

NOT DESIGNATED FOR PUBLICATION

No. 96,318

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MARY L. YOAKUM (formerly Horst),
Appellee,

and

VINCENT G. HORST,
Appellant.

MEMORANDUM OPINION

Appeal from Miami District Court; RONALD D. INNES, judge. Opinion filed
February 23, 2007. Affirmed.

Mark A. Corder, of Law Office of Mark A. Corder, P.A., of Olathe, for appellant.

Allan E. Coon, of Norton, Hubbard, Ruzicka & Creamer, L.C., of Olathe, for appellee.

Randy M. Barker, of Kansas Department of Social and Rehabilitation Services,

assignee of support rights.

Before GREEN, P.J., MARQUARDT, J., and BRAZIL, S.J.

Per Curiam: Vincent G. Horst appeals the Miami County District Court's refusal to transfer venue for postdivorce proceedings to Johnson County. We affirm.

Mary L. Yoakum, formerly Mary Horst, (hereinafter Yoakum) and Vincent Horst married and had two children. From October 2000 through February 2002, they resided in Miami County. In February 2002, Yoakum filed for divorce from Horst in Miami County. Horst did not dispute Miami County's jurisdiction or venue. Horst filed an answer and counterclaim, and has since filed many other pleadings in the divorce action in Miami County.

Following the divorce, both Horst and Yoakum relocated to Johnson County. Counsel for both parties are located in Johnson County. Kansas Social and Rehabilitation Services (SRS), which enforces child support payments, is located in Topeka.

On November 4, 2005, Horst filed a motion to transfer venue to Johnson County arguing that it would provide a more convenient forum for future proceedings. Oral

arguments from SRS, Horst, and Yoakum were heard in Miami County. The motion was denied. Horst timely appeals. Yoakum timely filed a motion for appellate attorney fees. Horst filed a response.

On appeal, Horst argues that the trial court erred when it denied his motion to transfer venue to Johnson County. Yoakum argues that Horst is forum shopping after being reprimanded and ordered to pay attorney fees by the Miami County court.

The grant or denial of a motion for change of venue is within the sound discretion of the trial court. *Schmidt v. Shearer*, 26 Kan. App. 2d 760, 765, 995 P.2d 381 (1999). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 44, 59 P.3d 1003 (2002).

Venue for divorce actions is in the county where either the respondent or petitioner is a resident, or where service on the respondent may be obtained. K.S.A. 60-607. Objections to venue must be timely made by motion prior to the commencement of the action on its merits. K.S.A. 60-610. If an objection to venue is not raised prior to trial, it is deemed waived. *Rauscher v. St. Benedict's College*, 212 Kan. 20, 23, 509 P.2d 1137 (1973). Horst never objected to the Miami County venue before the divorce trial.

Questions of venue in postjudgment actions are controlled by K.S.A. 60-607 and K.S.A. 60-609, which govern venue and change of venue, respectively, in domestic relations actions. *In re Marriage of Yount & Hulse*, 34 Kan. App. 2d 660, 664, 122 P.3d 1175 (2005). Upon the motion of a party, a trial court may transfer any civil action to any county where it might have been brought upon a finding that a transfer would better serve the convenience of the parties and witnesses and the interests of justice. K.S.A. 60-609(a). However, the trial court has discretion whether to grant the transfer. Unless the trial court abused its discretion, this court will uphold the trial court's decision.

Yoakum argues that once a trial court acquires jurisdiction over a divorce action, it has continuing jurisdiction, and no other trial court may assume jurisdiction. While it is correct that one trial court may not interfere with proceedings in another trial court, see *Nixon v. Nixon*, 226 Kan. 218, 221-22, 596 P.2d 1238 (1979), K.S.A. 60-609 provides a mechanism for transferring venue. None of the cases cited by Yoakum involves the proper use of K.S.A. 60-609. Yoakum's argument fails.

The same line of reasoning applies to Yoakum's argument that Miami County should retain venue based on comity. As the court that first acquired jurisdiction, Miami County would have no reason to invoke the principle of comity. Johnson County, however, could cite comity as a reason for refusing to take a case over which another trial court already has

jurisdiction. Since K.S.A. 60-609 allows the trial court that has venue to transfer venue to another trial court, comity does not apply to these facts.

The trial court denied Horst's motion to transfer venue because Miami County's judges were already familiar with the case, and to facilitate SRS's collection activity of child support.

Horst argues that collection activities could just as easily be handled by the district court trustee in Olathe. This assertion ignores SRS's explanation for why it opposes the transfer. SRS explained at the hearing that it "would have to relay court files, and update another individual to come up to speed. And, I'm already up to speed on this, so it would cause undue delay on the State's behalf on catching up, as far as enforcement."

Horst also argues that "[p]ost-divorce issues involving support, collection, medical expenses are all issues that don't require the District Court having any knowledge of the history of the case." There is an extensive record in this case containing many postjudgment motions that belie this contention. The trial court has an interest in promoting efficiency in the court system by preventing duplication among the courts. Horst's efforts to discount the trial court's reasons for its ruling are not persuasive. The trial court did not abuse its discretion when it denied Horst's motion to transfer venue.

Pursuant to Kansas Supreme Court Rules 7.07(b) and (c) (2006 Kan. Ct. R. Annot. 57), Yoakum filed a motion with this court seeking attorney fees for services on appeal. According to Yoakum,

"the motivation for [Horst's motion to transfer venue of a post-divorce matter from Miami County to Johnson County] was likely not to further the convenience of the parties or to facilitate the efficient judicial resolution of the parties' disputes, but rather to move the case to a forum that Mr. [Horst] hoped or believed might give him more favorable rulings. Given the (almost immediately pre-appeal) reprimand from the Miami County court to Mr. Horst to cease filing repetitive and meritless motions, it is also reasonable to infer that he hoped to get the case in front of a judge who would be less aware of the history of the litigation."

Yoakum argues that "even if a lawful transfer could have been ordered, the decision to do so would have been purely one of judicial discretion, and there was absolutely nothing offered by the appellant in the district court or in his appellate brief to even hint that Judge [Innes] abused [his] discretion in retaining the case." The affidavit filed by Yoakum's attorney claims fees totaling \$4,400.

Horst contends that his appeal is not frivolous and even if attorney fees are appropriate, the amount of time Yoakum's counsel spent preparing the appeal is

unreasonable. Horst attached an affidavit to his response showing that his attorney spent 6.5 hours on this appeal while Yoakum's attorney claims 24.7 hours.

Appellate courts may award attorney fees for services on appeal in any case in which the trial court had authority to award attorney fees. Rule 7.07(b). Here, the trial court had authority to award attorney fees under K.S.A. 60-1610(b)(4), which provides that costs and attorney fees may be awarded to either party as justice and equity require.

A frivolous appeal is "one in which no justiciable question has been presented and the appeal is readily recognized as devoid of merit in that there is little prospect that it can ever succeed." *Peoples Nat'l Bank of Liberal v. Molz*, 239 Kan. 255, 257, 718 P.2d 306 (1986).

Horst's appeal presents a justiciable question. Although Horst did not prevail in this appeal, his appeal is not frivolous and Yoakum's request for attorney fees is denied.

Affirmed.