NOT DESIGNATED FOR PUBLICATION

No. 91,959

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF: B.B.M.

MEMORANDUM OPINION

Appeal from Johnson District Court; LAWRENCE E. SHEPPARD, judge. Opinion filed December 17, 2004. Affirmed in part, reversed in part, and remanded with directions.

Martin W. Bauer and *Teresa L. Mah*, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellant American Adoptions, Inc.

Ronald W. Nelson and *Joseph W. Booth*, of Nelson & Booth, of Overland Park, for appellee natural father.

Before McANANY, P.J., MALONE, J., and LARSON, S.J.

Per Curiam: American Adoptions, Inc. (AA) appeals from the district court's decision not to exercise subject matter jurisdiction in AA's action to terminate the parental rights of Donald J. to Baby Boy M. Because the district court did not conduct an appropriate examination and analysis as required under the inconvenient forum statute, K.S.A. 38-1354, we reverse the district court's decision and remand for further proceedings consistent with this opinion.

Joann M. and Donald J. were unmarried but living together in Plano, Texas, when Joann discovered she was pregnant. She decided to put the expected baby up for adoption. In December 2002 or January 2003, Joann contacted the Gladney adoption center in Fort Worth, Texas, and began the adoption process.

In February 2003 Gladney filed an action in Texas to terminate Donald's parental rights to the yet-to-be born Baby Boy M. Donald filed an answer in which he opposed termination. Thereafter, Gladney voluntarily dismissed the action, apparently because of its unwillingness to proceed in a contested matter.

Joann sought out another adoption agency and settled on AA, a Kansas licensed adoption agency. On April 3, 2003, she came to Kansas where the Masons, the prospective adoptive parents, reside. She stayed at a motel in Lenexa. Baby Boy M. was

born at Shawnee Mission Medical Center in Merriam, Kansas, on April 23, 2003. The following day Joann relinquished her parental rights to AA. On April 25, 2003, Baby Boy M. was discharged from the hospital and placed with the Masons, with whom he has lived ever since.

On the day Baby Boy M. was released from the hospital, AA filed an action in Johnson County, Kansas, to terminate Donald's parental rights. The following day, April 26, 2003, Joann returned to Texas where she presently resides.

On May 16, 2003, within 30 days of Baby Boy M.'s birth as required by Texas law, Donald filed with the Texas Paternity Registry his notice of intent to claim paternity. Thereafter, on May 29, 2003, he filed an action in Dallas County, Texas, in which he sought primary placement of his son and, to that end, obtained a temporary restraining order against Joann. On June 10, 2003, Joann filed her answer in the Dallas County action in which she noted her relinquishment of parental rights and the pending termination action in Johnson County. She asserted that the court in Dallas County could not exercise its jurisdiction because at the time the Texas action commenced, Kansas was the home state for Baby Boy M. and there was already pending in Johnson County an action concerning Baby Boy M.'s custody. That same day, the court in Dallas County temporarily stayed the Texas proceedings because of the pending Kansas action.

Donald filed his answer in Johnson County on June 20, 2003, and prayed for dismissal of the termination action. Donald then moved to dismiss the Kansas action for lack of subject matter jurisdiction. The motion was heard on November 12, 2003. The court took extensive testimony from Joann, Donald, the Masons, and two employees of AA. After taking the matter under advisement, the district court issued its memorandum ruling in which it concluded it would not exercise subject matter jurisdiction based on substantive reasons and that pursuant to K.S.A. 38-1354 Kansas was an inconvenient forum. AA has now appealed.

Jurisdiction.

We first consider whether the Kansas court has subject matter jurisdiction. Since this is a question of law, we review the issue de novo. *In re Adoption of Baby Girl B.*, 19 Kan. App. 2d 283, Syl. ¶ 3, 867 P.2d 1074, *rev. denied* 255 Kan. 1001 (1994). Upon doing so, we conclude that the Kansas court has subject matter jurisdiction over these proceedings.

The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), K.S.A. 38-1336 *et seq.*, was enacted in 2000 to replace the Uniform Child Custody Jurisdiction Act (UCCJA), K.S.A. 38-1301 *et seq.* (1986). The UCCJEA specifically includes

termination of parental rights proceedings as child custody proceedings. K.S.A. 38-1337(5).

Under the circumstances of this case, the Kansas court has subject matter jurisdiction if Kansas is Baby Boy M.'s home state when the termination proceedings commenced and Texas is not. K.S.A. 38-1348(a). Since Baby Boy M. was less than 6 months of age when the termination proceedings commenced, his home state is Kansas, where he has lived from birth with a parent or a person acting as a parent. K.S.A. 38-1337(8). The Masons qualify as persons acting as parents since they have physical custody of Baby Boy M. and claim a right to legal custody under Kansas law. K.S.A. 38-1337(14)(A). Thus, Kansas is the initial child custody jurisdiction forum. The Texas court so concluded and appropriately stayed its proceedings and deferred to Kansas where proceedings were first brought. See *In re Marriage of Ruth*, 32 Kan. App. 2d 416, 422, 83 P.3d 1248 (2004); K.S.A. 38-1353; Tex. Family Code Ann. § 152.206 (West 2002).

Inconvenient forum

Though it has subject matter jurisdiction, the district court declined to exercise it for reasons of forum non conveniens. AA claims that the court erred in so ruling because (1) it did not consider the required statutory factors detailed in K.S.A. 38-1354, and (2) it

made its analysis from Donald's perspective rather than from the child's perspective.

Declining to exercise jurisdiction based on inconvenient forum is a matter of judicial discretion. *In re Marriage of Ruth*, 32 Kan. App. 2d at 423. We review the trial court's action to determine if it abused that discretion. *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 44, 59 P.3d 1003 (2002).

Statutory Factors

K.S.A. 38-1354 instructs on the procedure the court must follow to determine whether its forum is inconvenient. In doing so, the court must consider all relevant factors, including eight specifically enumerated in the statute. They are:

(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." Joann testified to an incident of domestic violence in Texas. The trial court made no reference to this issue, and nothing in the record establishes that the court considered it.

(2) "[T]he length of time the child has resided outside this state." The court addressed this issue in finding that Baby Boy M. was born in Kansas and has lived here

with the Masons since April 25, 2003. The record does not show whether the court took that fact into account in determining that Kansas was an inconvenient forum.

(3) "[T]he distance between the court in this state and the court in the state that would assume jurisdiction." The trial court did not address this issue; nor did it address the related issue of the costs imposed on Donald, AA, the Masons, or Baby Boy M. to travel to and from Kansas and Texas during any future proceedings. The court's reasoning suggests that proceedings in Texas would be easier for the natural parents. However, the impact on AA, the Masons, or Baby Boy M. did not appear to receive the same consideration. AA, the Masons, and Baby Boy M. would clearly be involved in any such proceedings and the convenience of the forum for them should be considered.

(4) "[T]he relative financial circumstances of the parties." The district court's decision made no reference to the financial circumstances of the parties.

(5) "[A]ny agreement of the parties as to which state should assume jurisdiction." While there is no reference to this issue, we are confident from the facts provided that no such agreement exists.

(6) "The nature and location of the evidence required to resolve the pending

litigation, including testimony of the child." The district court's reasoning does address the nature and location of some of the evidence that would be relevant to the issue of Donald's parental rights, and the court noted that Baby Boy M. is incompetent to testify. As discussed below, additional evidence and testimony may come from AA or the Masons on some of the claims upon which AA bases its termination petition. The district court should take those into account in determining the more convenient forum.

(7) "[T]he ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence." There is no reference in the district court's decision to whether it or the court in Texas could decide the issue more expeditiously. The Texas proceeding is to determine parentage. The Kansas proceeding assumes parentage and seeks to terminate the rights that flow from it. There appears to have been no consideration whether this divergence of issues presents any procedural impediments to a prompt resolution of the issues raised in Kansas in a Texas court. Further, the trial court makes no reference to the practicalities of presenting evidence on the Kansas issues in a Texas proceeding through live testimony as opposed to alternative means, such as depositions, stipulations, requests for admissions, interrogatories, and the like.

(8) "[T]he familiarity of the court of each state with the facts and issues in the

pending litigation." The Kansas court has already heard considerable evidence, some of which may relate to the substantive issues in the termination action. The Texas court stayed its proceedings the same day the issues were joined in Donald's paternity action. There is no reference in the district court's decision to whether the court in Texas is familiar with the facts and issues in the case or, as noted above, whether the Texas court is prepared to deal with the Kansas issues in its currently pending but stayed proceedings.

We conclude that the district court failed to make its decision that Johnson County, Kansas, was an inconvenient forum in accordance with K.S.A. 38-1354.

Perspective of Analysis

AA's second argument is that the trial court erred in making its analysis from Donald's perspective rather that from the child's. AA relies upon *Adoption of Baby Girl B.* in which this court found, in construing the UCCJA, that "[t]he prime consideration in determining if a court is an inconvenient forum is the best interests of the child. [Citations omitted.]" 19 Kan. App. 2d at 288.

The UCCJA specifically provided that "[i]n determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume

jurisdiction." K.S.A. 38-1307(c) (Ensley 1986). Further, the UCCJA stated several of the factors for asserting jurisdiction from the child's perspective.

Jurisdiction under the UCCJA was designed to promote the best interest of the child by discouraging parental abduction and providing that, in general, the state with the closest connections to the child and the most evidence regarding the child should decide the child's custody. However, this was not intended to be an invitation to address the substantive custody issues when deciding the jurisdiction issue, since the "best interest" consideration is not a basis for jurisdiction. Accordingly, upon enactment of the UCCJEA, the reference to the best interest of the child was eliminated in order to distinguish standards for establishing jurisdiction from standards for making the substantive custody determination. See Uniform Child Custody Jurisdiction and Enforcement Act, Prefatory Note, 9IA U.L.A. 652 (1999). Under the UCCJEA, the statutory factors are now viewed from the perspective of a detached observer, not the perspective of one particular party over another. Thus, while the court should not consider the statutory factors solely from the perspective of Baby Boy M., neither should it consider the factors solely from Donald's perspective.

While the district court considered the location of nature of the evidence related to the natural parents, it failed to consider the nature and location of the evidence related to

AA, the Masons, or Baby Boy M. The alleged grounds for termination of Donald's parental rights relate to claims of (1) Donald's abandonment or neglect of Baby Boy M. after knowledge of his birth; (2) Donald's unfitness as a parent; (3) Donald's failure to make reasonable efforts to support or communicate with his child after knowledge of his birth; (4) Donald's failure to support Joann during her pregnancy; and (5) Donald's abandonment of Joann after learning she was pregnant. It is certainly conceivable that AA and the Masons could provide evidence on some of these claims. In determining the more convenient forum, the prospect of testimony and other evidence from AA and the Masons must be taken into account.

Substantive Custody Considerations

The district court concluded that its analysis resulted in the scales tipping in favor of Texas as the more convenient forum. That weighing of evidence was incomplete when the inquiry on the issues was limited to Donald and Joann. Further, the Texas side of the scale was weighed down with considerations that had nothing to do with determining the more convenient forum when the court strayed into substantive areas which, as discussed above, the language changes in the UCCJEA sought to warn against.

Preliminarily, we note that the district court did not decline to exercise jurisdiction

by reason of conduct under K.S.A. 38-1355 and made no reference to K.S.A. 38-1355 in its decision.

Whatever court that ultimately exercises jurisdiction in this case will consider evidence of Donald's conduct with respect to the various claims upon which AA seeks to terminate Donald's parental rights. That conduct, however, is not relevant to the issue of the convenience of the forum. Thus, the scales were not properly weighted to the extent that the evidence added on the Texas side of the scales may have included the district court's findings that Donald exhibited considerable zeal in asserting his parental rights, that Joann left Texas and came to Kansas without notifying Donald that she had left, or that AA's conduct lacked forthrightness and credibility. These are matters that must be reserved for later consideration, if they prove to be relevant, by the court that assumes jurisdiction.

We are mindful of the problems that attend protracted legal proceedings regarding a child who is now a toddler and has spent his entire life with a family that ultimately may not be able to adopt him. We are likewise mindful that if Donald ultimately prevails, he will have lost years of crucial bonding time with his son. Nevertheless, our role is not to substitute our discretion for that of the trial court on the forum non conveniens issue now before us, or to reweigh the facts that were presented to the trial court. Upon considering

the limited issues presented to us, we affirm the district court's finding that Kansas is Baby Boy M.'s home state but reverse the decision that Kansas is an inconvenient forum. We remand the case for further proceedings and with directions for the trial court to consider all the statutory factors of K.S.A. 38-1354, and to do so from the perspective of a detached observer who takes into account the perspectives of all interested parties; to limit its consideration to issues relating to jurisdiction; and to not consider facts that go to the ultimate issue of whether Donald's parental rights should be terminated.

Affirmed in part, reversed in part, and remanded with directions.