[Cite as *Buxton v. Mancuso*, 2009-Ohio-6839.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BARRY C. BUXTON

Plaintiff-Appellee

-vs-

SIMONE MANCUSO

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CA 22

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 203-3140
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	December 21, 2009

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Wise, J.

{¶1} Appellant Simone Mancuso appeals the decision of the Knox County Court of Common Pleas, Juvenile Division, which denied her motion to establish that Ohio is an inconvenient forum in an interstate custody dispute. Appellee Barry Buxton is the father of the parties' child. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and appellee are the parents of Hannah, born in 2000. The parties have never been married to each other. In the fall of 2003, prior to an establishment of legal paternity for Hannah, appellant moved from Knox County, Ohio, to Shelbyville, Kentucky.

{¶3} On March 12, 2004, the trial court issued a judgment entry finding appellee to be Hannah's father, and establishing appellant as the child's residential parent and legal custodian, with certain companionship rights to appellee.

{¶4} On July 20, 2008, appellee, apparently dissatisfied with his level of companionship with Hannah, filed a motion for the reallocation of parental rights. On July 29, 2008, appellee also filed a motion to show cause.

{¶5} Appellant responded, inter alia, with a motion under R.C. 3127.21 requesting that the court find Ohio to be an inconvenient forum, and asserting that Kentucky should take jurisdiction over the case. After a hearing before a magistrate, the trial court denied appellant's motion regarding inconvenient forum. On April 2, 2009, the court issued temporary orders which maintained the child in appellant's custody, indicating that the reallocation of parental rights would be set for further hearing at an unspecified future date.

{¶6} On April 23, 2009, appellant filed a notice of appeal. She herein raises the following sole Assignment of Error:

{¶7} "I. BASED UPON THE MANIFEST WEIGHT OF THE EVIDENCE, THE COURT ERRED IN NOT FINDING THAT THE STATE OF OHIO IS AN INCONVENIENT FORUM UNDER O.R.C. 3127.21."

I.

{¶8} In her sole Assignment of Error, appellant argues the trial court erred in failing to determine that the court was an inconvenient forum pursuant to statute.

{¶9} As an initial matter, we must address the question of whether a final appealable order exists in this case. As noted above, the most recent litigation herein commenced with appellee-father's motion to be named residential parent of Hannah. On March 27, 2009, the trial court denied appellant-mother's motion to find that Ohio is an inconvenient forum under R.C. 3127.21. On April 2, 2009, the trial court issued a magistrate's order which directed that appellant-mother remain residential parent "pending final hearing." Appellant-mother then filed her notice of appeal on April 23, 2009.

{¶10} Pursuant to R.C 2505.02(B)(2), "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is *** [a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment."[1]

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[1] We herein focus on the language of R.C. 2505.02(B)(2), as we find that R.C. 2505.02(B)(1), (B)(3), (B)(5), (B)(6), and (B)(7) are inapplicable to the circumstances of the case sub judice. We further find that a trial court's redress of a forum non-conveniens motion under R.C. 3127.21 does not constitute an "ancillary proceeding" for purposes of a provisional remedy as set forth in R.C. 2505.02(B)(4). Cf. *Century*

{¶11} R.C. 3127.21(A) states as follows: "A court of this state that has jurisdiction under this chapter 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 convenient forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or at the request of another court."

{¶12} Generally, where a case is dismissed on the grounds of forum non conveniens, such dismissal is a final appealable order. See *Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc.,* 114 Ohio St.3d 82, 2007-Ohio-2942, ¶ 11. However, this does not answer the question of the appealability of an interlocutory denial of a forum non conveniens motion, as occurred in the case sub judice. We note that in *Buzard v. Triplett,* Franklin App.No. 05AP-579, 2006-Ohio-1478, the Tenth District Court of Appeals held that the denial of an "inconvenient forum" motion pursuant to the aforesaid statute was a final appealable order. The Court stated: "Because R.C. 3127.21 grants a party the right to contest the convenience of the forum, that party has a 'substantial right' as defined by R.C. 2505.02(A)(1). We also find that the order denying appellant's motion 'affects' a substantial right because, if it is not immediately appealable, appellant could not obtain appropriate relief in the future. Once appellant is forced to litigate in a forum he considers inconvenient, appropriate relief on that issue is foreclosed in the future. Therefore, we find that the order at issue here is a final order as defined by R.C. 2505.02(B)(2)." Id. at ¶11.

Business Services, Inc. v. Bryant, Cuyahoga App.Nos. 80507, 80508, 2002-Ohio-2967, ¶15.

{¶13} However, this Court has consistently held otherwise on this issue, albeit in cases pre-dating R.C. 3127.21. See *Leach v. Leach* (Aug. 3, 1992), Stark App.No. CA-8878, 1992 WL 195473; *Howald v. Howald* (Feb. 4, 1991), Licking App. No. CA 3586; *Pratt v. Pratt* (Dec. 5, 1979), Stark App. No. CA-5150. The Fourth and Twelfth Districts have reached similar conclusions. See *France v. Perry* (Sept. 27, 1995), Pike App.No. 94CA538, 1995 WL 572910; *In re Adoption of Favaron* (May 29, 1990), Clermont App. No. CA 90-01-002. In a similar vein, we have also held that the denial of a request to change venue is not a final, appealable order: "The decision to deny a change of venue does not result in any of the types of irreparable harm just listed. There is an adequate legal remedy from a decision denying a change of venue, after final judgment. In other words, it may be expensive to get the cat back in the bag, if a trial court errs when it denies a change of venue, but it can be done." *Mansfield Family Restaurant v. CGS Worldwide, Inc.* (Dec. 28, 2000), Richland App.No. 00-CA-3, 2000 WL 1886226.

{¶14} Therefore, upon review of the record in the case sub judice, because appellee's underlying request to be named residential parent is still awaiting redress pending a final hearing, we decline to adopt the reasoning of *Buzard*, supra, and thus hold appellant's attempt to appeal the interlocutory "inconvenient forum" ruling is not an appeal of a final order under R.C. 2505.02(B).

{¶15} For the foregoing reasons, the appeal of the judgment of the Court of Common Pleas, Juvenile Division, Knox County, Ohio, is hereby dismissed.

By: Wise, J.

Farmer, P. J., concurs.

Delaney, J., dissents.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 1106

Delaney, J., dissenting

{¶16} I respectfully dissent from the majority opinion. I agree with the reasoning of the Tenth District Court of Appeals in *Buzard*, supra, and would find the trial court's entry of March 27, 2009 denying Appellant's motion made pursuant to R.C. 3127.21 to be a final, appealable order. See also, *Critzer v. Critzer*, 8th Dist. No. 90679, 2008-Ohio-5126, ¶9. I therefore would proceed to address the merits of the appeal.

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JUDGE PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BARRY C. BUXTON	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SIMONE MANCUSO	:	
Defendant-Appellant	:	Case No. 09 CA 22

For the reasons stated in our accompanying Memorandum-Opinion, the appeal of the judgment of the Court of Common Pleas, Juvenile Division, Knox County, Ohio, is dismissed.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES