

RENDERED: NOVEMBER 12, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001768-ME

TONY D. BAUMGARTNER, SR. AND
CONNIE G. BAUMGARTNER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 09-CI-502004

TONY D. BAUMGARTNER, JR. AND
AIMEE M. BAUMGARTNER
(NOW LEE)

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS AND WINE, JUDGES.

ACREE, JUDGE: Tony Baumgartner, Sr. and Connie Baumgartner (collectively Grandparents¹) appeal the August 28, 2009² order of the Jefferson Family Court

¹ Ms. Baumgartner is not the biological grandmother of the child at issue.

² All events hereinafter occurred in 2009 unless otherwise stated.

declining to exercise jurisdiction over their petition for custody of their minor grandchild (Child). The family court determined that, although it had continuing exclusive jurisdiction over the matter, Texas was a more convenient forum.

Because we find Kentucky did not have continuing exclusive jurisdiction over the matter pursuant to Kentucky Revised Statute (KRS) 403.824, we affirm.

Child was born in Texas but moved to Kentucky with her parents, Tony Baumgartner, Jr. (Father) and Aimee Baumgartner (Mother), when she was three weeks old.³ Grandparents, who live in Kentucky, became active in her life.

Sometime later Mother was granted an Emergency Protective Order (EPO) against Father, and divorce proceedings ensued. The Shelby Circuit Court disposed of all matters related to the divorce, the initial custody determination, and the EPO.

Mother and Child resided with Grandparents for a brief period after the petition for dissolution was filed.

Mother and Father later reconciled and began cohabitating; Child lived with them. Grandparents became concerned about this living arrangement and sought custody of Child in a petition filed on June 10 in Jefferson County. Mother and Father were served on June 11 in Kentucky. On June 12, Mother, Father, and Child relocated to Texas.

Before the family court, Mother and Father argued Kentucky no longer had jurisdiction over the matter, and the court initially agreed. The family court changed its position, however, upon Grandparents' motion pursuant to Kentucky

³ Child was four years old at the time the petition was filed.

Rule of Civil Procedure (CR) 52 and CR 59.05. The court ruled that while Kentucky did retain continuing exclusive jurisdiction pursuant to KRS 403.824(1)(b), Texas was a more convenient forum for the matter and dismissed it pursuant to KRS 403.834. This appeal followed.

Grandparents have raised a number of grounds on which they believe the family court should have determined Kentucky was the proper forum for modification of the custody order. Because we find Kentucky lost continuing exclusive jurisdiction pursuant to KRS 403.824, we need not address them all.

“Whether a trial court acts within its jurisdiction is a question of law; therefore, our review is *de novo*.” *Biggs v. Biggs*, 301 S.W.3d 32, 33 (Ky.App. 2009)(citing *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004)). We reverse a finding of fact only when the family court’s determination was clearly erroneous. CR 52.01. Further, “a correct decision will not be disturbed on appeal merely because it was based on an incorrect ground or reason[.]” *Haddad v. Louisville Gas & Elec. Co.*, 449 S.W.2d 916, 919 (Ky. 1969)(citing 5 Am.Jur.2d, *Appeal and Error*, § 727, p. 170. We may therefore affirm the dismissal of the action if dismissal was appropriate, but for a reason other than that expressed by the family court.

Kentucky adopted the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968 to govern Kentucky’s jurisdiction over interstate custody disputes. *Williams v. Bittel*, 299 S.W.3d 284, 288 (Ky.App. 2009). The Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), codified in KRS 403.822 *et seq.*, was

adopted in 2004 to replace the UCCJA and bring Kentucky law into conformity with the federal Parental Kidnapping Act. *Id.* Broadly speaking, the UCCJEA was designed “to avoid jurisdictional conflict and competition in custody matters.” *Id.*

In the instant case, the family court determined KRS 403.824(1)(b) bestowed jurisdiction upon Kentucky courts, but subpart (1)(a) of the same statute did not. Grandparents now argue the family court erred in failing to find jurisdiction pursuant to KRS 403.824(1)(a), but that any such error was harmless because the court found it had exclusive continuing jurisdiction under KRS 403.824(1)(b) and proceeded accordingly.

The starting point for understanding the proper application of the jurisdictional statutes is KRS 403.822(1) because it “is the exclusive jurisdictional basis for making a child custody determination by a court of this state.” KRS 403.822(2). When Mother filed her petition to dissolve her marriage to Father in Shelby Family Court, that court acquired “jurisdiction to make an initial child custody determination [because Kentucky was] the home state of the child on the date of the commencement of the proceeding[.]” KRS 403.822(1)(a); *see also* KRS 403.800(3), (4), (8)(defining “Child custody determination,” “Child custody proceeding,” and “Initial determination”). The Shelby Family Court, having “made a child custody determination consistent with KRS 403.822 or 403.826 [maintained] exclusive, continuing jurisdiction over the determination *until*:

(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; *or*

(b) A court of this state or a court of another state determines that the child, the child's parents, and any other person acting as a parent do not presently reside in this state.

KRS 403.824(1)(a), (b)(emphasis supplied).

The Grandparents' petition seeking modification of custody, as defined by KRS 403.800(11), was not filed in Shelby Family Court but in Jefferson Family Court. Even if we presume both that Jefferson Family Court had concurrent jurisdiction with Shelby Family Court and that Grandparents were "person[s] acting as a parent[s]" as defined in KRS 403.800(13), we still must conclude that the jurisdiction of both courts terminated when the Jefferson Family Court determined that "the Court does not have exclusive, continuing jurisdiction under KRS 403.824[(1)](a) due to [Child's] current lack of a significant connection with Kentucky." (Jefferson Family Court Order entered August 28, 2009, Record 186). Much of the remainder of the Jefferson Family Court's Order is irrelevant.

The Jefferson Family Court's conclusion that "Kentucky does maintain exclusive, continuing jurisdiction under KRS 403.824[(1)](b)" is wrong and illustrates a misreading of the statute. As described above, jurisdiction is not *conferred* by KRS 403.824; that statute explains how jurisdiction *terminates*. Once the circumstances described *either* in subsection (1)(a) *or* (1)(b) are found to exist, jurisdiction ends.

Additionally, the family court's finding that Grandparents qualified as persons acting as parents under KRS 403.800(13) was not supported by substantial evidence. A person acting as a parent is one who had "physical custody of the child or has had physical custody for a period of six (6) consecutive months" during the year preceding the filing of the petition. KRS 403.800(13)(a). This was neither pleaded nor proved.

Grandparents' evidence falls short even if we were to give the statute a broader reading as they propose. Their evidence was that they had cared for Child "often" prior to her relocation to Texas. They specifically stated they "were used as childcare providers" every other weekend and when Mother and Father were working or having a date night, and that they had purchased medicine and clothing for Child.⁴ While their affidavits reflect that they frequently took it upon themselves to ensure Child received adequate care and necessities, there is no indication they assumed parental roles. Caring for the child on weekends, on her parents' "date nights," or occasionally while Mother and Father were at work more resembles the behavior of a babysitter than that of a person acting as a parent. Likewise, paying for medicine or other necessities, while generous and helpful, does not make a party a person acting as a parent without some greater showing. Grandparents' general claims that they "cared for and supported" Child did not

⁴ Grandparents' affidavits also addressed several instances in which they believed Mother and Father had acted as irresponsible parents. However, those allegations are irrelevant to the issue of jurisdiction, and we need not discuss them.

rebut Mother's statements that Grandparents had never undertaken responsibilities so great that they assumed the role of parents.

In the absence of additional parent-like behavior, there were no facts before the family court which justified a conclusion that Grandparents were acting as parents. Applying KRS 403.824(1)(b), then, the family court should have found that neither the child, nor a parent, nor a person acting as a parent, continued to reside in Kentucky.

Grandparents' next argument is that the family court should have exercised jurisdiction pursuant to KRS 403.824(2) in conjunction with KRS 403.822. KRS 403.824(2) provides, "A court of this state *which has made a child custody determination* and does not have exclusive, continuing jurisdiction under this section *may* modify that determination only if it has jurisdiction to make an initial determination under KRS 403.822." KRS 403.824(2)(emphasis supplied). This argument fails since the Jefferson Family Court never made a child custody determination as to Child. Furthermore, the language of the statute is permissive. KRS 446.010(20). A court *may* exercise jurisdiction under the stated circumstances. Under these circumstances, it was not an abuse of discretion for the Jefferson Family Court to decline to exercise jurisdiction.

Grandparents also contend on appeal that the family court should have exercised emergency jurisdiction over the matter because the child is at risk of abuse or neglect. KRS 403.828(1) provides that:

“[a] court of this state has temporary emergency jurisdiction *if the child is present in this state* and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or harm.”

KRS 403.828(1)(emphasis supplied). The record reveals the child is no longer in Kentucky, so this statute cannot apply. The family court did not err in failing to exercise temporary emergency jurisdiction.

Because Kentucky no longer retained jurisdiction over Child pursuant to either KRS 403.824(1) or KRS 403.828(1), the family court’s dismissal of Grandparents’ petition for modification of custody was proper.

WINE, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Nicole S. Bearnse
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