In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00044-CV

IN THE INTEREST OF A.X.T., A CHILD

On Appeal from the County Court at Law
Panola County, Texas
Trial Court No. 2011-086

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Because of allegations that Phil[1] had physically abused his then six-week-old infant daughter A.X.T., evidence was adduced to support these allegations. A resulting medical examination of A.X.T. by a child-abuse specialist revealed that the infant had sustained multiple fractures during her brief life, including breaks in the little girl's rib, elbow, and leg, as well as areas of concern under both of her knees. As a result, the Texas Department of Family and Protective Services (TDFPS) filed suit in early 2011 in Panola County, Texas, seeking conservatorship of A.X.T. and termination of the parent-child relationship between A.X.T. and her parents, Phil and Kathy.[2] While the Texas trial court did not terminate A.X.T.'s parent-child relationship as to either parent, it named two North Carolina residents as A.X.T.'s managing conservators, namely Phil's sister, Gretchen, and Gretchen's husband, Ted,[3] A.X.T.'s mother, Kathy, was named possessory conservator. Although the trial court found Phil was A.X.T.'s

[1]To protect the privacy of the minor child, we will refer to the minor child by her initials and her family members by pseudonyms. *See* TEX. R. APP. P. 9.8(b)(2).

[2]The affidavit of Melinda Sipes, an investigator for Child Protective Services, was filed in support of the petition. In her affidavit, Sipes averred that TDFPS had received an initial report of abuse by Phil on February 9, 2011, alleging that he pinched the throat of, and shook, A.X.T., who was six weeks old at the time. Although no bruises or marks were observed on the first contact with the family, TDPFS received a second complaint on February 21, 2011, when Phil admitted hitting the child on the side of her head with his hand, causing a swollen and red eye. When her face did not return to normal, Kathy took A.X.T. to the emergency room. Sipes also noted that, on February 23, 2011, Phil told her he planned to leave that night for North Carolina. She scheduled a February 25, 2011, appointment for an examination of A.X.T. at Children's Medical Center in Dallas with Dr. Cox, a child-abuse specialist.

[3]The orders were made April 24, 2012. At the time, Gretchen, Ted, Phil, and A.X.T. resided in Winston-Salem, North Carolina. The original order was subsequently modified on February 27, 2013, by an order granting bill of review and order in suit affecting the parent-child relationship (the SAPCR order). Since the original order was entered, Gretchen, Ted, Phil, and A.X.T. have resided in North Carolina, and Kathy has resided in Carthage, Texas.

father, no other explicit orders were rendered regarding Phil.[4] A.X.T. has lived with Gretchen and Ted in North Carolina since 2011.

Years later, Gretchen and Ted sought a declaratory judgment in Texas that the Texas trial court did not retain exclusive, continuing jurisdiction under Section 152.202(a)(1) and, in the alternative, that the court in North Carolina was a more appropriate forum to resolve family issues surrounding A.X.T. *See* TEX. FAM. CODE ANN. §§ 152.202(a)(1), 152.207 (West 2014). The trial court denied both requests, and Gretchen and Ted appeal.

We affirm the ruling of the trial court, because (1) there was no error in retaining jurisdiction under Section 152.202, (2) there was no abuse of discretion in retaining jurisdiction under Section 152.207, (3) finding that A.X.T. resided in Texas caused no harm, and (4) A.X.T.'s best interests do not affect the jurisdictional analysis.

(1) There Was No Error in Retaining Jurisdiction under Section 152.202

Under Section 152.202 of the Texas Family Code, a trial court that has made an initial child custody determination under Section 152.201 maintains exclusive continuing jurisdiction over the determination until:

> (1) a court of this state determines that neither the child, nor the child and one 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
>
> (2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

[4]It appears that the trial court had been given the impression that Phil had returned to Vietnam.

TEX. FAM. CODE ANN. § 152.202(a)(1)-(2) (West 2014). Since the trial court's determination under this section is a matter of subject-matter jurisdiction, we review its determination de novo. *In re Bellamy*, 67 S.W.3d 482, 485 (Tex. App.—Texarkana 2002), *disapproved on other grounds by In re Forlenza*, 140 S.W.3d 373, 379 (Tex. 2004) (orig. proceeding); *In re Brown*, No. 14-12-00641-CV, 2012 WL 3264407, at *1 (Tex. App.—Houston [14th Dist.] Aug. 8, 2012, orig. proceeding) (mem. op.); *see In re Forlenza*, 140 S.W.3d 373, 376 (Tex. 2004) (orig. proceeding). Generally, the petitioner has the burden to allege facts affirmatively showing the trial court's subject-matter jurisdiction. *Forlenza*, 140 S.W.3d at 376. When subject-matter jurisdiction is based on a statute, it must be shown under the applicable statute. *In re S.J.A.*, 272 S.W.3d 678, 682 (Tex. App.—Dallas 2008, no pet.) (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000)). In our determination, we consider relevant evidence when, as here, it is necessary to the resolution of the jurisdictional issue. *Id.*; *see Forlenza*, 140 S.W.3d at 376–78.

Appellants claim the evidence established (1) that neither A.X.T., P.T, Gretchen, nor Ted has a significant connection to Texas and (2) that there is no substantial evidence concerning the child's welfare in Texas. They also argue that the evidence shows that the trial court lost continuing exclusive jurisdiction under Section 152.202(a)(2) when Kathy ceased to live in Texas for a few months in late 2011 and early 2012. We will address these arguments in order.

Under subsection (a)(1), exclusive jurisdiction continues in the court issuing the initial decree unless the court finds (1) a significant connection does not exist between Texas, on one side, and the child, the child and one parent, or the child and one acting as a parent, on the other, *and* (2) substantial evidence concerning the child's care, protection, training, or personal

relationships is no longer available in Texas. *See Forlenza*, 140 S.W.3d at 375–76, 379; *Brown*, 2012 WL 3264407, at *2. If either a significant connection to Texas exists or substantial evidence is available in Texas, then exclusive continuing jurisdiction continues here. *Forlenza*, 140 S.W.3d at 379; *Brown*, 2012 WL 3264407, at *2. In this case, the trial court entered findings that A.X.T. maintains a significant connection to this state and that there is substantial evidence in Texas concerning the care, protection, training, and personal relationships of A.X.T. We will affirm if there is some probative evidence supporting either of the trial court's findings. *Lesem v. Mouradian*, 445 S.W.3d 366, 373 (Tex. App.—Houston [1st Dist.] 2013, no pet); *see Forlenza*, 140 S.W.3d at 376–79. In this case, we find there is some evidence supporting the trial court's finding that there is substantial evidence in Texas concerning the care, protection, and personal relationships of the child.

In response to questioning by the trial court, Kathy testified that the allegations against Phil were that he had choked, shaken, and slapped A.X.T. and that the findings were that she had two ribs, both kneecaps, her right arm, and her right leg broken. This testimony is consistent with the TDFPS investigation discussed in the Sipes affidavit. Although Gretchen testified that they supervise Phil's visits with the child, Kathy testified that Phil told her that he takes the child to the doctor and has other unsupervised access to A.X.T. The testimony of Kathy, a Texas resident, and the Sipes affidavit support the trial court's finding that there is substantial evidence in Texas concerning the child's care and protection.

Although Kathy admitted that she had not seen her daughter since January 19, 2012, she testified regarding Gretchen's actions to thwart her visits with A.X.T. Those actions included

denying Kathy's text messages, blocking her telephone number, and not informing Kathy that she was bringing A.X.T. to Texas in September 2012. In addition, Gretchen refused to give Kathy her home address, in violation of the SAPCR order.[5] Although Gretchen disputed some of that testimony, the trial court could reasonably believe that the Appellants were denying Kathy access to the child, thereby adversely affecting their relationship. *See Forlenza*, 140 S.W.3d at 376 (Supreme Court presumed the trial court accepted mother's testimony that more visitation would have occurred in Texas but for father's actions); *In re Majors*, No.12-15-00193-CV, 2015 WL 7769555, at *4 (Tex. App.—Tyler Dec. 3, 2015, orig. proceeding) (mem. op.) (trial court could reasonably believe that lack of significant connection to Texas was caused by father's refusal to return children for two years). One party's efforts to thwart the other party's rights to access to the child may be considered in the court's analysis under Section 152.202(a)(1). *See Forlenza*, 140 S.W.3d at 376; *Majors*, 2015 WL 7769555, at *4. Kathy's testimony supports the trial court's finding that there is substantial evidence in Texas concerning the child's personal relationships.

Nevertheless, Appellants argue that the facts of this case are similar to those considered by the Austin Court of Appeals in *Mills v. Canoy*, No. 03-04-00681-CV, 2005 WL 2043955 (Tex. App.—Austin Aug 25, 2005, no pet.) (mem. op.). While there is some similarity between the facts in *Mills* and those of this case, there are also some crucial differences. First, *Mills* originated as a divorce proceeding, and, although some of the child's medical and psychological records remained in Texas, the court of appeals noted those were all records before the child moved to North Carolina

[5]The SAPCR order required the parties to notify each other, the court, and the state case registry of, *inter alia*, any changes to their residential address and mailing address.

two years earlier. *Id.* at *3. This case originated because of the alleged abuse of A.X.T. by Phil, which has not been resolved as a result of Phil's move to North Carolina. All of this evidence remains in Texas and is relevant to A.X.T.'s current care and protection, since Phil has unsupervised access to the child in North Carolina. This is especially true since Appellants have represented to this Court that they wish to pursue permanency of A.X.T. in North Carolina. Second, although Mills argued that Canoy had thwarted his visitation with the child, the trial court did not place significance on that, instead scolding both parties for their lack of cooperation. *Id.* at *4. Here, the trial court found that the interference with Kathy's visitation rights by the Appellants was significant, and it scolded the Appellants for disobeying its SAPCR order and thwarting Kathy's access to the child. Thus, just as the evidence in *Mills* supported the trial court's transfer of jurisdiction under Section 152.202(a)(1), the evidence in this case supports the trial court's retention of jurisdiction under Section 152.202(a)(1).

Appellants also argue that the trial court lost exclusive jurisdiction under Section 152.202(a)(2) when Kathy ceased to live in Texas for a few months in late 2011 and early 2012, citing *In re Lewin*, 149 S.W.3d 727 (Tex. App.—Austin 2004, orig. proceeding).[6] Appellants rely on the affidavit of Gretchen filed in this case, which avers that Kathy resided in North Carolina from September 2011 through November 2011.[7] This absence occurred during the pendency of

[6]Although Appellants did not raise this argument at the trial court, the argument challenges the trial court's subject-matter jurisdiction, which "may be raised for the first time on appeal either by the parties or by the court of appeals." *Monk v. Pomberg*, 263 S.W.3d 199, 204 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004), *superseded by statute on other grounds*, TEX. GOV'T CODE ANN. § 311.034 (West 2013).

[7]Kathy testified that she left North Carolina January 19, 2012.

the original suit filed by TDPFS, which was filed on February 25, 2011, and before the trial court entered its initial child custody determination April 24, 2012. Appellants do not challenge that the trial court had jurisdiction to make the initial child custody determination consistent with Section 152.201 of the Texas Family Code.[8] *See* TEX. FAM. CODE ANN. § 152.201 (West 2014). On its face, Section 152.202 only applies in those instances in which a court of this state has previously "made a child custody determination consistent with Section 152.201." TEX. FAM. CODE ANN. § 152.202. Therefore, Section 152.202(a)(2) is inapplicable under these facts, and Appellants' argument is without merit.

We overrule this point of error.

(2) There Was No Abuse of Discretion in Retaining Jurisdiction under Section 152.207

Appellants rely on the same evidence to argue that the trial court abused its discretion in not determining that Texas is an inconvenient forum and that North Carolina is a more convenient forum to hear custody issues in this matter. Appellants argue that, under the facts of this case, the trial court was required to decline jurisdiction under Section 152.207 of the Family Code. *See* TEX. FAM. CODE ANN. § 152.207.

Under Section 152.207, a court having jurisdiction to determine child custody "may[9] decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under

[8]*See infra* note 10.

[9]Ordinarily, a statutory provision that a court "may" take an action indicates discretion to take it or not, while a provision that the court "shall" take the action indicates a duty to do so. *See In re Gen. Elec. Co.*, 271 S.W.3d 681, 686 (Tex. 2008). Here, the statute provides that the trial court, in making its decision, "shall" consider certain factors. TEX. FAM. CODE ANN. § 152.207(b). When statutory provisions seem internally inconsistent, we seek to harmonize them to give effect to the overall intent of the statute. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001); *In re A.A.G.*, 303 S.W.3d 739, 740 (Tex. App.—Waco 2009, no pet.).

the circumstance and that a court of another state is a more appropriate forum." TEX. FAM. CODE ANN. § 152.207(a). We review a trial court's decision under this section using an abuse-of-discretion standard. *Lesem*, 445 S.W.3d at 373; *Brown*, 2012 WL 3264407, at *2. The trial court abuses its discretion when it acts without reference to any guiding rules and principles, or when its decision is arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *In re Marriage of Ford*, 435 S.W.3d 347, 350 (Tex. App.—Texarkana 2014, no pet.). In considering whether the trial court abused its discretion, "we view the evidence in a light most favorable to the court's decision and indulge every legal presumption in favor of its judgment." *Ford*; 435 S.W.3d at 350 (citing *In re J.I.Z.*, 170 S.W.3d 881, 883 (Tex. App.—Corpus Christi 2005, no pet.)). An abuse of discretion is not shown by the fact that the trial court decided a matter differently than would the appellate court. *Brown*, 2012 WL 3264407, at *2.

In making its determination of whether it is an inconvenient forum and another state's court is a more appropriate forum, the trial court "shall" consider all relevant factors. TEX. FAM. CODE ANN. § 152.207(b). These factors include:

> (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
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> (2) the length of time the child has resided outside this state;
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> (3) the distance between the court in this state and the court in the state that would assume jurisdiction;
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> (4) the relative financial circumstances of the parties;
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> (5) any agreement of the parties as to which state should assume jurisdiction;
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> (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

> (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
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> (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

Id. at *3. The length of time the child has resided in North Carolina and the evidence concerning the child's current living condition weigh in favor of finding North Carolina as a more appropriate forum. However, weighing against such a finding is the evidence that domestic violence has occurred in the past and that this evidence is in Texas. Further, the Texas court is more familiar with these facts and issues. In addition, although there is no evidence of the financial circumstances of Appellants, the evidence shows that transferring the case to North Carolina would be a significant financial burden on Kathy, especially considering the distance between the Texas court and a North Carolina court.

Since the record does not clearly demonstrate that the trial court is an inconvenient forum or that North Carolina is a more appropriate forum, we cannot say that the trial court's decision to retain jurisdiction was arbitrary and unreasonable. *See id.* The trial court did not abuse its discretion.

(3) Finding that A.X.T. Resided in Texas Caused No Harm

Appellants also assert that the trial court erred in finding that Texas is the home state of A.X.T.[10] Appellants base their complaint on their argument asserted under their first point of error

[10]The "home state" of a child is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding[, or i]n the case of a child less than six months of age, . . . the state in which the child lived from birth with a parent or a person acting as a parent.." TEX. FAM. CODE ANN. § 152.102(7) (West 2014). As Appellants point out, determining a child's home state is particularly important in determining whether a trial court has jurisdiction to make an initial child custody

that the trial court lost its exclusive continuing jurisdiction when Kathy moved out of Texas temporarily. Since we have already overruled that point of error, any error in the trial court's finding regarding the child's home state was harmless.

(4) A.X.T.'S Best Interests Do Not Affect the Jurisdictional Analysis

Appellants claim the trial court erred because retaining jurisdiction in Texas is not in the best interest of A.X.T. Although they make a factual argument based on the child's long residence in North Carolina, Appellants do not cite any legal authority for their proposition that the child's best interest is a factor to be considered by the trial court in making a jurisdictional determination under Section 152.202 or Section 152.207. We have found no such authority. Neither of the relevant statutes provide that the child's best interest is to be taken into consideration in making the jurisdictional determination. *See* TEX. FAM. CODE ANN. §§ 152.202(a), 152.207(b). In contrast, the Family Code provides that, when making a determination on the issues of conservatorship, possession of, and access to the child, "[t]he best interest of the child shall always be the primary consideration of the court." TEX. FAM. CODE ANN. § 153.002 (West 2014). Therefore, we find no error on the part of the trial court, and we overrule this point of error.

determination. *See* TEX. FAM. CODE ANN. § 152.201; *In re Dean*, 393 S.W.3d 741, 743–44 (Tex. 2012). In this case, it is undisputed that the trial court had jurisdiction to make the initial child custody determination since the child's home state was Texas at the time the initial proceeding was filed. Since it made the initial determination, it acquired exclusive continuing jurisdiction under Section 152.202, even though the child has lived in North Carolina with Appellants for almost five years.

We affirm the judgment of the trial court.

Josh R. Morriss III
Chief Justice

Date Submitted: December 19, 2016
Date Decided: February 8, 2017