RENDERED: November 22, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000030-MR

MARSHA FRANCIS KEATON BYRD — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 97-CI-00182

RONALD KEATON — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE: Marsha Francis Keaton Byrd appeals from an order of the Magoffin Circuit Court transferring the custody of her son to her ex-husband, Ronald Keaton. Because we conclude the trial court abused its discretion in denying Byrd's motion for change of venue, we vacate and remand.

Byrd and Keaton were married in December 1993. On September 16, 1995, Byrd gave birth to the only child born of the marriage, a son. On October 14, 1997, the parties were divorced by a decree in the Magoffin Circuit Court. Byrd was awarded sole custody of the child, and Keaton was awarded visitation rights pursuant to the agreement of the parties.

Byrd and the child moved to Jefferson County in January 1999. In January 2000, the child developed a chronic rectal rash. Keaton alleged that when he questioned the child about the condition, the child replied that his cousin, who was approximately two years older than he, had been putting things in his rectum. Keaton claimed that as a result of this revelation, he took the child to the Highland Regional Medical Center Emergency Room on February 4, 2000. Dr. Styer, the emergency room physician on duty at the medical center, concluded from his examination of the child that the child was normal. However, Dr. Styer indicated that sexual abuse could not be ruled out without further evaluation and testing.

At the same time, Keaton contacted authorities concerning the alleged abuse. As a result, Jerri Conley, a social worker with the Magoffin County Office of Child Protective Services, was contacted. Conley interviewed the child and Keaton, and she thereafter forwarded a report to the Jefferson County Office of Child Protective Services.

When Keaton returned the child to Byrd on February 6, 2000, he informed her of the allegations. Byrd asserted that when she tried to question the child concerning what he had told Keaton, he denied the incident ever occurred. On February 7, 2000, Byrd took the child to Dr. Wendy C. Daly, a pediatrician. Dr. Daly examined the child and confirmed that he had a rash. She also indicated that she found no signs of sexual abuse. Based on Dr. Daly's recommendation, Byrd took the child to see Therisa K. Ingram, a licensed clinical social worker. In

addition to talking with the child, Ingram also interviewed the alleged perpetrator. As a result of her investigation, Ingram concluded that the child had not been sexually abused.

On February 11, 2000, Keaton filed a motion for change of custody in the Magoffin Circuit Court. While this action was pending, Keaton moved the Magoffin District Court to award him temporary custody. Conley, as an employee of Child Protective Services in Magoffin County, assisted in filing the petition. The petition was presented to a trial commissioner, and the commissioner awarded temporary custody of the child to Keaton. However, the commissioner set aside the temporary custody order two days later after learning that Keaton had already filed a petition for change of custody in circuit court, that Dr. Daly had examined the child and had determined that the child suffered from a rash, that Ingram had interviewed both the child and the alleged perpetrator, and that both professionals had ruled out sexual abuse.

During the short time Keaton had temporary custody of the child, he took him to a pediatrician in Lexington. The child was examined by Dr. Barry Ramsey of Westside Pediatrics on February 22, 2000. Keaton informed Dr. Ramsey that he believed the child had been sexually abused. Upon completion of his examination, Dr. Ramsey concluded that the child suffered from a streptococcal perirectal rash. Furthermore, Dr. Ramsey indicated that he found no evidence of sexual abuse.

As these events were occurring, the Jefferson County Office of Child Protective Services conducted its own

investigation into the allegations of abuse and neglect. Crystal Settles, a social worker employed by that office, was assigned to investigate the allegations reported by Keaton. At the close of her investigation, Settles concluded that the allegations were unsubstantiated.

On March 8, 2000, Byrd filed a motion for change of venue from the Magoffin Circuit Court to the Jefferson Circuit Court. Byrd argued that the child had closer connections to Jefferson County than to Magoffin County. She pointed out that both she and the child resided in Jefferson County and that Jefferson County was the location of evidence concerning the child's care, education, and relationships. She further noted that the child attended day care in Jefferson County and that his pediatrician was located there. In addition, Byrd noted that the neglect and abuse allegedly occurred there. As a result, the investigation by Child Protective Services would occur in Jefferson County, prospective witnesses to the alleged occurrences were located there, and any evaluation of Byrd's home would have to occur in that county.

Keaton countered Byrd's motion for change of venue by arguing that Magoffin County had been the couple's last marital residence and was the county where the divorce and initial custody order had been entered. Further, Keaton argued that not only was his residence in Magoffin County[1] but also the residence of several of his extended family who would testify. Keaton also asserted that Magoffin County was the residence of the emergency

[1] Keaton has since moved to Fayette County.

room doctor (a witness he did not present to the court during the trial), a state trooper to whom he reported the allegations (also a witness he failed to present to the court during the trial), and Jerri Conley (the social worker who conducted the initial interviews but did not investigate the case).

In an order entered on April 17, 2000, the circuit court denied Byrd's motion for change of venue. The court concluded that, as the court in which the original divorce decree was entered, it retained jurisdiction. As to venue, the court concluded that "Magoffin Circuit Court is not an inconvenient forum because Ronald Keaton's witnesses who reside and/or work in and around Magoffin County, Kentucky." The order made no mention of the facts raised by Byrd in her motion.

Byrd immediately appealed the court's order to this court. In an opinion rendered on June 1, 2001, a panel of this court denied relief. In explaining its reasoning, this court first pointed out that the order denying the transfer of venue failed to recite the finality language required by CR[2] 54.02, thus making it an interlocutory order not subject to appeal. Further, this court noted that even if the order had contained the necessary language, the appeal would be denied as the proper avenue to challenge a venue decision was through an appeal of the final judgment. The panel of this court then remanded the action to the Magoffin Circuit Court.

In an order entered on August 2, 2001, the court directed that the case be tried by deposition. Keaton was

[2] Kentucky Rules of Civil Procedure.

allowed forty-five days to take his evidence, and Byrd was then allowed forty-five days to take her evidence. Keaton was also allowed an additional fifteen days to take rebuttal evidence. The taking of proof did not go smoothly, and on October 8, 2001, Keaton filed a motion seeking a protective order concerning Byrd's scheduling of further depositions. The court resolved the dispute by canceling all of Byrd's remaining depositions (except that of Dr. Daly) and instructing her to reschedule the remaining depositions so as to conduct them all on a single day. As a part of this order, the court granted Byrd an additional thirty days to take her proof.

On January 4, 2002, the trial court entered an order modifying the prior custody award and changing custody from Byrd to Keaton. The court stated in pertinent part as follows:

> This court finds based on factors outlined above that there has been a change in the circumstances of the child and the custodian, Marsha Keaton Byrd, and that Walker Keaton's present environment in the custody of Marsha Keaton Byrd endangers seriously his physical, mental and emotional health and the harm likely to be caused by a change of environment, that is change of custody granting Ronald Keaton custody of Walker Keaton is outweighed by its advantages to Walker Keaton.

It is from that order that Byrd appeals.

Byrd has raised numerous arguments in her brief. We conclude that two of these arguments have merit and mandate that the order be vacated and remanded. We decline to address the remainder of her arguments because it is unnecessary to do so.

The parties have properly framed the main issue in this case as one of venue rather than jurisdiction. As the Kentucky

Supreme Court stated in Pettit v. Raikes, Ky., 858 S.W.2d 171, 172 (1993), "[w]hen the custody dispute is wholly intrastate, the issue is not jurisdiction, it is venue. In such circumstances, any circuit court in Kentucky possesses jurisdiction to decide the case; the only question is which of Kentucky's 120 circuit courts is the appropriate venue." As we examine the venue issue, we will not disturb the trial court's determination that venue was properly in the Magoffin Circuit Court "absent an abuse of discretion." Lancaster v. Lancaster, Ky. App., 738 S.W.2d 116, 117 (1987).

In the Pettit case our supreme court stated that "[h]aving determined that the issue is venue and not jurisdiction, this Court's decision in Shumaker v. Paxton, Ky., 613 S.W.2d 130 (1981), controls the outcome." Pettit, 858 S.W.2d at 172. Under the authority of the Shumaker case as well as other pertinent Kentucky cases, we conclude that the trial court abused its discretion in not granting Byrd's motion for change of venue.

In the Shumaker case McCracken County was held to be the county of proper venue in a custody modification case where the father, mother, and children all lived in that county, even though the parties were divorced and custody was originally awarded in Union County. 613 S.W.2d at 132. Our supreme court noted that Kentucky's no-fault divorce law and the Uniform Child Custody Jurisdiction Act (UCCJA) (KRS 403.400-.460) "have to a great extent eroded the doctrine of continuing exclusive jurisdiction." Id. at 131. Further, the court viewed the UCCJA

"as affording some direction and guidance for the proper forum in which to maintain an action such as we have here." Id. at 132. The court found "convincing" reasons for McCracken County assuming venue to be the fact that the parties and the children resided in McCracken County for at least the preceding two years prior to the filing of the modification motion, that evidence could probably be best produced by witnesses who resided in McCracken County, that the Department of Human Resources would be required to make a report on the parties' homes which would involve witnesses in McCracken County, and that McCracken County was the forum most convenient for the parties. Id.

Citing the Shumaker case, this court, in Hummeldorf v. Hummeldorf, Ky. App., 616 S.W.2d 794 (1981), stated that the county of the parties' marital residence prior to separation, the usual residence of the children, and the accessibility of witnesses and the economy of offering proof would be relevant factors in custody modification cases. Id. at 798. In Fitch v. Burns, Ky., 782 S.W.2d 618 (1989), our supreme court held that the UCCJA "sheds light by analogy on the present problem by reason of certain policy considerations stated therein." Id. at 621. The court specifically noted the provisions of KRS 403.400, which state several general purposes of the UCCJA, including to assure that custody litigation takes place where the child and family have the closest connection and "where significant evidence concerning his care, protection, training, and personal relationships is most readily available." KRS 403.400(1)(c).

Ash v. Thompkins, Ky. App., 914 S.W.2d 788 (1996), is also very pertinent to the facts and resolution of this case. In that case the Barren Circuit Court determined that it was the county of proper venue based on the fact that the father of the child resided there. After the circuit court granted the father's custody modification motion, this court reversed the judgment and held that Hart County rather than Barren County was the county of proper venue. Id. at 789-90. The court relied on the facts that the child and mother resided in Hart County, the child's paternity had been determined in that county, and all the child's significant contacts (including the location of the child's pediatrician) were in that county. The court stressed the fact that Hart County was the county of the child's permanent residence. Id. at 790.

Considering the aforementioned authority and the provisions of the UCCJA, we conclude that the trial court abused its discretion in not granting Byrd's motion for change of venue. As we have noted, the basis for the trial court's decision was that the original decree had been entered in the Magoffin Circuit Court and that the court was "not an inconvenient forum because Ronald Keaton's witnesses who reside and/or work in and around Magoffin County, Kentucky." These reasons overlook the significant and compelling reasons why Jefferson County was the proper venue for the case. Both Byrd and her child reside in Jefferson County, and evidence of his care, protection, training, and personal relationships is most readily available there. The child's pediatrician and daycare center are located in Jefferson

County. Jefferson County is also the location of the therapist that examined the child and the alleged perpetrator. The alleged actions which precipitated Keaton's motion occurred in Jefferson County, and the Child Protective Services office in Jefferson County was charged with conducting the investigation into the allegations. That office also did an evaluation of the child's home in Jefferson County. Under these circumstances, the trial court abused its discretion in denying Byrd's motion.

Byrd's argument regarding a statement made by the trial court in its order also raises concerns. In the order granting Keaton's modification motion, the trial court stated that Byrd had relied on testimony from Dr. Daly, the pediatrician who examined the child shortly after the allegations came to light, and Crystal Settles, the social worker who conducted the investigation into the allegations. The problem with this statement by the trial court was that this evidence was not in the record when the trial court rendered its decision and was not submitted by Byrd until January 16, 2002, more than two weeks after the court's ruling.

Byrd asserts that the trial court either obtained the transcripts of the video depositions of the witnesses by prohibited *ex parte* communication or else did not consider the evidence despite having made reference to it. On the other hand, Keaton responds that Byrd should have brought this issue to the attention of the trial judge on a motion to set aside, alter, or amend the court's findings and that "[o]nly the Trial Judge can explain his findings of fact." Further, Keaton asserts that Byrd

should have filed the evidence prior to the court's final order.[3] Keaton offers no explanation as to how the trial court came to learn of this evidence or whether the trial court actually considered it.

We have concerns as to how the trial court came to consider and reject evidence by Byrd that had not yet been placed in the record. Furthermore, the trial court apparently ruled on the issue without considering the very relevant testimony of Dr. Daly and Crystal Settles. In short, we believe the order should be vacated for this additional reason.

The order of the Magoffin Circuit Court is vacated, and the matter is remanded for the entry of an order granting a change of venue to Jefferson County.

BARBER, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

John T. Byrd
Louisville, Kentucky

BRIEF FOR APPELLEE:

John C. Collins
Salyersville, Kentucky

[3] The court's order of August 2, 2001, set deadlines for taking proof. It did not, however, set a deadline for submitting the proof (for example, transcribed testimony from depositions). Furthermore, the court entered the order changing custody without giving the parties notice or any opportunity to argue their respective cases either orally or in writing. In fact, Keaton himself placed his supplemental deposition testimony and testimony from his present wife into the record after the custody order had been entered.