

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000834-ME

KENNETH NICOULIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A. CHRISTINE WARD, JUDGE  
ACTION NO. 09-CI-500663

CHRISTIANE NICOULIN (NOW MOORE)

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Kenneth Nicoulin appeals from an order of the trial court which held that Kentucky is an inconvenient forum to address continuing parenting time and custody matters. He argues that the trial court did not follow the requirements set forth in KRS<sup>1</sup> 403.834 when making this determination.

Christiane Nicoulin (now Moore) did not file a brief in this matter. We agree with

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<sup>1</sup> Kentucky Revised Statute.

Mr. Nicoulin and vacate the trial court's order and remand for additional proceedings.

Nicoulin and Moore married in 1999 and have two minor children. The marriage was dissolved in 2010. The parties were able to resolve all custody and parenting time matters through a mediated settlement agreement. The parties agreed to joint custody and neither was designated the primary residential parent. This agreement was incorporated into the dissolution decree.

On July 12, 2012, Moore moved to modify the parenting schedule in order to move to Hawaii with the children and her new husband. After an evidentiary hearing, the trial court granted Moore's motion. In its order, the trial court ordered that Moore be responsible for all costs of transportation for the children to return to Kentucky during school breaks. Moore and the children relocated to Hawaii in January of 2013.

On May 1, 2014, Nicoulin moved to modify the parenting time, return the children to Kentucky, and designate him as the primary residential parent. As a basis for this motion, Nicoulin claimed that Moore had divorced her second husband, that Moore and her second husband each have domestic violence orders entered against them in Hawaii, and that Moore's lone income will cause the children to suffer.

A hearing was eventually scheduled for January 14, 2015. Even though Moore was permitted to testify by telephone, she did not call in or participate in any way. Nicoulin testified as to the allegations in his motion. He

also testified that Moore was no longer paying for the children to return to Kentucky for visitation and that he was solely bearing these costs. Nicoulin also testified that from October of 2014 through December of the same year, Moore had no phone service and he was unable to effectively communicate with the children.

On March 31, 2015, the trial court denied Nicoulin's motion to modify parenting time. The court also, *sua sponte*, ruled that Kentucky was an inconvenient forum pursuant to KRS 403.834. The court ruled that Hawaii should be the forum to address all matters related to the children. Finally, the court ruled that it did not find it necessary to allow Nicoulin to provide additional information regarding the inconvenient forum issue because it had heard relevant evidence during the hearing. Nicoulin filed a motion to alter, amend, or vacate. That order was granted in part, but denied as to the forum issue. This appeal followed.

The matter before us concerns a matter of law; therefore, we review it *de novo*. *Addison v. Addison*, 463 S.W.3d 755, 764 (Ky. 2015); *Biggs v. Biggs*, 301 S.W.3d 32, 33 (Ky. App. 2009).

KRS 403.834 states:

(1) A court of this state which has jurisdiction under KRS 403.800 to 403.880 to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is

appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) The length of time the child has resided outside this state;
- (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (d) The relative financial circumstances of the parties;
- (e) Any agreement of the parties as to which state should assume jurisdiction;
- (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under KRS 403.800 to 403.880 if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

Nicoulin argues that the trial court erred when it did not give him the opportunity to present evidence regarding the inconvenient forum issue by not following the mandate set forth in KRS 403.834(2). We agree. The trial court

denied Nicoulin the opportunity to provide evidence regarding the factors listed in KRS 403.834(2)(a)-(h). While some of these factors may have been addressed in the hearing, there is no guarantee all relevant evidence was submitted. This is especially true considering this issue was first raised *sua sponte* by the trial court in its order denying Nicoulin's motion. Nicoulin was not aware this issue was being considered by the trial court and should be given the opportunity to fully argue it in accordance with the requirement set forth by KRS 403.834(2)

Based on the foregoing, we vacate the trial court's order and remand for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

J. Bart McMahon  
Louisville, Kentucky