Cite as 2012 Ark. App. 457

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-538

	Opinion Delivered September 5, 2012
MAFALDA CASAS-CORDERO APPELLANT	APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT [NO. DR-2010-135-4]
V.	HONORABLE GORDON WEBB, JUDGE
ANTHONY MIRA APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from a January 27, 2011, order of the Baxter County Circuit Court declining to exercise jurisdiction in a child-custody case based on a finding that the child's best interest would be better served by resolving the issues in a concurrent proceeding in the Superior Court of Los Angeles County, California. Appellant-mother asserts that the Baxter County Circuit Court erred in declining to exercise jurisdiction. We affirm.

The parties agree that the first custody order was contained in an October 2000 California divorce decree, which granted the parties joint custody of the infant child, and that appellant, without permission of the California court, moved with the child to her native Chile in 2005. They also agree that the second custody order was a California order of April 2005 granting appellee-father sole custody, denying any right of visitation to appellant, and ordering appellant to return the child to California immediately. Appellant refused to do so,

obtaining an order from a Chilean court finding that, although appellant did in fact abscond with the child, returning the child to appellee would pose a grave risk of exposing the child to "physical or psychological harm or otherwise place the child in an intolerable situation," and because the child herself said that she did not love appellee, was afraid of him, and wanted to stay in Chile.

Nevertheless, in 2008 appellant returned to the United States with the child and established a household with appellee in Baxter County, Arkansas. There the parties and child resided together until January 2010, when appellee petitioned the Baxter County Circuit Court to give full faith and credit to the 2005 California custody order and to enjoin appellant from having any contact with the child. After the trial court granted these requests, appellant filed a petition for change of custody in March 2010 asserting that, although appellee had been awarded sole custody of the child by an April 19, 2005, order of the Los Angeles County Superior Court, there had been a significant change in circumstances since the entry of that order so that it was now in the best interest of the child that full custody be awarded to appellant. Appellee, who had maintained a residence and paid taxes in California while residing in Arkansas, subsequently took the child to California where concurrent custody proceedings were instituted in the Los Angeles County Superior Court. Appellee refused to return with the child to Arkansas for scheduled hearings, pleading that doing so would cause the child severe psychological trauma, this allegation being supported by a report from Jennifer Tansey, Ph.D., a California clinical psychologist who examined, observed, and tested

the sixteen-year-old child. The Arkansas trial judge then conferred with Judicial Commissioner John Chemeleski of the Superior Court of California, County of Los Angeles, who presided over the concurrent custody proceedings and who had also presided over the proceedings resulting in both the original custody order of 2000 and the modified custody order of 2005. The trial court found that, although Arkansas did have jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) to determine custody of the child, California was a more convenient forum, and thus the Arkansas court declined to exercise jurisdiction. This appeal followed.

Appellant argues that Arkansas does in fact have jurisdiction over this child-custody dispute pursuant to the jurisdictional provisions of the Parental Kidnapping Prevention Act (PKPA), codified at 28 U.S.C. § 1738A, and those of the UCCJEA, codified at Ark. Code Ann. § 9-19-101 *et seq*. We agree. It is clear from the record that Arkansas had been the child's home state for over one year at the time the custody proceedings were instituted and that the Arkansas trial court properly held that it had the authority to decide the custody dispute. *See* 28 U.S.C. § 1738A(c)(2)(A)(i); Ark. Code Ann. § 9-19-1203 (Repl. 2009).

It is equally clear that the Superior Court of Los Angeles County, California, also had jurisdiction over this matter. Appellee instituted a proceeding in that court seeking an injunction to prevent appellant from having contact with the child and seeking enforcement of the 2005 child-custody order entered by that court. Appellee submitted a sworn statement pursuant to California Rule of Court 5.52(a) declaring that he had left Arkansas with the child

and sought the protection of the California court because appellant had committed child abuse and had abducted the child in the past, and because the child was threatening suicide should she be required to spend any time with appellant. This was supported by a report from Dr. Tansey, who was treating the child, stating that the child suffered from post-traumatic stress disorder as a result of her abduction to Chile by appellant, rendering her anxious, depressed, and unable to resist appellant's demands if left alone with her. Dr. Tansey stated that the child's health required a controlled, safe environment free from any possibility of unpredictable intrusion from appellant, and that failure to provide her with such an environment could result in both permanent psychological damage and re-abduction. This was a sufficient allegation that the child was threatened with maltreatment or abuse to permit the California court to exercise temporary emergency jurisdiction pursuant to California Family Code § 3424(a). Furthermore, once a California court has made a child-custody determination under specified provisions of California's UCCJEA, the court generally retains exclusive, continuing jurisdiction over the determination while a parent remains a resident of California, *In re Marriage of Wahl*, 137 Cal. Rptr. 3d (6th Dist. 2012), and a parent is considered to be a California resident for purposes of this determination if he maintains a functional residence available for his use at all times. *In re Marriage of Nurie*, 98 Cal. Rptr. 3d 200 (1st Dist. 2009).

The UCCJEA, as adopted by both Arkansas and California, requires that a court, upon learning that a child-custody proceeding has been commenced in another state having

jurisdiction, is to stay its proceeding and communicate with the court of the other state to determine which court is the more appropriate forum. *See* Ark. Code Ann. § 9-19-206 (Repl. 2009); Cal. Fam. Code § 3426(b). The courts did so communicate in this case, leading the Arkansas court to find that the Superior Court of California, County of Los Angeles, was the more appropriate forum because of Commissioner Chemeleski's extensive prior involvement in the case and the ready availability of the child's treating psychologist, and to enter the order to that effect which is now before us on appeal.

Arkansas Code Annotated section 9-19-207(b) (Repl. 2009) details the procedure to be followed in deciding which state is the more appropriate forum in such situations:

> 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; and

> (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

Appellant does not argue that this finding was contrary to the evidence but instead asserts that there was no evidence whatsoever submitted to the trial court and that "[a]ppellee merely relied upon legal arguments without presenting any testimony. Thus, it was an error by the trial court to decline jurisdiction in this matter." Appellant's assertion is not supported by the record. Both parties were directed to file briefs setting forth their positions on this issue and citations to legal authority and, although appellant neglected to include them in her abstract or addendum, both parties did file briefs with the trial court, attaching affidavits and factual exhibits to their briefs. In her reply brief, appellant dismisses this evidence and argues that a hearing was necessary to decide the issues. We rejected an identical argument in *Piccioni v. Piccioni*, 2011 Ark. App. 177. We hold that the affidavits and exhibits submitted to the trial court were sufficient to allow the trial court to resolve the relevant issues of fact as required by Ark. Code Ann. § 9-19-207(b). Furthermore, although we have not been asked by appellant to determine where the preponderance of the evidence lies, our review of the full record leaves us with no doubt that the trial court's findings were supported by the evidence in this case.

Finally, appellant argues that the trial court erred in failing to give full faith and credit to the Chilean order, entered subsequent to the 2005 California order, by which the Chilean court declined to return the child to California pursuant to the Hague Convention. We need

not address this issue because it was not raised or ruled on below; appellant did not seek modification of the Chilean order but instead expressly sought modification of the California custody order entered in 2005 granting custody to appellee and ordering her to return the child from Chile—an order with which she failed to comply. Even were the issue before us, we would find no error because "[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Hague Convention, art. 19.

Affirmed.

GRUBER and HOOFMAN, JJ., agree.

Worsham Law Firm, P.A., by: *Richard E. Worsham* and *Brooke F. Steen*, for appellant.

Caldwell Law Office, by: *Theresa L. Caldwell*, for appellee.