

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY ALLEN EMARD,

Plaintiff-Appellant,

v

CARYN CARLE,

Defendant-Appellee.

UNPUBLISHED

January 7, 2010

No. 293441

Ionia Circuit Court

LC No. 08-026310-DP

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

In this custody case involving the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.*, plaintiff appeals by right the trial court's order dismissing the complaint for lack of jurisdiction. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant lived in Michigan from August 13, 2006, until July 21, 2007. According to her testimony, she had come here from Massachusetts to "step away" from a traumatic family episode. During that time, she met plaintiff and they became romantically involved. Defendant became pregnant and went back to Massachusetts to have the child because her mother was there. The child was born in Massachusetts on November 15, 2007. Plaintiff went to Massachusetts to bring defendant and the child back to Michigan on March 31, 2008. Defendant testified that she had planned to stay in Michigan only three weeks, but that she had no way of getting back to Massachusetts and ended up staying until August 5, 2008. Although her plan had been to "live as a three person family," defendant did not want to live with plaintiff's mother and the rest of plaintiff's family. On June 6, 2008, plaintiff filed a paternity action seeking a determination that he was the child's father. He also sought custody. Defendant filed an answer on July 1, 2008, challenging jurisdiction and asserting that she and the child were residents of Massachusetts and were just visiting Michigan. The trial court entered an order of filiation on August 15, 2008, finding that plaintiff was the father and granting defendant temporary physical custody. The order noted, "Domicile of the child is not being determined and is contested by the parties." Plaintiff was ordered to pay child support.

A conciliation conference was held on September 17, 2008. On September 22, 2008, the court's order provided for the parties to have joint legal custody, defendant to have physical custody, and plaintiff to have parenting time. The court found that the child's domicile was Massachusetts. Plaintiff objected to this order. In April and May 2009, a hearing was held on

plaintiff's objection. Defendant participated by telephone from Massachusetts. The court granted physical custody to plaintiff by an order dated May 27, 2009. The order was silent regarding domicile. Plaintiff went to Massachusetts to collect the child and requested the local police to take the child from defendant. On May 29, 2009, defendant sought a grant of full custody from the Massachusetts court and a hearing was scheduled for July 2, 2009. Plaintiff then filed an ex-parte emergency motion in the Michigan trial court to modify and stay defendant's parenting time, clarify the issue of domicile, and affirm jurisdiction. The trial court held a pre-hearing conference on July 13, 2009; the resulting order found that the child's guardian ad litem (GAL) had not been given notice of the hearing held in April and May. Accordingly, the court set aside its order of May 27, 2009, and stated that the order of September 22, 2008, was the one in force.

A final hearing was held the next day on plaintiff's emergency motion. The transcript of that hearing establishes that the court intended to discharge the GAL but failed to so indicate on the order because the order had been prepared prior to the hearing. The referee, for the first time, conducted a hearing on jurisdiction. The parties did not dispute that the child was brought to Michigan on March 31, 2008, and the referee concluded that because the child had not lived in Michigan for at least six months before the paternity action was filed, Michigan was not the "home state." The referee then found that there was "a significant connection between the child and the state of Michigan," making jurisdiction appropriate. The referee also implicitly found that Massachusetts was not the "home state" because (1) defendant had only lived there with the child about four months, and (2) when defendant came to Michigan at the end of March 2008 she intended to stay rather than just visit.

However, the trial court did not enter the referee's recommended order. In its written opinion, the court first noted that no motion for reconsideration had been filed regarding its order of July 13, 2009, which had set aside the order of May 27, 2009, and reinstated the order of September 22, 2008. The court also noted that on July 15, 2009, it had consulted with the Massachusetts court. As a result, the Massachusetts court had entered an order finding that Massachusetts was the home state and granting full custody to defendant. The court stated, "[T]his court is not allowed to exercise jurisdiction . . . if another state in which a comparable action is pending is the child's 'home state' under the [UCCJEA]."

The trial court reasoned that when plaintiff filed his paternity suit, defendant's answer challenged jurisdiction. There was a temporary custody order entered on August 15, 2008, awarding physical custody to defendant. Thereafter, recommendations were made to continue physical custody with defendant and plaintiff objected to them. Thus, no permanent custody determination had ever been made by the court. The court held that Michigan had never been the home state because the child did not live here for six months before the suit was filed; defendant's answer and the Massachusetts order meant Massachusetts would have had jurisdiction. Although the court did not have jurisdiction under the UCCJEA, it had jurisdiction to enter a child custody determination under the paternity act, MCL 722.711. But the court noted that it lacked continuing, exclusive jurisdiction. Thus, the court lacked current jurisdiction to modify the existing order of September 22, 2008, because Massachusetts had exclusive jurisdiction. Defendant's "temporary absence in conjunction with [her] contesting jurisdiction in Michigan" did not change the home-state status of Massachusetts.

Statutory interpretation is a question of law that we review de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). A trial court's determination regarding its own subject matter jurisdiction is a question of law, also reviewed de novo. *White v Harrison-White*, 280 Mich App 383, 387; 760 NW2d 691 (2008). We review a trial court's findings of fact for clear error. See MCR 2.613(C).

At issue is the trial court's finding that the child's home state was Massachusetts. MCL 722.1102(g) provides a specific definition:

“Home state” means the state in which a child lived with a parent or a person acting as a parent for *at least 6 consecutive months immediately before the commencement of a child-custody proceeding*. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a parent or person acting as a parent is included as part of the period. [Emphasis added.]

“Child-custody proceeding” is defined as “a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. Child-custody proceeding includes a proceeding for . . . paternity” MCL 722.1102(d). There is no dispute that plaintiff's paternity suit, seeking custody, qualified as a child custody proceeding.

Under the UCCJEA, MCL 722.1201(1), a Michigan court has jurisdiction only if Michigan is the home state of the child or if a court in another state does not have jurisdiction or has declined to exercise jurisdiction:

Except as otherwise provided in section 204, a court of this state has jurisdiction to make an initial child-custody determination *only in the following situations*:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

(b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under sections 207 or 208, and the court finds both of the following:

(i) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under sections 207 or 208.

(d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).

Massachusetts was the original home state because the child was born there and lived there with a parent for a time after birth. MCL 722.1102(g). Michigan could become the home state, but only after the child had resided here with a parent six months or only if both the child and defendant stopped living in Massachusetts. *Id.* And if Michigan was not the home state, the trial court could exercise jurisdiction only if no other state had jurisdiction or the home state court declined jurisdiction. Obviously, this last condition does not apply.

Plaintiff argues that the trial court erred by finding that Massachusetts was the home state because defendant left that state with the child to live in Michigan. Plaintiff contends that defendant's absence was not a temporary absence under MCL 722.1102(g), and that she did not continue to live in Massachusetts as required by MCL 722.1201(1)(a). Plaintiff points to defendant's testimony at the hearing of October 21, 2008, where she stated that she planned for them to be a family and that she planned to move back to Michigan. However, defendant's statement that her "plan was to move back here," in the context of her whole testimony at this proceeding and others, was more ambiguous than plaintiff indicates:

Q. So are you telling me then that it was the plan for him to go back to Massachusetts with you or for you to stay here in Michigan but to live someplace other than his parents?

A. My plan was to move back here.

Q. Okay.

A. When I was ready. I wanted to be able to support my own dwelling here. I didn't want to live in his mother's house. I wanted to live as a three person family. And this had been discussed between he and I many times.

The trial court's conclusion that defendant's presence in Michigan was temporary was a factual finding. It is true that the court did not specifically cite a great deal of evidence when making this factual finding. However, there is ample evidence in the record to support it. At the early hearings in July 2008 when the court ordered genetic testing and entered the order of filiation, defendant stated that she hated Michigan and was tricked by plaintiff into staying far longer than she intended. Thus, even at this early point in the proceedings, defendant was expressing her desire to take the child back to Massachusetts. The trial judge was present at these hearings, unlike the later hearings, which were conducted by the referee. Accordingly, the trial court had a special opportunity to judge the credibility of defendant and plaintiff. We simply cannot conclude that the trial court's finding that defendant did not intend to remain in Michigan with the child was clearly erroneous.

This means that Massachusetts had jurisdiction and the trial court could not take jurisdiction under MCL 722.1201(1)(b).¹ The trial court had no authority to enter any child custody determination, including the temporary custody order. MCL 722.1102(c) (including temporary orders within the definition of “child custody determination”). Plaintiff therefore is strictly correct that the trial court erred by concluding that it had not made a custody determination. But his argument that neither Michigan nor Massachusetts was the home state must fail in light of the court’s factual determination that defendant did not intend to remain in Michigan when she came in March 2008.

The trial court’s decision could also be reasonably interpreted as a refusal to exercise jurisdiction. Such a decision would be reviewed for an abuse of discretion. *Jamil v Jahan*, 280 Mich App 92, 99; 760 NW2d 366 (2008). “Generally, an appellate court should defer to the trial court’s judgment, and if the trial court’s decision results in an outcome within the range of principled outcomes, it has not abused its discretion.” *Id.* Given the circumstances of this case, and the Massachusetts court’s determination that it was the home state, we cannot say that the trial court abused its discretion by declining to exercise jurisdiction.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra

¹ MCR 3.201(D)(3) provides the applicable definition: “‘Jurisdiction’ means the authority of the court to hear cases and make decisions and enter orders on cases.” MCL 722.1201(1)(b) does not require another state’s court to *exercise* jurisdiction, only to *have* it. If defendant was only temporarily in Michigan, Massachusetts was the home state and had jurisdiction in accord with MCL 722.1201(1)(a).