

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001485-ME

KATHERINE S. BAKER

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 03-CI-504624

MARTIN BAKER

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Katherine S. Baker brings this appeal from an order of the Jefferson Family Court summarily denying her motion for an order establishing jurisdiction and for modification of parenting schedule, entered July 1, 2004. For the following reasons, we vacate and remand to the family court for an evidentiary hearing.

A brief recitation of the facts is warranted.

Appellant Katherine Baker (Kate) and Appellee Martin Baker

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

(Martin) resided in Fullerton, California during their eleven-year marriage. The marriage produced three children, born in 1992, 1994, and 1997. Kate petitioned for dissolution of the marriage on June 28, 1999. (Orange County, California, Superior Court Case Number 99D006106). On June 20, 2002, the parties entered into a stipulated agreement providing for joint legal custody of the three minor children with Kate retaining sole physical custody. The stipulation specifically provided that "(f)ather gives consent to Mother moving out of state with the minor children." Pertinent to this appeal, the stipulation also provided:

JURISDICTION. The parties hereby stipulate that jurisdiction for this matter is to remain in California until either the Court declines jurisdiction or until the parties jointly stipulate to another jurisdiction, which is then accepted by the Court in question. (If the parties were to stipulate to jurisdiction in a locale which then declined jurisdiction, then jurisdiction would remain with California.) . . .

ATTORNEYS' FEES IN ACTION TO ENFORCE OR MODIFY AGREEMENT. The prevailing party in any action or proceeding to enforce or modify any provision of this agreement, or any corresponding provision of a subsequent judgment into which the provision is merged, will be awarded reasonable attorneys' fees and costs. For the moving party to be deemed the prevailing party for purposes of this provision, at least ten days before the filing of any motion he or she must provide written notice to the other party specifying the alleged breach or default, if capable of being cured, or the modification requested. The other party must then be allowed to

avoid implementation of this provision by curing the breach or default specified or executing an agreement for the modification requested] (sic) during the, (sic) ten-day period.

The parties were thereafter granted a divorce on September 16, 2002, by the Superior Court.

Meanwhile, in July, 2002, Kate and the children moved to Jefferson County, Kentucky. In December, 2003, Kate petitioned the Jefferson Family Court to "Domesticate and Enforce Custody Judgment and Modify Parenting Schedule," and Martin responded pro se in opposition thereto. The record contains no resolution of this petition.

On June 16, 2004, Kate filed the motion which formed the basis of this appeal, specifically moving for an order establishing jurisdiction and for modification of parenting schedule, to which Martin did not respond. In summarily denying the motion and declining to accept jurisdiction, the Jefferson Family Court concluded 1) that because California had adopted the doctrine of "exclusive, continuing jurisdiction" in custody matters, pursuant to California Family Code § 3422, Kate was first required to file a motion in the California divorce action to give that court the opportunity to determine that it no longer had jurisdiction; and 2) that California was the more appropriate forum to consider the issue of the parties' parenting schedule with the children, given that a) Martin still

lived in California and had another child living there who is the half-brother of Kate and Martin's children, b) Kate's brother, wife and child (cousin to Kate and Martin's children) still lived in California, c) Kate had withheld visitation with the children from Martin since April, 2003, without seeking a modification from the California court, and d) the parties had agreed that Kate and the children could move out of California so long as California retained jurisdiction. Therefore, the family court "decline(d) to accept jurisdiction of this matter until Ms. Baker has filed a motion in the parties' California divorce action and given that court the opportunity to determine that it no longer has jurisdiction of this matter." Further, without a specific motion from Martin, the family court reserved his "motion for reimbursement of necessary travel and other expenses, including attorney fees, under KRS 403.450(3) . . . until such time as he submits an itemized affidavit to the Court, setting forth the time incurred, the hourly rate, and other expenses incurred." Kate's Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the family court's order (as it pertained to the custody and parenting schedule) was denied, and this appeal followed. Martin did not file a brief for appellee.

As a preliminary matter, we note that there is a pending motion by Kate before this Court for leave to submit the

following additional information. Between the filing of the notice of appeal and the filing of her brief, apparently in response to the directive of the family court in the order now on appeal, Kate filed a motion in California asking the Orange County Superior Court to decline jurisdiction and to transfer the action to Kentucky. This motion was granted and the case was transferred from California to Kentucky on December 30, 2004.² Kate thereafter filed a motion in this Court asking leave to submit this order to this Court. Martin did not respond, and the motion was passed to this panel on the merits.

Having reviewed the record, we are inclined to grant Kate's motion given that the California court's order declining jurisdiction and transferring same to the Jefferson Family Court was specifically requested by the Jefferson Family Court and is material to the disposition of this appeal.

Before us on appeal, Kate asserts that because of disputed factual issues, the family court erred in denying her

² The order, in pertinent part, states as follows: 1. The proceedings in this case are transferred to the Jefferson County Kentucky Family Court, pursuant to § 397.5 of the California *Family Code* and § 396b of the California *Code of Civil Procedure* provided they will accept jurisdiction. [Kate] to pay costs of transfer.

2. The Orange County California Superior Court determines that it is an inconvenient forum for the future determinations of the child custody issues in this case and that the Jefferson County Kentucky Family Court is a more appropriate forum for the determination of those issues. Therefore, pursuant to *Family Code* § 3427, the future determination of the child custody issues in this case by the Orange County Superior Court are stayed in favor of the Jefferson County Kentucky Family Court; and the Orange County Superior Court declines to exercise its jurisdiction for future determinations of the child custody issues in this case.

motion without a hearing, and also in its prospective application of Kentucky Revised Statutes (KRS) 403.824. We review questions of fact under the clearly erroneous standard of CR 52.01. Riechle v. Riechle, 710 S.W.2d 442, 444 (Ky. 1986). We review questions of law de novo. See *generally* Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999). As we conclude that the summary factual findings of the family court are not supported by substantial evidence but instead based on conflicting facts which are best resolved by an evidentiary hearing, we vacate and remand.

The family court based its summary denial of jurisdiction on KRS 403.460 and 403.470, concluding that the California court was more appropriate to consider the issue of the parties' parenting schedule because:

The children lived in California from their birth until July of 2002, when they moved to Kentucky. [Martin] still resides in California. [Martin] has another child living in California, who is the half-brother of the children. [Kate's] brother, his wife, and their child, the cousin of the children, still reside in California. [Kate] has withheld visitation with the children from [Martin] since his last visit with them in California in April of 2003 without seeking a modification of their parenting schedule in the California court. Finally, the parties agreed that [Kate] and the children could move out of California so long as California retained jurisdiction of this matter. It is unlikely that [Martin] would have agreed to permit [Kate] and the children to leave California without any

assurance that California would have retained jurisdiction of this matter.

While there is evidence in the record to support these factual findings, the evidence cannot be characterized as substantial. Instead, in reviewing the record we find that the findings are supported only by the unsworn pro se response filed by Martin to the initial petition filed in this case by Kate, and are diametrically opposed by Kate in her pleadings. As there was conflicting evidence in the pleadings, an evidentiary hearing should have been held. See generally Williams v. Phelps, 961 S.W.2d 40, 43 (Ky.App. 1998).

In any event, our vacating and remanding of the family court's decision in order to conduct an evidentiary hearing on this matter dovetails with the family court's directive in the decision:

[T]his Court will decline to accept jurisdiction of this matter until [Kate] has filed a motion in the parties' California divorce action and given that court the opportunity to determine that it no longer has jurisdiction of this matter.

As the California court has declined jurisdiction and transferred the case to Kentucky, the case is ripe for decision on the terms as set by the family court.

Two issues remain on appeal. First, Kate asserts that the family court erred in sua sponte awarding attorney fees and costs to Martin. While it is accurate that Martin did not make

a motion for attorney fees and costs, he did indicate in his pro se response that it was appropriate under Kentucky law for the court to charge Kate with all of Martin's expenses incurred in opposing Kate's request. We also note that Kate agreed in the stipulated agreement to the award of attorney fees and costs to the prevailing party in an action to enforce or modify the agreement. We decline to address this issue, however, as Kate did not raise this issue in her CR 59.05 motion or prehearing statement. CR 59.06, 76.03(8).

Second, we cannot agree with Kate's assertion that the family court erred in prospectively applying KRS 403.824, which provides for continuing and exclusive jurisdiction in the same manner as the California code, and which was not effective until July 13, 2004, several days following the court's ruling herein. Although it is true that the family court made reference in its order to the (at the time) upcoming change in the statute, it is clear from a reading of the order that the court based its decision on the law in effect at the time the decision was rendered. We therefore see no error.

For the foregoing reasons, we vacate the order of the Jefferson Family Court and remand for an evidentiary hearing and other proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

No brief for appellee.

Mary Janice Lintner
Louisville, Kentucky