

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002458-ME

JAMES ROBERT MCDANIEL, II

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 06-CI-00126

MICHELLE MAUPIN

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: KELLER, LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: James Robert McDaniel, II appeals from findings of fact, conclusions of law and order of the Casey Circuit Court in an action filed by Michelle Maupin seeking a child custody order. James argues that the Casey Circuit Court improperly exercised jurisdiction in the matter after being informed that James had previously filed a similar petition in Scott Circuit Court. He maintains that the principles of priority and comity should have operated to vest jurisdiction with the Scott Circuit Court rather than the Casey Circuit Court, and that the Casey Circuit Court improperly

failed to abate the Casey County proceeding. For the reasons stated below, we find no error.

Michelle Maupin gave birth to Ashlee McDaniel out of wedlock on December 8, 2003. A DNA test subsequently proved James to be Ashlee's father. Ashlee lived with Michelle in Scott County, and Michelle served as Ashlee's primary caregiver. Though no formal visitation schedule was established, James and/or his mother took care of Ashlee from time to time. The record indicates that Michelle began residing in Casey County in April 2005, and shortly thereafter married Jamey Maupin with whom she, Ashlee and Ashlee's sister now reside.

On June 27, 2006, James filed a petition in Scott Circuit Court seeking custody of Ashlee. Three days later on June 30, 2006, Michelle filed a similar petition in Casey Circuit Court also seeking custody. Each petition proceeded toward adjudication, with the Casey County matter moving at a faster pace. James' petition reached the Domestic Relations Commissioner ("DRC"), who found that since April or May 2005, Ashlee spent more than 50% of her time in Scott County, that the Scott County action was the senior action, and that the venue issue should be decided by Scott Circuit Court.

While the Scott County action was pending, the Casey County action continued and reached finality. Shortly before the final order was rendered in the Casey County action, James filed a motion in the Casey Circuit Court proceeding seeking to abate the action based on the Scott Circuit Court DRC Report rendered on October 4,

2006, which was confirmed by order of the Scott Circuit Court on October 16, 2006.

The motion was denied by way of an order rendered on October 27, 2006.

On October 30, 2006, the Casey Circuit Court rendered the findings of fact, conclusions of law and order from which James now appeals. The court found in relevant part that the proper venue for the action was Casey Circuit Court. It went on to order that joint custody, care and control of Ashlee was awarded to James and Michelle, with Michelle designated the primary residential custodian. As a basis for the finding that Casey County was the proper venue, the court pointed to “undisputed clear and convincing evidence” that Ashlee permanently resided in Casey County since April 2005.

James now appeals from the October 30, 2006, findings of fact, conclusions of law and order. He maintains that the Scott Circuit Court - a court of competent jurisdiction presiding over a senior action - has both a right and duty to dispose of the venue issue. He notes that Michelle’s Casey County action - having been filed three days later - was the junior action, and that the principles of priority and comity should operate to bar the Casey Circuit Court from acting in a matter contrary to that of the Scott County proceeding. In response, Michelle argues that the evidence clearly shows that Ashlee has permanently resided in Casey County since April 2005, and that there is no question but that the child’s county of residence is the proper venue for adjudicating a petition to establish custody.

We have closely studied the record, the written arguments and the law, and find no basis to overturn the order of the trial court. The matter before us is primarily a

question of venue, and there appears to be no statutory guideline for the resolution of questions of venue in child custody proceedings. Rather, the courts have employed practical or “common sense” tests to resolve these issues. In *Hummeldorf v.*

Hummeldorf, 616 S.W.2d 794 (Ky.App. 1981)¹, a panel of the Court of Appeals stated,

In *Shumaker*, the parties disputed the proper forum for modification of an existing child custody decree. The two courts involved were the circuit court which granted the original decree and the circuit court of the county where the parties had subsequently moved and lived at the time the modification was sought. The *Shumaker* decision approved the assumption of jurisdiction by the latter court. The following factors were considered there and would be relevant in cases like the one on appeal: (1) the county of the parties’ marital residence prior to separation; (2) the usual residence of the children, if any; (3) accessibility of witnesses and the economy of offering proof.

Similarly, in *Wallace v. Wallace*, --- S.W.3d ----, 2007 WL 1378149 (Ky.App. 2007) (rendered May 11, 2007; to be published), a panel of this Court determined that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) - which addresses interstate custody disputes - could be useful in determining the venue of intrastate custody and visitation proceedings. Citing *Lancaster v. Lancaster*, 738 S.W.2d 116 (Ky.App. 1987), the *Wallace* court reaffirmed that venue should be found with the “more convenient and most interested forum.”

When we apply *Hummeldorf*, *Lancaster*, and *Wallace* to the facts at bar, there is little doubt but that the Casey Circuit Court was a proper venue for adjudicating the custody and visitation issues. Testimony was adduced that Michelle and Ashlee

¹ Abrogated on other grounds.

established their permanent residence in Casey County in April 2005, where they now reside with Michelle’s husband. The record also indicates that Ashlee’s sister, babysitter and the extended family of her step-father are permanent residents of Casey County. The Casey Circuit Court found this evidence to be both “clear and convincing” and “unrebutted,” and it constitutes a proper basis for the court’s implicit determination that Casey County was the “more convenient and most interested forum.” *Wallace, supra*. And finally, the *Hummeldorf* court noted that the circuit court is vested with discretion in matters of venue. It stated that, “a circuit court can proceed when it is the most convenient forum, and when necessary can thwart the efforts of a party to establish an unrealistic or burdensome forum.” *Hummeldorf* at 798. Since substantial evidence is contained in the record to support the court’s finding that Ashlee permanently resides in Casey County, and because the case law allows for venue to be found in the more convenient and most interested forum, we find no error on this issue.

We acknowledge that James’ argument addressing the principles of priority and comity is not without merit, as those principles serve to promote judicial economy and avoid duplicate and possibly conflicting rulings. *See generally, Riddle v. Howard*, 357 S.W.2d 705 (Ky. 1962). Fortunately, there is no evidence in the record that the Scott Circuit Court proceeding produced a conflicting result (or any result, for that matter), and James’ argument on this issue does not form a basis for tampering with the order on appeal.

For the foregoing reasons, we affirm the findings of fact, conclusions of law and order of the Casey Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Theodore H. Lavit
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BRIEF FOR APPELLEE:

Greg Dunn
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