

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002332-MR

SHAWN MIRACLE

APPELLANT

v. APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 01-CI-00309

JANICE K. WALKER (NOW COLLIER)

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND MOORE, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: In this child custody matter, Shawn Miracle has appealed from the October 12, 2006, order of the McCracken Family Court denying his motion to transfer or decline jurisdiction. We affirm.

Shawn Miracle and Janice Collier, who were never married, are the parents of Steven Blake Miracle, born on March 27, 1997. Shawn, who lives in the State of Ohio, has never been a resident of Kentucky. Janice is currently a resident of Kentucky.

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In a suit filed by Shawn in Livingston Circuit Court in 1997, Janice was awarded sole custody of Steven, while Shawn was ordered to pay child support and afforded reasonable visitation. This order was entered on March 31, 2000, and visitation was amended on October 6, 2000. No further orders were entered by the Livingston Circuit Court.

On March 19, 2001, Janice filed a Petition to Modify Visitation and Child Support in McCracken Family Court, as she had moved from Livingston to McCracken County by this time. Shawn objected to Janice's petition, arguing that Livingston Circuit Court was the proper court of jurisdiction, as it had entered the previous orders relating to this matter. After conferring with then-Judge Cunningham, the family court decided that it had venue to hear the petition. The parties eventually came to an agreement concerning visitation, and the family court modified child support to increase the amount owed by Shawn to \$409.78 per month.

On December 1, 2005, the family court modified custody and support based upon Janice's arrest and subsequent conviction on drug and wanton endangerment charges. Steven had been in the temporary custody of Shawn in Ohio since his removal from Janice the previous January. In the order, the family court awarded sole custody to Shawn

with the proviso that Mr. Miracle must complete his [Special Forces] training and be back in the home with the child by the time the child completes the second grade in May, 2006. If Mr. Miracle has not completed his training or has been deployed overseas, Mrs. Collier shall become the primary

residential custodian as long as she is continuing to remain clean and sober and is not participating in any drug activity.

Janice was permitted visitation with Steven, and child support was to be recalculated. No appeal was taken from this order. The family court later clarified the visitation arrangement to allow Janice to purchase airline tickets for optional second visits each month.

On June 14, 2006, Janice filed a motion to enforce the December 2005 order and to return Steven to her custody, asserting that Shawn had not returned to Ohio on a full-time basis as of June 1, 2006. She also indicated that she would be objecting to any further continuances requested by Shawn's attorney, describing these requests as a ploy to change forum. She pointed out that Shawn had filed an action in the Common Pleas Court of Marion County Ohio, Family Division, seeking to modify visitation and support, as well as to enforce the December 1, 2005, order.

On July 12, 2006, Shawn filed a motion to transfer the case to Ohio or for the family court to decline jurisdiction. Under KRS 403.824(1), he argued the family court no longer had continuing, exclusive jurisdiction, as Kentucky was no longer Steven's home state and as both he and Steven were residents of Ohio and had been for more than one year. In the alternative, Shawn requested that the family court decline to exercise further jurisdiction pursuant to KRS 403.834, as it was an inconvenient forum and the Common Pleas Court of Marion County, Ohio, was a more convenient forum to the greater number of witnesses and evidence to be produced. Janice objected to the motion, stating that Steven had been in Ohio on a "conditional" modification of custody,

that the family court was more familiar with the proceedings, and that she had been a continuous resident of the Commonwealth.

On July 14, 2006, the family court heard arguments on the pending motions, including a motion for rule requiring Shawn to show cause why he should not be held in contempt for his failure to allow visitation. Early in the hearing, the family court addressed Shawn's jurisdiction motion and indicated that it was going to retain jurisdiction, as the purpose of the December 2005 order was to verify that Shawn had returned to Ohio by the time Steven completed the 2nd grade. The family court then heard testimony on the remaining issues. On August 11, 2006, the family court entered its Findings of Fact and Order, which solely addressed Janice's motion to enforce and the motion for rule. While the family court found Shawn in contempt regarding visitation, it denied Janice's request that custody revert to her. However, the family court ordered that “if Shawn Miracle is out of the home for more than fourteen (14) consecutive days while being deployed in military service, primary residential custody shall revert to Janice Collier[.]” No appeal was taken from this order.

On October 3, 2006, Shawn filed a notice of his intent to obtain a ruling on his pending motion to transfer or decline jurisdiction. He filed an affidavit in further support of his motion. On October 12, 2006, the family court entered an order ruling on the pending motion:

This case comes before the Court upon a renote of [a] prior motion filed by Shawn Miracle on July 12, 2006 to transfer or decline jurisdiction. Petitioner filed a response and objection to that motion. The Court never issued a

formal order overruling that motion, but its subsequent actions clearly showed the motion was to be overruled. Two days after the motion was filed to transfer or decline jurisdiction, the Court conducted an evidentiary hearing on motions which were pending at that time and entered an order on August 11, 2006. No timely motion to alter, amend or vacate or notice of appeal was filed from the Order of August 11, 2006. The Order of August 11, 2006 clearly had the effect of this Court continuing jurisdiction in this matter. In order to clarify the record, the Court is now entering an order formally overruling the motion which was previously orally overruled by the Court at the initiation of the hearing on July 14, 2006. The Court being otherwise advised;

IT IS HEREBY ORDERED, ADJUDGED AND DIRECTED that Shawn Miracle's motion to transfer or decline jurisdiction be and hereby is denied. Under KRS 403.822, *et seq*, this Court retains exclusive continuing jurisdiction on all issues related to custody and visitation of Steven Blake Miracle.

It is from this order that Shawn has taken the present appeal.

On appeal, Shawn continues to argue that the family court erred in denying his motion to transfer or decline jurisdiction, as it no longer had continuing and exclusive jurisdiction pursuant to KRS 403.824 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). In her brief, Janice argues that the family court properly retained jurisdiction. Furthermore, she suggests that Shawn's notice of appeal was untimely filed, as the family court initially retained jurisdiction in the August 11, 2006, order, and that his renote of the original motion was merely an attempt to expand the time to file an appeal.

We shall first address Janice's argument that Shawn's appeal was untimely filed. Janice contends that because the judge orally ruled on the jurisdiction issue at the

July 14, 2006, hearing and entered a substantive ruling on the other pending motions in the August 11, 2006, order, Shawn should have appealed from that order. We note that Shawn did not file a reply brief contesting this argument. However, we disagree with Janice that the appeal was untimely. While the judge stated her intention of retaining jurisdiction during the July 14, 2006, hearing, a written order formally denying the motion was not entered until October 12, 2006. Pursuant to CR 73.02, a notice of appeal is to be filed within thirty days “after the date of notation of service of the judgment or order under Rule 77.04(2).” The Clerk of the McCracken Circuit Court certified that the order ruling on the motion to transfer or decline jurisdiction was mailed on October 12, 2006; therefore, Shawn's appeal was timely. Accordingly, we decline Janice's request to dismiss Shawn's appeal as untimely filed.

We shall now address the merits of Shawn's appeal; namely, whether the family court properly decided to retain jurisdiction, based upon its determination that it had exclusive, continuing jurisdiction over the custody matter.² Our standard of review in this matter is set forth in CR 52.01:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

² Because it was not raised in his brief, we shall infer that Shawn has waived his inconvenient forum argument.

The Supreme Court of Kentucky addressed this standard in *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003), and held that a reviewing court may set aside findings of fact,

only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

With this standard in mind, we shall review the family court's decision in this matter.

In *Wallace v. Wallace*, 224 S.W.3d 587 (Ky.App. 2007), a case that was rendered after Shawn's brief was filed and the day Janice's brief was filed, this Court addressed the UCCJEA:

To make Kentucky laws consistent with the provisions of the federal Parental Kidnapping Prevention Act, in 2004 the General Assembly replaced the Uniform Child Custody Jurisdiction Act (UCCJA) with the UCCJEA. While the fundamental purpose of the UCCJEA remains the avoidance of jurisdictional competition and conflict with other states in child custody matters, the UCCJEA contains substantive changes when making determinations of initial jurisdiction and modification jurisdiction.

...

A detailed analysis of the reason for the distinction between initial and modification jurisdiction contained in the UCCJEA was given in *Staats v. McKinnon*, 206 S.W.3d 532, 546 (Tenn.Ct.App. 2006):

The PKPA also significantly altered the analysis for modification jurisdiction. The UCCJA applied the same basic jurisdictional tests to both the initial entry and the modification of child custody determinations. UCCJA §§ 3(a), 14(a), 9 U.L.A. at 307, 580. The PKPA added the concept of “continuing jurisdiction,” 28 U.S.C.A. § 1738(A)(c)(2)(E), (d), and provided that once a state had entered or modified a child custody determination in compliance with the statute's jurisdictional requirements, its jurisdiction would “continue[] as long as . . . such State remains the residence of the child or of any contestant,” 28 U.S.C.A. § 1738A(d). The PKPA prohibited courts from modifying another state's child custody determination if the other state had continuing jurisdiction over the determination and had not declined to exercise it. 28 U.S.C.A § 1738A(g)-(h). Thus, while “home state” jurisdiction was at the top of the jurisdiction hierarchy under the UCCJA, under the PKPA, continuing jurisdiction trumped “home state” jurisdiction.

Wallace, 224 S.W.3d at 589-90. The *Wallace* Court then stated that “[t]he concept of continuing jurisdiction incorporated into the UCCJEA was adopted by Kentucky and is contained in KRS 403.824[.]” *Id.* at 590. KRS 403.824 provides:

(1) Except as otherwise provided in KRS 403.828, a court of this state which has made a child custody determination consistent with KRS 403.822 or 403.826 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, nor the child and one (1) 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; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any other person acting as a parent do not presently reside in this state.

(2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under KRS 403.822.

The *Wallace* Court concluded:

Thus, the state having original jurisdiction over custody maintains exclusive continuing jurisdiction though the child has acquired a new home state if the general requirement of the substantial connection jurisdictional provisions are met. As stated by the court in *Ruth v. Ruth*, 32 Kan.App.2d 416, 421, 83 P.3d 1248, 1254 (2004), exclusive, continuing jurisdiction prevails under the UCCJEA until the “relationship between the child and the person remaining in the state with exclusive, continuing jurisdiction becomes so attenuated that a court could no longer find significant connections and substantial evidence.”

Wallace, 224 S.W.3d at 590.

In *Wallace*, the Court addressed a situation where the parents, while they both were Kentucky residents, were divorced and granted joint custody of their three children, with the mother named as the primary residential custodian. Eventually, the mother and two of the children moved to Tennessee. The father had previously obtained

custody of the third child, and they continued to live in Kentucky. When the father, a military police officer in the United States Army, received orders requiring him to relocate to Hawaii, he moved to modify his visitation with the children in Tennessee.

This Court had:

no difficulty in concluding that Kentucky has exclusive, continuing jurisdiction [The father] is a Kentucky resident and visitation with the younger children has taken place in Kentucky. Just as important, the children's sibling, Cody, is a resident of the state. It is clear to this court that information relevant to the issue of visitation with all three children would be found in Kentucky.

Id. at 591.

Turning to the case before us, we agree with Janice that the family court properly determined that it had exclusive, continuing jurisdiction over the custody case. Although we recognize that Shawn and Steven reside in Ohio and that Steven has significant connections to Ohio, there remains a significant enough connection with Kentucky to justify continuing jurisdiction in the family court. It is undisputed that Janice has at all times lived in Kentucky and that visitation continues to take place in Kentucky. Furthermore, the family court itself made its position clear as early as December 2005 that it intended to continue to review the matter to ensure that Shawn complied with its order to return to Ohio by a specified date. We also note that the family court has dealt with this case for several years and has an extensive knowledge of the facts and issues that have arisen during the course of the litigation. The record clearly establishes that a significant connection to Kentucky exists, supporting the family court's

decision that it had exclusive, continuing jurisdiction over this matter. Therefore, we hold that the family court did not commit any error in making this determination, or abuse its discretion in denying Shawn's motion to transfer or decline jurisdiction.

For the foregoing reasons, the order of the McCracken Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael L. Judy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

John T. Reed
Paducah, Kentucky