

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001428-ME

TERRY WILLIAMS

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN W. WIGGINS, JUDGE
ACTION NO. 15-CI-00139

CYNTHIA MOONEY WILLIAMS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, NICKELL AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Cynthia Mooney Williams sought to modify timesharing her children had with their father, Terry Williams. The Muhlenberg Circuit Court (Kentucky court) had continuing jurisdiction over such matters following their dissolution. As Cynthia preferred to pursue such an action in her home state, she first brought a petition to domesticate and modify the Kentucky

child custody order before the Family Court of Fayette County, West Virginia, (West Virginia court). When that was denied by the West Virginia court for lack of jurisdiction, Cynthia filed a motion in the Kentucky court to transfer venue. Terry appeals from the Kentucky court's order which granted Cynthia's motion and transferred the case to West Virginia on the basis of an inconvenient forum.

Terry and Cynthia were married in Fayette County, West Virginia, in 1997. They have three children, K.B.W. (born in March 2000), V.E.W. (born in November 2003) and J.A.W. (born April 2008). The Williams lived in West Virginia a portion of their marriage and then moved to Muhlenberg County, Kentucky.

On April 2, 2015, Cynthia filed a dissolution action in the Kentucky court, along with a separation agreement drafted by her counsel. The separation agreement specified as to custody and timesharing:

The parties agree that it would be in the best interest of their three (3) minor children . . . that HUSBAND and WIFE jointly share their care, custody and control with WIFE being the primary residential custodian and HUSBAND to have the right of visitation at all reasonable times and places to be agreed upon by the parties hereto.

The parties acknowledge that following the end of the 2015 school year, WIFE shall move with the parties' children to West Virginia and the parties agree to meet in

Lexington, Kentucky for the pick up and return of the children for visitation purposes.^[1]

The Kentucky court approved the separation agreement, which was later incorporated into the decree of dissolution entered on June 9, 2015.

In 2017, Terry filed a motion for contempt in the Kentucky court regarding Cynthia's not meeting Terry in Lexington for timesharing. Ultimately, this matter was resolved with an agreed order granting Terry makeup parenting time.

On May 11, 2018, Cynthia filed a petition to domesticate and modify their Kentucky child custody order in the West Virginia court. Terry filed a motion to dismiss Cynthia's petition. In a June 22, 2018 order, the West Virginia court determined that because Kentucky is the "home state" under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), Kentucky has exclusive, continuing jurisdiction over custody determinations unless and until Kentucky determines it no longer has exclusive, continuing jurisdiction or that a court in West Virginia would be a more convenient forum. Therefore, the West Virginia court lacked jurisdiction to modify custody and took no action on Cynthia's petition. The West Virginia court continued the matter for sixty days to give

¹ We take judicial notice of the fact that depending on the actual locations in these destinations that it takes approximately three hours for Terry to drive from Muhlenburg County, Kentucky, to Lexington, Kentucky, and it takes Cynthia approximately four hours to drive between Fayette County, West Virginia, to Lexington, Kentucky.

Cynthia an opportunity to commence proceedings in Kentucky to raise the issue of it being an inconvenient forum. Cynthia filed a motion to reconsider, which was denied for lack of jurisdiction on these same grounds.

While the petition was pending before the West Virginia court, K.B.W. reached her majority and graduated from high school. On July 27, 2018, Terry filed a motion before the Muhlenberg Circuit Court to modify child support as K.B.W. was now emancipated.

On August 20, 2018, Cynthia filed a response to the motion to modify child support objecting to the Kentucky court's resolving this matter and made a motion to transfer venue to West Virginia. Cynthia argued venue was no longer appropriate in Kentucky because it was an inconvenient forum under the factors listed in Kentucky Revised Statutes (KRS) 403.834(2).

During a brief six-minute hearing on Cynthia's motion to transfer venue, the parties argued their respective positions, no testimony was provided by the parties and the Kentucky court made its ruling. The Kentucky court orally granted the motion to transfer venue to the West Virginia court, explaining after considering the factors, that West Virginia was the more convenient forum. The Kentucky court explained the financials (which had earlier been established that Terry made 75% of the money compared with 25% for Cynthia) were in favor of the transfer of venue, as was the fact that the children and Cynthia were in West

Virginia and the location of the evidence, including the location of the children, was important to consider for testimonial purposes.

The Kentucky court's order to transfer venue was entered on August 29, 2018. In the written order, no reasoning was provided for this decision. The Kentucky court clerk, via certified mail, sent the record to the West Virginia court that same day.

On September 13, 2018, an agreed order regarding amendment of child support was entered by the Kentucky court. It ordered Terry to pay child support for the two minor children in accordance with the child support guidelines.²

Terry timely appealed from the order transferring venue on September 25, 2018. As the record had already been mailed to the West Virginia court, he was unable to request which portions of the record be certified on appeal. The Kentucky court's certified record on appeal consisted of only eighteen pages (five of which were the case index) and a DVD of the hearing.³

² It is problematic for the Kentucky court to make such an order after already transferring the case to the West Virginia court.

³ The only documents in the record were the order to transfer venue, the certified mail receipt and returned receipt from the record being mailed, the agreed order amending child support with a child support worksheet attached and the notice of appeal.

This was inadequate for appropriate briefing and review. Neither party was able to adequately cite to the record; they cited to the case index instead. The lack of an adequate record was especially problematic for our review.

However, fortunately, we were able to obtain an attested copy of the record from West Virginia.⁴ This record also clarifies what occurred in the West Virginia court.

On November 21, 2018, the West Virginia court granted Terry's motion to stay proceedings pending the outcome of the appeal in the Kentucky Court of Appeals. This prudent ruling was likely made in conformance with West Virginia's adoption of the UCCJEA provision which forms our KRS 403.832 governing simultaneous proceedings, which is intended to prevent inconsistent results.

Terry argues that the circuit court improperly granted the transfer of this matter to West Virginia as Kentucky maintains exclusive, continuing jurisdiction over this matter. He argues that Kentucky, as the home state,

⁴ We are very appreciative of the assistance from the West Virginia Fayette Circuit Court Clerk in fulfilling our request so that we may properly review this matter on appeal. We believe it would be the better practice for lower courts approving a transfer of venue to not transmit the record to another court until after either the time for filing a notice of appeal has elapsed with no appeal being filed, or after the appellate process is complete. Transmitting the record prior to this time could lead to inconsistent results if the jurisdiction receiving the case begins to make rulings on the matter and then our courts determine that the order to transfer venue was improperly granted. At minimum, a complete copy of the record should be made before transferring the record to facilitate the appellate process.

continues to have significant connections to Terry and the children based on his continuing residence in Kentucky and the children visiting him, all information is as easily accessible in either state, and the record is devoid of any findings of fact by the circuit court regarding the KRS 403.834(2) factors needed to determine this is an inconvenient forum. He argues that Cynthia is forum shopping and it is inappropriate to change forums when Kentucky continued to exercise jurisdiction as recently as 2017, nothing has changed but the passage of time and that it is inappropriate for Cynthia to benefit from her voluntary relocation.

Our determination as to whether the Kentucky court properly acted within its jurisdiction in declining to exercise continuing jurisdiction in modification matters is a question of law which we review *de novo*. *Biggs v. Biggs*, 301 S.W.3d 32, 33 (Ky.App. 2009). However, once a determination is made that the court acted within its jurisdiction, its decision to decline or retain jurisdiction after considering whether the present jurisdiction is an inconvenient forum is reviewed for abuse of discretion. *Williams v. Frymire*, 377 S.W.3d 579, 589 (Ky.App. 2012).

The statutes relevant to our inquiry are KRS 403.824 and KRS 403.834. KRS 403.824 provides in relevant part:

- (1) Except as otherwise provided in KRS 403.828, a court of this state which has made a child custody determination consistent with KRS 403.822 or

403.826 has 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.

We have no difficulty concluding that Kentucky had continuing and exclusive jurisdiction pursuant to KRS 403.824(1), as interpreted by *Addison v. Addison*, 463 S.W.3d 755, 765 (Ky. 2015), which authorized the Kentucky court to continue to make rulings to modify and enforce the dissolution decree, as Terry insists, and Cynthia concedes. Pursuant to KRS 403.824, “[t]he original decree state retains continuing, exclusive jurisdiction if the child and the parent (or person acting as a parent) remaining in this state have significant connections.” *Addison*, 463 S.W.3d at 765. As originally held by *Biggs*, 301 S.W.3d at 33, and upheld by *Addison*, 463 S.W.3d at 765, “if the parent remaining in the original decree State exercises at least some visitation with the child in that state, significant connections exist.” There is no question that Terry continued to exercise some visitation with the children in Kentucky.

However, that does not end our inquiry as the Kentucky court could decline jurisdiction pursuant to KRS 403.834 if it properly determined that Kentucky was an inconvenient forum compared to West Virginia.

KRS 403.834 provides in relevant part:

- (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.

The trial court must consider and apply the statutory factors contained in KRS 403.834(2) in making such a decision. *Biggs*, 301 S.W.3d at 34-35.

Although the Kentucky court’s written decision failed to address the KRS 403.834(2) factors, it is evident from a review of the video record of its ruling from the bench that these factors were appropriately considered, and the Kentucky court believed they strongly favored its ultimate decision that Kentucky was an inconvenient forum. Its ruling was clearly based on its assessment that factors (d) (“[t]he relative financial circumstances of the parties”) and (f) (“[t]he nature and location of the evidence required to resolve the pending litigation, including testimony of the child”) strongly favored declining jurisdiction in favor of West Virginia, whose court was prepared to accept jurisdiction. The other factors were either not relevant or of limited importance. In doing so, the Kentucky court properly acted within its discretion. While the Kentucky court should have made written findings in its written order, its reasoning is clear enough from its oral order; even if this was technically an error, it would be promoting form over

substance to reverse on this basis and further delay the litigation of this matter in West Virginia. Additionally, we note that if Terry believed the Kentucky court's factual findings regarding inconvenient forum were insufficient, he should have moved for more specific findings. *See Williams v. Bittel*, 299 S.W.3d 284, 290 (Ky.App. 2009).

Accordingly, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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