

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JEANNE KEMP, NKA GAGE	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	Case No. 2010-CA-00179
MICHAEL KEMP	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2003DR00101

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 18, 2011

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, J.

{¶1} Defendant-appellant Michael Kemp appeals a judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, which overruled his objections to the decision of the magistrate and relinquished jurisdiction over appellant's parental rights and responsibilities in his minor child to the State of California. Plaintiff-appellee is Jeanne Kemp nka, Gage. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY RELINQUISHING JURISDICTION OVER PARENTAL RIGHTS AND RESPONSIBILITIES TO CALIFORNIA.

{¶3} "II. THE TRIAL COURT ERRED BY NOT PERMITTING FATHER TO PROVIDE TESTIMONY ON THE STATUTORY FACTORS THAT OHIO COURTS MUST CONSIDER WHEN DECIDING WHETHER TO RELINQUISH EXCLUSIVE, CONTINUING JURISDICTION."

{¶4} The record indicates the parties were divorced in October, 2003, having produced one child. In December, 2006, the trial court terminated the parties' shared-parenting plan and permitted appellee to move to California with the child. At the time she was five years old.

{¶5} The trial court set up a long-distance parenting time schedule for appellant. It provided appellant and appellee would share travel expenses for summer and Christmas visitation. Appellant could also enjoy additional parenting time during extended times the child may be off school, including spring breaks, but this would be at appellant's expense.

{¶6} In February, 2010, appellant filed a motion to modify the parties' parental rights and responsibilities, and requested he become the residential parent of the minor child. In response, appellee filed a motion to dismiss, arguing Ohio was no longer a convenient forum. The matter was referred to a magistrate, who conducted a hearing and issued a decision finding that Ohio is not a convenient forum, and declining jurisdiction to hear appellant's motion to modify parental rights and responsibilities. The magistrate directed appellee to file an appropriate action to register or transfer jurisdiction to the appropriate California court within sixty days. The court retained jurisdiction to address issues of child support.

{¶7} Appellant filed objections to the magistrate's opinion. The trial court made findings of fact, concluding the magistrate was correct in declining jurisdiction over the motion to modify parental rights and responsibilities and in finding Ohio is a non-convenient forum.

I.

{¶8} In his first assignment of error, appellant argues the trial court abused its discretion in finding Ohio is no longer a convenient forum for the case at bar. Our standard of reviewing the trial court's decision is the abuse of discretion standard. *In Re: Collins*, Guernsey App. No. 06-CA-000028, 2007-Ohio-4582, at paragraph 15, citing *Hall v. Hall*, Licking App. No. 06-CA-1334, 2007-Ohio, 4199, which in turn cited *Bowen v. Britton* (1993), 84 Ohio App. 3d 473, 478, 616 N.E. 2d 1217. The Supreme Court has repeatedly defined the term "abuse of discretion" as implying the court's attitude is unreasonable, arbitrary, or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E. 2d 1140.

{¶9} R.C. 3127.16 et. seq. codifies the Uniform Child Custody Jurisdiction and Enforcement Act. The statute provides an Ohio court that has made a child custody determination has exclusive, continuing jurisdiction over the determination until the court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in Ohio. Appellant resides in Stark County, Ohio, and appellee and the child live in California. Appellant argues that because at least one party continues to reside in Ohio, the Stark County Domestic Relations Court has exclusive continuing jurisdiction over custody matters. Appellant concedes, however, the Ohio court can decline continued involvement if it determines Ohio is an inconvenient forum under the present circumstances, and finds another court is more convenient.

{¶10} R.C.3127.21 provides in pertinent part:

{¶11} "(B) 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 the following:

{¶12} "(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;

{¶13} "(2) The length of time the child has resided outside this state;

{¶14} "(3) The distance between the court in this state and the court in the state that would assume jurisdiction;

{¶15} "(4) The relative financial circumstances of the parties;

{¶16} “(5) Any agreement of the parties as to which state should assume jurisdiction;

{¶17} “(6) The nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;

{¶18} “(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence;

{¶19} “(8) The familiarity of the court of each state with the facts and issues in the pending litigation.” The magistrate made findings of fact on the factors she considered were relevant: the child has lived in California for over three years; the distance between the possible jurisdictions; the relative financial circumstances of the parties; the familiarity of the court with the issues and facts; and the nature and location of the evidence required.

{¶20} The magistrate conceded appellant’s financial circumstances could make it difficult for him to litigate his motion in California. He would bear the cost of the guardian ad litem traveling to the child’s home in California to view the home and meet with relevant persons including certain key witnesses, such as teachers, day care or after-school providers, and possibly doctors, all of whom are in California. The magistrate found the Ohio court has had an intense history of involvement with the case, but nevertheless, a California court could familiarize itself with the case and the issues.

{¶21} Appellant asserts the court abused its discretion because it did not consider his work schedule, and the difficulty for him to arrange his vacation time to travel to California for hearing dates. Appellant urges his finances have suffered

because of layoffs and transfers, and loss of overtime. Appellant states he has two additional children whom he is supporting in addition to the minor child in this action, and suggests appellee is in a much better financial position to afford to travel to Ohio to attend court hearings. Appellant notes the minor child comes to Ohio for eight weeks during the summer, and would be available for the guardian ad litem's investigation and any psychological evaluations. Appellant states he will have to work with a new attorney far from his home. Appellant concedes there is evidence of a change in circumstances in California, but urges there is also evidence in Ohio.

{¶22} In overruling appellant's objections, the trial court listed the statutory factors stated supra, and found that the magistrate followed R.C. 3127.21 and considered the factors. The court found the issue is whether there has been a change in circumstances in the child's life or in the life of appellee as her custodial parent. The court concluded Ohio is not a convenient forum.

{¶23} We have reviewed the record, and we find the trial court did not abuse its discretion in determining Ohio is not a convenient forum, and in relinquishing jurisdiction over the matter to California.

{¶24} The first assignment of error is overruled.

II.

{¶25} In his second assignment of error, appellant argues the trial court erred in not conducting an evidentiary hearing on the statutory factors. The magistrate heard the arguments of counsel, but did not take testimony.

{¶26} The trial court found the magistrate did not err in not granting an evidentiary hearing, finding R.C. 3127.21 does not require an evidentiary hearing, but

only requires the court to allow the parties to “submit information”. See R.C. 3127.21 (B), supra.

{¶27} The court found appellant had the opportunity to submit information in writing and by way of oral argument before the magistrate, and before the court on the hearing on the objections. The court found appellant took full advantage of the opportunity in both hearings and provided written material which included an eight page memorandum with attachments.

{¶28} The language of R.C. 3127.31(B) does not require the court to conduct an evidentiary hearing. We agree with the trial court an evidentiary hearing was not necessary under the facts and circumstances of this case, including the thoroughness with which counsel presented their case.

{¶29} The second assignment of error is overruled.

{¶30} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Hoffman, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

