IN THE COURT OF APPEALS OF IOWA

No. 1-728 / 01-0872
Filed November 28, 2001

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CLERK SUPREME COURT

IN THE INTEREST OF P.D.M., Minor Child,

K.B., Father,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Alan D. Allbee, Associate Juvenile Judge.

The father appeals from a court's denial of his motion to dismiss the Iowa private termination proceeding. **REVERSED AND REMANDED.**

Christy R. Liss, Waterloo, for appellant.

Beth E. Hansen, Waterloo, and Chad Kepros, Iowa City, for co-petitioner Randall.

Michael W. Buckner, Waterloo, guardian ad litem for minor child.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

HUITINK, P.J.

A father appeals the decision of the juvenile court which denied his motion to dismiss a petition to terminate his parental rights on the ground the court did not have jurisdiction under Iowa Code chapter 598B, the Uniform Child-Custody Jurisdiction and Enforcement Act. We determine the case should have been dismissed, and therefore reverse.

Kevin and Dahyera are the parents of Perry, who was born on March 2, 2001. Dahyera is married to George. Genetic testing shows Kevin is Perry's biological father.

Prior to Perry's birth, Kevin, Dahyera, and George all lived in Wisconsin.[1] In January 2001 Kevin filed a petition in Wisconsin seeking to establish paternity of the then unborn child. He also sought a determination of custody and support for the child. A guardian ad litem was appointed for the child. On February 22, 2001 a hearing was held. The court ordered Dahyera to inform the guardian ad litem of the child's birth and whereabouts within twenty-four hours of the child's birth. The order also stated, "Once the baby is born Dahyera [,] shall not remove or allow anyone else to remove the baby from the State of Wisconsin." A further hearing was set for March 12, 2001, to determine paternity and custody.

Sometime prior to March 2, 2001, Dahyera went to Waterloo, Iowa, where she gave birth to Perry. On March 6, 2001, Dahyera and an attorney, Ross, as co-petitioners, filed a petition in Iowa to terminate the parental rights of Dahyera, Kevin, and George to Perry. They did not inform the Iowa court of the pending

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[1] Kevin and Dahyera lived in Madison, Wisconsin, while George lived in a nearby town, Ft. Atkinson.

action in Wisconsin. After the child's birth Dahyera returned to Wisconsin. Dahyera and George filed releases of custody. A guardian ad litem was appointed for the child. Ross was appointed as the child's custodian. He placed the child with a prospective adoptive couple who live in Iowa.

On March 20, 2001, Kevin filed a motion to dismiss the Iowa action, claiming Iowa should not accept jurisdiction of the case because there was already a pending proceeding in Wisconsin, Wisconsin was a more convenient forum for the parties, and Dahyera had engaged in unjustifiable conduct by wrongfully taking the child to the state of Iowa.

A hearing was held on April 18, 2001. The juvenile court denied the motion to dismiss. The court determined Iowa was the child's home state under Iowa Code section 598B.102(7) (Supp. 1999) because the child had lived in Iowa from the time of its birth. The court found the Wisconsin proceeding did not meet the requirements of the Parental Kidnapping Prevention Act (PKPA), and therefore, was not entitled to full faith and credit in Iowa. The court found that although Kevin, Dahyera, and George all lived in Wisconsin, Iowa was not an inconvenient forum. In addition, the court concluded the mother's conduct in coming to Iowa did not rise to the level of "unjustifiable conduct" which would cause the court to decline jurisdiction under section 598B.208(1). Kevin appealed.

I. Scope of Review.

Our scope of review is de novo. *See* Iowa R. App. P. 4; *In re Jorgensen*, 627 N.W.2d 550, 555 (Iowa 2001).

II. Home State.

This case was brought pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), which replaced the Uniform Child-Custody Jurisdiction Act (UCCJA) in cases filed after July 1, 1999. *See* Iowa Code § 598B.402. Under the UCCJEA, a court may assume jurisdiction in an initial child custody determination on the basis of significant connection only if the child has no home state. Iowa Code § 598.201(1); *Jorgensen*, 627 N.W.2d at 564.

The juvenile court determined Iowa was Perry's home state as that term is defined in the statute:

> *"Home state"* means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned.

Iowa Code § 598B.102(7). Perry was less than six months of age at the time the motion to dismiss was considered. The only state he had lived in was Iowa, and we agree that under the definition of section 598B.102(7), Iowa should be considered Perry's home state.

III. Simultaneous Proceedings.

A determination that Iowa is Perry's home state does not end our consideration, however. Kevin requested that Iowa decline to accept jurisdiction on the basis that a proceeding concerning the custody of the child had been commenced in a court of another state. Section 598B.206(1) provides:

> [A] court of this state shall not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been

> commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under section 598B.207.

The juvenile court determined section 598B.206 did not apply in this case because the Wisconsin court did not have jurisdiction substantially in conformity with the UCCJEA. The court found that because Wisconsin was not the child's home state, jurisdiction in Wisconsin did not meet the requirements of the statute.

The circumstances of this case are somewhat unique because Wisconsin allows a paternity suit to be initiated before a child is born. *See* Wis. Stat. § 767.45(3) (1999). Neither the PKPA, the UCCJEA, nor the UCCJA addresses the question of a state's exercise of jurisdiction before a child is born. *See In re Unborn Child of Starks,* 18 P.3d 342, 347 (Okla. 2001) ("home state" arises at time of child's birth). At the time the Wisconsin action was commenced, however, Kevin, Dahyera, and George all lived in Wisconsin, and that was obviously the proper state to file the paternity action. At that time there was no choice-of-state problem, and we find Wisconsin's exercise of jurisdiction over the case was valid and should have been given recognition as a proceeding substantially in conformity with the UCCJEA.[2]

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[2] Under section 598B.206(2), where there are simultaneous proceedings "a court of this state shall stay its proceeding and communicate with the court of the other state." If the other state does not determine Iowa is a more appropriate forum, the Iowa case should be dismissed. Iowa Code § 598B.206(2).

IV. Jurisdiction Declined by Reason of Conduct.

Kevin contends the juvenile court abused its discretion by refusing to dismiss the action under section 598B.208 on the ground that Dahyera had engaged in unjustifiable conduct. Section 598B.208(1) provides:

> [I]f a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless any of the following applies:
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> *a.* The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.
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> *b.* A court of the state otherwise having jurisdiction under sections 598B.201 through 598B.203 determined that this state is a more appropriate forum under section 598B.207.
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> *c.* No court of any other state would have jurisdiction under the criteria specified in sections 598B.201 through 598B.203.

We determine this is a discretionary ground for denying jurisdiction. *See Barcus v. Barcus,* 278 N.W.2d 646, 650 (Iowa 1979) (considered a similar provision of the UCCJA, permitting a court to decline jurisdiction on the basis of a party's "reprehensible conduct"); *see also Shanoski v. Miller,* 780 A.2d 275, 279 (Me. 2001) (court reviewed whether lower court exceeded the bounds of its discretion in declining to exercise jurisdiction under the UCCJEA).

As we noted above, Wisconsin properly exercised jurisdiction over the paternity suit. The court ordered, "Once the baby is born Dahyera [ ] shall not remove or allow anyone else to remove the baby from the State of Wisconsin." Obviously the order anticipated the child would be born in Wisconsin and would remain in Wisconsin. The court set a hearing date for further consideration of the child's paternity, custody, and placement.

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Dahyera, knowing full well of the Wisconsin orders, left Wisconsin and gave birth to the child in Iowa. She then initiated a new proceeding in Iowa, which sought to terminate the parental rights of herself, Kevin, and George. We note she did not include any mention of the Wisconsin proceedings in the Iowa petition, as required by section 598B.209(1). Dahyera claimed the Wisconsin order did not specifically prevent her from giving birth in Iowa.

We determine Dahyera's actions violated the terms of the Wisconsin order. Although the removal occurred prior to the child's birth, the child has clearly been "removed" from the state of Wisconsin. We find Dahyera's actions constituted "unjustifiable conduct" under section 598B.208(1). The comment to this section in Uniform Laws Annotated provides:

> If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home State, that jurisdiction will decline to hear the case. . . . This section applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it.

Unif. Child-Custody Enforcement & Juris. Act § 208, 9 U.L.A. cmt. at 684-85 (1999). Here, Dahyera violated the intent of the Wisconsin orders in order to create jurisdiction in Iowa. To put it another way, jurisdiction in Iowa exists only because Dahyera ignored the clear intent of the Wisconsin order that the child remain in Wisconsin.

We also find none of the exceptions found in section 598B.208(1) exist in this case. Clearly, Kevin did not acquiesce to the exercise of jurisdiction in Iowa. Iowa Code § 598B.208(1)(a). Wisconsin has not determined Iowa is a more

appropriate forum. Iowa Code § 598B.208(1)(b). In addition, there is not an absence of jurisdiction in any other state; Wisconsin has exercised jurisdiction. Iowa Code § 598B.208(1)(c).

Based on all of the facts in this case, we determine the juvenile court abused its discretion by not declining jurisdiction based on Dahyera's unjustifiable conduct. We conclude the petition for termination of parental rights filed in Iowa should have been dismissed under section 598B.208(1). In his brief, Kevin seeks attorney fees and costs, as permitted by section 598B.208(3). We reverse the decision of the juvenile court and remand solely for proceedings regarding fees and costs permitted by section 598B.208(3).

REVERSED AND REMANDED.

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