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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 01/18/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) No. 1 CA-CV 10-0125
)
RYAN RUSSELL POTTINGER,) DEPARTMENT B
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
)
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
LISA MARIE STEPHENS,)
)
Respondent/Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2009-002210

The Honorable Andrew G. Klein, Judge

AFFIRMED

Law Office of Harry P. Friedlander
By Harry P. Friedlander
Attorneys for Appellant

Mesa

Ryan Russell Pottinger
In *Propria Persona*

Goodyear

J O H N S E N, Judge

¶1 Lisa Marie Stephens appeals the superior court's
assertion of subject matter jurisdiction over her dispute with
Ryan Russell Pottinger over the custody of their two children.

FACTS AND PROCEDURAL HISTORY

¶12 Stephens and Pottinger are the natural parents of A and Q, born in 2001 and 2004, respectively. The children were born in Illinois and lived with both parents there until Pottinger moved to Arizona in spring 2005. The children remained with Stephens in Illinois, visiting their father in Arizona during the summer.

¶13 In 2008, the living arrangement reversed. The children lived with Pottinger in Arizona for the first five months of the year, returning to Illinois to spend the summer with their mother. In late summer or early fall, the children returned to Arizona. Stephens and Pottinger orally agreed that Stephens would spend part of the 2008 Christmas holiday with the children in Arizona, returning them to Pottinger for three days after Christmas, and then she would accompany them back to Illinois, where the children would live until the spring or summer of 2009. Instead, Stephens picked up the children as agreed on December 25, but never returned them to Pottinger before taking them to Illinois.

¶14 Stephens filed a petition in Illinois to determine custody on March 6, 2009. On March 24, Pottinger filed a complaint in Arizona for paternity, child custody, parenting time and child support. Stephens moved to dismiss the Arizona action for lack of subject matter jurisdiction.

¶15 At oral argument on Stephens's motion to dismiss, both parties agreed that neither Arizona nor Illinois was the children's "home state" within the meaning of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), adopted in Arizona as Arizona Revised Statutes ("A.R.S.") sections 25-1001 (2007) to -1067 (2007).¹ The superior court set a hearing to take evidence on Pottinger's assertion that Stephens had acted unjustifiably pursuant to A.R.S. § 25-1038 (2007), thereby prohibiting Illinois from exercising jurisdiction.² The court also scheduled a telephonic conference with the judge assigned to the Illinois action.

¶16 The superior court issued an order after the hearing in which it found that Stephens and Pottinger had agreed that

¹ Pursuant to A.R.S. § 25-1002(7)(a) (2007), a child's home state is defined as:

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, including any period during which that person is temporarily absent from that state.

Illinois also has adopted the UCCJEA. See 750 Illinois Compiled Statutes ("ILCS") 36/101 (2004) to -403 (2004).

² Arizona Revised Statutes § 25-1038 provides: "Except as otherwise provided in § 25-1034, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction" See also 750 ILCS 36/208 (2004).

after Stephens visited the children in Arizona over the Christmas holiday in 2008, she would take them back to Illinois with her, but that she would return Q to Arizona in March 2009 and return A in May 2009. The court found the parties' agreement included a promise by Stephens that she would not "blindsided" Pottinger by filing a custody action in Illinois. The court determined that but for that promise, Pottinger would not have permitted the children to return to Illinois with Stephens after Christmas in 2008. The court accordingly concluded that Stephens unjustifiably obtained physical custody of the children in December 2008 by subterfuge, and that Stephens's unjustifiable conduct prohibited Illinois from exercising jurisdiction over the controversy. The court then held it had subject matter jurisdiction under the UCCJEA.³

¶17 Stephens filed a motion for a new trial, which the superior court denied. The court then entered an order establishing paternity and ordering shared legal and physical custody. Stephens timely appealed the court's assertion of subject matter jurisdiction. We have jurisdiction of the appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-120.21(A)(1) (2003).

³ Stephens has not provided us with a transcript of the August 2009 evidentiary hearing. Nor does the record include any information regarding the telephone conversation the superior court had with the Illinois judge just prior to the hearing.

DISCUSSION

A. Standard of Review.

¶18 We review questions of subject matter jurisdiction under the UCCJEA *de novo*. See *In re Marriage of Tonnessen*, 189 Ariz. 225, 226, 941 P.2d 237, 238 (App. 1997). We accept the superior court's findings of fact unless they are clearly erroneous. *Pence v. Glacy*, 207 Ariz. 426, 428, ¶ 10, 87 P.3d 839, 841 (2004).

B. Relevant Legal Principles.

¶19 Arizona adopted the UCCJEA to resolve disputes over subject matter jurisdiction in interstate child custody cases. *Welch-Doden v. Roberts*, 202 Ariz. 201, 208, ¶¶ 29-30, 32, 42 P.3d 1166, 1173 (App. 2002); A.R.S. §§ 25-1001 to -1067. Under the UCCJEA, the starting point in determining subject matter jurisdiction is the child's "home state." A.R.S. § 25-1031(A)(1) (2007); see *supra* note 1. If a child has no home state, a state may exercise subject matter jurisdiction if both:

(a) The child and the child's parents, or the child and at least one parent . . . have a significant connection with this state other than mere physical presence [and]

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

A.R.S. § 25-1031(A)(2)(a)-(b); see also 750 ILCS 36/201(a)(2)(A)-(B) (2004).

¶10 With exceptions not relevant here, a court must decline jurisdiction under the UCCJEA if it "has jurisdiction . . . because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct." A.R.S. § 25-1038(A); see also 750 ILCS 36/208 (2004). This provision is aimed at parents who unjustifiably take their children to another state for the purpose of establishing jurisdiction in that state. See A.R.S. § 25-1038(A).

¶11 If, as in this case, a custody proceeding has been initiated in another state before the commencement of an action in Arizona, the first state's court will retain jurisdiction if it has jurisdiction substantially in conformity with the UCCJEA. See A.R.S. § 25-1036(A), (B) (2007). If the first state does not have jurisdiction in substantial conformity with the UCCJEA, Arizona may exercise jurisdiction if it meets the UCCJEA criteria. See A.R.S. §§ 25-1031 and -1036.

C. Under the Uncontested Findings of Fact, Subject Matter Jurisdiction Is Proper in Arizona.

1. Neither state was the children's "home state."

¶12 As noted, both parties conceded in the superior court that neither Arizona nor Illinois was the children's home state because at no time within the six months prior to filing had the children lived consecutively in either state for a total of six

months. See *Welch-Doden*, 202 Ariz. at 208-09, ¶ 33, 42 P.3d at 1173-74.

¶13 On appeal, arguing that the children's "regular home truly was with [her] in Illinois," Stephens urges us to depart from the meaning of "home state" established in *Welch-Doden*. We decline to do so.

2. Arizona has jurisdiction because Stephens's unjustifiable conduct precluded jurisdiction in Illinois.

¶14 Because the children did not have a home state, and a custody proceeding already had been initiated in Illinois, the Arizona court's first obligation was to determine whether the Illinois court could exert jurisdiction in substantial conformity with the Arizona UCCJEA provisions. See A.R.S. § 25-1036(A).

¶15 In his response to the motion to dismiss, Pottinger argued Illinois could have subject matter jurisdiction only by virtue of Stephens's wrongful removal of the children from Arizona by deceit. He argued her deceit constituted unjustifiable conduct that would compel Illinois to decline jurisdiction. See A.R.S. § 25-1036; see also 750 ILCS 36/208.

¶16 As noted, the superior court found that Pottinger would not have released the children to Stephens in December 2008 had she not agreed to return them to Arizona in the spring and to refrain from filing for custody in Illinois. In denying

Stephens's new trial motion, the court explained, "[T]he gist of the Court's ruling is that Mother engaged in improper conduct by utilizing a subterfuge to regain physical custody and that, but for her unclean hands, the children would have remained in Arizona for the requisite six consecutive months for jurisdiction to be asserted [in Arizona]."

¶17 On appeal, Stephens does not take issue with the superior court's factual findings that she obtained physical custody of the children in December 2008 by subterfuge and that but for her deceit, the children would have resided in Arizona for six consecutive months prior to her filing for custody in Illinois. Rather, she argues the court misapplied the law in concluding that jurisdiction in Arizona was proper.

¶18 Stephens first contends that A.R.S. § 25-1038(A) applies only if Illinois obtained jurisdiction "because of" her unjustifiable conduct. She argues the superior court failed to understand that Illinois could have exercised jurisdiction over Stephens's petition based on the children's substantial connections to that state, rather than based on conduct the superior court found unjustifiable.

¶19 Stephens misunderstands the superior court's ruling. The court found that had Stephens not engaged in her unjustifiable conduct, the children would have remained in Arizona and that in that event, Arizona would have become their

home state before March 6, 2009, when Stephens filed her petition in Illinois. The superior court correctly reasoned that once Arizona became the children's home state, Illinois could not have exercised jurisdiction over the matter. A.R.S. § 25-1031(A)(1); see also 750 ILCS 36/201. Accepting as true the superior court's findings of fact, we agree that, under the circumstances, Illinois could have had jurisdiction only by virtue of Stephens's unjustifiable conduct in removing the children to Illinois by deceit. See A.R.S. § 25-1038; 750 ILCS 36/208.

¶20 Contrary to Stephens's argument on appeal, the superior court did not "give credit" to Arizona for time the children spent in Illinois to establish jurisdiction. The court based its ruling not on home-state status, but rather on Stephens's unjustifiable conduct and its subsequent analysis regarding the children's substantial connections to Arizona.⁴

¶21 Stephens further argues that as a matter of law, her removal of the children from Arizona could not constitute unjustifiable conduct because she was the "sole legal custodian of the children" pursuant to A.R.S. § 13-1302(B) (2010). That

⁴ Whether Illinois could have exerted subject matter jurisdiction based on substantial connections with the state is irrelevant; the superior court found that Stephens did not file her petition in Illinois until well after Arizona would have become the children's home state had she not engaged in unjustifiable conduct. Accordingly, the existence of substantial connections with Illinois is not before us.

statute provides, in relevant part, "If a child is born out of wedlock, the mother is the legal custodian of the child for purposes of this section until paternity is established and custody or access is determined by a court." A.R.S. § 13-1302(B).

¶22 Although the children were born out of wedlock, Stephens's argument fails. The statute's grant of sole legal custody to the mother of a child born out of wedlock is limited by the phrase, "for purposes of this section." A.R.S. § 13-1302(B). The section at issue is a criminal statute pertaining to custodial interference. *Id.* There are no allegations that Pottinger criminally interfered with Stephens's custodial rights. Therefore, A.R.S. § 13-1302 is inapplicable.

3. Scope of the evidentiary hearing.

¶23 Stephens also argues the superior court erred by failing to hold an evidentiary hearing on disputed facts. The only factual dispute she raises, however, relates to the time the children spent in each state prior to the commencement of this action. Because Stephens conceded that the children had not spent six consecutive months in either state in the six months prior to filing, the issue of their residence in earlier time periods is irrelevant. *See Welch-Doden*, 202 Ariz. at 208-09, ¶ 33, 42 P.3d at 1173-74 (clarifying home state determination).

CONCLUSION

¶24 Accepting the superior court's finding of fact that Stephens engaged in unjustifiable conduct in an effort to establish jurisdiction in Illinois, we conclude that Illinois did not have jurisdiction in substantial conformity with the UCCJEA. On appeal, Stephens does not contest the Arizona court's subsequent finding that Pottinger and the children had "significant connection[s]" with Arizona and that "substantial evidence [was] available . . . concerning the child[ren]'s [well-being]." See A.R.S. § 25-1031(A)(2)(a)-(b). Accordingly, we affirm the superior court's decision to exercise subject matter jurisdiction over the matter and its subsequent rulings. We grant Pottinger his costs on appeal, contingent on compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
DONN KESSLER, Presiding Judge

/s/
SHELDON H. WEISBERG, Judge