

NOTICE

Decision filed 08/29/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 120526-U

NO. 5-12-0526

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

KALA BREE BOUCHER,

Petitioner-Appellant,

v.

TYLER DALE ROSE,

Respondent-Appellee.

)
)
)
)
)
)
)
)
)
)

Appeal from the
Circuit Court of
Jackson County.

No. 11-F-141

Honorable
Kimberly L. Dahlen,
Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing the petition for child support and visitation filed by petitioner, nor did it err in declining to hold an evidentiary hearing regarding jurisdiction because a petition was previously filed by respondent in Kentucky, and after a discussion between the Illinois court and the Kentucky court, jurisdiction in Kentucky was found to be proper.

¶ 2 Petitioner, Kala Bree Boucher, appeals from an order of the circuit court of Jackson County dismissing her petition for child support and visitation. The circuit court dismissed the petition after conferring with Judge Sheila Farris of the Henderson circuit court in Kentucky (Kentucky court) and receiving an order from the Kentucky court in which the Kentucky court chose to retain jurisdiction in a similarly styled case filed by respondent, Tyler Dale Rose. On appeal, petitioner contends: (1) the circuit court erred in dismissing her petition, (2) the circuit court erred by refusing to conduct an evidentiary hearing on the issue of jurisdiction, and (3) the circuit court failed to properly communicate with the Kentucky judge and failed to take the proper steps to preserve what was communicated between the

circuit court and the Kentucky court. We affirm.

¶ 3

BACKGROUND

¶ 4 Petitioner and respondent were never married but have a son who was born on December 11, 2007. On December 13, 2011, petitioner filed a petition for child support and visitation order in the circuit court in which she alleged that the child lived with her for his entire life in Jackson County, Illinois, except for a brief period of time in which respondent took the child to Henderson, Kentucky, and, as a result, "there may be pending criminal charges for child abduction." Petitioner further alleged that she knew "of no proceeding that could affect the current proceeding, including proceedings for enforcement, except the possible criminal charges that may be brought against respondent for child abduction." Petitioner stated that she had "heard of threats of a court action in Kentucky" but she had yet to receive any written notice of such. Petitioner asked *inter alia* that respondent be ordered to refrain from removing the child from the custody of petitioner other than at times allowed by the circuit court and be ordered to pay child support.

¶ 5 On February 9, 2012, respondent filed a response to the petition in which he denied that the child resided with petitioner his entire life or that the child resided in Jackson County, Illinois, his entire life. Respondent alleged "that on December 28, 2011, in the Family Court Division of the Henderson Circuit Court of the Commonwealth of Kentucky *** there was entered an Order Determining Jurisdiction and Setting Parenting Times," and a copy of that order was attached as Exhibit A. Respondent alleged that at that proceeding petitioner appeared and presented evidence, argued, and "submitted herself to the jurisdiction of the [Kentucky] Court." Respondent asked that the Illinois petition be denied. The December 28, 2011, Kentucky order attached as Exhibit A stated that the Kentucky court "determines that it has and shall retain jurisdiction over this matter until and unless it concludes otherwise after conferring with a judge in Illinois and conducting an evidentiary

hearing as to which state is the appropriate forum." The order gave the parties joint custody, established "parenting times," and set up an exchange point "in Shawneetown, Illinois, customarily used by the parties."

¶ 6 On May 14, 2012, respondent filed a motion to dismiss and to decline jurisdiction. Attached thereto was a copy of a verified petition for temporary and permanent child custody filed by respondent in the Kentucky court on December 6, 2011. Respondent alleged that Kentucky already determined that it has jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (Act) (750 ILCS 36/206(a) (West 2008)) and, therefore, asked that petitioner's petition for child support and visitation be denied and that the circuit court decline to exercise jurisdiction.

¶ 7 On May 29, 2012, petitioner filed an affidavit regarding where the parties' son resided since the time he was born. Thereafter, the record indicates the trial judge attempted to call the family judge in the Kentucky court on July 13, 2012, but there was "[n]o answer" and on July 17, 2012, the Kentucky judge was "[n]ot available." The record further shows that the circuit court judge called the Kentucky judge on July 20, 2012, and on July 21, 2012. On July 21, 2012, the circuit court judge made a notation that she spoke to the Kentucky judge who "will get back to the [c]ourt about whether Kentucky will keep the case." On August 15, 2012, the Kentucky judge entered an order retaining jurisdiction, which was filed with the circuit court on August 22, 2012. On September 10, 2012, the circuit court dismissed the petition for child support and visitation on the basis that Kentucky retained jurisdiction of the matter. The circuit court told petitioner's attorney that petitioner could file a motion to reconsider with case law showing that the circuit court could override Kentucky's jurisdiction.

¶ 8 Petitioner filed a motion to reconsider with no citation to authority. On October 17, 2012, the trial court filed an order denying petitioner's motion to reconsider, which

specifically stated as follows:

"Judge Farris' order, which was sent to [petitioner], specifically states that she conferred with me, Judge Dahlen, of Jackson County, Illinois by telephone conference, that she reviewed the record of the December 19, 2012 [sic], hearing in Henderson Family court, and determined to retain jurisdiction. The [c]ourt found that the minor child had not resided in Illinois for six consecutive months prior to filing of the action and 'at the time of December 19, 2012 [sic] court appearance the [r]espondent (who was Kala Boucher) stated no action had been filed in Illinois.' The [c]ourt further stated, 'upon hearing testimony of the parties, this [c]ourt issued an order awarding the parties joint custody of [the minor child] on December 28, 2012 [sic], with specific parenting times.' 'The child has significant contacts with this jurisdiction and the December 28, 2012 [sic] order, remains in full force and effect.'

The order is dated August 14, 2012 and is signed by Judge Sheila N. Farris."

The circuit court found that since petitioner "appeared in court in Kentucky, she should have raised the jurisdictional issue in that State." Petitioner now appeals.

¶ 9

ANALYSIS

¶ 10 Petitioner argues the circuit court erred in dismissing her petition, that this case should be remanded to the circuit court for an evidentiary hearing on the issue of jurisdiction, and that the circuit court judge did not properly communicate with the Kentucky judge. We disagree.

¶ 11 Under the Act, not just one state, but several states, may have jurisdiction of a child custody determination, and the first such state to exercise jurisdiction has exclusive right to proceed. *In re Marriage of Schoeffel*, 268 Ill. App. 3d 839, 843, 644 N.E.2d 827, 830 (1994). Section 206 of the Act specifically provides for a situation such as the one presented here where there are simultaneous proceedings in different jurisdictions:

"§ 206. Simultaneous Proceedings.

(a) Except as otherwise provided in Section 204, a court of this State may not exercise its jurisdiction under this Article if, at the time of the commencement of the proceeding, a proceeding concerning custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this Act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this State is a more convenient forum under Section 207.

(b) Except as otherwise provided in Section 204, a court of this State, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 209. If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this Act, the court of this State shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this Act does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding." 750 ILCS 36/206 (West 2008).

In the instant case, when petitioner filed her action in the circuit court of Illinois on December 13, 2011, there was already an action pending in Kentucky filed by respondent on December 6, 2011.

¶ 12 Nevertheless, petitioner contends that Illinois was the home state of the child and the parties for six months prior to filing either the Illinois or the Kentucky proceeding, and, thus, Kentucky was not the proper forum. We are unpersuaded by petitioner's argument for two reasons: (1) petitioner's argument fails to take into account the fact that respondent filed his petition for custody in Kentucky before any such action was pending in Illinois, and (2) petitioner's argument fails to take into account the fact that both parties appeared before the

Kentucky court on December 28, 2011, at which time petitioner had the opportunity to present evidence regarding residence and jurisdiction.

¶ 13 In its order determining jurisdiction and setting parenting times, the Kentucky court specifically stated, "This [c]ourt determines that it has and shall retain jurisdiction over this matter until and unless it concludes otherwise after conferring with a judge in Illinois and conducting an evidentiary hearing as to which state is the appropriate forum." The Kentucky court then ordered joint custody and set times when each party would have physical custody of the child. On February 7, 2012, petitioner filed a motion for default judgment for her previously filed petition for child support. In response, respondent filed the December 28, 2011, Kentucky order attached as an exhibit. On April 9, 2012, a case management conference was held in the circuit court, and the judge was made aware of the jurisdictional issue with the Kentucky court.

¶ 14 The circuit court followed the procedure set forth in section 206 of the Act for simultaneous proceedings. The circuit court contacted Judge Farris of the Kentucky court. After at least two unsuccessful attempts, Judge Dahlen was able to reach Judge Farris of the Kentucky court. Judge Farris told Judge Dahlen she would check into jurisdiction and get back to her. Judge Dahlen then correctly stayed jurisdiction pursuant to section 206 of the Act until the Kentucky court made its determination.

¶ 15 On August 15, 2012, Judge Farris entered an order retaining jurisdiction in Kentucky and forwarded a copy of that order to the circuit court, which the circuit court received on August 22, 2012. The Kentucky court made its decision after conferring with Judge Dahlen of the circuit court by telephone and after reviewing the record of the hearing held on December 19, 2011, in Kentucky. The Kentucky court specifically found that the minor child had not resided in Illinois for six months prior to the filing of the Kentucky action. The Kentucky court also stated that after hearing evidence it found that the child had significant

contacts with Kentucky and retained jurisdiction in Kentucky. Our review of the record indicates there was proper communication between the Illinois and Kentucky courts; therefore, the circuit court did not err in dismissing the petition for child support and visitation, as Kentucky retained jurisdiction of both matters.

¶ 16 We are also unpersuaded by petitioner's argument that the trial court erred by failing to hold an evidentiary hearing regarding jurisdiction. There is nothing in the Act that requires a court to hold an evidentiary hearing. Section 206 provides that if another state has commenced custody proceedings, the Illinois court "shall examine the court documents and other information supplied by the parties pursuant to Section 209." 750 ILCS 36/206(b) (West 2008). Section 209 provides for "Information To Be Submitted To Court." 750 ILCS 36/209 (West 2008). That section provides that a party has a continuing duty to inform the Illinois court of other proceedings in Illinois or in any other state that could affect the current proceeding. 750 ILCS 36/209 (West 2008).

¶ 17 Moreover, the Kentucky order entered on December 28, 2011, specifically stated that Kentucky was retaining jurisdiction of the matter and conducting its own evidentiary hearing. Our supreme court has specifically stated:

"It is not within the purview of this court to review the credibility assessments of the court of another state for purposes of assessing error, and the [Act] does not instruct us to undertake such an endeavor. The [Act] is narrowly drafted to provide a mechanism by which courts can review legal determinations, such as jurisdiction and service, when deciding whether another state's custody order should be registered in Illinois. See 750 ILCS 36/305(d) (West 2004). However, the [Act] does not provide a mechanism for relitigation or review of another court's fact determinations. See 9 U.L.A. §101, Comment, at 657 (1999)." *In re Sophia G.L.*, 229 Ill. 2d 143, 165, 890 N.E.2d 470, 483 (2008).

Here, the Kentucky court made a factual finding that the minor had not resided in Illinois for six months prior to the time the Kentucky action was filed. It was not up to Illinois to relitigate that issue.

¶ 18 Petitioner cites *In re Frost*, 289 Ill. App. 3d 95, 681 N.E.2d 1030 (1997), in support of her argument that an evidentiary hearing was required. However, that case is distinguishable from the instant case because it was not a case in which simultaneous proceedings were filed in different states. In *Frost*, the respondent, mother of the child, moved to dismiss the petition for lack of subject matter jurisdiction or, in the alternative, to defer to California, where she and the minor child resided, on the basis of *forum non conveniens*. *Frost*, 289 Ill. App. 3d at 96, 681 N.E.2d at 1032. The petitioner alleged the parties had an agreement which allowed the respondent to take the child to California for the summer only and that she would return with the child at the end of summer. *Frost*, 289 Ill. App. 3d at 102-03, 681 N.E.2d at 1036. The respondent denied the existence of such an agreement and said that the petitioner knew in May that she would not be returning from California. Given the conflicting contentions, the *Frost* court determined that an evidentiary hearing was necessary to determine whether there was an agreement the child would return to Illinois and whether the petitioner knew more than six months prior to filing his petition to establish paternity, custody, and visitation that the child's residence in California was permanent. *Frost*, 289 Ill. App. 3d at 95, 681 N.E.2d at 1036.

¶ 19 Here, however, neither party alleges an agreement or a breach thereof. The parties simply resided in separate but adjoining states and were attempting to work out custody and visitation on their own until respondent filed an action in Kentucky. The record is clear that respondent filed his action in Kentucky before petitioner filed the instant action. The circuit court properly conferred with the Kentucky court as required by section 206 of the Act. The circuit court was correct to accept the factual findings of the Kentucky court. After careful

consideration, we cannot say the circuit court erred in refusing jurisdiction over this matter.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Jackson County is affirmed.

¶ 21 Affirmed.