



**In the
Missouri Court of Appeals
Western District**

JOHN T. HIGHTOWER,

Respondent,

v.

MELISSA ANN MYERS, et al,

Appellant.

WD 69095

Filed: December 23, 2008

**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
The Honorable Sandra C. Midkiff, Judge**

Melissa Ann Myers (Mother) appeals the circuit court's 2007 judgment modifying its 2003 custody judgment to award John T. Hightower (Father) custody of their child, J.H., during the school year so she can attend school in Kansas City. Mother raises three points in her appeal. In her first point, she claims that the circuit court erred in entering its 2007 judgment, which modified its 2003 judgment, because it lacked subject matter jurisdiction to enter the 2003 judgment.¹ In her second point, she claims that the circuit court erred in entering its 2007 judgment because it lacked subject matter jurisdiction. In her third point, she asserts that the circuit court erred in entering its 2007 judgment modifying the parties' custody arrangement by awarding Father custody of J.H.. Because we find Mother's second point dispositive, we address that point only.

¹Although not stated in her Point on Appeal, Mother, in the argument section, appears to attack the validity on jurisdictional grounds of the 2003 judgment as well. This she cannot do. She participated in the 2003 action and there was no appeal. That judgment cannot be attacked now.

Factual and Procedural Background

Father and Mother were never married, but they did conceive one child, J.H., in 1999. In May 2001, Mother and J.H. moved to New Jersey. In January 2002, Father filed a motion for custody in the circuit court of Jackson County. On June 30, 2003, the circuit court entered its amended judgment. In the judgment, the circuit court made a specific finding that Missouri had subject matter jurisdiction over the custody dispute. The circuit court granted Mother physical custody of J.H. during the school year and granted Father visitation during the holidays and summer. Neither party appealed the judgment.

Mother and J.H. continued to live in New Jersey. On September 5, 2006, Father filed a motion in the circuit court of Jackson County to modify the 2003 custody judgment. In his motion, he sought sole physical custody of J.H.. After a trial, the circuit court entered judgment granting Father's motion. This appeal follows.

Analysis

In her second point, Mother claims that the circuit court erred in entering its 2007 judgment because, pursuant to section 452.450,² the circuit court lacked subject matter jurisdiction over the custody dispute. Mother asserts that the circuit court lacked subject matter jurisdiction over the custody dispute because Father never established that, on the date he filed his motion in Missouri, J.H. had significant connections to the State or that Missouri could assume jurisdiction under the default provision of section 452.450.

In this case, Father filed a motion, pursuant to section 452.410, to modify the circuit court's 2003 judgment regarding custody, visitation, and support. Section 452.410 reads:

²All statutory references are to RSMo 2000 and the Cumulative Supplement.

Except as provided in subsection 2 of this section, the court shall not modify a prior custody decree *unless it has jurisdiction under the provisions of section 452.450* and it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child.

(Emphasis added). Section 452.450 is Missouri's version of the Uniform Child Custody Jurisdiction Act (UCCJA) and sets out four different ways that a circuit court can obtain subject matter jurisdiction over a child custody dispute:

1. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This state:

(a) Is the home state of the child at the time of commencement of the proceeding; or

(b) Had been the child's home state within six months before commencement of the proceeding and the child is absent from this state for any reason, and a parent or person acting as parent continues to live in this state; or

(2) It is in the best interest of the child that a court of this state assume jurisdiction because:

(a) The child and his parents, or the child and at least one litigant, have a significant connection with this state; and

(b) There is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this state and:

(a) The child has been abandoned; or

(b) It is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse, or is otherwise being neglected; or

(4) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

Hence, under section 452.450, Missouri can obtain subject matter jurisdiction over a child custody dispute if (1) Missouri is the child's home state, (2) it is in the best interest of the child for Missouri to assume jurisdiction, (3) the child is physically present in the state and has been abandoned, or the evidence establishes that Missouri must assume jurisdiction because of an emergency, or (4) no other state has jurisdiction or another state has declined jurisdiction and it is in the child's best interest for Missouri to assume jurisdiction. "The comments to the UCCJA make it clear that the grounds for jurisdiction set out in paragraphs (1) through (4) of section 452.450.1 are in descending preferential order." *Gosserand v. Gosserand*, 230 S.W.3d 628, 632 (Mo. App. W.D. 2007).

Whether or not the circuit court had subject matter jurisdiction pursuant to the UCCJA is a question of law, which we review *de novo*. *Id.* at 631. The party who seeks jurisdiction in Missouri has the burden of establishing a *prima facie* basis for that jurisdiction. *Id.* In establishing his basis for jurisdiction, the party must rely only on the facts as they existed at the time the court's jurisdiction is first invoked. *Id.* Thus, since Father filed the modification motion in Missouri, he had the burden of establishing that Missouri had jurisdiction to adjudicate the custody of J.H..

The parties agree that Missouri could not base its jurisdiction on section 452.450.1(1) because Missouri was not J.H.'s home state. The parties also agree that Missouri could not obtain jurisdiction under section 452.450.1(3) because J.H. was not physically present in Missouri and, even if she was physically present, there was no evidence that she had been

abandoned or that there was an emergency. Hence, for Missouri to obtain jurisdiction, Father was required to establish that the best interest requirements of 452.450.1(2) were met or the default provision requirements of 452.450.1(4) were met.

Section 452.450.1(2) provides that Missouri has jurisdiction to make a child custody determination if it is in the best interest of the child that Missouri obtain jurisdiction because (a) the child and at least one parent have a significant connection with this state, and (b) there is “substantial evidence concerning the child’s present or future care, protection, training, and personal relationships[.]”

Paragraph (2) perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in section 1. The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state.

UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 309 (1999) (COMMISSIONERS’ NOTE); *Gosserand*, 230 S.W.3d at 632-33.

Under Section 452.450.1(2)(a), the minimum requirement is that the child and at least one of the parents have *significant* connections with Missouri. *Gosserand*, 230 S.W.3d at 632. The parties agree that Father meets this minimum requirement because he has resided in Missouri since J.H.’s birth. The only issue is whether or not Father carried his burden to establish that J.H. has *significant* connections with Missouri. In finding that he did carry his burden, the circuit court concluded:

There was evidence available in this state including but not limited to all of the following: [J.H.’s] relationship with her father and other members of his family,

her activities when in her father's physical custody, future housing school and care, history of [J.H.'s] interaction with her father and effect of thwarted visitation or scheduled parenting time.

The problem with these findings is that J.H.'s only connection with Missouri is the fact that her father lives here and she has court-ordered visitation with him for a six-week period every summer and some holidays throughout the year and, during these periods, she interacts with her father and his relatives. This is not enough to establish significant connections with Missouri. *See Krasinski v. Rose*, 175 S.W.3d 202, 206 (Mo. App. E.D. 2005); *Payne v. Weker*, 917 S.W.2d 201, 204-05 (Mo. App. W.D. 1996) (child did not have significant connection with Missouri even though father could have exercised visitation rights in Missouri); *State ex rel. Laws v. Higgins*, 734 S.W.2d 274, 279 (Mo. App. S.D. 1987) (father's exercise of his six week visitation rights was not enough to establish significant connections). In fact, to find that J.H. had significant connections with Missouri simply because her father had some visitation with her in Missouri would render this requirement satisfied in every case that one parent had any visitation rights with the child. The circuit court could not obtain subject matter jurisdiction over the parties' custody dispute on the basis of section 452.450.1(2).

Section 452.450.1(4), the default provision, allows Missouri to obtain subject matter jurisdiction if (1) no state has jurisdiction under the first three subdivisions, or another state that has jurisdiction has declined to exercise it, and (2) it is in the best interest of the child that Missouri assume jurisdiction. *See State ex rel. Dep't of Soc. Servs., Div. of Child Support Enforcement v. Hudson*, 158 S.W.3d 319, 325 (Mo. App. W.D. 2005). Mother claims that Missouri could not assume jurisdiction under the default provision because New Jersey had jurisdiction over the custody dispute and had not declined jurisdiction. It is undisputed that New Jersey has not declined to exercise jurisdiction. Thus, if New Jersey had jurisdiction then the

circuit court erred in assuming subject matter jurisdiction over this controversy. Hence, the issue becomes whether or not New Jersey could have exercised jurisdiction over J.H. by virtue of the first three subsections of section 452.450.

Under section 452.450.1(1), New Jersey would have jurisdiction over J.H.'s custody if (1) it was her home state at the commencement of the proceeding, or (2) it had been her home state within six months before the commencement of the proceeding and one parent continued to live in New Jersey. Pursuant to section 452.445(4):

'Home state' means the state in which, immediately preceding the filing of custody proceeding, the child lived with his parents, a parent, an institution; or a person acting as parent, for at least six consecutive months; or, in the case of a child less than six months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period[.]

Thus, J.H.'s home state would be New Jersey if, immediately preceding Father's filing of his motion, she lived with Mother in New Jersey for at least six consecutive months or New Jersey had been J.H.'s home state within the last six months and one of her parents continued to live there.

The circuit court found that New Jersey was not J.H.'s home state because Mother and J.H. had moved from New Jersey to Georgia in August 2006. On appeal, Mother maintains that Father did not carry his burden at the trial to establish that she was not living in New Jersey when he filed his motion. We agree that Father failed to carry his burden of presenting sufficient evidence that Mother was not present in New Jersey when he filed his motion.

Throughout the trial, the parties agreed that Mother did not move to Georgia in August 2006. Mother consistently testified that she worked at her current job in New Jersey until the very end of August and then moved to Georgia in September 2006. During Mother's cross-

examination, Father's counsel did not attempt to challenge her on the date that she quit her job or on the date that she moved to Georgia. Rather, during her cross-examination, Father's counsel conceded that she moved in September and used that fact to establish that it was in J.H.'s best interest to live with him. For example, Father's counsel argued that it was not in J.H.'s best interest to live with Mother because Mother had left her stable employment in New Jersey to go to Georgia even though she would be unemployed:

Q: So at the time that you moved in September of 2006 you had no job to go to; did you?

A: No, I didn't.

Q: But you left a job that you had in New Jersey; is that right?

A: Yes, I did.

Father's counsel also argued that it was not in J.H.'s best interest to live with Mother because by waiting until September 2006 to move, J.H. missed a month of school:

Q: And if you will look at the early part of August, when does it say that school started at Connie Dugan?

A: August 7th.

Q: All right. So you took [J.H.] to Georgia in the early part of September and enrolled her in school 30 days late; is that correct?

A: That is correct.

Q: Okay. So when you moved down there, or when you were making plans to move down there, you didn't take it upon yourself to find out what school she would be in and when the school would start and when she would need to be there so she could start school on time?

A: Yes.

Q: Did you do that?

A: Yes, I did.

Q: And it appears you didn't make sure that she got there on time?

A: Okay. I had no choice but to enroll her into school late.

Q: Why is that?

A: Because of the transition from moving from New Jersey to Douglasville, Georgia.

Q: You just told me that Mr. Napper was living down there in July.

A: Okay.

Q: Why didn't you go in July and get your child started in school in the early part of August?

A: Because we did not sign the paperwork on our house yet and nothing was finalized.

In fact, from this exchange, it is evident that Father's counsel was actually faulting Mother for not moving in August so J.H. would not have missed school time. Hence, part of Father's case for custody rested on the premise that Mother moved in September 2006, and not August 2006.

Father corroborated Mother's testimony that she moved in September 2006 by testifying that Mother moved in early September 2006:

Q: Did you ever---when did you find out what school in Georgia that your daughter would be going to?

A: Once they had established residency, and she was going to start, I think in a couple days. But nothing prior to the move.

Q: So that was in early September?

A: Early September.

Hence, a review of the record establishes that both parties agreed that Mother moved in September 2006.

During the entire trial, there is only one reference to Mother moving in August 2006. At one point during her cross-examination, Father's counsel questioned her about how many times she had been back to New Jersey:

Q: And since you have moved to Georgia in August of 2006, how many times have you been back to New Jersey?

A: Once.

This part of the record does not support the circuit court's conclusion that Mother moved in August 2006. Although Father's counsel's question stated that Mother had moved in August, the focus of her question was not on when she moved, but on how many times she had been back since she moved. And, in fact, that is how Mother took the question because she simply answered "once." Thus, nothing in the question or answer can be construed as Father's counsel asking for confirmation that Mother moved in August 2006 or that Mother implicitly agreed that

she had moved in August. Thus, there is no direct testimonial evidence that Mother moved in August 2006.

In a supplemental letter to the court, Father points to additional evidence that he claims supports the circuit court's conclusion that Mother moved in August 2006. For example, he points out that the record establishes that Mother's boyfriend moved to Georgia in July; she signed the lease to her new residence on August 5, 2006, in Georgia; and when she met Father at the New Jersey airport in August to pick up J.H., she had a trailer attached to her vehicle. Father claims that the only reasonable inference from this evidence is that Mother packed up all of her belongings in a trailer, picked up J.H. at the airport, and drove to Georgia in time to sign her lease on August 5, 2006.

Father is correct that this evidence is in the record. Father is also correct that these facts could help support a conclusion that Mother moved in August 2006. Father is wrong that, from this evidence alone, the circuit court could reasonably infer that Mother moved to Georgia on August 5, 2006. A reasonable inference is defined as:

[A] logical *a priori* conclusion drawn by reason from proven or admitted facts. It is more than, and cannot be predicated on, mere surmise or conjecture. It is not a possibility that a thing could have happened or an idea founded on the probability that a thing may have occurred.

Care & Treatment of Morgan v. State, 176 S.W.3d 200, 210 (Mo. App. W.D. 2005) (quoting *Bond v. Cal. Comp. & Fire Co.*, 963 S.W.2d 692, 698 (Mo. App. W.D. 1998)). Father's argument that these three facts prove that Mother moved in August is, without additional evidence, nothing more than a possibility based on speculation.

For example, in making the assumption that this evidence proves that Mother moved to Georgia in August 2006, Father is just speculating that Mother had all of her belongings in the

trailer. It is just as possible, however, that Mother, in anticipation of her move, was taking some belongings to a storage facility or that Mother had just picked up the trailer so she could use it to pack her belongings in the next few weeks. And, it is also possible that Mother was using the trailer for an unrelated reason. Whatever the reason, the fact remains that Father presented no evidence establishing that the trailer actually ever contained all of Mother's belongings.

Furthermore, while Father is correct that Mother conceded that she signed her lease on August 5, 2006, and, thus, Mother conceded that she was in Georgia on August 5, 2006, Father has presented no evidence that Mother actually stayed there and did not come back to New Jersey. Without more evidence, Father is just speculating that Mother signed the lease and stayed in Georgia. This is an especially unconvincing inference because the parties agreed that the lease did not start until September 1, 2006.

Finally, Father is correct that the evidence established that Mother's boyfriend moved to Georgia in July. The mere fact that Mother's boyfriend was in Georgia in July does little to establish that Mother moved there in August. And, in fact, Father has presented no evidence that Mother stayed with her boyfriend in August while they waited for the lease on their new residence to start. Thus, while these three facts could help support Father's claim that Mother moved to Georgia in August 2006, they are insufficient, without additional facts, to maintain the claim.

In his supplemental letter to the court, Father also points out that the circuit court could have found Mother's testimony regarding her move to be incredible. Father is correct that the circuit court was free to disbelieve any part of Mother's testimony. *Love v. Love*, 75 S.W.3d 747, 754 (Mo. App. W.D. 2002). In making this argument, however, Father assumes that Mother had the burden to prove to the circuit court that she was present in New Jersey on September 5, 2006.

Father's argument inappropriately places the burden of proof on Mother. Rather, as we noted above, Father, as the proponent of Missouri assuming jurisdiction, had the burden of proving that jurisdiction was proper in Missouri. *Gosserand*, 230 S.W.3d at 631. Thus, even if the circuit court disbelieved Mother's testimony and Father's corroborating testimony regarding where she lived, Father was obligated to affirmatively establish that Mother was not living in New Jersey when he filed his motion. Father failed to establish that Mother and J.H. moved to Georgia in August when he commenced this litigation.

Since Mother and J.H. were present in New Jersey when he filed his motion, New Jersey was J.H.'s home state and could have exercised jurisdiction over the parties' custody dispute. Since it did not decline jurisdiction, Missouri could not assume jurisdiction under the default provision in section 452.450.1. *Hudson*, 158 S.W.3d at 325 (finding Missouri did not have jurisdiction under section 452.450.4 because another state was the child's home state). The circuit court, therefore, erred in exercising subject matter jurisdiction over the custody dispute. The case is remanded to the circuit court so it can vacate its 2007 judgment and dismiss Father's motion.

Ronald R. Holliger, Presiding Judge

Lisa White Hardwick, Judge, and James E. Welsh, Judge, concur.