.' " *Id.*, *quoting White v. Harrison-White*, 280 Mich.App. 383, 760 N.W.2d 691, 697 (2008); *see also Wallace*, 224 S.W.3d at 591. "[I]t is not necessary for a child to reside in the Commonwealth in order for Kentucky to retain jurisdiction." *Biggs*, 301 S.W.3d at 34.

Accordingly, continuing jurisdiction generally controls over "home state" jurisdiction under the UCCJEA unless the standard set forth in KRS 403.824(1)(a) is met. *See Wallace*, 224 S.W.3d at 589-90; *Staats v. McKinnon*, 206 S.W.3d 532, 546 (Tenn. Ct. App. 2006). The fact that Appellant and C.M. now live in Indiana – standing alone – does not deprive Kentucky of jurisdiction over this case. Instead, Kentucky's "exclusive, continuing jurisdiction prevails under the UCCJEA until the 'relationship between the child and the person remaining in the state with exclusive, continuing jurisdiction becomes so attenuated that a court could no longer find significant connections and substantial evidence.' " *Wallace*, 224 S.W.3d at 590, *quoting Ruth v. Ruth*, 32 Kan.App.2d 416, 421, 83 P.3d 1248, 1254 (2004).

Cognizant of this required showing, Appellant claims that Appellee moved to West Virginia in 2006 and has only a tenuous connection with Kentucky as a result. In response, Appellee acknowledges that he briefly moved to West Virginia for work in 2008 but that he moved back to Kentucky shortly thereafter. The problem is that neither party has provided us with specific citations to the record to support their factual assertions, as is their obligation. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv)-(v) (Appellant); CR 76.12(d)(iii)-(iv) (Appellee). Consequently, we are left with a "he said/she said" dispute on the issue of Appellee's residence without being provided with anything to support either position. However, in light of the fact that Appellant is the party seeking to invoke KRS 403.824 and to move this matter to another jurisdiction, we believe that the consequences for this failure are more appropriately borne by her.[3] Appellee maintains that he is a Kentucky resident, and we have been provided with no tangible reason to believe otherwise. As noted above, for purposes of KRS 403.824, "a significant connection exists if 'one parent resides in the state and exercises at least some parenting time in the state.' " *Biggs*, 301 S.W.3d at 33, *quoting White*, 760 N.W.2d 691 at 697. This standard appears to have been met here.

Moreover, despite the parties' ongoing squabbling, it appears that the child has had regular visitation with Appellee and Appellee's family in Kentucky.

[3] We also note that Appellant's argument in this regard is largely speculative in nature and indicates her belief that "Appellee was *likely* not a resident of Kentucky" when Appellant moved to transfer the case. (Emphasis added).

We also note that as of the time Appellant sought to transfer the case to Indiana, she and C.M. had only lived in the state for a year. Thus, "substantial evidence" regarding this matter remained in Kentucky. As such, we believe that Appellee and the child have a "significant connection" with Kentucky and that Kentucky holds exclusive, continuing jurisdiction under the UCCJEA. Therefore, we find no error in the circuit court's decision to retain jurisdiction.

In the alternative, Appellant argues that Kentucky is now an inconvenient venue for this case in light of her move to Indiana and that a change of venue is merited pursuant to KRS 403.834. This Court reviews a circuit court's decision upon a motion for change of venue for abuse of discretion. *Miller v. Watts*, 436 S.W.2d 515, 518 (Ky. 1969); *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky. App. 2009). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRS 403.834(1) allows a Kentucky court to decline jurisdiction – even if it rightfully has jurisdiction under KRS 403.824 – "if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." *See also Biggs*, 301 S.W.3d at 34. As noted, the trial court has considerable discretion when making this determination. However, it generally must consider the following factors set forth in KRS 403.834(2):

> (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.

See also Biggs, 301 S.W.3d at 34. "Although Kentucky's caselaw for the UCCJEA is still developing, other jurisdictions that have adopted the UCCJEA consistently require their courts to apply rather meticulously the factors in the statutes that correspond to KRS 403.834(2)." *Id.*

Unfortunately, for reasons given above we have no way of knowing what arguments with respect to venue were presented to the circuit court – which raises the issue of preservation of error – and Appellant has again failed to directly cite us to anything in the record that would support her arguments. "We are not required to, and generally will not, search an entire record for the purpose of determining whether or not a contention of a litigant should be sustained. The

burden is on the parties and not the court." *Snell v. Commonwealth*, 420 S.W.2d 127, 129 (Ky. 1967) (Internal citations omitted). It also does not appear that Appellant moved the court for any specific findings concerning the factors set forth in KRS 403.834(2). Thus, the fact that the circuit court did not more specifically address those factors is not before us. CR 52.04. In light of these failures, we cannot say that the circuit court abused its discretion in failing to transfer venue of this case to Indiana pursuant to that statute.[4] Therefore, we will not disturb the circuit court's denial of Appellant's motion to transfer the case on grounds of improper venue.

For the foregoing reasons, the judgment of the Knott Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Jason Charles Reichenbach Prestonsburg, Kentucky	Tommy R. May Pikeville, Kentucky

[4] We further note that the factors set forth in KRS 403.834(2)(b), (g), and (h) would appear to support keeping the case before the Knott Circuit Court.