IN THE COURT OF APPEALS OF IOWA

No. 2-072 / 11-1381
Filed February 15, 2012

IN RE THE MARRIAGE OF JULIAN TREVINO AND MARLENA MARIE TREVINO

Upon the Petition of
JULIAN TREVINO,
Petitioner-Appellee,

And Concerning
MARLENA MARIE TREVINO,
Respondent-Appellant.

Appeal from the Iowa District Court for Franklin County, Christopher C. Foy, Judge.

A mother appeals an order confirming the State of Iowa's jurisdiction in a custody modification action, contending Iowa does not have jurisdiction because neither she nor the children have been residents of the state since 2008. **REVERSED AND REMANDED.**

Brian D. Miller of Miller & Miller, P.C., Hampton, for appellant.

Larry W. Johnson of Walters & Johnson, Iowa Falls, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

Marlena Trevino appeals an order confirming the State of Iowa's jurisdiction in a child-custody modification action. She contends Iowa does not have jurisdiction because neither she nor the children have been residents of the state since 2008.

I. Background Facts and Proceedings

Marlena and Julian Trevino married in 2005 and had two children. The family moved from Iowa to Texas in 2008, but Julian returned to Iowa later that year. On his return, he filed a dissolution of marriage petition in Iowa. At a hearing on temporary matters, Marlena applied to move the custody proceedings to Texas. The district court found that "the Trevino family intended and began a permanent residence in Texas on March 11, 2008, exactly six months prior to the commencement of the proceeding." The court concluded it had jurisdiction under Iowa Code section 598B.201(1)(a) (2007), a provision of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA).[1] Following trial, the court dissolved the marriage and granted Marlena physical care of the children.

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[1] Iowa Code section 598B.201 states:

> 1. Except as otherwise provided in section 598B.204, a court of this state has jurisdiction to make an initial child-custody determination only if any of the following applies:
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> > a. This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
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> "*Home state"* means
> the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period.

Iowa Code § 598B.102(7). We read the court's decision to mean that Marlena and the

Julian subsequently filed an application to modify custody. Marlena responded with a “motion to determine proper jurisdiction of pending application to modify.” She asserted that she and the children had lived in Texas since March 11, 2008, and she asked the court to

> direct that jurisdiction of the pending matter be transferred to the State of Texas because the children and one parent of the children do not have significant connection with the State of Iowa and because substantial evidence is no longer available in the state of Iowa concerning the children’s care, protection, training and personal relationships.

She alternately requested that the court decline to exercise jurisdiction on the ground that Iowa was an inconvenient forum.

After considering the attorneys’ arguments, the district court issued an order confirming jurisdiction. The court stated, “Because [Marlena] did not appeal the [original] Jurisdiction Order, its holding is binding on the parties as part of the law of this case.” The court further stated that Marlena “presented no facts in support of her motion, only arguments of counsel” and, accordingly,

> failed to show any change in circumstances since the entry of the Jurisdiction Order or the Dissolution Order that would divest the Court of exclusive, continuing jurisdiction under section 598B.202(1) or that would render the Court an inconvenient forum under section 598B.207.

The court concluded that it continued to have “exclusive jurisdiction to enforce or modify the custody provisions of Dissolution Order and that it is a convenient forum to do so.” Marlena appealed.

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children were not out of the State of Iowa “for at least six consecutive months.” We assume without deciding that this is a correct interpretation of the statute.

II. Analysis

A. Exclusive Continuing Jurisdiction

As noted, the district court concluded it had exclusive, continuing jurisdiction under section 598B.202 of the UCCJEA. That provision states:

> 1. Except as otherwise provided in section 598B.204, a court of this state which has made a child-custody determination consistent with section 598B.201 or 598B.203 has exclusive, continuing jurisdiction over the determination until any of the following occurs:
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> a. A court of this state determines that the child does not have, the child and one parent do not have, or the child and a person acting as a parent do not 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.
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> b. A court of this state 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 this state.
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> 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 section 598B.201.

Whether this requirement has been met is a question of subject matter jurisdiction. *In re Jorgensen*, 627 N.W.2d 550, 554 (Iowa 2001). If we determine subject matter jurisdiction is lacking, the only appropriate disposition is to dismiss the custody modification application. *See id.* at 555. Our review of the record is de novo. *Id.*

The parties do not dispute that the district court made an initial child-custody determination as part of the dissolution decree. *See* Iowa Code § 598B.102(3) (defining "[c]hild custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child"). Accordingly, the court could exercise exclusive

continuing jurisdiction until the court determined "that . . . the child and one parent do not have . . . 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." *Id.* § 598B.202(1)(a).

We begin with the district court's conclusion that Marlena failed to carry her burden of proving these factors because she presented no evidence at the jurisdictional hearing. We are not persuaded that her failure to proffer witnesses is fatal to her motion, because, at the jurisdictional hearing, the court determined that the attorneys for both parties could stipulate to relevant facts and the court would rely on those stipulated facts in ruling on the motion. The attorneys did just that.

Marlena's attorney began by proffering the following facts. Marlena and the children lived in Texas continuously from March 11, 2008; the older child attended a primary school in Texas, and the younger child stayed at home with her mother; Marlena and the childen attended church in a town ten minutes away from the town in which they lived; the children spent alternate weekends with Marlena's mother in Texas; and the children had regular contact with other family members in Texas, including Marlena's aunt, uncle, and cousins. Marlena's attorney also stated that additional witnesses who were residents of Texas would be called in connection with Julian's application to modify custody.

Following this proffer, the district court asked Julian's attorney whether the court could "rely on these facts [ ] for purposes of determining the pending motion." Julian's attorney responded, "Yeah." He added that his client was a resident of Iowa and made "two separate attempts to go to Texas and get the

children" but was refused. He also noted that contempt citations and sanctions had been imposed against Marlena. Marlena's attorney responded by declining to admit or deny the claimed facts concerning Marlena's refusal to allow Julian to see the children.

We find this record sufficient to determine whether the children had a significant connection with Iowa and whether substantial evidence relating to their welfare was available in this State. The record points to two possible conclusions. The fact that Marlena and the children lived in Texas for more than three years prior to the court's ruling on exclusive continuing jurisdiction, the fact that the older child attended school in Texas, and the fact that the children interacted exclusively with relatives in Texas would suggest they lacked a significant connection with Iowa and substantial evidence of their welfare was not available in this State. On the other hand, the fact that Marlena denied Julian visitation in Iowa and, as a result, precluded the children from developing connections in this State suggests that Marlena should not reap the benefit of having the case transferred to Texas.

The Oklahoma Court of Civil Appeals faced a similar dilemma in *McCullough v. McCullough*, 14 P.3d 576 (Okla. Civ. App. 2000). There, mother and son moved from Oklahoma to California before a dissolution decree was entered in Oklahoma. *McCullough*, 14 P.3d at 577. The decree set a visitation schedule for the father which was subsequently modified to allow for extended visitation in Oklahoma. *Id.* The father later filed a motion in Oklahoma to modify the custody arrangement. *Id.* at 578. He alleged that the mother was guilty of improper conduct and separately noted that the mother had willfully violated the

prior visitation order. *Id.* The district court found California to be the more appropriate forum. *Id.* at 579. On appeal, the father reiterated that the mother's "'reprehensible conduct' in preventing his contact with the child" as well as other factors should have prevented the transfer of the case to California. *Id.* at 580. The Oklahoma Court of Civil Appeals found this was not a case in which the mother directly created a jurisdictional basis in California, the state she claimed had jurisdiction. *Id.* The court explained that the dissolution decree "specifically contemplated" the child's residence in California. *Id.* According to the court, "the basis for California's jurisdiction and its status as a more appropriate forum flows from A's permanent residence there, not from any acts by Mother which frustrated Father's attempts to maintain a relationship with A." *Id.* The court determined that

> [e]ven if Mother was guilty of 'reprehensible conduct' as alleged by Father, which we do not decide, it was unrelated to the creation of jurisdiction in California. The trial court was not required to deny Mother's motion to transfer based on Father's allegations of her misconduct.

Id. In a footnote, the court stated that the trial court's focus "quite properly [ ] was on the potential disruption in A's life which could be caused by litigation in Oklahoma and not on the reward or punishment of either parent." *Id.* at 581 n.4. The court affirmed the trial court, concluding that "California has a closer connection with the issues in this case and would have that connection even if Father had been allowed to exercise all of the visitation awarded to him under the 1994 order." *Id.* at 581.

Given the striking similarity between *McCullough* and this case, we find the Oklahoma court's opinion persuasive. Applying its reasoning, we note that

Marlena's move to Texas was known at the time of the dissolution decree. The decree afforded Julian visitation in Iowa for six weeks every summer and on certain holidays. The decree was later modified to make the six-week period consecutive and to ensure that Julian had visitation on certain specified holidays every other year. The court also afforded Julian two extra weeks of summer visitation in 2010 to compensate for Marlena's denial of visitation following the entry of the dissolution decree.

With these facts garnered from a de novo review of the entire record, we conclude that even if Julian had been able to exercise all of the visitation he was due, the children would not have had a more significant connection with Iowa than they did with Texas. For that reason, we cannot say that Marlena's refusal to facilitate visitation in Iowa created the basis for transferring jurisdiction to Texas. The children still would have lived the better part of their lives in Texas and most, if not all, the evidence concerning their welfare would have come from Texas. Accordingly, we conclude that the district court should not have exercised exclusive, continuing jurisdiction over the custody modification matter.[2]

This does not mean that Julian is without a remedy for Marlena's violations of the visitation provisions of the decree. Texas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act. Tex. Fam. Code ch. 152. That Act contains a provision allowing the Texas court to decline jurisdiction

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[2] Julian notes that "Iowa cases reflect an undeniable bias favoring continuing jurisdiction of the decree state when modification is sought." The cases he cites, however, were decided under a predecessor statute rather than Iowa Code chapter 598B. Additionally, a key opinion under that predecessor statute, *In re Marriage of Cervetti*, 497 N.W.2d 897, 899 (Iowa 1993), addressed Iowa's jurisdiction in a custody modification action and found, "North Carolina, not Iowa, is the state presently having the most significant connection with this case and holding the most substantial evidence about the children's welfare."

by reason of "unjustifiable conduct." Tex. Fam. Code § 152.208. The Act also imposes on that court a duty to enforce a child-custody determination of another state. *Id.* § 152.303. But these are decisions that the Texas, rather than Iowa, courts have to make, given the absence of exclusive, continuing jurisdiction in Iowa.

Having found that Iowa does not have exclusive, continuing jurisdiction, we proceed to an alternate basis for Iowa to exercise jurisdiction set forth in Iowa Code section 598B.202(2). Under that subparagraph, "[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 section 598B.201." Section 598B.201, quoted in note 1, does not give Iowa jursidiction to make an initial custody determination because Iowa has not been the home state of the children for more than three years. Texas was the children's home state during that period and Texas courts accordingly had jurisdiction over custody matters. As Texas courts have not declined to exercise jurisdiction, Iowa courts may not assert jurisdiction to modify the custody application under this provision.

B. Inconvenient Forum

Marlena also argues that Iowa is an inconvenient forum under Iowa Code section 598B.207. That section provides in pertinent part:

> 1. A court of this state which has jurisdiction . . . to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

> 2. 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 . . . consider all relevant factors, including all of the following:
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> b. The length of time the child has resided outside this state.
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> c. The distance between the court in this state and the court in the state that would assume jurisdiction.
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> . . . .
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> f. The nature and location of the evidence required to resolve the pending litigation, including testimony of the child.
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> . . . .
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> h. The familiarity of the court of each state with the facts and issues in the pending litigation.

Iowa Code § 598B.207. Without repeating the stipulated facts and the facts found on our de novo review of the record, we find Texas to be the more convenient forum. *See In re Marriage of Hocker*, 752 N.W.2d 447, 451(Iowa Ct. App. 2008) ("Although the Iowa court may be more familiar with the original court case in the decree, we agree with the Iowa district court's conclusions that at this time the bulk of the evidence pertinent to modification of child custody is in Illinois.").

III. Disposition

We reverse the district court's ruling finding exclusive, continuing jurisdiction over the custody modification application in Iowa and remand for dismissal of that application.

REVERSED AND REMANDED.