2016 IL App (2d) 160004-U
No. 2-16-0004
Order filed May 2, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re PARENTAGE of M.P., a Minor,	)	Appeal from the Circuit Court
	)	of Lake County
	)	
	)	No. 15-F-0709
	)	
	)	Honorable
(Bradley Hughes, Petitioner-Appellee, v.	)	Patricia S. Fix,
Dana Prouty, Respondent-Appellant).	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision to decline jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act was not an abuse of discretion in light of its well-founded determinations that Illinois is an inconvenient forum and that respondent's conduct in removing a minor from Arizona in violation of a court order constituted misconduct as contemplated by that Act.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, Dana Prouty, appeals two orders of the circuit court of Lake County. In the first, the trial court granted the motion of petitioner, Bradley Hughes, to decline jurisdiction in favor of Arizona. The second order is a denial of respondent's motion to to vacate the dismissal

of the case based on the trial court's decision to decline jurisdiction. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Petitioner instituted the instant action by filing a complaint to establish paternity with respect to M.P. on September 2, 2015. The complaint states that petitioner was adjudicated the father of M.P. by the Superior Court of Arizona, Maricopa County, on February 4, 2015. At the time of the filing of the complaint, petitioner also filed a motion asking Illinois to decline jurisdiction, arguing it is an inconvenient forum.

¶ 6 The parties have two children together (M.P. and an older brother), and respondent also has an older child—a daughter—by another man. Custody proceedings began in 2012 in Maricopa County Arizona regarding M.P.'s brother and respondent's daughter. The child that is the subject of these proceedings—M.P.—is the youngest child had by respondent and petitioner. During the course of proceedings in Arizona, an order was entered prohibiting respondent from removing the older children from that state. Nevertheless, on August 1, 2013, respondent, who was pregnant with M.P. at the time, brought them to Illinois. They moved in with respondent's father. M.P. was born on August 29, 2013.

¶ 7 On October 1, 2013, the Arizona court issued a warrant for petitioner to take custody of M.P.'s brother. Two days later, petitioner came to Illinois and took M.P.'s brother back to Arizona. Respondent indicated M.P. could not return to Arizona due to health issues. On February 4, 2015, the Arizona court found that petitioner was the father of M.P. It also appointed an expert, Dr. John Moran, to evaluate the parties regarding their children. The expert issued an initial, 73-page report on November 11, 2015.

¶ 8 A bystander's report from the hearing on petitioner's motion to decline jurisdiction reveals the following. Dr. Moran testified, *inter alia*, that he is a psychologist licensed in the state of Arizona. He has never met M.P. His evaluation pertained to M.P.'s brother and respondent's daughter. He testified that "[h]e was appointed to conduct a comprehensive family evaluation." He opined that the respective fathers should have sole legal decision-making authority regarding M.P.'s brother and respondent's daughter. He recommended various counseling services for respondent. He further recommended that respondent have daily supervised telephonic contact with the children. Moran interviewed respondent. She believed that the judge in Arizona (Judge Polk) was biased against her. He interviewed petitioner and noted nothing that adversely affected his parenting abilities. On cross-examination, Moran acknowledged that he had only limited information about M.P. He had not observed M.P.'s brother interact with respondent. His report would be available to any experts from Illinois who wished to review it, and his methods were in general use across the United States. A custody trial was set in Arizona for January 12, 2016.

¶ 9 Petitioner testified that he is a medical doctor licensed to practice in Arizona. He works three days per week. He identified numerous witnesses that reside in Arizona. Petitioner characterized the Arizona legal proceedings as "extensive." Respondent has a home in Arizona, and she filed pleadings in that state alleging that she resided in Phoenix. Petitioner testified that it was difficult for him to travel due to his work responsibilities. M.P.'s brother had lived in Arizona his entire life before respondent removed him to Illinois. Petitioner has never met M.P. and only interacted with him electronically (via FaceTime). He did not complete his residency, so he works in home health care. He earns $80,000 per year. Petitioner stated that he has no health conditions that would prevent him from traveling to Illinois.

¶ 10 Deborah Schmitz testified for respondent. She is an "Illinois-licensed-pediatric occupational therapist." She provided occupational therapy to M.P. and coordinated others who provided additional care. M.P. suffers from "severe and permanent disabilities." Five therapists are engaged in his care, and he receives hour-long therapy sessions in five areas. M.P. has developmental delays and difficulties interacting with strangers.

¶ 11 Respondent testified that she was born and raised in Illinois. M.P. has lived in Illinois for his entire life. Petitioner has never met M.P. Petitioner's family is from Kentucky. M.P. currently resides near extended family, and he has seven playmates in his therapeutic play group. He suffers from chromosomal deletion, which causes severe developmental delays as well as facial and certain other deformities. Respondent acknowledged that she has an aunt in Arizona. She stated that while she has been to Arizona, her primary residence has always been in Illinois. She has not made M.P.'s medical records available to petitioner. She denied recalling several Arizona court documents and a stipulation indicating that she resides at an Arizona address.

¶ 12 Respondent's father also testified. Respondent has resided with him for the two years leading up to the hearing. He has observed respondent with M.P. M.P. "visits treatment providers." M.P. is sometimes "reluctant" in new situations. On cross-examination, he acknowledged that M.P. has been taken to Wisconsin on visits. Greg Williams, a CASA volunteer, testified that he has observed M.P. and respondent. Ryan Kriz, respondent's fiancé, testified that he has known respondent for four months and that M.P. "greeted him with open arms." The bystander's report states that the last three witnesses had opinions as to subjects such as respondent's parenting and care of M.P., but it does not state what those opinions were.

¶ 13 The trial court relied upon Sections 207 and 208 of the Uniform Child-Custody Jurisdiction and Enforcement Act (Act) (750 ILCS 36/207, 208 (West 2016)). The trial court

first made a predicate finding that Illinois was the legal "home state" of M.P. based on the facts that he was born in Illinois and has resided there for his entire life.

¶ 14 The trial court then determined that Illinois is an inconvenient forum as contemplated by the Act. In so ruling, it discussed each statutory factor set forth in section 207 of the Act. It found that most of the factors did not apply. However, it found that the parties' relative financial circumstances were "near equal," noting that petitioner's income was limited as a doctor, as he had not completed his residency, and respondent's financial burdens were low, as she was living in her father's home. It relied heavily on the last three statutory factors: the nature and location of the evidence; the ability of the respective courts (Illinois and Arizona) to decide the issue expeditiously; and the familiarity of the respective courts with the case. Regarding the evidence the trial court found that M.P. would offer no testimony due to his age. It then stated that it considered the location of the balance of the evidence and found that Arizona "might still be in a more expeditious position to decide that evidence." As for familiarity, it noted that until shortly before the hearing in the instant case, Arizona had "a hundred percent" familiarity with the case "for the better part of four years." The trial court pointed out that there was actually litigation pending in Arizona regarding the matter. The trial court acknowledged that the Parental Kidnapping Prevention Act (28 U.S.C. § 1738A (2000)) creates a preference for a child's home state, but it permits a state to defer jurisdiction in certain circumstances and its goals are consistent with those of the Act.

¶ 15 The trial court also cited what it termed respondent's "unjustifiable conduct," specifically, removing M.P.'s brother from Arizona and leaving Arizona while pregnant with M.P. and refusing to return for a custody adjudication. In light of all of these considerations, the trial court found that Illinois is an inconvenient forum and that Arizona is "a more appropriate

forum." At the request of respondent's counsel, the trial court made findings pursuant to Illinois Supreme Court Rule 304(a) (eff. March 8, 2016). This appeal followed. Subsequent to filing her notice of appeal, respondent filed in the trial court a motion to vacate its order declining jurisdiction. The trial court ruled on the motion to vacate the day after it was filed, finding that it lacked jurisdiction over the motion due to the pendency of this appeal.

¶ 16 III. ANALYSIS

¶ 17 Respondent now raises three arguments concerning the trial court's decision to decline jurisdiction. She alleges error in the trial court's findings that: (1) Illinois is an inconvenient forum; (2) her removal of the older two children from Arizona in violation of a court order constituted conduct justifying the trial court declining jurisdiction; and (3) her returning to her family home in Illinois justified the trial court declining jurisdiction. A decision to decline jurisdiction in favor of a foreign court will be affirmed absent an abuse of discretion by the trial court. *In re Marriage of Elblkasy*, 241 Ill. App. 3d 662, 665 (1993). An abuse of discretion occurs only where no reasonable person could agree with the trial court. *In re Marriage of Hall*, 278 Ill. App. 3d 782, 785 (1996).

¶ 18 A. INCONVENIENT FORUM

¶ 19 Section 207 of the Act states, "A court of this State which has jurisdiction under this Act 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." 750 ILCS 36/207(a) (West 2016). The statute directs a court to consider the following eight factors:

> "(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;

(2) the length of time the child has resided outside this State;

(3) the distance between the court in this State and the court in the state that would assume jurisdiction;

(4) the relative financial circumstances of the parties;

(5) any agreement of the parties as to which state should assume jurisdiction;

(6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) the familiarity of the court of each state with the facts and issues in the pending litigation." 750 ILCS 36/207(b) (West 2016).

This is a nonexlcusive list, and a court may consider any relevant matter. 750 ILCS 36/207(b) (West 2016).

¶ 20 Respondent asserts that petitioner based his request on his own presence in Arizona; the pendency of proceedings in Arizona; and respondent's ownership of a residence in that state. Respondent acknowledges that a "lengthy forensic scientist's report" was generated during the course of the Arizona proceedings, but points out that it did not concern M.P. Respondent then addresses the factors set forth in section 207(b).

¶ 21 First, as found by the trial court, there is no indication of any domestic violence between the parties. Regarding the second factor, respondent points out that M.P. has spent his entire life in Illinois, as the trial court found. Thus, the second factor would favor Illinois maintaining jurisdiction. The third factor is the distance between the respective courts. Respondent notes that the distance is significant, so the burden of transporting witnesses from Illinois to Arizona is

not *de minimis*. However, the same can be said of transporting witnesses from Arizona to Illinois. A reasonable person could conclude that this factor was entitled to little weight. As for the fourth factor, respondent complains that the trial court found the parties' economic circumstances to be similar despite the fact that petitioner made $80,000 per year and respondent is unemployed. While true, the trial court based its ruling on the fact that respondent was living at her father's home and thus had far fewer expenses. Again, this is a conclusion with which a reasonable person could agree. The fifth factor, the existence of an agreement regarding a choice of forum, does not apply because no such agreement exists.

¶ 22 The sixth factor is "the nature and location of the evidence required to resolve the pending litigation, including testimony of the child." 750 ILCS 36/207(b)(6) (West 2016). The trial court correctly found that given the child's age, that consideration did not apply regarding the child's testimony. Here, respondent argues that the trial court erred in "weighing the existence of the pending custody proceedings regarding the elder two children in Arizona more heavily than the overwhelming weight and importance of this specific and special child situated solely in Illinois." Respondent asserts that M.P.'s "existence is dependent on the care of numerous professionals, located in Illinois." All evidence regarding this care is located in Illinois. It is undoubtedly true that substantial evidence regarding M.P.'s condition and care is located in this state. However, petitioner submitted evidence indicating similar care was available in Arizona. Further, a comprehensive report has already been prepared regarding the family (even if it does not address M.P. directly) by an Arizona professional. The fact that custody proceedings have been pending for four years is also significant. At best, this factor favors Illinois to a degree, but there is substantial relevant evidence in Arizona as well.

¶ 23 The seventh factor is "the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence." 750 ILCS 36/207(b)(7) (West 2016). A custody hearing was already set in Arizona, and Arizona courts have been dealing with this family for four years. While it is true that a significant amount of evidence exists outside of that state, relevant evidence also exists there. In short, a reasonable person could conclude that this factor favors Arizona, but, like the last factor, some circumstances point to Illinois.

¶ 24 Finally, the eighth factor is "the familiarity of the court of each state with the facts and issues in the pending litigation." 750 ILCS 36/207(b)(8) (West 2016). A reasonable person could determine that this factor favors Arizona overwhelmingly. Respondent "concedes that Arizona has familiarity with the facts and issues regarding the parties themselves." She points out that Arizona has no familiarity with M.P.'s "special circumstances," such as his developmental delays, needs, and history of healthcare. While his latter proposition is true, it is also true that no Illinois court is familiar with M.P.'s "special circumstances." Thus, Arizona's "familiarity with the facts and issues regarding the parties themselves" favors Arizona, and the respective courts' lack of familiarity with M.P.'s special needs points in neither direction.

¶ 25 In sum, the final factor clearly points to Arizona, the second favors Illinois, the seventh somewhat favors Arizona and the sixth points to Illinois to a degree. The other factors provide no substantial guidance here. Under such circumstances, we simply cannot find that no reasonable person could agree with the trial court. Therefore, no abuse of discretion occurred.

¶ 26 Arguing for a contrary result, respondent relies on *Fleckles v. Diamond*, 2015 IL App (2d) 141229, which she deems to be "strikingly similar." Having reviewed that case, we see no meaningful similarities. In *Fleckles*, this court held that Illinois could not exercise jurisdiction

over a child born in Colorado until Colorado declined jurisdiction. *Id.* ¶ 52 ("To hold here that Illinois may make an initial child-custody determination, we believe, would ignore this goal and ignore that the UCCJEA gives priority to the jurisdiction of the child's 'home state.' "). Here, the question is not whether Illinois can exercise jurisdiction over a child whose home state is not Illinois; rather, it is whether Illinois—the home state—*should* decline jurisdiction as an inconvenient forum. *Fleckles* also involved the issue of whether a court could make a determination regarding which state is a child's home state for the purposes of the Act before the child's birth, which is not at issue here. Thus, *Fleckles* provides no support for respondent's position.

¶ 27 B. REMOVAL OF THE OLDER CHILDREN FROM ARIZONA

¶ 28 Respondent also contends that the trial court abused its discretion in determining that her removal of her older two children from Arizona in violation of a court order was conduct that justified Illinois declining to exercise jurisdiction. Section 208(a) of the Act (750 ILCS 36/208(a) (West 2016)) provides:

> "(a) Except as otherwise provided in Section 204 or by other law of this State, if a court of this State has jurisdiction under this Act because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:
>
> (1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
>
> (2) a court of the state otherwise having jurisdiction under Sections 201 through 203 determines that this State is a more appropriate forum under Section 207; or

> (3) no court of any other state would have jurisdiction under the criteria specified in Sections 201 through 203."

There is no indication that any of the exceptions apply.

¶ 29 Respondent acknowledges that she violated the order of the Arizona court. She then asserts that the "older child was promptly recovered by the father." While true, to recover the older child, petitioner had to procure a warrant and travel to Illinois. Thus, while the recovery may have been prompt, the implication that it was not burdensome is not well founded.

¶ 30 Respondent contends that the gravity of her misconduct is outweighed by M.P.'s needs and best interests. In support, she cites *In re Marriage of Arulpragasam & Eisele*, 304 Ill. App. 3d 139 (1999) (this case was decided under law in effect prior to the adoption of the Act, yet its principles remain of potential persuasive guidance). Unfortunately respondent's brief does not provide pinpoint citation to the portion of the case that purportedly supports respondent's position, and we are left to divine respondent's intentions here. The only section that addresses misconduct holds that a mother did not engage in misconduct where she attempted to comply with a dissolution judgment requiring her to seek permission before removing her children from the state of Massachusetts. This is almost precisely the opposite of what transpired here—respondent blatantly violated a court order in removing her children from Arizona. Thus, *Arulpragasam* is inapposite.

¶ 31 She cites foreign authority—which we find persuasive—for the proposition that " '[b]oth [the Act] and the case law, however, recognize properly that the apparent imperative to discourage abduction must, when necessary, be submerged to the paramount concern in all custody matters: the best interest of the child.' " *Brown v. Brown*, 195 Conn. 98, 113 (1985) (quoting *Nehra v. Uhlar*, 43 N.Y.2d 242, 250 (1977)). We have no quarrel with this proposition;

however, respondent simply makes a bare assertion that M.P.'s needs and the difficulties she would have presenting her case outweigh the gravity of her misconduct. The policies underlying the Act are significant. It exists to "avoid jurisdictional competitions and conflicts between states, to protect children's best interests, and to discourage forum shopping." *Cf. In re Marriage of Kneitz*, 341 Ill. App. 3d 299, 304 (2003) (discussing prior law directed at the same issues). On appeal, it is respondent's burden, as the appellant, to demonstrate error. See *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008). The mere assertion that M.P.'s needs are entitled to greater weight than such policy concerns that were flouted by respondent is not enough to carry that burden and show that no reasonable person could agree with the trial court. In sum, we reject respondent's argument on this point.

¶ 32 C. RETURNING TO HER FAMILY HOME AS MISCONDUCT

¶ 33 Respondent next states that the trial court erred in determining that her return to her family home was conduct justifying declining jurisdiction. She does not provide citation to what portion of the trial court's order she is contesting in this argument. As we read the trial court's decision, it did not base its ruling on the fact that respondent returned to her family home, it based its ruling on the fact that when she returned to her family home, she removed her children from Arizona in violation of a court order (along with finding Illinois an inconvenient forum). Respondent cites nothing to suggest that the fact that she was returning to her family home somehow mitigated her wrongful conduct of violating the court order. Indeed, she only cites one case in her entire argument, which she acknowledges has "vastly different" facts. See *In re D.S.*, 217 Ill. 2d 306 (2005).

¶ 34 In short, we do not believe this argument is responsive to the trial court's ruling, and we find it, in any event, unpersuasive and lacking supporting authority. Moreover, the trial court's

decision regarding Illinois being an inconvenient forum and respondent's misconduct in violating the Arizona court order are sufficient to justify declining jurisdiction here.

¶ 35 D. THE TRIAL COURT'S JURISDICTION

¶ 36 Respondent's final contention is that the trial court erred in determining that it did not have jurisdiction to consider her motion to vacate its order declining jurisdiction. This motion was filed after respondent filed her notice of appeal.[1] This argument is moot. Regardless of whether we determined the trial court had jurisdiction to entertain respondent's motion, our next step would be to remand this cause to the trial court for further proceedings. This is because, either way, we have resolved this appeal, and, as this is an appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. March 8, 2016) of less than the entire proceeding, we must remand this cause. On remand, the trial court can take whatever action is appropriate, including addressing the merits of respondent's motion to vacate its earlier order.

¶ 37 IV. CONCLUSION

¶ 38 In light of the foregoing, the judgment of the circuit court of Lake County is affirmed, and this cause is remanded.

¶ 39 Affirmed and remanded.

[1]While the filing of the motion to vacate the order being appealed could have rendered respondent's notice of appeal premature (see *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 432 (2005), the motion was, in fact, resolved the day after it was filed, rendering the notice of appeal effective in accordance with Illinois Supreme Court Rule 303(a)(2) (eff. January 1, 2015).