

Case Summary

This appeal stems from a domestic relations dispute, brought by Tamara Bonebrake (“Wife”) against non-resident Michael Bonebrake II (“Husband”), to obtain child support and custody rights over the parties’ minor child, M.B. Wife filed her petition for dissolution of marriage in the Marshall Superior Court (“Indiana court”). Husband filed his action for dissolution in the District Court, Jefferson County, Colorado (“Colorado court”). The Indiana court determined it had jurisdiction to hear the case, notified the Colorado court, and subsequently granted Wife temporary physical custody of M.B. Concluding the Colorado court acquiesced in the Indiana court’s assumption of jurisdiction, we affirm the trial court on the jurisdictional issue. Further, noting the trial court modified the order from which this appeal arises and substantially changed the order by awarding permanent primary physical custody of M.B. to Husband and terminating the order of support against him, the remainder of this appeal is moot.

Issues

The parties raise several issues for our review, which we restate as follows:

1. Whether the trial court appropriately assumed jurisdiction for the purpose of entering child custody and child support orders;
2. Whether the trial court’s October 31, 2005, order impermissibly sought to punish Wife for leaving Colorado and ignored the best interests of the child;
3. Whether the trial court abused its discretion by awarding temporary physical custody of M.B. to Wife subject to the modification of awarding permanent physical custody to Husband if Wife failed to move with M.B. to Colorado within 120 days of the court’s order;
4. Whether the trial court appropriately denied Husband’s petition for attorney fees; and

5. Whether the trial court erred in denying Husband custody of the child.

Facts and Procedural History

The parties were married on May 20, 2000, and lived in Colorado. The parties have one minor child, M.B. In February 2003, Wife left Colorado for Indiana, taking M.B. with her. Wife filed a Petition for Dissolution of Marriage in the Indiana court on September 4, 2003. Husband filed a Motion to Dismiss All Dissolution Proceedings on November 7, 2003.

Husband filed a Petition for Dissolution of Marriage and Child Custody on November 18, 2003 in Colorado. He also filed, in the Indiana court, a Motion for Judicial Notice of Foreign Law on December 8, 2003.

On December 19, 2003, the Indiana court issued its Order, finding it had jurisdiction to determine the case. The Indiana court notified the Colorado court of this Order. The Indiana court subsequently issued a provisional order, on December 30, 2003, granting Wife temporary physical custody of M.B. and ordering Husband to pay support.

On March 5, 2004, the Colorado court issued its Order Re Jurisdiction. In that order, the Colorado court stated:

6. The Superior Court of Marshall County Indiana has made a custody determination as that is defined in the Colorado UCCJEA and the Indiana UCCJA. This Court is required to give deference to that finding under the UCCJEA, unless that Court declines to exercise its jurisdiction. Judge Bowen [of the Indiana court] has elected to retain jurisdiction and that decision will be respected by this Court.

Appellee/Cross-Appellant's Appendix at 54. The Colorado court further determined that although it must defer to the Indiana court with respect to child custody issues, it need not defer on the matters of support, maintenance, property and other matters adjunct to the

marital relationship. Id. at 55. The Colorado court subsequently granted the divorce, and made distribution of property and debt.

On October 31, 2005, the Indiana court issued its Opinion and Judgment, which addressed custody, visitation, and child support issues regarding M.B. With respect to custody of M.B., the Indiana court ordered the following:

The court thus determines that the parties are awarded the joint legal custody of [M.B.], with the Wife being awarded the temporary primary physical custody of the child for a period of 120 days, upon the express condition that the Wife and child return to the State of Colorado within said time. If the Wife and child so return within the time set, the award of primary physical custody to the Wife will become a permanent custody order upon such return. Should the Wife and child not return to Colorado within the time set, unless modified by agreement of the parties or by order of the court, then the Wife's custody shall terminate and primary physical custody shall be granted to the Husband, who shall then be entitled to petition the court to award him custody as provided here based on the Wife's failure to comply with the express condition upon which she was granted the temporary physical custody and which would have entitled her to the permanent primary physical custody had she complied with said condition.

Appellant's Appendix at 19.

On February 15, 2006, Wife filed her Notice of Appeal, and the instant appeal ensued. Also on February 15, 2006, Wife filed her Motion For Stay of Order or Extension of Time To Comply with Court Order. After a hearing, on February 28, 2006, the Indiana court declined to grant a stay but extended all proceedings regarding custody to June 2, 2006. Wife subsequently filed a Motion To Stay Order and Judgment in the Indiana Court of Appeals, requesting this court to find the Indiana court's judgment would cause substantial hardship on M.B. in the event this court found her appeal meritorious. This court denied

Wife's Motion to Stay Order and Judgment on May 26, 2006. Wife did not return to live in Colorado with M.B.

Subsequently, Husband filed his Amended Petition for Modification of Custody, and the Indiana court awarded him permanent primary physical custody of M.B. and terminated the order of support against Husband. See Id. at 42. In its Order On Custody Modification, filed June 27, 2006, the Indiana court addressed various issues including Wife's parenting time and temporary custody, travel costs and expenses, support, health care insurance premiums, tax exemptions, arrears, and continuing jurisdiction. With regard to jurisdiction the court stated:

This court shall continue to have jurisdiction over this cause and all matters raised herein as long as one of the parties resides in Indiana, or until such time as Indiana may be compelled as a matter of law to yield jurisdiction to another forum because of forum non convenience, or it becomes permissible to yield jurisdiction to another forum, whether legally required or not, where appropriate to do so under all the then existing circumstances.

Id. at 50.

Discussion and Decision

I. Jurisdiction under UCCJA

A. Standard of Review

An Indiana court's jurisdiction to decide custody matters having interstate dimensions, such as the instant case, is governed by the Uniform Child Custody Jurisdiction Act ("UCCJA"). In determining whether a trial court has improperly exercised jurisdiction under the UCCJA, we apply an abuse of discretion standard. In re Paternity of R.A.F., 766 N.E.2d 718, 723 (Ind. Ct. App. 2002), trans. denied. An abuse of discretion occurs when the trial

court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. Westenberger v. Westenberger, 813 N.E.2d 343, 344-45 (Ind. Ct. App. 2004), trans. denied.

B. Assumption of Jurisdiction by Indiana Court

Husband asserts the Indiana court lacked jurisdiction to enter the custody orders under Indiana's version of the UCCJA. Husband complains the Indiana court effectively usurped the power of the Colorado court when the Indiana court assumed jurisdiction on December 19, 2003, when it knew there was a pending Colorado custody proceeding. Husband argues the Indiana court's assumption of jurisdiction here violates the legislative purpose and intent of the UJCCA. Specifically, Husband maintains Colorado was M.B.'s home state in February 2003 and the Indiana court should have stayed the proceeding to give the Colorado court the opportunity to assert its jurisdiction. He argues temporary absences caused by a unilateral removal of the child by one parent from the home state do not change the home state of the child, citing Ortman v. Ortman, 670 N.E.2d 1317, 1321 (Ind. Ct. App. 1996), trans. denied. Husband further complains the Indiana court erroneously assumed Colorado could not or would not assert jurisdiction on the custody matters without some substantial cost to re-litigate in Colorado. Husband challenges this assumption as a determination outside the stricture of the UCCJA and mere speculation on the part of the Indiana court.

Husband maintains the Indiana court should have refrained from exercising jurisdiction until the Colorado court declined to exercise such jurisdiction. He asserts the Indiana court should have exchanged information on the jurisdictional question with the Colorado court before Indiana held its jurisdictional hearing, citing Bergman v. Zempel, 807

N.E.2d 146, 150 n.5 (Ind. Ct. App. 2004). Husband asserts the trial court’s jurisdictional analysis should have included the factual determination that Wife engaged in a unilateral removal and that Colorado is the forum with the closer connection between the child and its family, and Colorado continues to be the “home state” of the minor child; the court should have issued a stay of the Indiana proceedings allowing the Colorado court in its then-pending child custody proceedings to take up the issue of whether the Colorado court would decline to exercise jurisdiction over custody issues; and the Indiana court should have exercised its jurisdiction over child custody matters in Indiana only if the Colorado court first declined to assert Colorado’s jurisdiction under the “home state” test.

The UCCJA sets out the method to determine jurisdiction. Ashburn v. Ashburn, 661 N.E.2d 39, 41 (Ind. Ct. App. 1996), trans. denied. If the court becomes aware at the outset of the proceedings that the custody dispute has an interstate dimension, it must make a determination of subject matter jurisdiction pursuant to the UCCJA. Clark v. Clark, 404 N.E.2d 23, 29 (Ind. Ct. App. 1980). The trial court must first determine whether it has jurisdiction, and, if so, whether to exercise that jurisdiction. Stephens v. Stephens, 646 N.E.2d 682, 685 (Ind. Ct. App. 1995).

Thus, we consider whether the Indiana court had jurisdiction under Indiana Code section 31-17-3-3, part of Indiana’s version of the UCCJA. Under Indiana Code section 31-17-3-3(a)(1)(A), Indiana may have jurisdiction in this matter if Indiana was M.B.’s home state at the time of Wife’s petition. “Home state” is defined in Indiana Code section 31-17-3-2(5) as “the state in which the child, immediately preceding the time involved, lived with the child’s parents, a parent, or a person acting as parent, for at least six (6) consecutive months. .

. . . Periods of temporary absence of any of the named persons are counted as part of the six (6) month . . . period.”

Here, the record shows the first Indiana court order was issued December 19, 2003. Therein, the court noted Wife permanently moved to Marshall County on February 26, 2003; filed a Petition for Dissolution of Marriage on September 4, 2003; and resided in Indiana more than six months prior to filing her petition. The Indiana court entered its order stating it has jurisdiction to hear and determine this case.

There is no question that in 2003 the Indiana court was aware of the interstate dimension of the case and its affirmative duty to determine its jurisdiction prior to issuing its order. The record shows the Indiana court specifically noted in its December 19, 2003, order that it “has jurisdiction to hear and determine this case.” Appellee/Cross-Appellant’s Appendix at 37. The Indiana court notified the Colorado court of its assumption of jurisdiction. Id. at 38. Further, the Colorado court noted in its “Order Re Jurisdiction” filed March 12, 2004, that the Indiana court had elected to retain jurisdiction and “that decision will be respected by this Court.” Id. at 54. The Colorado court denied Husband’s request for it to enter orders concerning child custody, parenting time, or parental decision-making. The Indiana court specifically considered and decided it had jurisdiction and the Colorado court clearly declined to exercise jurisdiction on this issue.

The subsequent December 30, 2003, Provisional Order and October 31, 2005, Opinion and Judgment¹ are predicated on this initial assumption of jurisdiction by the Indiana court.

In its Opinion and Judgment, the Indiana court wrote:

¹ The original determination of jurisdiction found in the December 19, 2003, Order and the further Provisional Order of December 30, 2003, were made by The Honorable Robert Bowen of the Marshall Superior Court.

Thereafter, the final hearing of August 2, 2005, and the resulting October 31, 2005, Opinion and Judgment and other subsequent proceedings and orders came before The Honorable Senior Judge Donald Jones. His Motion To Correct Errors Opinion and Ruling specifically addressed the continuing jurisdictional issue:

The record discloses that the Husband challenged the jurisdiction of the Marshall Superior Court 1, and that on December 19, 2003, Judge Robert Bowen entered an order that the Court had jurisdiction to hear and determine the case. At the trial in August 2005, Husband continued to object to the Court's jurisdiction and made a continuing objection to the trial. At the commencement of the trial the Court specifically declined to revisit Judge Bowen's ruling on jurisdiction and continues to decline to revisit the issue. If on appeal it is held that the Court did not have jurisdiction of this custody action, then the case will go back to Colorado.

At the trial of this cause, the Court was not made privy to what facts or evidence, if any, were presented to Judge Bowen on the issue of jurisdiction, nor was the Court able to determine from the record the basis for the ruling. However, the Court did hear evidence that would have caused the Court to decline to exercise jurisdiction had that been presented at a hearing before the final trial. No authority has been cited suggesting that Judge Bowen would have been prohibited from changing or modifying his ruling on jurisdiction either because he thought he might have made a mistake, or because he heard evidence subsequent to his initial ruling that warranted or justified a change. A different judge presiding at the trial would not be precluded from making a different decision based on evidence presented to him at trial. Likewise, no authority has been cited suggesting that the length of time between the Court's finding of jurisdiction and the trial, when the evidence was presented that might have caused the Court to decline to exercise jurisdiction, prohibited it from declining jurisdiction if it had so chosen. Again, if on appeal it is determined that the Court had jurisdiction, but should have declined to exercise it, the issue will again go back to Colorado.

Husband in his Cross-Motion to Correct Errors raises the suggestion the Court continued to hear the case at final hearing based upon a cost/time analysis. Such was not the case. The Court had as an option that it could rule that Marshall County did not have jurisdiction, but declined to do so. It also had the option to decline to exercise jurisdiction for the reasons previously given, but declined to do so. As noted earlier, if either or both of these options is determined to be error, the case will be returned to Colorado. Based on the totality of the evidence, the Court concluded that the decision reached in this cause and the method used to effectuate it was an appropriate and better result and found no reason to revisit jurisdiction or to decline to exercise jurisdiction in this case.

Appellant's App. at 36.

... Although the court cannot determine exactly what facts or evidence were presented to the regular judge of this court, the ruling was entered December 19, 2003, finding that Indiana had jurisdiction to act in this cause. However, jurisdiction appears to be and continues to be an issue in this cause and even this trial was held over the continuing objection of lack of jurisdiction.

On November 18, 2003, while proceedings were pending in Indiana, Husband filed his Petition for Dissolution of Marriage in Colorado. Colorado ultimately dissolved the marriage of the parties and decided the property rights of the parties. Colorado however deferred to Indiana on all issues relating to custody and support.

* * *

In this case, the contacts which these parties had with Colorado, the lack of contacts which the parties had with Indiana and the surreptitious manner in which the Wife and child departed Colorado for Indiana would have resulted in this court declining to exercise jurisdiction had it heard the evidence relating to this issue at any other time than presented to the court in the final hearing. Assuming that Colorado would even accept jurisdiction at this late hour, it would require the relitigation of these issues at the cost of a substantial amount of additional time and money. Neither may be justified.

Appellant's App. at 16-17.

Under these facts, we determine the Indiana court neither abused its discretion nor misinterpreted the law when it exercised jurisdiction over the custody of M.B. We presume a trial court performed its affirmative duty to examine the question of its subject matter jurisdiction in this interstate custody dispute. Meyer v. Meyer, 756 N.E.2d 1049, 1052 (Ind. Ct. App. 2001). Further, an Indiana court may exercise jurisdiction under the UCCJA where a custody proceeding is pending in another state, if the other state has stayed its proceedings because this state is a "more appropriate forum" or because the other state has stayed its proceedings "for any other reason." The operative point is that the other state court has stayed its custody proceeding, as the Colorado court did in this case. See In re Hughes, 665

N.E.2d 929, 932-33 (Ind. Ct. App. 1996). Further, this case was originated before the Indiana court in 2003. It is in M.B.'s best interest for the case to be resolved as quickly as possible. The Indiana court has already heard the evidence and rendered its orders. As a practical matter, the modification of custody awarding Husband permanent primary physical custody of M.B. may result in the Colorado court acquiring jurisdiction over this matter in the future. Thus, based on the totality of the circumstances in this case, we find no abuse of discretion in the trial court's assumption of jurisdiction.

II. Effect of Subsequent Order

Because we find that the Indiana court properly exercised its jurisdiction, we next address the other issues raised in the case before this court. Of importance to our consideration of the issues raised is the June 27, 2006 Order On Custody Modification entered by the Indiana court which stated:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Wife's temporary primary physical custody of the parties minor child is now terminated and the Husband is awarded the permanent primary physical custody of the child and the order of support heretofore entered against the Husband and in favor the Wife is terminated effective June 2, 2006, as to both matters.

Appellant's App. at 45. Thus, the Opinion and Judgment of October 31, 2005, on which the instant appeal is based, has been substantially modified.

Here, Wife challenges the trial court's original order complaining it impermissibly sought to punish her for leaving Colorado and ignored the best interests of the child. She also asserts the trial court's award of temporary physical custody of M.B. to her subject to the modification of awarding permanent physical custody to Husband if Wife failed to move

with the child to Colorado within 120 days of the court's order improperly applied Bojrab v. Bojrab, 810 N.E.2d 1008 (Ind. 2004), and was an abuse of discretion. Likewise, several of Husband's issues on cross-appeal challenge the trial court's original order, including a challenge to the trial court's denial of his petition for attorney fees and a challenge to the award of custody of M.B. to Wife.

Inasmuch as the trial court has substantially modified its October 31, 2005, Opinion and Judgment, we now determine an appeal of the initial order will have no effect on the subsequent order. Thus, the other issues raised are, accordingly, moot. See Stratton v. Stratton, 834 N.E.2d 1146, 1149 (Ind. Ct. App. 2005) (where trial court made final custody determination and Wife is attacking validity of trial court's temporary custody determination, issue is moot); Francies v. Francies, 759 N.E.2d 1106, 1110-11 (Ind. Ct. App. 2001) trans. denied (Wife's challenge to validity of trial court's emergency custody determination was moot where trial court had since made a final custody determination); Terry v. Terry, 161 Ind. App. 293, 315 N.E.2d 379 (1974) (where wife appealed order awarding custody of minor children to husband, and while appeal was pending, trial court modified order and granted custody to wife; because order appealed from had been completely superseded, appeal of the initial order was moot).

Conclusion

Because the Colorado court acquiesced in the Indiana court's assumption of jurisdiction, we find no abuse of discretion on the jurisdictional issue. Further, with regard to the other issues raised in the appeal and cross-appeal, as the trial court in this case substantially modified the original custody determination from which the parties appeal, we

are unable to render effective relief and we find the other issues relating to the original order are moot.

Affirmed.

BARNES, J., concurs.

SULLIVAN, J., concurs in result.