

RENDERED: SEPTEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001915-ME

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NO. 2008-CA-002179-ME

&

NO. 2008-CA-002180-ME

DONALENE R. DUNAWAY

APPELLANT

v.

APPEALS FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 02-CI-00145

RYAN SCOTT WHITE

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,¹ SENIOR JUDGE.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HENRY, SENIOR JUDGE: This opinion addresses three consolidated appeals brought by Donalene R. Dunaway, *pro se*, from a series of orders of the Rowan Circuit Court in a modification of child custody action.

Donalene Dunaway and Ryan Scott White were married on March 29, 1998. Their daughter, Shelbie, was born on May 15, 1998, and their son, Devin, was born on May 24, 2002. During the course of the marriage, the couple resided in Rowan County. The couple separated shortly before Devin's birth, in April 2002, and a decree of dissolution of marriage was entered on October 28, 2002. On April 17, 2003, as part of the property settlement agreement, Dunaway and White entered into a joint custody arrangement, with Dunaway serving as the primary residential custodian of the children and White receiving standard visitation with some modifications.

Almost five years later, on April 2, 2008, White made a motion to hold Dunaway in contempt of court and for sole custody of Shelbie and Devin. As grounds for his motion, he alleged that Dunaway had moved to Montana with the children without informing him. He also alleged that Dunaway had incurred three charges for driving under the influence since the dissolution of their marriage, that Dunaway's boyfriend had tried to hang himself at her house where he was discovered by Shelbie, that Dunaway's first husband was charged with vehicular homicide while driving her vehicle, and that Dunaway had broken her leg in a bar fight.

A hearing on White's motion was held before the Domestic Relations Commissioner on June 3, 2008. The DRC entered a Report and Recommendations on June 16, 2008. She recommended that joint custody should continue, but that White should serve as the primary residential parent, with Dunaway having visitation for the summer vacation, spring and fall breaks and alternate holidays. This latter arrangement was based on the DRC's understanding that Dunaway would continue to reside in Montana.

Dunaway filed exceptions to the report and a motion for a new hearing on June 25, 2008. Without holding a hearing, the trial court entered an order on July 2, 2008, overruling the exceptions and adopting the DRC's recommendations. Dunaway's attorney made a motion to withdraw on July 9, 2008. Two days later, Dunaway sought an extension of time to file a motion to alter, amend or vacate. She also informed the court that she currently owned a home and resided in Kentucky, and requested the court to review the visitation schedule, which was based on her residing in Montana. The trial court denied the motion for an extension of time. She thereafter filed a *pro se* motion to alter, amend or vacate, a motion for additional findings of fact on essential issues, and a motion for a new trial. The trial court entered an order denying the motions as untimely and an order permitting Dunaway's attorney to withdraw. On July 21, 2008, Dunaway requested the trial court to review its computations regarding the timeliness of her motions. On August 6, the trial court entered an order finding

that her motions were timely but summarily denied them. Dunaway filed her notice of appeal on September 3, 2008 (2008-CA-001915).

White thereafter filed a motion to establish child support. A hearing was held before the DRC, who filed recommendations on September 12. White filed exceptions and Dunaway filed objections. On October 7, the trial court entered an order denying the objections and adopting the DRC's recommendations, although the objections had been docketed for a hearing on October 10. Dunaway filed her notice of appeal on November 3 (2008-CA-002179).

Finally, Dunaway filed a motion for change of venue on October 17, 2008. The motion was summarily denied, and Dunaway filed her notice of appeal on November 18 (2008-CA-002180).

The three appeals were consolidated by order of this Court on February 17, 2009.

Dunaway argues that she was denied her right to due process through the ineffectiveness of her trial counsel and the errors of the trial court. We have reviewed her arguments and hold that the trial court did err in denying her motion for a hearing after she filed exceptions to the DRC's report on June 25, 2008. White contends that Dunaway waived the issue because she failed to request a hearing or oral argument. We disagree. The record shows that Dunaway did request a new hearing; indeed, the document she submitted is entitled "Exceptions to Recommendations of the Domestic Relations Commissioner and Motion for a New Hearing." Under Kentucky Rules of Civil Procedure (CR) 53.06(2), as it is

interpreted in *Kelley v. Fedde*, 64 S.W.3d 812 (Ky. 2002), such a hearing is mandatory under these circumstances. “[W]hile a full-blown evidentiary hearing is not contemplated by the rule, the parties must be afforded an opportunity for oral argument.” *Id.* at 814 (citing *Haley v. Haley*, 573 S.W.2d 354 (Ky. App. 1978)). Under the holding in *Kelley*, this case must be reversed and remanded for a hearing on Dunaway’s exceptions to the DRC’s report. Because the outcome of such a hearing could affect the terms of child support and visitation, these issues are precluded from our consideration and shall not be addressed.

The subject of Dunaway’s third appeal is the trial court’s denial of her motion for a change of venue from Rowan County to Garrard County Circuit Court, which she filed on October 17, 2008. As grounds for the motion, Dunaway stated that White had been a resident of Garrard County for five years; that she and her son from a previous marriage had been living in Garrard County for several months; that the children attended school in Garrard County; and that she and White’s employers were located in close proximity to Garrard County. Dunaway asserts that the trial court was required to hold a hearing on her motion pursuant to KRS 452.030, which states in part that “[o]n any motion for change of venue the court shall have a hearing for the presentation of evidence and arguments for and against the motion.” The provisions of Chapter 452 are not applicable to the circumstances of this case, however. KRS 452.010(2) provides that

A party to any civil action triable by a jury in a Circuit Court may have a change of venue when it appears that, because of the undue influence of his adversary or the

odium that attends the party applying or his cause of action or defense, or because of the circumstances or nature of the case he cannot have a fair and impartial trial in the county.

Dunaway's motion for a change of venue did not meet these requirements. This case does not involve a civil action triable by a jury, nor has she alleged any of the grounds set forth in the statute which are necessary to sustain such a motion. The trial court did not err, therefore, in refusing to hold a hearing on this matter.

As the appellees have stated, the correct legal basis for Dunaway's motion is the doctrine of *forum non conveniens*.

Forum non conveniens presupposes proper venue, but posits that another county where venue would be proper also is a more convenient forum, and calls for a discretionary ruling by a trial court to that effect. Thus *forum non conveniens* is a subdivision of venue requiring the exercise of trial court discretion.

Dollar General Stores, Ltd. v. Smith, 237 S.W.3d 162, 166 (Ky. 2007).

The doctrine of *forum non conveniens* is based on the recognition that there are certain instances in which a court properly vested with jurisdiction and venue may, nonetheless, dismiss an action if it determines that it is more convenient for the litigants and witnesses that the action be tried in a different forum.

Beaven v. McAnulty, 980 S.W.2d 284, 285 (Ky. 1998) (superseded by statute on other grounds).

A trial court's decision on a question of *forum non conveniens* "will not be reversed by an appellate court, except where such determination is found to be an abuse in the exercise of that discretion." *Williams v. Williams*, 611 S.W.2d

807, 809 (Ky. App. 1981). An abuse of discretion occurs when the court's "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). No allegation was made by Dunaway that appearing in Rowan Circuit Court had caused undue inconvenience or hardship to either of the parties. The Rowan Circuit Court had considered and ruled on numerous issues relating to child custody, maintenance and visitation since the dissolution of Dunaway and White's marriage in 2002. It was not unreasonable of the court to refuse to allow a change of venue under these circumstances, and its order denying the motion is therefore affirmed.

This case is reversed and remanded for a hearing on Dunaway's exceptions to the DRC's report of June 16, 2008, as mandated by CR 53.06(2). The circuit court's order denying Dunaway's motion for a change of venue is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Donalene Dunaway, *pro se*
Lancaster, Kentucky

BRIEF FOR APPELLEE:

Earl Rogers, III
Morehead, Kentucky