

RENDERED: OCTOBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000245-ME

SHANNON NICHOLE BURKE

APPELLANT

APPEAL FROM BARREN CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 00-CI-00637

KYLE ANTHONY BURKE

APPELLEE

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** * * * * *

BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; STUMBO, JUDGE;
SHAKE, SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Shannon Nichole Burke brings this appeal from a
December 7, 2009, order of the Barren Circuit Court, Family Court Division,
(family court) modifying visitation/timesharing by designating Kyle Anthony

Burke as the primary residential parent of the parties' two minor children. We reverse and remand with directions.

Shannon and Kyle were married February 20, 1999. Two children were born of the parties' marriage – a daughter on August 2, 1999, and a son on October 19, 2001. The marriage was dissolved by decree of dissolution of marriage entered in the Barren Circuit Court, Family Court Division, (family court) on October 2, 2003. An executed property settlement agreement was incorporated into the decree. Pursuant to the agreement, Shannon was awarded sole custody of the children, and Kyle was granted visitation. Kyle was ordered to pay child support to Shannon.

Following entry of the decree, the parties filed various post-decree motions regarding visitation/timesharing and child support. By agreed order entered July 26, 2005, the parties were awarded joint custody of the children. Shannon was designated primary residential parent and Kyle was awarded visitation/timesharing.

Sometime thereafter, Shannon moved to the Louisville, Kentucky, area, ultimately residing with her children and fiancé in Jeffersonville, Indiana. Likewise, Kyle also moved to Louisville (Jefferson County), Kentucky, to reside after Shannon's relocation. As a result, neither party remained in Barren County when the proceedings now on appeal were commenced. In January 2008, the parties entered an agreed order in the Barren Circuit court allowing Shannon to reside in southern Indiana with the two children.

Relevant to this appeal, on February 13, 2009, Kyle filed a motion to modify visitation/timesharing. In her response, Shannon argued that Kentucky did not have continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)¹ and, alternatively, that Barren County was the improper forum/venue. Shannon believed that venue was proper in Jefferson County, Kentucky, or in southern Indiana, where the children resided. Ultimately, the family court concluded that Kentucky had continuing jurisdiction under the UCCJEA and that the venue was proper in Barren County. Following an evidentiary hearing, the family court granted Kyle's motion to modify visitation and designated him primary residential parent. Shannon was awarded visitation; however, no child support was ordered. This appeal follows.

Shannon contends that Kentucky lacked continuing jurisdiction to adjudicate a modification of visitation/timesharing as to the parties' children. Shannon specifically asserts that Kentucky does not have continuing jurisdiction pursuant to Kentucky Revised Statutes (KRS) 403.824(1) as she and the children now reside in Indiana.

KRS 403.824(1) is contained in the UCCJEA and provides, in relevant part:

- (1) . . . a court of this state which has made a child custody determination . . . has exclusive, continuing jurisdiction over the determination until:

¹ The Uniform Child Custody Jurisdiction and Enforcement Act is codified as KRS 403.800 to KRS 403.880.

- (a) A court of this state determines that neither the child, nor the child and one (1) 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[.]

For the reasons hereafter stated, we believe Kentucky possessed continuing jurisdiction under UCCJEA.

In *Biggs v. Biggs*, 301 S.W.3d 32, 33 (Ky. App. 2009), this Court relied upon the following comment contained in the model UCCJEA, in interpreting KRS 403.824:

[E]ven if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction . . . [sic] If the relationship between the child and the person remaining in the State . . . becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

The *Biggs* Court emphasized that a “significant connection” existed under KRS 403.824(1) if one parent continued to reside in Kentucky and exercised “at least some parenting time” in Kentucky. *Id.* at 33. The Court further reiterated that in custody cases continuing jurisdiction trumped home state² jurisdiction and stated

² KRS 403.800 defines “home state” as “the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six (6) months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period[.]”

that “it is not necessary for a child[ren] to reside in the Commonwealth in order for Kentucky to retain jurisdiction.” *Id.* at 34.

In this case, although Shannon and the children resided in Indiana, Kyle remained in Jefferson County, Kentucky. The record reveals that the children had frequent and regular visitation with Kyle in Kentucky. The children also have a half-sibling that they spend time with while in Kentucky visiting with Kyle. As such, we believe that Kyle and the children have a “significant connection” with Kentucky and that Kentucky possesses continuing jurisdiction under the UCCJEA. Thus, the family court did not err by so concluding.

Alternatively, Shannon contends that the Barren Circuit Court is not the proper venue/forum for these proceedings. Shannon asserts that neither the parties’ nor the children currently reside in Barren County and that Jefferson County, Kentucky, is the proper venue.

When considering the appropriate forum within a state for adjudication of a custody issue, the proper question is one of venue and not jurisdiction. *Wallace v. Wallace*, 224 S.W.3d 587 (Ky. App. 2007). To determine proper venue, the same factors relevant to a jurisdictional issue under UCCJEA (KRS 403.824 and KRS 403.834) are utilized for guidance in a venue issue as to interstate custody issues. *Id.* And, our review of a circuit court’s decision upon a motion for change of venue is for abuse of discretion. *Stipp v. St. Charles*, 291 S.W.3d 720 (Ky. App. 2009). An abuse of discretion occurs when the circuit

court's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001).

In the case *sub judice*, the parties were married in Barren County, Kentucky. The decree of dissolution was entered in Barren County in 2003. Sometime thereafter, Shannon moved to Jefferson County, Kentucky. Kyle also later moved to Jefferson County. During 2006, Shannon and both children moved to Jeffersonville, Indiana; a short distance from Jefferson County, Kentucky. The children attend school in Jeffersonville, Indiana. Also, at the time these proceedings were commenced, Kyle lived in Jefferson County, Kentucky. Kyle's child from a previous marriage visits regularly with him in Jefferson County and gets along well with the children during visitation.

From the record, it is uncontroverted that neither party nor the children currently reside in or have significant connection with Barren County. KRS 403.824; KRS 403.834. The children's school is in Jeffersonville, Indiana, and they spend considerable time in Jefferson County, Kentucky with their father and often with his child from a previous marriage. Also, there no longer exists substantial evidence as to the children's care, protection, education, or relationships in Barren County. KRS 403.824; KRS 403.834. Given the specific facts of this case, we are of the opinion that Jefferson County, Kentucky, is the proper forum to litigate this matter and Barren County is not. The circuit court abused its discretion by concluding otherwise.

Accordingly, we reverse the circuit court's order and remand with directions to transfer this case to Jefferson County for proceedings thereon.³ Additionally, the prejudgment status of the parties shall be restored and maintained pending transfer to Jefferson County. Thus, Shannon is restored to her role as primary residential parent, and Kyle shall be permitted visitation as previously ordered.

For the foregoing reasons, the order of the Barren Circuit Court is reversed and this cause is remanded with directions to transfer this case to the Jefferson Circuit Court, Family Court Division.

ALL CONCUR.

BRIEF AND ORAR ARGUMENT
FOR APPELLANT:

Benjamin D. Rogers
Glasgow, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

John B. Gardner
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³ Although we do not reach the merits of Shannon's arguments, we, nevertheless, are compelled to express concern for the legal basis surrounding the circuit court's finding of facts as expressed in the December 7, 2009, order designating Kyle as primary residential parent. In particular, this Court is unaware of any contemporary legal precedent supporting the circuit court's belief that Shannon's "unmarried cohabitation living arrangements is inherently unstable" because it is in "denigration of marriage." Likewise, this finding appears totally inconsistent with the court's order entered January 23, 2008, that approved the parties' custodial and living arrangements. As this case is being transferred to Jefferson County, the issue is now moot.