COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP143-AC **Cir. Ct. No. 2008FA1070**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF CLIVE R. O.:

CYNTHIA H. AND STEVEN H.,

PETITIONERS-APPELLANTS,

V.

JOSHUA O. AND KRISTINE O.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Cynthia H. and Steven H. appeal from the order of the circuit court that dismissed their action against Joshua O. and Kristine O. for grandparent visitation on the grounds that Wisconsin is an inconvenient forum.

We conclude that the circuit court did not err when it dismissed the petition, and we affirm.

¶2 This is the third incarnation of a custody and placement dispute between Cynthia and her daughter, Kristine, over Kristine's son. In this case, Cynthia and her husband brought a petition for grandparent visitation under WIS. STAT. § 767.43(1) (2007-08).[1] The circuit court determined under WIS. STAT. § 822.27 that Wisconsin was not a convenient forum and that Rhode Island was and dismissed the action.

¶3 In their appeal to this court, Cynthia and Steven argue that: (1) the circuit court did not consider that it had continuing jurisdiction in a child custody case under WIS. STAT. § 822.22, but rather addressed the jurisdiction issue under § 822.27; (2) the court considered information that was not contained in sworn affidavits, including decisions and orders from other courts, and statements contained in an attorney's affidavit; (3) the record was devoid of evidence to support the court's determination that Rhode Island was a more convenient forum for this dispute, including no evidence that the child or the parents resided in Rhode Island; and (4) the court did not properly address the statutory criteria. Two main themes unite these various arguments. First, that there was no proper evidence in the record from which the circuit court could determine that the child and his parents resided in Rhode Island at the time the visitation petition was filed and, second, that the circuit court improperly considered evidence from outside the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

record in the form of decisions and orders of the circuit court in other cases and statements from counsel.

¶4 We conclude that there was evidence in the record from which the circuit court could find that the child and his parents reside in Rhode Island. Further, to the extent the court may have considered any evidence from outside of the record, we conclude that if this was error, it was harmless. We also conclude that the circuit court properly exercised its discretion when it determined that Rhode Island was a more convenient forum than Wisconsin. Consequently, we affirm the order of the circuit court.

BACKGROUND

¶5 In order to understand the issues presented by this appeal, it is necessary to understand the timeline of the procedural history of the case, as well as some of the procedural history of the two related cases.[2] Judge Reilly presided over this case, while Judge Mawdsley presided over the related guardianship and termination of parental rights case.

> August 6, 2008 – Judge Mawdsley made an oral ruling in the guardianship case denying permanent guardianship to Cynthia.
>
> August 14, 2008 – Cynthia H. and Steven H. filed a petition against Joshua O. and Kristine O. for grandparent visitation under WIS. STAT. § 767.43(1). The petition stated, in part:

[2] For a full explanation of the facts of the underlying dispute, see our opinion in ***Cynthia H. v. Joshua O.***, appeal No. 2008AP2456-AC (Nov. 4, 2009).

> [A]s a result of a contested hearing in the Waukesha County guardianship proceedings the Honorable Robert G. Mawdsley ordered that the guardianship shall be terminated and placement and custody of the minor child shall be returned to the respondents in Warwick, Rhode Island via a transition plan implemented by Dr. Gary Kendziorski.

August 20, 2008 – Judge Mawdsley entered the order in the guardianship case terminating the grandparents' guardianship and ordering that a transition plan be implemented to return Clive to his parents.

August 25, 2008 – Cynthia and Steven filed a petition for appointment of a guardian ad litem in the visitation case, noting that the parents "reside out of state," and that "the final transition" of the child to the parents occurred that day. The petition lists the parents address in Warwick, Rhode Island, and asked the court to appoint a new GAL because their counsel had difficulty working with the GAL in the other cases.

August 28, 2008 – Judge Reilly appointed the same GAL. The same day, Cynthia and Steven also moved to terminate the appointment of the GAL. Their attorney attached an affidavit that stated in one paragraph: "Now that the child has been returned to the birth parents in Rhode Island…."

September 11, 2008 – Joshua and Kristine answered the visitation petition and argued that Wisconsin does not have jurisdiction.

September 12, 2008 – Cynthia and Steven filed an order to show cause for a temporary order for visitation. Cynthia submitted an affidavit in support that discussed Judge Mawdsley's order in the guardianship case. Further, the affidavit stated that the child was returned to his parents on August 25 and moved with the parents to Rhode Island.

September 22, 2008 – Judge Mawdsley dismissed Cynthia's petition to terminate Joshua and Kristine's parental rights.

September 25, 2008 – Joshua and Kristine moved to dismiss the visitation case for lack of jurisdiction and responded to Cynthia's motion for a temporary order allowing visitation. Their attorney included her own affidavit for each motion.

October 16, 2008 – Judge Mawdsley determined that Cynthia and Steven had not complied with his order of August 20 and that their failure to cooperate had caused the failure of the court ordered transition of the child to his parents in the guardianship case.

October 17, 2008 – Joshua and Kristine moved to dismiss the visitation case asking the court to "decline jurisdiction" under WIS. STAT. § 822.27.

December 5, 2008 – Judge Reilly entered an order that determined that Rhode Island was a more convenient forum, but stayed the proceedings for forty-five days to allow Cynthia and Steven to transfer the case to Rhode Island.

March 17, 2009 – The court dismissed the grandparent visitation petition.

ANALYSIS

¶6 Cynthia and Steven first argue that the circuit court erred when it dismissed their petition because it did not consider the requirements of WIS. STAT. § 822.22, the exclusive and continuing jurisdiction statute. That statute says that "a court of this state that has made a child custody determination consistent with [WIS. STAT.] s. 822.21 or s. 822.23 has exclusive or continuing jurisdiction over the determination" until one of two factors has occurred. Section 822.21 is the initial child custody jurisdiction determination, and § 822.23 establishes a Wisconsin court's jurisdiction to modify the determination of the court of another state. Cynthia and Steven argue that their visitation petition was filed on August 14, 2008, and "[a]t the time of filing, the Circuit Court for Waukesha County had already exercised jurisdiction in a guardianship action and had made a child custody determination by terminating the guardianship on August 20, 2008."[3]

¶7 Cynthia's and Steven's argument, based on WIS. STAT. § 822.22, suggests that the circuit court determined that it did not have jurisdiction over the case. That is a misstatement of what occurred. The circuit court acknowledged that it had jurisdiction, but declined to exercise it because it determined that Rhode Island was a more convenient forum under WIS. STAT. § 822.27. This statute provides:

[3] Cynthia and Steven do not explain why they did not file the petition in the ongoing proceeding, but instead started a new proceeding in the circuit court.

> 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 appropriate forum. (Emphasis added.)

This statute allows a court that already has jurisdiction, i.e., under WIS. STAT. § 822.21, to decline to exercise that jurisdiction if it determines that Wisconsin is an inconvenient forum and another state would be more convenient. The circuit court in this case considered the appropriate statute when it determined that Rhode Island would be a more convenient forum.[4] Because we have concluded that the circuit court properly addressed § 822.27, we do not address Cynthia's and Steven's arguments about the court's failure to address the specific standards in § 822.22.

¶8 Cynthia and Steven also argue in a couple of different contexts that the circuit court erred when it considered the facts from the guardianship and TPR cases and that there was no independent evidence in the record that established the fact that Joshua, Kristine, and their son all reside in Rhode Island, or that they resided in Rhode Island at the time Cynthia and Steven filed the visitation petition. We also reject these arguments.

[4] We note that Cynthia's and Steven's argument on this point contradicts itself and other arguments in their brief. While they insist that the controlling date for purposes of the visitation petition is the date on which they filed it, August 14, 2008, their argument on this issue asserts that the court had continuing and exclusive jurisdiction as the result of an event that occurred on August 20, 2008. Further, the event that they say triggers the exclusive and continuing jurisdiction of the court in this case happened in a different case before a different judge. They spend much of their brief chastising the court in this case for considering the rulings of that same proceeding, yet when it suits their argument, they do not hesitate to suggest that the court erred by not considering those proceedings. This is not the only instance in which the arguments in Cynthia's and Steven's brief are close to frivolous.

¶9 First, Cynthia and Steven base their argument on their assertion that the date that controls is the date they filed their visitation petition. In support of this argument, they cite a case that discusses the date for determining whether jurisdictional requirements have been met. Cynthia and Steven again ignore that the statute on which the court relied, WIS. STAT. § 822.27, allows a court that has jurisdiction to decline to exercise that jurisdiction at any time. In other words, by applying this statute, the circuit court accepted that it had jurisdiction, but determined that there was a more appropriate forum. The fact that Joshua and Kristine may have been in Wisconsin on August 14, 2008, waiting for a determination in guardianship proceeding brought against them by Cynthia and Steven, is not relevant to the court's decision to decline jurisdiction under § 822.27. The statute plainly states that the decision to decline may be made "at any time." August 14 is not the controlling date for that determination.

¶10 Secondly, there was evidence in the record, including statements in documents filed by Cynthia and Steven, that Joshua, Kristine, and their son all resided in Rhode Island, and did so when the circuit court made the forum determination. The petition for the appointment of a guardian ad litem submitted by Cynthia and Steven to the court on August 25, 2008, states: "The parents reside out of state," and "the parties made the final transition of the infant from the grandparents to the parents on August 25, 2008." The affidavit Cynthia submitted in support of her order to show cause states: "On August 25, 2008, the birth parents moved the child to the State of Rhode Island." The very basis of Cynthia's and Steven's petition for visitation was the fact that Judge Mawdsley had ordered the child returned to his parents in Rhode Island. Cynthia's and Steven's argument that there was no evidence presented that the parents and child resided in Rhode Island on August 14 is disingenuous at best.

¶11 Cynthia and Steven also argue that the court improperly "took judicial notice" of the decisions Judge Mawdsley made in the guardianship and TPR cases and improperly considered as evidence statements in the affidavit filed by Joshua's and Kristine's attorney. Again, Cynthia and Steven make this argument in support of their claim that there was no evidence that the parents and child resided in Rhode Island on August 14, 2008. First, we have determined that August 14 is not the controlling date. Further, there was sufficient independent evidence, provided by Cynthia, that the child and his parents resided outside of Wisconsin at the time the court declined to exercise jurisdiction. Consequently, even assuming that the court erred by considering evidence from other cases, such an error was clearly harmless.

¶12 Secondly, Cynthia and Steven based their request for visitation in part on Judge Mawdsley's decision. Their petition states:

> [A]s a result of a contested hearing in the Waukesha County guardianship proceedings the Honorable Robert G. Mawdsley ordered that the guardianship shall be terminated and placement and custody of the minor child shall be returned to the respondents in Warwick, Rhode Island via a transition plan implemented by Dr. Gary Kendziorski.

Cynthia and Steven cited to Judge Mawdsley's decision as one of the bases of their petition for visitation, cited it in their request for the appointment of a guardian ad litem, and in support of their argument that the court had continuing and exclusive jurisdiction. They cannot now argue that the court improperly considered that decision.

¶13 Cynthia and Steven also argue that the court improperly considered statements made by Joshua's and Kristine's counsel in affidavits. Again, because we have already determined that there was sufficient evidence from Cynthia, we

need not address this argument in detail, other than to note that Cynthia and Steven have mischaracterized both counsel's statements and the circuit court's reliance on them. The cases they cite in support of this argument are similarly inapposite. While one of counsel's affidavits contains argument, she was not asking the court to accept the argument as a statement of evidentiary fact, and the circuit court did not do so. We see nothing improper in counsel's affidavits.

¶14 Most importantly, Cynthia and Steven never challenge the fact that the child resides with his parents in Rhode Island. Their argument is only that he did not reside with his parents in Rhode Island when they filed their visitation petition on August 14. This is, of course, true since "the transition" had not yet taken place. As we have discussed, however, this is not the controlling date under WIS. STAT. § 822.27. Further, there was evidence that the parents and child resided in Rhode Island at the time the forum decision was made.

¶15 Cynthia and Steven also argue that the circuit court did not consider the appropriate statutory criteria. We review the circuit court's determination that Rhode Island was a more convenient location for an erroneous exercise of discretion. ***Hatch v. Hatch***, 2007 WI App 136, ¶6, 302 Wis. 2d 215, 733 N.W.2d 648. "A circuit court properly exercises its discretion when it 'examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, arrives at a conclusion that reasonable judges could reach.'" ***Id.*** Under WIS. STAT. § 822.27, the court is required to consider all of the statutory factors, including "whether there is any need to protect the child from domestic violence, the distance between Wisconsin and the other state, the location of the child, and the relative financial circumstances of the parties." ***Id.***, ¶19. We conclude that the circuit court considered the appropriate factors and made a reasoned and fair

determination under all of the circumstances of this case that Rhode Island was the more appropriate forum.

¶16 For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.