

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

G.P.	:	JUDGES:
	:	
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
-vs-	:	Hon. Patricia A. Delaney, J.
	:	
L.M.	:	Case No. 16CA0005
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Morrow County Court of Common Pleas, Juvenile Division, Case No. 2014 JUCST00074

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: November 17, 2016

APPEARANCES:

For Plaintiff-Appellant:

D. JASON HALSEY
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Powell, OH 43065

For Defendant-Appellee:

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Delaney, J.

{¶1} Plaintiff-Appellant G.P. appeals the May 11, 2016 judgment entry of the Morrow County Court of Common Pleas, Juvenile Division.

FACTS AND PROCEDURAL HISTORY

{¶2} Plaintiff-Appellant G.P. (“Father”) and Defendant-Appellee L.M. (“Mother”) are the parents of four minor children. Mother and Father are not legally married, but in 2004, they entered into a ceremonial marriage.

{¶3} At the time of their ceremonial marriage, Mother and Father resided in Tennessee, close to Father’s family. Mother is from Ohio and her parents reside in Morrow County, Ohio. Mother and Father’s four children were born in Tennessee. Mother and Father would visit Mother’s family in Ohio every six to eight weeks.

{¶4} On August 23, 2013, Mother and Father moved their family to Hawai’i so Father could start a metal-roof manufacturing business. It is unknown whether the move to Hawai’i was intended to be permanent. While in Hawai’i, Mother did not have employment outside of the home and she homeschooled the children.

{¶5} On December 29, 2013, Mother asked Father to leave their home in Hawai’i. On January 31, 2014, Mother took the children and left Hawai’i after an alleged incident of physical abuse by Father. Mother and the children went to Morrow County, Ohio to be with Mother’s parents. On February 5, 2014, Mother filed a petition for an ex parte domestic violence civil stalking protection order against Father in the Morrow County Court of Common Pleas. The trial court granted the ex parte order of protection.

{¶6} Father filed an “Ex Parte Motion for Immediate Return of Minor Children to the Jurisdiction of the Family Court” with the Family Court of the Fifth Circuit of Hawai’i

on February 12, 2014. The Family Court of the Fifth Circuit of Hawai'i granted the motion and set the matter for a hearing on February 25, 2014. Mother filed a motion to dismiss for lack of subject matter jurisdiction.

{¶7} On February 21, 2014, Father filed a motion for relief from judgment from the ex parte order of protection issued by the Morrow County Court of Common Pleas. Father argued Ohio had no jurisdiction because Hawai'i was the home state of the children.

{¶8} Father filed a Complaint to Establish Father/Child Relationship and for Allocation of Parental Rights and Responsibilities with the Morrow County Court of Common Pleas, Juvenile Division, on May 6, 2014. Mother answered Father's complaint on May 12, 2014. The trial court appointed a Guardian ad Litem for the children.

{¶9} In the Morrow County Court of Common Pleas, the trial court held a full hearing on Mother's Ex Parte Order on May 20, 2014. Father was present at the hearing. On May 21, 2014, the trial court granted the order of protection against Father until September 1, 2014. The trial court further ordered that Mother would remain in custody of the children and Father would have supervised visitation with the children pursuant to a visitation schedule.

{¶10} On June 20, 2014, Mother and Father filed a Joint Notice of Withdrawal/Dismissal of Father's complaint.

{¶11} The Family Court of the Fifth Circuit of Hawai'i held a hearing on July 15, 2014 on Father's motion for immediate return of the children and Mother's motion to dismiss for lack of subject matter jurisdiction. On July 18, 2014, the court denied Mother's

motion to dismiss for lack of prosecution. The court granted Father's motion for immediate return of the children to Hawai'i.

{¶12} Mother filed a counter-complaint to establish paternity and parental rights and responsibilities with the Morrow County Court of Common Pleas, Juvenile Division on July 31, 2014. The trial court designated Mother's filing as an original complaint.

{¶13} On October 17, 2014, Mother filed an amended motion to dismiss for lack of subject matter jurisdiction with the Family Court of the Fifth Circuit of Hawai'i.

{¶14} On February 10, 2015, the trial court judge of the Morrow County Court of Common Pleas, Juvenile Division contacted the Family Court of the Fifth Circuit of Hawai'i pursuant to R.C. 3127.09 to discuss proper jurisdiction to determine custody, support, and visitation issues for the children under the terms of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The State of Hawai'i has also adopted the UCCJEA in the Hawai'i Revised Statutes Chapter 583A, et seq. The discussion between the judges was memorialized in the record on February 12, 2015. The judges agreed that neither Ohio nor Hawai'i was the home state under the UCCJEA, but Ohio was the most appropriate state for the matter to be heard based on the circumstances.

{¶15} The Family Court of the Fifth Circuit of Hawai'i held a hearing on Mother's amended motion to dismiss on March 12, 2015. On March 20, 2015, the court issued a judgment entry determining that pursuant to the factors under H.R.S. §583A-207, Hawai'i was an inconvenient forum and declined to exercise jurisdiction over Father's complaint for custody, support and visitation. The Hawai'i Intermediate Court of Appeals affirmed the judgment entry in *GP v. LP*, 138 Hawai'i 134, 377 P.3d 1052, 2016 WL 1601059 (Haw.App.2016), filed on March 31, 2016.

{¶16} Mother's complaint before the Morrow County Court of Common Pleas came on for a trial over several days in March and April 2015. The magistrate held an in camera hearing with two of the children on April 1, 2015. The parties also underwent psychological evaluations, which the magistrate considered. The GAL report recommended that custody of the children be granted to Mother.

{¶17} On June 12, 2015, the magistrate issued her decision. Relevant to the assigned errors raised by Father, the magistrate found the Morrow County Court of Common Pleas, Juvenile Division, had subject matter jurisdiction over Mother's complaint under the UCCJEA. The magistrate next recommended that based on the child support computation worksheet, Father should pay child support in the amount of \$198.58 per child per month.

{¶18} Father filed objections to the magistrate's decision. On May 11, 2016, the trial court issued its judgment entry overruling the objections to the magistrate's decision. The trial court adopted the magistrate decision (with minor modifications not relevant to this appeal). It is from this decision Father now appeals.

ASSIGNMENTS OF ERROR

{¶19} Father raises two Assignments of Error:

{¶20} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING IT HAS SUBJECT MATTER JURISDICTION OVER THE CASE.

{¶21} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CALCULATING THE CHILD SUPPORT ORDER."

ANALYSIS

Jurisdiction Over the Child Custody Dispute

{¶22} Father argues in his first Assignment of Error that the trial court abused its discretion when it elected to exercise jurisdiction over the child custody dispute. We disagree.

{¶23} The UCCJEA was drafted by the National Conference of Commissioners on Uniform State Laws to resolve interstate custody disputes and to avoid jurisdictional competition with courts of other jurisdictions. *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 833 N.E.2d 420, ¶ 20-21. Ohio adopted the UCCJEA and codified the law in R.C. Chapter 3127. Hawai'i also adopted the UCCJEA and codified the law in H.R.S. §§583A-101 et seq.

{¶24} In this case, the Morrow County Court of Common Pleas determined it had jurisdiction of the parties' custody dispute. In making the determination whether to retain jurisdiction, R.C. 3127.15(A) provides the trial court with the following jurisdictional grounds:

Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state has jurisdiction to make an initial determination in a child custody proceeding only if one of the following applies:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six 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.

(2) A court of another state does not have jurisdiction under division (A)(1) of this section or a court of the home state of the child has declined to exercise jurisdiction on the basis that this state is the more appropriate forum under section 3127.21 or 3127.22 of the Revised Code, or a similar statute of the other state, and both of the following are the case:

(a) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

(b) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(3) All courts having jurisdiction under division (A)(1) or (2) of this section 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 section 3127.21 or 3127.22 of the Revised Code or a similar statute enacted by another state.

(4) No court of any other state would have jurisdiction under the criteria specified in division (A)(1), (2), or (3) of this section.

The UCCJEA therefore provides four types of initial child custody jurisdiction: home-state jurisdiction, significant-connection jurisdiction, jurisdiction because of declination of jurisdiction, and default jurisdiction. R.C. 3127.15(A)(1) – (4); *Rosen*, ¶ 31.

{¶25} A party cannot waive a UCCJEA claim because it concerns subject matter jurisdiction and the power of the court to adjudicate the matters of a case. *Rosen*, ¶ 45. A UCCJEA claim can be raised at any time. *Id.*

{¶26} A trial court's decision as to whether to exercise jurisdiction pursuant to the UCCJEA should only be reversed upon a showing of an abuse of discretion. *In re B.M.*, 5th Dist. Holmes No. 11-CA-010, 2011-Ohio-6608, ¶ 8 citing *Hall v. Hall*, 5th Dist. Licking No. 06CA134, 2007–Ohio–2449 citing *Bowen v. Britton*, 84 Ohio App.3d 473, 478, 616 N.E.2d 1217 (4th Dist.1993). The Supreme Court of Ohio has stated that an abuse of discretion “connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

No Home State because Hawai'i Declined Jurisdiction

{¶27} The UCCJEA gives jurisdictional priority and exclusive continuing jurisdiction to the “home state” of the child. *Rosen*, ¶ 21. “Home state” means the state in which a child lived with a parent for at least six consecutive months immediately preceding the commencement of a child custody proceeding. A period of temporary absence of any of them is counted as part of the six-month or other period. R.C. 3127.01(B)(7). In this case, the trial court determined neither Ohio nor Hawai'i was the home state for the minor children. Mother and Father moved to Hawai'i on August 23, 2013. Mother left Hawai'i and went to Ohio with the children on January 31, 2014. The children resided in Hawai'i for five months and eight days before moving to Ohio. Mother filed an ex parte petition for a civil protection order with the Morrow County Court of Common Pleas on February 5, 2014. On February 12, 2014, Father filed an ex parte motion for the return of the children to Hawai'i in the Family Court of the Fifth Circuit of Hawai'i. On May 6, 2014, Father also filed a complaint for the allocation of parental rights in the Morrow County Court of Common Pleas.

{¶28} Father contends the Morrow County Court of Common Pleas erred when it asserted jurisdiction because Hawai'i is the home state of the minor children pursuant to R.C. 3127.15(A)(1) and therefore has jurisdictional priority and exclusive continuing jurisdiction over the custody case. Mother argues it is irrelevant whether Hawai'i is the home state because on March 20, 2015, the Family Court of the Fifth Circuit of Hawai'i declined to exercise jurisdiction over the custody case. On March 20, 2015, the Family Court of the Fifth Circuit of Hawai'i ruled that pursuant to the factors of H.R.S. §583A-207, Hawai'i was an inconvenient forum and declined to exercise jurisdiction over the custody case. In 2002, the Hawai'i legislature adopted the UCCJEA, codified in H.R.S. §§ 538A-101 et seq. H.R.S. § 583A-207 states:

(a) A court of this State which has jurisdiction under this chapter 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 the motion of a party, the court's own motion, or request of another court.

(b) 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:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) The length of time the child has resided outside this State;

- (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;
- (5) Any agreement of the parties as to which state should assume jurisdiction;
- (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence;
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation; and
- (9) The physical and psychological health of the parties.

{¶29} The lower court's decision to decline jurisdiction pursuant to H.R.S. § 583A-207 was affirmed in *GP v. LP*, 138 Hawai'i 134, 377 P.3d 1052, 2016 WL 1601059 (Haw.App.2016).

{¶30} The Morrow County Court of Common Pleas determined that even if Hawai'i had home state jurisdiction, Hawai'i declined to exercise jurisdiction on the basis that Ohio was the more appropriate forum. (Judgment Entry, May 11, 2016). Under R.C. 3127.15(A)(3), Ohio may exercise jurisdiction if "[a]ll courts having jurisdiction under division [3127.15](A)(1) or [3127.15](A)(2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine custody of the child * * *."

Substantial Connection Jurisdiction in Ohio

{¶31} The Morrow County Court of Common Pleas went on to affirm the magistrate's decision that Ohio could exercise jurisdiction over the custody action because Ohio had "significant connection jurisdiction" under R.C. 3127.15(A)(2). Under "significant connection jurisdiction," the statute provides:

(2) A court of another state does not have jurisdiction under division (A)(1) of this section or a court of the home state of the child has declined to exercise jurisdiction on the basis that this state is the more appropriate forum under section 3127.21 or 3127.22 of the Revised Code, or a similar statute of the other state, and both of the following are the case:

- (a) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
- (b) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

{¶32} The record supports the trial court's finding that Mother has a significant connection with the state of Ohio. Mother is from Ohio and her parents currently reside in Ohio. Mother is living with the children on her parents' property. While they lived in Tennessee, Mother and Father regularly visited Mother's parents in Ohio. Mother is employed in Ohio. There is also substantial evidence in Ohio regarding the children's care, protection, training, and personal relationships. The trial court appointed a GAL for the children at the inception of Mother's case. The older children are enrolled in school in Ohio. The children have lived in Ohio since January 2014 and the trial was held in March

2015. The children lived in Hawai'i for five months and eight days. The trial court noted it was unclear from Mother's and Father's testimony whether the move to Hawai'i was intended to be permanent.

{¶33} Hawai'i declined jurisdiction of the custody dispute and as the trial court stated, if Ohio did not assume jurisdiction, the family would be in "no man's land." Based on the record, we find the Morrow County Court of Common Pleas did not abuse its discretion when it elected to exercise jurisdiction over the child custody dispute pursuant to the UCCJEA.

Unjustifiable Conduct

{¶34} Father next argues the trial court abused its discretion when it found it could exercise jurisdiction because Father contends Mother engaged in unjustifiable conduct pursuant to R.C. 3127.22(A) by fleeing to Ohio with the children.

{¶35} R.C. 3127.22(A) states:

Except as otherwise provided in section 3127.18 of the Revised Code or another law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless one of the following applies:

* * *

(2) A court of the state otherwise having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code determines that this state is a more appropriate forum under section 3127.21 of the Revised Code or a similar statute of the state.

{¶36} R.C. 3127.22(D) defines “unjustifiable conduct” as “conduct by a parent or that parent's surrogate that attempts to create jurisdiction in this state by removing the child from the child's home state, secreting the child, retaining the child, or restraining or otherwise preventing the child from returning to the child's home state in order to prevent the other parent from commencing a child custody proceeding in the child's home state.”

{¶37} In this case, we find any argument as to the alleged issue of unjustifiable conduct is resolved by R.C. 3127.22(A)(2). Pursuant to R.C. 3127.22(A)(2), if Ohio has jurisdiction because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, Ohio shall decline to exercise its jurisdiction unless a court of the state otherwise having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code determines that Ohio is a more appropriate forum under section 3127.21 of the Revised Code or a similar statute of the state. Father’s contends Hawai’i is the home state of the children. The Family Court of the Fifth Circuit of Hawai’i found under H.R.S. §583A-207, the state of Hawai’i was an inconvenient forum and declined to exercise jurisdiction over the custody dispute. The Hawai’i Court determined Ohio was a more appropriate forum. Accordingly, even if the trial court sustained Father’s argument that Mother engaged in unjustifiable conduct in bringing the children to Ohio, Ohio is permitted by statute to exercise jurisdiction over the matter because Hawai’i declined to exercise jurisdiction because Ohio was the more appropriate forum.

{¶38} Father’s first Assignment of Error as to the decision of the Morrow County Court of Common Pleas, Juvenile Division, to retain jurisdiction of the child custody matter is overruled.

Father's Child Support Obligation

{¶39} Father argues in his second Assignment of Error that the trial court erred in calculating Father's child support obligation. We disagree.

{¶40} In *Booth v. Booth*, 44 Ohio St.3d 142, 541 N.E.2d 1028 (1989), the Ohio Supreme Court determined that the abuse of discretion standard is the appropriate standard of review in matters concerning child support. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Paat v. Paat*, 5th Dist. Delaware No. 15 CAF 03 0025, 2016-Ohio-119, ¶ 66 citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Furthermore, as an appellate court, we are not the trier of fact. Our role is to determine whether there is relevant, competent, and credible evidence upon which the factfinder could base his or her judgment. *Tennant v. Martin–Auer*, 188 Ohio App.3d 768, 2010–Ohio–3489, 936 N.E.2d 1013, ¶ 16 (5th Dist.), citing *Cross Truck v. Jeffries*, 5th Dist. No. CA–5758, 1982 WL 2911 (Feb. 10, 1982).

{¶41} Father contends the trial court miscalculated his child support obligation because the court improperly imputed income to Father. R.C. 3119.01(C)(7) states as follows regarding gross income for purposes of child support calculations: “ ‘Gross income’ means, except as excluded in division (C)(7) of this section, the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses to the extent described in division (D) of section 3119.05 of the Revised Code; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; annuities; social security benefits, including retirement, disability, and survivor benefits that are not

means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; benefits that are not means-tested and that are received by and in the possession of the veteran who is the beneficiary for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration; spousal support actually received; and all other sources of income. * * *.” We have recognized that “[t]he definitions of income under R.C. 3119.01 are broad and expansive to protect the child's best interests.” *Cooper v. Cooper*, 5th Dist. Licking No. 14 CA 100, 2015-Ohio-4048, ¶ 30 quoting *Vonderhaar–Ketron v. Ketron*, 5th Dist. Fairfield No. 10 CA 22, 2010–Ohio–6593, ¶ 48, citing *Bishop v. Bishop*, 4th Dist. Scioto No. 03CA2908, 2004–Ohio–4643, ¶ 16 (additional citation omitted).

{¶42} The statutory child support computation worksheet includes space for the assessment of each parent's income, which is defined, for a parent who is unemployed or underemployed, as “the sum of the gross income of the parent and any potential income of the parent.” R.C. 3119.01(C)(5)(b). “In deciding if an individual is voluntarily under employed or unemployed, the court must determine not only whether the change was voluntary, but also whether it was made with due regard to obligor's income-producing abilities and his or her duty to provide for the continuing needs of the child.” *Weisgarber v. Weisgarber*, 5th Dist. Stark No. 2015CA00158, 2016-Ohio-676, ¶ 25 quoting *Farrell v. Farrell*, 5th Dist. Licking No.2008–CA–0080, 2009–Ohio–1341, ¶ 20. The decision to impute income to a parent is within the trial court's sound discretion. *Id.* citing *Rock v. Cabral*, 67 Ohio St.3d 108 (1993); *Blakemore*.

{¶43} Father is the 51% owner of a metal-roofing manufacturing company located in Hawai'i. Father's brother owns 49% of the company. The evidence showed the net profit of the business in 2014 was \$117,134.00. The trial court found Father's income was \$59,738.34, which equated to 51% of the net profits. Father contends the trial court erred when it imputed income to Father. The trial court, Father contends, disregarded the evidence that demonstrated Father only earned \$400 per week from the business.

{¶44} The trial court did consider Father's statement as to his income, but also considered the evidence that showed Father paid \$15,000 in attorney's fees from the company account for the prosecution of the custody action. The trial court found Father's payment to his attorney from the company business account demonstrated Father had access to the sums earned by the company.

{¶45} We find no abuse of discretion for the trial court to impute the income of Father's company as Father's gross income.

{¶46} Father's second Assignment of Error is overruled.

CONCLUSION

{¶47} The judgment of the Morrow County Court of Common Pleas, Juvenile Division is affirmed.

By: Delaney, J.,

Farmer, P.J. and

Gwin, J., concur.