COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2009AP576
2009AP577

Cir. Ct. Nos. 2008TP17A
2008JA52A

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

NO.2009AP576
IN RE THE TERMINATION OF PARENTAL RIGHTS TO CLIVE R. O., A PERSON UNDER THE AGE OF 18:

CYNTHIA H. AND STEVEN H.,

PETITIONERS-APPELLANTS,

V.

JOSHUA O. AND KRISTINE O.,

RESPONDENTS-RESPONDENTS.

NO. 2009AP577
IN THE MATTER OF THE ADOPTION OF CLIVE R. O.:

CYNTHIA H. AND STEVEN H.,

PETITIONERS-APPELLANTS,

V.

JOSHUA O. AND KRISTINE O.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed and cause remanded with directions.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 ANDERSON, J. After Cynthia H. and Steven H. (collectively, Cynthia) filed a petition to terminate the parental rights of Joshua O. and Kristine O., the trial court stayed the matter, concluding that under WIS. STAT. § 822.27 (2007-08),[1] the Wisconsin courts are an inconvenient forum. Cynthia appeals, arguing that the trial court failed to follow the proper procedures outlined in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[2] and failed to properly examine the factors under § 822.27. We do not agree and affirm the trial court.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. ch. 822 may be cited as the "Uniform Child Custody Jurisdiction and Enforcement Act." WIS. STAT. § 822.01(1). The UCCJEA became effective in March 2006, and one of the changes from the prior UCCJA was that it contained broader definitions of child custody proceedings. Carlton D. Stansbury, *Wisconsin's Adoption of the UCCJEA Significantly Alters and Clarifies Child Custody Jurisdiction*, 26 WIS. J. FAM. L. 4, 95 (2006). WISCONSIN STAT. § 822.02(4) makes clear that the UCCJEA definition of child custody proceedings includes guardianships and termination of parental rights.

¶2 We begin by admonishing Cynthia's counsel for providing to this court an extraordinarily disingenuous recitation of the background facts. We invite the reader to review our decisions on the related guardianship and grandparent visitation disputes for an accurate factual background. *See* ***Cynthia H. v. Joshua O.***, Nos. 2008AP2456-AC and 2009AP143-CR.

¶3 On August 6, 2008, Cynthia filed a petition to terminate the parental rights of her daughter Kristine and son-in-law Joshua to their son Clive. In the TPR petition, Cynthia alleged a myriad of failures against Kristine and Joshua, including that they "have completely disassociated themselves from the child." In addition to this TPR petition, Cynthia petitioned the court for a temporary order and injunction prohibiting Kristine and Joshua from contacting or visiting Clive pending the final TPR hearing. In this petition, Cynthia alleged that Kristine and Joshua "abandoned their child."

¶4 In response to Cynthia's TPR and Temporary Injunction petitions, Kristine and Joshua brought a Motion to Dismiss for Lack of Personal Jurisdiction/Competency. This motion was essentially threefold. In it, Kristine and Joshua urged the court to decline jurisdiction under WIS. STAT. § 822.28, based upon Cynthia's unjustifiable refusal to allow them to reunite with their child when they asked to do so in February and March of 2008. Alternatively, they urged the court to find that it did not have jurisdiction because "the fact that [Kristine and Joshua] returned to [Wisconsin] and submitted to the jurisdiction of this court to contest the Petition for Permanent Guardianship … does not confer jurisdiction under [WIS. STAT.] § 822.21." Finally, they argued that if the court determined it did have jurisdiction, it should decline jurisdiction because "even though the petitioner, [Cynthia,] continues to reside in Wisconsin, substantial

evidence concerning the child and the child's care is located in Rhode Island, which has not declined jurisdiction." And, therefore, pursuant to WIS. STAT. § 822.27(1), the court should find Wisconsin to be an inconvenient forum.

¶5 A motion hearing was held on September 22, 2008, where the trial court ultimately stayed the TPR matter and declined jurisdiction based on an inconvenient forum analysis pursuant to WIS. STAT. § 822.27.[3] Cynthia appeals. Along with their response, Kristine and Joshua bring a motion for frivolous appeal.

¶6 As a general matter, custody determinations are committed to the trial court's discretion. ***Hatch v. Hatch***, 2007 WI App 136, ¶6, 302 Wis. 2d 215, 733 N.W.2d 648. A trial court properly exercises its discretion when it "examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, arrives at a conclusion that reasonable judges could reach." ***Id.*** (citing ***Guelig v. Guelig***, 2005 WI App 212, ¶44, 287 Wis. 2d 472, 704 N.W.2d 916.). We also review the trial court's application of WIS. STAT. ch. 822. In addition, we will lastly address the respondents' frivolous appeal motion pursuant to WIS. STAT. § 809.25(3). Statutory construction is a question of law reviewed without deference to the trial court. *See* ***Hatch***, 302 Wis. 2d 215, ¶6.

[3] The transcript for the TPR jurisdiction motion hearing was erroneously/inadvertently included in the record for the related guardianship matter. We found it labeled as "DOC 66" of the guardianship record. "DOC 66" is headed with the guardianship case title and case number and "Guardianship Court Trial Day 2." However, below the heading, it has the correct day of the TPR hearing and the correct appearances. We have reviewed the transcript, and it is indisputably the transcript of the TPR hearing. The TPR record on appeal is effectively supplemented to include the transcript. The clerk of the circuit court is directed to put a copy of the transcript into the correct file when the records are returned to the circuit court clerk's custody.

¶7 Our analysis is limited to a review of a procedural decision of the trial court, i.e., whether the trial court properly acted within its discretion when it stayed the matter and determined that, pursuant to WIS. STAT. § 822.27(1), Wisconsin is an inconvenient forum for Cynthia's TPR petition.

¶8 In support of Cynthia's first argument that the trial court failed to follow proper procedures outlined in the UCCJEA and failed to properly analyze the facts regarding jurisdiction, she directs us to section WIS. STAT. § 822.01(2) of the act which states:

> **(2)** The general purposes of this chapter are to do all of the following:
>
> (a) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody that have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.
>
> (b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child.
>
> (c) Discourage the use of the interstate system for continuing controversies over child custody.
>
> (d) Deter abductions of children.
>
> (e) Avoid relitigation in this state of custody decisions of other states.
>
> (f) Facilitate the enforcement of custody decrees of other states.

Along with citing this "general purposes" language, Cynthia spends time on unpersuasive case law. Nowhere in her brief does Cynthia make known to this court how the trial court "failed to properly follow procedure and analyze the facts regarding jurisdiction." This argument seems based on nothing but Cynthia's

dissatisfaction with the result. In short, Cynthia's argument is vacuous and does not succeed in persuading that the trial court erred.

¶9 Instead, we are persuaded by Kristine and Joshua's position that the trial court correctly applied the UCCJEA standard. The trial court appropriately determined that the case before it fit into the category listed in WIS. STAT. § 822.22(1)(a), which provides in relevant part:

> [A] court of this state that has made a child custody determination consistent with [WIS. STAT. §] 822.21 … has exclusive, continuing jurisdiction[4] over the determination until any of the following occurs:
>
> (a) A court of this state determines that neither the child, nor the child and one 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.

Sec. 822.22(1)(a) (footnote added).

¶10 Thus, it was reasonable for the trial court to determine that WIS. STAT. § 822.22(1)(a) was applicable because neither Clive nor his parents had a significant connection with Wisconsin—they resided in Rhode Island—and, while there certainly may be evidence in Wisconsin regarding the guardianship case and much of it may overlap with the TPR case, we cannot say that it was error for the trial court to determine that substantial evidence concerning Clive's care,

[4] The trial court made an "initial custody determination" when it denied Cynthia's petition for permanent guardianship on August 6, 2008. As a result of this determination, the trial court gained exclusive, continuing jurisdiction under WIS. STAT. § 822.22(1).

protection, training, and personal relationships was no longer available in Wisconsin now that he was residing with his parents out of state.

¶11 Having determined that it was proper for the trial court to reexamine its jurisdiction, we move to Cynthia's second argument, claiming that the trial court erred in its determination that Wisconsin is an inconvenient forum because it failed to properly examine the factors under WIS. STAT. § 822.27.

¶12 WISCONSIN STAT. § 822.27 provides in pertinent part:

> **Inconvenient forum. (1)** A court of this state that 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 the 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 all of the following:
>
> (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 that 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.
>
> (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, the court shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition that the court considers just and proper.

¶13 In short, under WIS. STAT. § 822.27(2), the trial court *must* consider all relevant factors including eight specifically listed factors in paragraphs (a) through (h). Consideration is a mental process and no magic words are needed by the trial court to show that it engaged in this process. Upon our examination of the record and the law, we are satisfied that the trial court did as the statute required it to do. We discuss each listed factor below, but hasten to reemphasize that the mental process of consideration may not always transfer onto the pages of a transcript; this does not ipso facto mean the court did not engage in consideration or that its consideration was improper.

¶14 The court began its analysis by stating on the record that it was "[l]ooking at the factors under the inconvenient forum situation" which "also apply." It did not mention factor one, "[w]hether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child." *See* WIS. STAT. § 822.27(2)(a). Domestic violence is not at issue in this case and, thus, not relevant. So, here, the trial court need not have done more to consider factor one than to read it, recognize that it did not apply and move on; we are satisfied it did this.

¶15 Factor two, "[t]he length of time that the child has resided outside this state," was considered by the court. *See* WIS. STAT. § 822.27(2)(b). Cynthia takes issue with the court's statement:

> If you look at sub (2) and the inconvenient forum factors, okay, the length of time the child has resided outside this particular state, well, this was a question of—again, it was a situation of a good decision by the respondents to basically have the child reside with a relative as opposed to foster care on the direction of a doctor.

She contends this statement shows that the court did not address how long Clive lived outside the state, as was required. We cannot agree. We interpret the court's statement differently. In acknowledging the relatively long length of time Clive had lived in Wisconsin, it implied recognition of the short period of time he had resided in Rhode Island. The court need not say magic words to have properly considered something. The court considered what it was supposed to consider; unhappily for Cynthia, it clearly did not consider the short length of time in Rhode Island to be determinative.

¶16 Factor three,"[t]he distance between the court in this state and the court in the state that would assume jurisdiction," was considered by the court in relation to the treatment of the case from the onset. *See* WIS. STAT. § 822.27(2)(c). Again, the court made an acknowledgment in noting that the distance "would be a significant difference." However, it also did not consider this distance significant enough to keep the litigation in Wisconsin. Rather, it concluded that it was fair that the litigation be held in Rhode Island, where the child and the respondents resided.

¶17 Factor four, "[t]he relative financial circumstances of the parties," WIS. STAT. § 822.27(2)(d), was specifically acknowledged by the court as one

which favored the respondents position that the litigation be in Rhode Island. The court explained, "[T]he financial circumstances of the petitioners are greater than that of the respondents, and that's why going to Rhode Island for litigation if the petitioners choose to do that … is only fair."

¶18 In considering factor five, "[a]ny agreement of the parties as to which state should assume jurisdiction," *see* WIS. STAT. § 822.27(2)(e), the court stated the obvious, "No, [there is no agreement,] that's not [the case] here."

¶19 We skip to factor seven, "[t]he ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence," *see* WIS. STAT. § 822.27(2)(g), which the court considered to be "not a big factor at this time." Thus, indicating that under the facts of the particular case, this factor would not substantially impact the court's inconvenient forum determination.

¶20 With regard to factor eight, "[t]he familiarity of the court of each state with the facts and issues in the pending litigation," WIS. STAT. § 822.27(2)(h), the court said that it was "familiar with the facts here [in Wisconsin]," however, "[t]he facts are over as far as the guardianship goes" and the facts relevant to the TPR case "are different" and "being created every day" in Rhode Island. It explained that these new factors are such things as "[i]s Kristine out of her postpartum situation, is she rehabilitating herself with the counseling, with her work, and Josh's, you know, what's he doing as far as work goes and assisting in the rearing of the child." Thus, the court implied that the Rhode Island court would be in a better position to become familiar with relevant facts regarding the TPR litigation, because these are new facts and are developing in Rhode Island.

¶21 Going back to factor six, WIS. STAT. § 822.27(2)(f), "[t]he nature and location of the evidence required to resolve the pending litigation, including testimony of the child," Cynthia is correct that the court made some gratuitous comments; however, to what harm? Cynthia has not proven any. We note that the court, after listing this factor, did not specifically relate its consideration. However, as already emphasized, this lack of specific explanation on the record does not equate to error. We garner from the transcript that the court well considered each and every factor, including this factor. We also note that an explanation for factor six could dovetail the court's explanation for factor eight, since the two factors require similar considerations; it is likely that the court realized this as well and chose not to repeat itself. Regardless, the record does not reveal any error on the part of the trial court.

¶22 The record demonstrates that the trial court engaged in scrupulous and extensive deliberation to reach the result it did; we commend its handling of this entire situation. The trial court followed the proper procedures outlined in the UCCJEA and properly examined the inconvenient forum factors in order to make its determination that Wisconsin is an inconvenient forum.

¶23 As a final matter, Kristine and Joshua argue that this appeal is frivolous. We categorically agree. Upon careful review, we are convinced that Cynthia pursued this appeal in bad faith solely for purposes of harassing Kristine and Joshua. *See* WIS. STAT. § 809.25(3)(c)1. We therefore grant respondents' motion and remand to the trial court to assess attorney fees and costs against the appellants.

By the Court.—Order affirmed and cause remanded with directions.

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