

NOT DESIGNATED FOR PUBLICATION

No. 97,077

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

DENNIS MARK TOTMAN,
Petitioner/Appellant,

and

VERONICA LEE TOTMAN,
Respondent/Appellee.

MEMORANDUM OPINION

Appeal from Crawford District Court; JOHN C. GARIGLIETTI, judge. Opinion filed August 10, 2007. Affirmed.

Robert L. Farmer, of Nuss and Farmer, P.A., of Fort Scott, for appellant.

Robert S. Tomassi, of Wheeler & Mitchelson, Chartered, of Pittsburg, for appellee.

Before RULON, C.J., GREENE, J., and LARSON, S.J.

Per Curiam: This is Dennis Mark Totman's appeal of the district court's

determination under the provisions of the Kansas Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), K.S.A. 38-1336 *et seq.*, to decline jurisdiction in Kansas in favor of Oregon over issues involving his daughter, E.E.T.

Dennis argues on appeal that prior orders in Oregon as to parentage, custody, support, and visitation were nullified by his subsequent marriage to his daughter's mother, Veronica Lee Totman, and actions in Kansas; jurisdiction to determine custody and parenting time is proper in Kansas under K.S.A. 38-1348 because of the parties' substantial contacts with Kansas; and the only convenient forum for a custody and parenting time determination in this action is the State of Kansas.

There does not appear to be a substantial disagreement as to the facts in this case, but the result they compel has been competently litigated and is the subject of sharp disagreement.

E.E.T., the daughter of Dennis and Veronica, was born in Oregon on July 19, 2004. At that time, Dennis and Veronica were not married and Dennis was a Kansas resident and Veronica resided in Oregon with her two other children. Dennis had subjected himself to the jurisdiction of Oregon courts for issues concerning E.E.T. and on February 11, 2005, an agreed stipulated general judgment was entered with the Oregon court awarding joint custody, primary physical custody to Veronica, required Dennis to

pay child support payments, and established parenting time.

On April 22, 2005, Dennis and Veronica were married in Portland, Oregon. Child support payments terminated in May. On June 15, 2005, Veronica and her three children joined Dennis at his home in Arcardia, Kansas, and Veronica established a Kansas home-based business.

At 12:19 p.m. on November 7, 2005, Veronica filed a protection from abuse petition in Kansas asking the Crawford County District Court to issue protective orders for her and her children because she feared for their safety. In the petition, Veronica indicated that custody of the minor children had been established in Oregon. At 3:18 p.m. on November 7, 2005, Dennis filed a petition for divorce in Crawford County District Court. Dennis' affidavit for custody incorrectly claimed that he had not participated in any other litigation concerning the custody of this daughter. The affidavit also stated that no custody proceeding concerning his daughter was pending in a Kansas court or any other state. Based on Dennis' affidavit for custody, the district court entered an emergency temporary order enjoining Veronica from removing their daughter from Kansas and provided that no child support was to be paid by either party.

Veronica filed a denial to Dennis' petition on November 14, 2005, and counterclaimed for divorce, division of property, and custody of E.E.T. Although not in

the record, the parties have indicated that a temporary parenting order was entered in Kansas allowing Veronica to move back to Oregon which she did on December 11, 2005.

On December 16, 2005, Veronica filed for sole custody of E.E.T. in Multnomah County, Oregon, and in her affidavit in support of modification of custody, parenting time and child support indicated she had been advised at the safehouse to move back to Oregon. Her affidavit did not mention the protective orders she had obtained in Kansas.

On April 5, 2006, Veronica filed a motion in Kansas requesting that the Kansas court decline jurisdiction and permit the Oregon courts to exercise jurisdiction over her daughter's custody issues. Dennis countered with a brief in support of Kansas having jurisdiction pursuant to the UCCJEA. The matter was set for a telephonic conference between the parties, counsel, and Judge John Gariglietti of Crawford County District Court in Kansas and Judge Katherine Tennyson of Multnomah County, Oregon.

The conference occurred on April 6, 2006. The parties agreed that neither Kansas nor Oregon could be considered as the daughter's home state as defined by K.S.A. 38-1337(8) of the UCCJEA. A wide-ranging discussion between the judges occurred with counsel for both parties presenting arguments in favor of and against jurisdiction in Kansas and Oregon. Ultimately, Judge Gariglietti stated:

"Well, apparently the Oregon Court and Judge Tennyson is prepared to assume that duty. Like I say, I—I don't necessarily agree or disagree with counsel. I think, obviously, the question would be the best interest of the child for a placement, etc., parenting time. Apparently the respondent has chosen at this point to move back, live in the State of Oregon, and so I could decline jurisdiction at this point and allow Judge Tennyson to proceed."

The parties continued to press their arguments, but Judge Gariglietti ruled he would stick with his original decision to decline and allow Oregon to proceed.

After a controversy over the language of the journal entry and the denial of Dennis' motion to reconsider the judge's ruling declining jurisdiction under the inconvenient forum statute, K.S.A. 38-1354, Dennis has appealed.

Dennis first argues the Kansas district court cannot rely on the Oregon custody order established after E.E.T.'s birth because it became void based on Dennis' and Veronica's subsequent marriage.

This contention does not appear to be contested by Veronica as both parties point us to *In re Marriage of Allen*, 31 Kan. App. 2d 31, 36-37, 59 P.3d 1030 (2002), which relied in part on *Stevenson v. U.S. National Bank of Oregon*, 72 Or. App. 39, 695 P.2d 77

(1985), which appears to hold that prior agreements of the parties become null and void upon the subsequent marriage of the parties.

This was not a critical issue here as Veronica was not attempting to contend the Oregon court's prior ruling was controlling. What was of importance to the judges was the fact Judge Tennyson had presided at the prior proceedings and had knowledge of the facts in the case.

This was discussed during the April 6, 2006, hearing and became a factor under K.S.A. 38-1354(b)(8) which requires consideration of "the familiarity of the court of each state with the facts and issues in the pending litigation." The facts of existence of the prior proceedings and the Oregon court's knowledge thereof were properly considered by Judge Gariglietti in making his decision to decline jurisdiction in favor of Oregon.

Next, Dennis argues the district court erred in not finding Kansas' jurisdiction is proper based on K.S.A. 38-1348 because of the parties' substantial contacts with the State of Kansas.

The existence of jurisdiction is a question of law over which our court's review is unlimited. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006). To the extent our opinion covers questions concerning the UCCJEA, our review is de

nov. *McNabb v. McNabb*, 31 Kan. App. 2d 398, 403, 65 P.3d 1068 (2003).

K.S.A. 38-1348 provides in its entirety:

"(UCCJEA 201). (a) Except as otherwise provided in K.S.A. 38-1351 and amendments thereto, a court of this state has jurisdiction to make an initial child-custody determination only if:

(1) 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;

(2) a court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under K.S.A. 38-1354 or 38-1355 and amendments thereto, and:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) substantial evidence is available in this state concerning the child's care, protection, training, and personal

relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under K.S.A. 38-1354 or 38-1355 and amendments thereto; or

(4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

"(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

"(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination."

As we have previously stated, the parties have agreed that E.E.T. does not qualify for home state status based on her residence of 11 months in Oregon and 5 months in Kansas when this action began, and with K.S.A. 38-1348(a)(3) and (4) not applicable, we turn to the language of K.S.A. 38-1348(a)(2) which would allow Kansas to exercise jurisdiction when (1) E.E.T. and Dennis have a significant connection with Kansas other than physical presence, and (2) substantial evidence is available in Kansas concerning E.E.T.'s care, protection, training, and personal relationships.

The parties have counter arguments as to which one has the more significant connection to the state where they now reside. Dennis points to the residence of the parties when the divorce petition was filed, his long-term Kansas residence, his significant family connections, E.E.T. had been living in Kansas for 5 months prior to the divorce filing, Veronica utilizing Kansas courts for the petition for abuse filing, and a majority of the witnesses to the couple's co-parenting are in Kansas, all of which make the Kansas connection more significant than Oregon's.

Veronica disagrees and points to the Oregon court's prior involvement with matters of custody, parenting, and support, the 11 months of residence of E.E.T. in Oregon as compared to the 5 months in Kansas, the availability of the two most important witnesses to the family relationship, her other two children, the lack of any prior custody order in Kansas and its existence in Oregon, all of which Veronica argues makes Oregon the state with the most significant connections.

With conflicted facts such as exist here, and simultaneous custody proceedings in two different states prohibited by K.S.A. 38-1353 (except for temporary emergency jurisdiction as allowed by K.S.A. 38-1351), Judge Gariglietti took the appropriate action by conferencing with the Oregon Circuit Court to make a determination as to which court would retain jurisdiction as contemplated by K.S.A. 38-1345.

The evidence presented to the Kansas court established that either Kansas or Oregon would have jurisdiction under the UCCJEA over this case since neither was the home state, neither had declined jurisdiction, but yet both had significant connections to the case and the parties, the child's care, protection, training, and personal relationships. K.S.A. 38-1348(a)(2). Judge Gariglietti did not commit reversible error by failing to find the most significant relationships of the parties were with Kansas and acted in the manner contemplated by the UCCJEA.

Lastly, Dennis argues the district court erred in declining jurisdiction as the inconvenient forum.

Whether to decline or exercise jurisdiction based on an inconvenient forum is a matter of judicial discretion. We review the trial court's action to determine if it abused that discretion. *In re Marriage of Ruth*, 32 Kan. App. 2d 416, 423, 83 P.3d 1248 (2004). "[D]iscretion is abused only when no reasonable person would take the view adopted by the trial court." *Saucedo v. Winger*, 252 Kan. 718, 733, 850 P.2d 908 (1993). The party asserting the trial court abused its discretion bears the burden of showing such abuse of discretion. *State v. Martts*, 277 Kan. 267, 280, 83 P.3d 1216 (2004).

In making the determination of what is really the more appropriate forum, K.S.A. 38-1354(b) teaches us:

"(b) 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 allow the parties to submit information and shall consider all relevant factors, including:

(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."

The parties make counter arguments as to each of the eight statutory factors which we will briefly summarize.

(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." Dennis argues Veronica filed a protection of abuse order in Kansas, the only evidence involving this issue lies in Kansas and if he is ever to defend against the abuse allegations, practicality demands that Kansas assert jurisdiction. Veronica responds that the domestic violence issue is a nonfactor. She argues that if Dennis is allowed to rely on this factor in support of Kansas jurisdiction, then it creates the absurdity that if a party wishes for Kansas to retain jurisdiction, it will help that party's chances by abusing his or her spouse or child in Kansas forcing the spouse to seek court protection.

(2) "[T]he length of time the child has resided outside this state." Dennis argues this factor weighs in favor of Kansas because his daughter resided in Kansas at the time of the divorce proceedings. Veronica counters that at the time of the petition, their daughter had resided in Oregon longer than she had resided in Kansas.

(3) "[T]he distance between the court in this state and the court in the state that would assume jurisdiction." Dennis argues the distance between Kansas and Oregon is

obviously great and will be a severe hardship for him to travel several thousand miles to actively participate in the proceedings. He suggests that Veronica has created this inconvenience and it would be unfair to allow her to benefit from causing the inconvenient forum.

(4) "[T]he relative financial circumstances of the parties." Dennis argues he may earn more income than Veronica, but it is due to her unilateral decision to leave her Kansas business and move to Oregon. He again argues it would be inequitable to punish him after Veronica created the inconvenient forum.

Veronica addresses the third and fourth factors together. She states that her resources are very limited and it would be cost prohibitive for her to participate in the hearings in Kansas. She argues that Dennis has already demonstrated a willingness and financial ability to submit to Oregon jurisdiction by the prior custody orders he requested in Oregon. She also states that her financial situation is not helped by the fact that Dennis used the Kansas courts to eliminate his child support of their daughter.

(5) "[A]ny agreement of the parties as to which state should assume jurisdiction." There is no agreement in this case.

(6) and (7) "The nature and location of the evidence required to resolve the

pending litigation, including testimony of the child; and . . . the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence." Dennis reiterates the arguments he made regarding significant connections under K.S.A. 38-1348(a)(2)(A). Veronica counters that the two witnesses that could provide the most candid testimony about parenting skills of both parties are Veronica's two other daughters who lived with and were parented in Kansas by both parties until the divorce. These two critical witnesses reside in Oregon with their natural father. She also asks the court to consider that the only reason Kansas is the one state with evidence of the parenting skills as a married couple is that Dennis absented himself from participating in parenting duties during the first 11 months of their daughter's life.

(8) "[T]he familiarity of the court of each state with the facts and issues in the pending litigation." Dennis acknowledges the prior orders of the Oregon courts and the Oregon court's familiarity with the case but argues the most current evidence on the parties' parenting and relationship as a married couple are in Kansas. Dennis contends that Judge Gariglietti has reviewed the case completely and is familiar with all the issues, especially the current issues and facts. Veronica reiterates the arguments she set forth to establish significant connections under K.S.A. 38-1348(a)(2)(A).

Additionally, Veronica states the statutes permit consideration of "all relevant factors" in reaching its decision. She argues the trial court may also have considered the

fact that Dennis deceived the district court in his divorce petition by filing a false affidavit for custody proceeding stating that their daughter had resided in Kansas for the past 5 years.

This review of the factors show there were valid arguments made by both parties but it is clear that Judge Gariglietti did not abuse his discretion in the decision which he reached. There was clear statutory authority under K.S.A. 38-1354(a) to decline jurisdiction in Kansas as an inconvenient forum and in this case allow Oregon as the more appropriate forum and willing to accept jurisdiction to make the determination of all of the issues concerning E.E.T. in this case.

We deny Veronica's request for attorney fees upon appeal as the issues presented were difficult and raised valid issues on appeal.

Affirmed.