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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000698-ME

H.B. APPELLANT

APPEAL FROM KENTON FAMILY COURT
v. HONORABLE LISA BUSHELMAN, JUDGE
ACTION NOS. 14-J-01133, 14-J-01133-001, 14-J-01150, & 14-J-01150-001

A.B.; S.B.; P.[M.]B.; A.[M.]B.; AND
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH
AND FAMILY SERVICES APPELLEES

AND

NO. 2015-CA-001017-ME

A.B. APPELLANT

APPEAL FROM KENTON FAMILY COURT
v. HONORABLE LISA BUSHELMAN, JUDGE
ACTION NOS. 15-D-00046 & 15-D-00046-001

H.B.;
H.B., ON BEHALF OF P.[M.]B.; AND
H.B., ON BEHALF OF A.[M.]B. APPELLEES

AND

NO. 2015-CA-001018-ME

S.B. APPELLANT

v. APPEAL FROM KENTON FAMILY COURT
HONORABLE LISA BUSHELMAN, JUDGE
ACTION NOS. 15-D-00047 & 15-D-00047-001

H.B.;
H.B., ON BEHALF OF P.[M.]B.; AND
H.B., ON BEHALF OF A.[M.]B. APPELLEES

OPINION AND ORDER
AFFIRMING
AND DENYING MOTION TO DISMISS

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE, ACREE AND MAZE, JUDGES.

MAZE, JUDGE: These consolidated appeals arise from various orders in custody, dependency, and domestic violence proceedings before the Kenton Family Court. H.B., the custodian of two minors, appeals from orders in the custody and dependency actions finding that Indiana is the home state of the children, and dismissing those actions following entry of custody orders in Indiana. A.B. and S.B., the parents of the children, appeal from domestic violence orders (DVOs)

entered against them on behalf of H.B. and the children. Finding no substantial error in any of these matters, we affirm.

These appeals arise from a long and complex procedural history. A.B. and S.B. are the mother and father, respectively, of P.M.B., A.M.B., and A.R.B. The parents and all three children were residents of Indiana. H.B. is the adult daughter of A.B. and a resident of Kentucky. On June 7, 2014, P.M.B. came to live with H.B. in Grant County, Kentucky. After P.M.B. made allegations of physical and sexual abuse against her parents, H.B. contacted the Kentucky Cabinet for Health and Family Services (the Cabinet) and the Indiana Department of Child Services (DCS). P.M.B. repeated her allegations during interviews with social workers from the Kentucky Cabinet for Health & Family Services. However, A.M.B. and A.R.B. did not confirm the allegations during interviews with the DCS.

In August 2014, H.B. attempted to obtain an Emergency Custody Order (ECO) in Grant County, but it was denied. She moved to Kenton County and filed the Petition there. With the Cabinet's cooperation, H.B. also filed a dependency/neglect/abuse (DNA) action on behalf of P.M.B. The trial court initially denied the ECO based on lack of jurisdiction. However, the court scheduled the matter for a hearing on August 21, 2014. The original petition incorrectly identified A.R.B., rather than A.B., as the mother. Thereafter, H.B. amended the petition and A.B. was properly served.

A.B. and S.B. appeared at the hearing on August 21. A.M.B. and A.R.B. were also present. While they denied the veracity of the allegations, A.B. and S.B. stipulated to the testimony. The trial court found probable cause for the continued removal of P.M.B. Consequently, the court ordered the child removed and placed with H.B.

During the course of the hearing, the trial court noted that the allegations included abuse or neglect of A.M.B. and A.R.B. H.B. completed DNA petitions in the presence of the court alleging that both children were at imminent risk of abuse or neglect and that both children were presently in Kenton County. The trial court found probable cause that these children were found in Kenton County and at risk of harm. The Court placed A.M.B. with H.B. and placed A.R.B. with the Cabinet.

Following the hearing, A.M.B. and A.R.B. disclosed that they had witnessed and had been victims of domestic violence in their parents' home. The trial court conducted a temporary removal hearing for A.M.B. and A.R.B. on August 25, 2014. The parents again stipulated to the testimony, while denying its veracity. The trial court found probable cause for the continued removal of both children and continued the previous temporary custody placements.

The trial court scheduled a status hearing for all three children on September 18, 2014. S.B.'s counsel requested a continuance to allow further discovery. Additionally, A.R.B. noted that he was about to turn eighteen and asked to be recommitted to the Cabinet. The trial court granted the request over

the parents' objections. Since A.R.B. has reached the age of majority, the issues relating to his removal are now moot and are not at issue in this appeal.

Thereafter, A.B. and S.B. moved to dismiss the petitions relating to P.M.B. and A.M.B., arguing that Kentucky did not have home-state jurisdiction over the children, and that removal of A.M.B. was improper because she came to Kentucky under a civil summons. The trial court directed the parties to brief these issues. On December 1, 2014, the trial court entered an order denying the motion. The court found that it had jurisdiction to enter an ECO order under KRS[1] 610.010, KRS 620.060, and KRS 403.828. The court further found that KRS 421.260(1) does not apply as it addresses immunity for witnesses and not parties.[2]

The trial court scheduled a hearing in the DNA action for January 9, 2015. In the interim, A.B. and S.B. filed an action in the Boone County (Indiana) Circuit Court to establish paternity and custody of A.M.B. and A.R.B. In the Kentucky action, A.B. moved to dismiss the petitions for lack of jurisdiction, or in the alternative, to transfer the matter to Indiana based upon home-state jurisdiction. On January 21, 2015, the trial court entered an order finding that Indiana is the home state of the children and dismissing the petition. Pursuant to this order, P.M.B. and A.M.B. were returned to Indiana.

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[1] Kentucky Revised Statutes.

[2] KRS 421.260(1) provides as follows:

> If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

Thereafter, H.B. filed a motion to alter, amend or vacate the order, noting that the Indiana court had not yet entered a custody order. H.B. also argued that P.M.B. had resided in Kentucky, and consequently, Kentucky had home-state jurisdiction over her. The courts in Kentucky and Indiana conferred over the matter. After determining that no Indiana custody order had been entered, the trial court ordered the temporary custody order be reinstated until the Indiana court entered a custody order. The trial court gave A.B. and S.B. six months to obtain a custody order from Indiana.

On March 13, 2015, the Indiana court entered an order assuming home-state jurisdiction over P.M.B. and A.M.B. That order also granted H.B. temporary emergency custody of the children. Shortly thereafter, the DCS filed a child protection case on behalf of the children. On April 3, 2015, the trial court entered an order dismissing the petitions, concluding that its emergency jurisdiction had lapsed. On the same date, the Indiana court entered an order directing that the children be returned to Indiana and placed in foster care.

After the trial court reinstated its temporary custody order, the children were returned to H.B.'s custody. Around the same time, on February 27, 2015, H.B. filed domestic violence petitions on behalf of herself and the children. On March 11, 2015, the trial court entered DVOs against A.B. and S.B. and granted temporary custody of the children to H.B. S.B. moved to set aside the DVOs based upon the jurisdictional issues raised in the custody and DNA actions.

On June 4, 2015, the trial court denied the motion. The court noted that the April 3 order from the Indiana court superseded its prior orders regarding custody and placement of the children. However, the trial court declined to set aside the no-contact provisions of the DVOs.

H.B. appeals from the trial court's orders finding that Indiana is the home state of P.M.B. and A.M.B. and concluding that its emergency custody jurisdiction expired once Indiana entered a custody order. She also argues that the trial court denied her notice and an opportunity to be heard on whether the risk of harm to the children in Indiana was continuing. S.B. and A.B. each appeal from the entry of the March 11, 2015 DVOs. They argue that the DVOs were entered without proper notice and opportunity to be heard, and were not supported by substantial evidence. Finally, they contend that the trial court erred in failing to set aside the no-contact provisions of the DVOs.

As a preliminary matter, A.B. and S.B. move to dismiss H.B.'s appeal as untimely. As previously noted, the trial court entered its final order dismissing the custody and DNA actions on April 3, 2015. H.B. filed a notice of appeal on May 4, referencing Case Numbers 14-J-1150-001 and 14-J-1164-001. However, the latter case number concerned A.R.B., who is not a party to this appeal. On May 8, H.B. filed a "Corrected Notice of Appeal" referencing Case Number 14-J-1133, which was the action involving P.M.B. A.B. and S.B. contend that the defect in the original notice of appeal, and H.B.'s untimely correction of that defect, precludes her appeal.

We disagree. The failure to name an indispensable party in a notice of appeal is a jurisdictional defect which cannot be remedied by the substantial compliance doctrine. *City of Devondale v. Stallings*, 795 S.W.2d 954, 956-57 (Ky. 1990), citing CR[3] 73.02. But while H.B.'s original notice of appeal incorrectly identified one of the case numbers, she correctly named P.M.B. as a party, as well as the April 3, 2015 order being appealed. This is all that CR 73.02 requires. A party's failure to comply with other rules relating to appeals shall "not affect the validity of the appeal or motion, but is ground for such action as the appellate court deems appropriate . . . ." CR 73.02(2). Since H.B. filed a timely and sufficient notice of appeal,[4] we decline to dismiss her appeal based only on the incorrect identification of the case number.

The issues in H.B.'s appeal primarily turn upon the home-state provisions of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). KRS 403.800 *et seq*. The fundamental purpose of the UCCJEA is the avoidance of jurisdictional competition and conflict with other states in child custody matters. *Wallace v. Wallace*, 224 S.W.3d 587, 589 (Ky. App. 2007). Consequently, KRS 403.822(1) provides that a Kentucky court has jurisdiction to make an initial custody determination only if:

> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home

[3] Kentucky Rules of Civil Procedure.

[4] We take notice that May 3, 2015, thirty days from entry of the final order, fell on a Sunday. Consequently, H.B. had until Monday, May 4 to file her notice of appeal.

> state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state; or
> (b) A court of another state does not have jurisdiction under paragraph (a) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under KRS 403.834 or 403.836; and
>
> 1. The child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
> 2. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships; or
>
> (c) All courts having jurisdiction under paragraph (a) or (b) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under KRS 403.834 or 403.836; or
> (d) No court of any other state would have jurisdiction under the criteria specified in paragraph (a), (b), or (c) of this subsection.

KRS 403.800(7) defines "home state," in pertinent part, to mean, "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 this case, there is no question that P.M.B. and A.M.B. both lived in Indiana with their parents for the six months immediately preceding the commencement of the child custody proceeding in August 2014. The Kenton Family Court had temporary emergency jurisdiction to make a custody determination under KRS 403.828(1) because the children were present in Kentucky and because H.B. alleged facts sufficient to find that it was "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 abuse." KRS 403.610(9) and KRS 403.620 also authorized the court to issue temporary and emergency custody orders.

However, that temporary emergency jurisdiction could only remain in effect until Indiana made the decision whether to exercise jurisdiction. KRS 403.828(2). A.B. and S.B. filed their custody action in Indiana on January 5, 2015, and the Indiana court indicated that it intended to exercise jurisdiction shortly thereafter. In fact, the trial court returned P.M.B. and A.M.B. to Indiana in January under the mistaken understanding that the Indiana court had entered a custody order. While the Indiana court did not enter a formal custody order until March 13, we agree with the trial court that Indiana did not lose home-state jurisdiction in the interim.

H.B. also argues that the trial court erred by ruling that the emergency custody order expired once Indiana issued a custody order. She further maintains that the trial court deprived her of an opportunity to be heard on whether the children were still subject to a risk of harm. However, the trial court fully complied with the requirements of KRS 403.828(3) and (4). Upon being informed that a custody proceeding had been commenced in Indiana, the trial court communicated with the Indiana court. In addition to the communication, records were exchanged between the Cabinet and the DCS, and the trial court and the Indiana court.

Although there was some initial miscommunication whether the Indiana court had entered a custody order, the trial court eventually specified that A.B. and S.B. would have six months to obtain a custody order from the Indiana court. Moreover, once Indiana entered the custody order on March 13, the trial court no longer had jurisdiction over the custody matter. Nevertheless, the trial court waited until April 3 to enter an order formally relinquishing jurisdiction to Indiana.

Furthermore, the trial court reviewed the records from the Cabinet, the Indiana court and the DCS in concluding that the children were no longer at a risk of harm. The trial court made all findings necessary to conclude that its emergency jurisdiction had expired and that Indiana was properly exercising home-state jurisdiction. In the absence of jurisdiction, the trial court properly declined to conduct any further proceedings on the matter.

In their appeals, A.B. and S.B. challenge the trial court's entry of the March 11, 2015 DVOs. The jurisdictional requirements under the UCCJEA and for entry of a DVO are different. A Kentucky court has jurisdiction to enter a DVO to "[a]ny family member or member of an unmarried couple who is a resident of this state or has fled to this state to escape domestic violence and abuse . . . ." KRS 403.725(1). Unlike the residency requirements to establish home-state jurisdiction under the UCCJEA, there is no minimum time period to establish residency for a protective order. *Spencer v. Spencer*, 191 S.W.3d 14, 17 (Ky. App. 2006).

When H.B. filed the domestic violence petition on February 27, 2015, the children had only recently returned to Kentucky under the reinstated temporary custody order, but the Indiana court had not yet entered a custody order. Since H.B. and the children were all present in Kentucky, the trial court had jurisdiction to enter a domestic violence order. Consequently, the trial court had jurisdiction to enter the DVO despite the pending custody actions in both Kentucky and Indiana.

Nevertheless, A.B. and S.B. argue that the DVO was not supported by substantial evidence required by KRS 403.740. That statute permits a court to enter a DVO following a hearing "if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur[.]" KRS 403.720(1) defines "domestic violence and abuse" as "physical injury, serious physical injury, stalking, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members . . . [.]" Under the preponderance standard, the court must conclude from the evidence that the victim "was more likely than not to have been a victim of domestic violence." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

On appeal, we are mindful of the trial court's opportunity to assess the credibility of the witnesses, and we will only disturb the lower court's finding of domestic violence if it was clearly erroneous. CR 52.01. But with regard to the trial court's application of law to those facts, this Court will engage in a *de novo* review. *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010).

At the March 11, 2015 hearing, the trial court found A.B. and S.B. had been served with the petition and had notice of the hearing. A.B. and S.B. admit on appeal that they chose not to attend the hearing either in person or by counsel. Consequently, KRS 403.735(2) did not require the trial court to continue the proceedings. Therefore, we conclude that the trial court did not violate their rights to due process by conducting the hearing in their absence.

Furthermore, KRS 403.730(1) requires the trial court to conduct a review to determine whether domestic violence or abuse exists. While that review usually consists of an evidentiary hearing, such a hearing is not necessary where the evidence is uncontested. In this case, the trial court relied upon the allegations in the petition, which were filed under oath as required by KRS 403.747(1).[5]

In particular, the petition alleged that H.B. and the children had been victims of past violence and abuse by A.B. and S.B., and that they were in fear of their safety. Although the allegations in the petition were rudimentary, the trial court also took notice of the evidence presented in the custody and DNA actions. In light of all of the evidence, we conclude that the trial court had a sufficient basis on which to find that domestic violence or abuse had occurred as defined by the statute.

Finally, A.B. and S.B. complain that H.B.'s use of the DVO process was an attempt to circumvent the ongoing proceedings in the custody and DNA actions. They further contend that the trial court's continuation of the no-contact

[5] The General Assembly repealed KRS 403.747 during its 2015 session. 2015 *Ky. Laws*, Ch. 102, § 51. The repeal became effective on January 1, 2016.

provision in the DVO interferes with Indiana's exercise of jurisdiction in its custody proceeding. The record refutes both contentions.

The trial court stated that it was aware of the proceedings in the other actions. In addition, H.B. pointed out at the hearing that there had been a no-contact order in the custody action, but it was not reinstated when the Kentucky court reasserted jurisdiction in February. The trial court had the authority to enter the no-contact order as part of the DVO, and we find no evidence that H.B. sought it for an improper purpose. Moreover, the custody and no-contact provisions of the DVO remain subordinate to the home-state jurisdiction of the Indiana court. *Bissell v. Baumgardner*, 236 S.W.3d 24, 30 (Ky. App. 2007). Therefore, we conclude that the trial court properly entered the DVO in this case.

Accordingly, the orders of the Kenton Family Court in the above-styled actions are affirmed.

IT IS FURTHER ORDERED that the motion to dismiss H.B.'s appeal is DENIED.

ALL CONCUR.

ENTERED: September 16, 2016

/s/ Irv Maze
Judge, Court of Appeals

BRIEFS FOR
APPELLANT/APPELLEE,
H.B.:

Kelly S. Wiley
Covington Kentucky

BRIEFS FOR
APPELLEES/APPELLANTS
A.B. AND S.B.:

Steven R. Jaeger
Erlanger, Kentucky

Counsel for Appellees
P.M.B. and A.M.B.

Michael Andrew Hummel
Assistant Public Advocate
Covington, Kentucky

Counsel for Appellee
Cabinet for Health and Family
Services

Kelly Alaine Leonard
Kenton County Attorney's Office
Covington, Kentucky