ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CA07-577

APRIL 9, 2008

SHARON MORGAN APPELLANT	APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT [NO. E-98-614 (RV)]
V.	HON. RICE VAN AUSDALL, JUDGE
TERRY GARRISON APPELLEE	AFFIRMED

Appellant Sharon Morgan appeals the order from the Craighead County Circuit Court granting appellee Terry Garrison's motion to transfer the case to North Carolina. The issue on appeal is whether the circuit court erred by finding that a North Carolina court was the more appropriate forum to hear custody and welfare actions in this case. Finding no abuse of discretion, we affirm.

The parties were divorced on February 17, 1999. Twin children, a daughter, Alyssa Garrison, and a son, Spencer Garrison, D/O/B: November 1, 1997, were born of the marriage. Pursuant to an order filed May 4, 2001, appellee was awarded custody of the minor children, subject to appellant's visitation privileges as set out in the order.

On February 18, 2003, the parties entered into an agreed order that permitted appellee to relocate to North Carolina with the children. That order reduced appellant's child-support obligation to forty-one dollars per week and relieved her of a child-support arrearage. That order also provided that appellant was entitled to one weekend visitation per month and eight weeks of summer visitation with the minor children.

On June 21, 2006, appellant filed a petition for contempt citation, alleging various violations of the February 18, 2003 order related to her communication and visitation with the children. She requested a modification to the order, specifically asking that the restriction of overnight guests of the opposite sex allowed to stay in the home of appellee in the presence of said minor children be changed to include any sexual partners of any gender. Appellee filed a response to the petition on July 21, 2006, along with a motion to dismiss, or in the alternative, a motion of inconvenient forum, and a motion for a continuance. An order was entered on July 25, 2006, finding appellee in contempt of the February 18, 2003 order and declining to remove the case to North Carolina.

On October 23, 2006, appellee filed a motion to stay and transfer due to inconvenient forum with various supporting documents, letters, and affidavits attached in support. The circuit court entered a ruling in favor of appellee on November 22, 2006, although the letter ruling was dated October 31, 2006, and appellant admits to receiving a copy of it on November 1 or 2, 2006, prior to her filing a response to appellee's motion. Appellant then filed a motion to reconsider and a response to the motion to stay and transfer due to inconvenient forum on the same day, November 22, 2006. Appellant's motion to reconsider

was denied in an order filed by the circuit court on December 6, 2006. She filed a timely notice of appeal, and this appeal followed.

Standard of Review and Applicable Statutory Law

The decision of whether to decline jurisdiction is left to the sound discretion of the circuit court and is not to be reversed absent an abuse of that discretion. *Gray v. Gray*, 69 Ark. App. 277, 12 S.W.3d 648 (2000). Under the Uniform Child Custody Jurisdiction and Enforcement Act, codified at Ark. Code Ann. § 9-19-101 - 9-19-405, Arkansas has jurisdiction in the present case. However, an Arkansas court that has jurisdiction may decline to exercise jurisdiction upon findings that it is an inconvenient forum under the circumstances and that a court of another jurisdiction is a more appropriate forum. *See* Ark. Code Ann. § 9-19-207(a). Arkansas Code Annotated sections 9-19-207(b) & (c) provide:

> (b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another State to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> > (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;
> > (2) the length of time the child has resided outside this State;
> > (3) the distance between the court in this State and the court in the State that would assume jurisdiction;
> > (4) the relative financial circumstances of the parties;
> > (5) any agreement of the parties as to which State should assume jurisdiction;
> > (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
> > (8) the familiarity of the court of each State with the facts and issues in the pending litigation.

> (c) If a court of this State determines that it is an inconvenient forum and that a court of another State is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated State and may impose any other condition the court considers just and proper.

Discussion

In arguing that the circuit court erred in declining jurisdiction and transferring the case to North Carolina, appellant asserts that had the circuit court properly considered the eight factors it would have rendered Arkansas the continuing convenient forum for this case. Appellant relies on the connections the children have to Arkansas, including that she has always lived here, and that the children's half sister, grandmother, and extended maternal family live in Arkansas. She also points out that appellee lives approximately nine hundred miles away, and her financial circumstances have never been favorable, which creates an "additional road block" to her visitation with the children.

Appellant asserts that the most significant factor to be analyzed is the familiarity of the Arkansas circuit court with the facts and issues of the case. It is undisputed that the circuit judge was clearly familiar with the parties, and appellant claims that he recognized their respective "propensities," specifically referring to the circuit judge noting the "games" being played by appellee in interfering with appellant's visitation with the children. She contends that this special knowledge of the parties and the history of the case is crucial to the fair determination of the pending litigation. Appellant argues that there is no way that the court in North Carolina can have as complete an understanding of the history of appellee's deliberate attempts to alienate the children from her and the many steps he has taken to deny a meaningful relationship between them. She cites examples such as appellee: failing to bring

the children with him for the hearing, which further delayed her visitation; anonymously calling DHS to investigate appellant's home prior to the hearing; and taking the children to a psychiatrist just days before visitation to obtain an opinion that they cannot return to Arkansas.[1] She maintains that the Arkansas circuit court has special insight into all of appellee's games to which she has been subjected throughout her attempts to maintain a relationship with her children since the parties' divorce in 1999.

The circuit court noted in its decision to decline further jurisdiction in favor of the District Court of Wayne County, North Carolina, that the children have lived there for the past several years and that recent relationships touching on the children's welfare are now located in that state. The circuit court also made a finding that the majority of the pertinent evidence regarding custody and visitation reposes in North Carolina.

While the circuit court set forth two of the factors to be considered under Ark. Code Ann. § 9-19-207, appellant claims that the majority of the remaining factors would support keeping the case in Arkansas. She contends that it is a gross miscarriage of justice to hold otherwise. We disagree.

In *Uttley v. Bobo*, 97 Ark. App. 15, 242 S.W.3d 638 (2006), this court determined that Arkansas was not an inconvenient forum where there were several occasions during the litigation when it was acknowledged that Arkansas would maintain jurisdiction, where the father remained in Arkansas, the children continued to travel to Arkansas for visitation, and

[1]Appellee points out that the DHS investigation was initiated by the children's therapist and was conducted in October 2005, almost nine months prior to the July 2006 hearing; he also explains that the only time she was denied visitation was in the second half of the summer of 2005, upon advice of the therapist.

the Arkansas circuit court was familiar with the case because it had been ongoing for approximately six years. In *Uttley*, the children had been living in the United Kingdom with their mother for approximately five years. Appellee distinguishes *Uttley*, where the mother had no argument to present that an English court would be an appropriate form to make a child-custody determination. Conversely, in the instant case, appellee presented evidence that he and the children had resided in North Carolina for almost three and one-half years, and that substantial evidence concerning the children's care, education, protection, health, and personal relationships now exists in that state as well. Additionally, the judges from the relevant courts in Arkansas and North Carolina conferred on the matter and came to the conclusion that North Carolina could assume jurisdiction if the same was relinquished in Arkansas and that North Carolina had the proper procedures in place to proceed with both pending and future issues concerning the children.

Appellee also cites *Mellinger v. Mellinger*, 26 Ark. App. 233, 764 S.W.2d 52 (1989), for the proposition that a circuit court may decline to exercise jurisdiction where it finds it to be an inconvenient forum, taking into account whether another state is the children's home state or has a closer connection with the children and parent, or that evidence of present and future care is more readily available in another state. Both Arkansas and North Carolina statutes define "home state" to mean 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. *See* Ark. Code Ann. § 9-19-102; N.C. Gen. Stat. § 50A-102. Additionally, North Carolina law provides that a North Carolina court may modify a child-custody determination made by a court of another state if the North Carolina court has

jurisdiction to make an initial determination and a court of North Carolina would be a more convenient forum. N.C. Gen. Stat. § 50A-203. Accordingly, appellee asserts that North Carolina would have jurisdiction to hear matters concerning the care and custody of the parties' minor children as a "home state" and would have jurisdiction to modify the child-custody determination if this court determines that it would be a more convenient forum.

Appellee argues that a North Carolina court would be able to expeditiously decide future matters related to the care and custody of the parties' children. On July 24, 2006, appellee filed a complaint[2] in the District Court of Wayne County, North Carolina, asking, in part, for the North Carolina court to make inquiry of the State of Arkansas and accept jurisdiction over the custody of the minor children. He also requested that the State of North Carolina give full faith and credit to the previous Arkansas order. The Arkansas circuit judge conferred with the North Carolina judge on the matter, and the North Carolina judge responded that "North Carolina would only be allowed to assume jurisdiction if in fact Arkansas were to relinquish same." While appellee appears to be asking for this court to affirm the circuit court's decision so that he may proceed with *previously* filed litigation, the analysis would apply to issues that subsequently arise as well.

There was significant evidence presented that definitely favored appellee's position, including the fact that since February 2003, the children have spent only approximately eighteen weeks, or less than ten percent of their time, in Arkansas. In 2003, appellant ended her eight-week visitation period two weeks early, asking appellee to pick the children up

[2]This complaint was filed as case number 06 CVD 1660.

because she was moving in with a boyfriend and she did not have a place for them to stay. In 2004, she requested that appellee pick the children up after only five of their eight weeks of visitation had expired. In 2005 and 2006, the children spent approximately four weeks in Arkansas; however, appellee does not provide a reason for these shortfalls.

The contacts and relationships with their half-sister, grandmother, and extended maternal family appear to be de minimis at best, especially the half-sister, with whom they have no relationship and who is married with a child of her own. The children have developed significant relationships with appellee's extended family in North Carolina, including attending church with their paternal grandmother there and celebrating holidays. The children's schools, extracurricular activities, and friends are all located in North Carolina, as would be all evidence concerning those issues that might arise in future hearings. Critical evidence concerning the mental health of the children is located in North Carolina, including records of their treatment with Cindy May, a licensed psychological associate with whom the children have sought treatment since 2005 related to alleged emotional abuse inflicted by appellant.

Appellant fails to provide any support or authority for her proposition that the familiarity of the Arkansas court with the facts and issues of the case should be the overriding factor to be considered. In *Snisky v. Whisenhunt*, 44 Ark. App. 13, 864 S.W.2d 875 (1993), this court affirmed an Arkansas trial court's refusal to continue jurisdiction in a child-custody case in favor of a Florida court fifteen months after the parties consented to jurisdiction remaining in Arkansas. There the trial court, as later affirmed by this court, determined that Florida was the child's home state under the Parental Kidnapping Protection Act and the

Uniform Child Custody Jurisdiction Act. In the instant case, over three years had passed since the conclusion of the last action filed between the parties, which is twice as long as the time period considered in *Snisky*. Appellee argues that in this situation the circuit court acted well within its discretion in declining to retain jurisdiction, and he argues that the familiarity would not be as strong as before because of the approximately forty months that had elapsed since an order had been entered in the case.

Finally, appellee maintains that appellant's assertions of financial hardship are disingenuous, as her husband and his family have a very successful business, and she is gainfully employed. He discusses the discrepancy between the size and amenities of her residence versus her child-support obligation and emphasizes her poor history with respect to that obligation. There is clearly a conflict between the parties' perspectives in this matter; however, credibility and the weight to be afforded to each of their testimony is a matter for the circuit court. This court has often declared that we accord deference to the superior position of trial judges in determining the credibility of witnesses and the weight to be given their testimony. *See Downum v. Downum*, __ Ark. App. __, __ S.W.3d __ (Feb. 6, 2008).

The statute outlines the factors that are to be considered, and while the circuit court could have more thoroughly set out its analysis, nothing in the record indicates that the circuit court clearly erred in the consideration of those factors. We hold that the circuit court did not abuse its discretion in declining jurisdiction in favor of the North Carolina court; accordingly, we affirm.

Affirmed.

GLOVER and VAUGHT, JJ., agree.