[Cite as *Dorazio v. Dorazio*, 2016-Ohio-713.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103308

CHARLES D. DORAZIO

PLAINTIFF-APPELLANT

vs.

MICHELLE L. DORAZIO

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-01-283656

BEFORE: Celebrezze, J., E.T. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 25, 2016

ATTORNEY FOR APPELLANT

Thomas A. McCormack
Thomas A. McCormack, Attorney at Law
The Superior Building, Suite 1
815 Superior Avenue
Cleveland, Ohio 44114

ATTORNEY FOR APPELLEE

Dennis P. Levin
Landerbrook Corporate Center
5910 Landerbrook Drive
Suite 200
Cleveland, Ohio 44124

FRANK D. CELEBREZZE, JR., J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Appellant, Charles D. Dorazio ("Father"), appeals from a decision of the Cuyahoga County Domestic Relations Court finding that Ohio is an inconvenient forum to litigate custody issues regarding a child that has resided with appellee, Michelle L. Dorazio ("Mother"), in New York for over a decade. Father argues that the trial court erred in so deciding and in denying his motion for sanctions for frivolous conduct without holding a hearing. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶3} Mother and Father obtained a divorce in Cuyahoga County on November 6, 2002. The divorce decree granted shared parenting of the three children of the marriage. Both parents were named residential parents and Father was ordered to pay child support. With permission of the court, Mother moved to New York in 2002 prior to the entry of divorce. The three children lived with Mother in New York after the divorce. In 2004, Mother filed pleadings with a New York court seeking to modify custody and visitation. Mother and Father participated in hearings, and the New York court issued orders relating to custody and visitation of the three children.

{¶4} The parties returned to the Cuyahoga County court for an agreed order modifying the terms of the divorce decree in 2008. Father was designated residential parent of the oldest child who then moved back to Ohio to reside with Father, while

Mother was designated residential parent of the two younger twin children who continued to reside with her in New York. Father's child support obligations were modified accordingly.

{¶5} Maintaining that one of the twin children wanted to move to Ohio, Father filed a motion with the Cuyahoga County court seeking to be designated residential parent for school purposes so that the child could reside in Ohio. Father also filed a motion alleging that Mother engaged in frivolous conduct and sought sanctions. Mother filed a motion seeking to have the court declare Ohio an inconvenient forum for this child and for the court to relinquish jurisdiction to New York. The Cuyahoga County court set those matters for hearing before a magistrate.

{¶6} On the day of trial, the parties decided to have the motions heard on the significant briefing filed. The magistrate issued a decision on July 1, 2015, that was jointly signed by the trial court provisionally adopting the decision. This decision was docketed on July 9, 2015. The judgment entry denied Father's motion for frivolous conduct and determined that Ohio was an inconvenient forum to resolve the custody matter involving the child who was the subject of the motion to modify. The magistrate and trial court found that jurisdiction should be relinquished to the New York court. Father did not file objections to the decision, and instead filed a notice of appeal bringing the matter before this court and assigning two errors for review:

> I. The trial court erred and abused its discretion in finding, contrary to the UCCJEA, that the Cuyahoga County Domestic Relations Court is an inconvenient forum.

II. The trial court erred and abused its discretion when it dismissed without a hearing [Father's] motion for findings of frivolous conduct.

II. Law and Analysis

A. Failure to Object

{¶7} As an initial matter, this court must note that Father failed to file objections to the magistrate's decision. Civ.R. 53(D)(3)(b)(iv) states:

> Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

{¶8} Therefore, Father has waived any qualm he may have with the findings or conclusions contained within the decision as adopted by the trial court. *State ex rel. Booher v. Honda of Am. Mfg.*, 88 Ohio St.3d 52, 53, 723 N.E.2d 571 (2000); *Watson v. Chapman-Bowen*, 8th Dist. Cuyahoga No. 101295, 2014-Ohio-5288, ¶ 15-16.

B. Convenience of Ohio as a Forum

{¶9} Even if Father had filed objections, his argument that the trial court abused its discretion when it found that Cuyahoga County was an inconvenient forum under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") is contrary to the record.

{¶10} Ohio's codification of the UCCJEA is contained in Chapter 3127 of the Ohio Revised Code. The Act's intent is to reduce jurisdictional conflicts among states

regarding child custody and visitation matters by ensuring that a state court would not exercise jurisdiction over a child in a custody proceeding if a court in a different state was already exercising jurisdiction. *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶ 20-21. The Act sets up clear rules regarding subject matter jurisdiction to decide custody and visitation issues. It provides that a court that has made an initial custody determination retains jurisdiction to decide future matters related to custody and visitation unless one of two situations arise. R.C. 3127.16. Once a competent court determines a matter, the parties to the matter are bound by that determination, subject to subsequent modification. R.C. 3127.05.

{¶11} Here, the Cuyahoga County court had jurisdiction to determine custody because the parties were Ohio residents living in Ohio at the time the action for divorce commenced and the Cuyahoga County court made the initial custody determination. Therefore, that court "has exclusive, continuing jurisdiction over the determination until the court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state." R.C. 3127.16. Subject to limited exception,

> a court of [New York] may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under paragraph (a) or (b) of subdivision one of section seventy-six of this title and:

> 1. The court of the other state determines it no longer has exclusive, continuing jurisdiction under section seventy-six-a of this title or that a court of this state would be a more convenient forum under section seventy-six of this title; or
>
> 2. A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

NY CLS Dom Rel Section 76-b. Ohio has a substantially similar provision:

> [A] court of this state may not modify a child custody determination made by a court of another state unless the court of this state has jurisdiction to make an initial determination under division (A)(1) or (2) of section 3127.15 of the Revised Code and one of the following applies:
>
> (A) The court of the other state determines that it no longer has exclusive, continuing jurisdiction under section 3127.16 of the Revised Code or a similar statute of the other state or that a court of this state would be a more convenient forum under section 3127.21 of the Revised Code or a similar statute of the other state.
>
> (B) The court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

R.C. 3127.17.

{¶12} Here, Father has continued to reside in Ohio, so the only way the New York court could exercise subject matter jurisdiction over custody and visitation issues is if the court of initial jurisdiction, the Cuyahoga County court, found that it was no longer a convenient forum.

{¶13} A court that initially had jurisdiction over children in a custody dispute may relinquish it to another state where circumstances have changed such that the state is no longer a convenient forum. R.C. 3127.21. This statute provides in part,

> [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.

The statute then goes on to set forth a non-exhaustive list of factors a court should consider when determining whether Ohio is an inconvenient forum:

> (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 the 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;

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

{¶14} This court reviews the trial court's decision in these matters for an abuse of its discretion. *White v. Ritchey*, 7th Dist. Mahoning No. 12 MA 98, 2013-Ohio-4164, ¶ 12. Such an abuse is noted by a decision that is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶15} After finding that it had exclusive jurisdiction in this matter, the magistrate went through the factors in R.C. 3127.21 and found:

(1) There is no evidence of domestic violence.

(2) The child at issue in the currently pending motion * * * has resided in the state of New York for thirteen years, since approximately February 2002. The Court notes that [he] was less that two years of age in February 2002, and has therefore resided outside of this state for the vast majority of his young life.

(3) The distance between Cleveland, Ohio and Watertown, New York is approximately 398 miles.

(4) Neither party discussed [their relative financial circumstances] in their briefs, however, [Mother] indicated in her Motion that [Father's] income is substantially greater than [Mother's]. [Father] is employed by UPS with an approximate income of $70,000 per year, [Mother] is a nurse and earns slightly over $20,000 per year. [Father's] higher income would give him greater resources to travel to New York in order to participate in the pending litigation.

[(5) There was no agreement between the parties as to jurisdiction so the court skipped item five above.]

([6]) [The child at issue] has resided in the state of New York for 13 years, most of his life, with his mother and his twin sister * * *. [The child's] doctors, school, and much of his extended family are all in New York. [He] spends summers in Ohio with his Father and his older brother * * *, who has resided primarily with [Father] for the past seven years. [The child] has friends in Ohio and has also spoken to a clinical psychologist in Ohio, Dr. Esson, regarding his wishes with respect to the allocation of parental rights and responsibilities.

([7]) Both courts have the ability to decide this issue expeditiously. Evidence and witnesses are located in both states. [The child's] school and doctors are located in New York. He has friends and family in both jurisdictions. A Guardian ad Litem has already been appointed by the New

York court, however, the GAL has conducted only limited investigation thus far as no further action is being taken in the New York proceedings until this Court determines whether or not it will relinquish jurisdiction. The Court notes that any investigation by a GAL could be more easily conducted in New York, as the child, the child's school and doctors are located in that jurisdiction.

([8]) Both court have been involved in the allocation of parental rights and responsibilities of the Dorazio children. The parties were divorced by this Court on November 6, 2002 and were granted shared parenting of their three children. In February 2002, this Court issued an order permitting [Mother] to relocate to New York with the minor children. In August of 2005, the Family Court in Jefferson County, New York entered orders that granted joint custody of the children to the parents, with their primary physical residence to be with Mother. Father was awarded visitation with the children. Both parties participated in the hearing that resulted in the New York court's order. The parties then returned to this Court in January 2008 seeking to modify their Shared Parenting Plan to designate [Father] as the residential parent for school purposes of the oldest child, * * * who then began to reside in Ohio with [Father]. There are currently motions to modify the allocation of parental rights and responsibilities with respect to [the child who is the subject of the present motion] pending in both

> jurisdictions. The Family Court in Jefferson County, New York, has appointed a Guardian ad Litem. The two courts have discussed the jurisdictional situation and have agreed that Ohio has continuing jurisdiction. No further action is being taken in the New York proceedings until this Court determines whether or not it will relinquish its jurisdiction.
>
> After considering all of the preceding factors, this Court finds that the factors weigh in favor of finding this Court an inconvenient forum for the purposes of determining the modification of the allocation of parental rights and responsibilities of the minor child * * *.

{¶16} This decision thoroughly discussed the factors listed in R.C. 3127.21 and arrived at the determination that the relative equities in the situation indicated that the matter was better determined in New York. From the record and trial court's decision, it cannot be said that this is an abuse of the court's discretion. The child has lived in New York most of his life, many of the pertinent witnesses reside in New York, Father had more financial wherewithal to absorb the cost of litigating the matter in a foreign jurisdiction, and the matter could be expediently decided in either court.

{¶17} Similar findings were made in another case where an Ohio court declined to exercise continuing jurisdiction. *White*, 7th Dist. Mahoning No. 12 MA 98, 2013-Ohio-4164. There, the Seventh District did not find an abuse of discretion in the trial court's decision that thoroughly went through the eight factors found in R.C. 3127.21(B). *Id.* at ¶ 30. The lower court found the child had resided with his mother in Pennsylvania for ten months and was enrolled in school there, that the father, who

remained in Ohio, had greater financial means, and the majority of evidence in the case would come from witnesses located in Pennsylvania. *Id*. at ¶ 16-23.

{¶18} Even if Father had properly preserved this alleged error for review, the trial court did not abused its discretion in adopting the magistrate's decision declining jurisdiction.

C. Transfer of Jurisdiction Over Only One Child

{¶19} Some of Father's arguments relate to a matter of interpretation of the UCCJEA rather than any factual determination made by the magistrate. Father argues that Ohio's codification of the UCCJEA does not allow a court to find it is an inconvenient forum for only one child and transfer subject matter jurisdiction over only that child.

{¶20} Father argues that

> [i]t is not possible to limit consideration of the appropriate forum for parenting proceedings under the UCCJEA, and Ohio's version of it, to one or even two of the children. If that approach is taken, it results in a situation such as this, where two courts in two states are exercising jurisdiction over one or two of the three children who together constitute the family. The resulting substantial potential for conflicting judgments concerning the children can disrupt the family.

{¶21} This argument is unsupported by any case law or statutory interpretation limiting the application of Ohio's UCCJEA to an all or nothing approach when multiple

children are involved. Further the statute setting forth the court's ability to relinquish jurisdiction provides, "[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 * * *." The matter before the court was a motion filed by Father to modify custody of only one child, and the UCCJEA does not appear to limit relinquishment as Father argues.

{¶22} In support of this conclusion, R.C. 3127.21 seems to contemplate that a court may decline to exercise jurisdiction in one situation while retaining it in another within the same case: "A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding." R.C. 3127.21(D). As the UCCJEA applies only to custody and visitation issues, the court would retain jurisdiction over child support and other matters related to a divorce decree. There is no reason apparent in the statute or Father's arguments why the court could not retain jurisdiction over one child, while finding that it is an inconvenient forum to modify a custody determination of another. This holding offers a greater amount of flexibility to fulfill the purposes of the UCCJEA.

{¶23} Father's argument about the possibility of inconsistent orders is also unlikely to occur. The Cuyahoga County court declined to exercise jurisdiction to determine a custody dispute involving one child. If the New York court attempts to exercise jurisdiction beyond that relinquished by the Cuyahoga County court, Father has adequate means for relief in New York by way of a writ or direct appeal.

{¶24} For these reasons, Father's first assignment of error is overruled.

D. Dismissal of Motion for Findings of Frivolous Conduct

{¶25} Father also argues that the court erred in its judgment entry when it summarily dismissed his motion for sanctions for frivolous conduct without holding a hearing.

{¶26} R.C. 2323.51(B)(1) provides in part,

> at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

{¶27} This court generally reviews a court's decision denying sanctions for an abuse of discretion. *Taylor v. Franklin Blvd. Nursing Home, Inc*. 112 Ohio App.3d 27, 31, 677 N.E.2d 1212 (8th Dist.1996).

{¶28} Father's arguments in his motion relate to Mother filing motions in a New York court, the full records of which are not before the trial court. Father asserts that the New York court clearly lacked subject matter jurisdiction, and therefore, Mother initiating custody actions in that court constituted frivolous conduct in Ohio. The place for Father to assert frivolous conduct is in the New York court. Father has not pointed to any case

law that holds that an Ohio court can find a party engaged in frivolous conduct for actions taken in court proceedings in another state.

{¶29} Father also failed to bring this alleged error to the trial court's attention by filing objections to the magistrate's decision. The trial judge provisionally adopted the magistrate's decision for purposes of expediency, or in the language of the rule, issued an interim order. Civ.R. 54(D)(4)(e). Father still had the opportunity to file timely objections. Civ.R. 54(D)(3). Father failed to file any objections where he could have pointed out to the court that although the parties had agreed to submit the forum non conveniens issue to the magistrate on briefs, no agreement was made as to the motion for frivolous conduct. The trial court could have then corrected the alleged error by holding a hearing or denying the motion by pointing out the problems, among others, set forth above.

{¶30} Father's second assignment of error is overruled.

III. Conclusion

{¶31} The trial court did not err in declining to exercise jurisdiction over the motion to modify custody pending before it where Mother and the subject child had lived in New York for several years, important witnesses were primarily located in New York, and Father was in a better position to absorb the costs of pursuing the matter in New York. Father's argument that the Cuyahoga County court could not relinquish jurisdiction as to the pending motion only is not supported by any case law or statutory interpretation. Further, Father failed to file objections to the magistrate's decision. This

failure waives the arguments raised in Father's first and second assignments of error. Finally, the trial court did not err in denying Father's motion for sanctions based on frivolous conduct.

{¶32} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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FRANK D. CELEBREZZE, JR., JUDGE

EILEEN T. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR