

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Tremaine Johnson, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 14AP-1037
 : (C.P.C. No. 06JU-8548)
 :
 Stephanie R. Kelly, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on June 30, 2015

Goldman & Rosenthal, and *Lee S. Rosenthal*, for appellant.

Painter & Westfall, LLC, *Elizabeth V. Westfall* and *Nathan D. Painter*, for appellee.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch

BRUNNER, J.

{¶ 1} Plaintiff-appellant, Tremaine Johnson, appeals from a final judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, that overruled his objections to a decision and entry adopting a magistrate's decision on the court's jurisdiction to act on matters for the parties when each of them and their minor child resides outside of Ohio. While the trial court's decision also decided matters of custody of the parties' minor child, Trinity Johnson, appellant's sole assignment of error is that the trial court lacked jurisdiction to render its decision, based on both parties and their child now being located out of state. The trial court adopted the magistrate's decision finding jurisdiction, overruling appellant's motion to dismiss and modifying custody of Trinity, awarding it to defendant-appellee, Stephanie Kelly, residential parent and legal custodian of the parties' minor child. We conclude that the trial court properly exercised jurisdiction over the case and accordingly did not err in

overruling Johnson's objections and entering judgment. The judgment of the trial court is affirmed.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} The litigation between the parties has a lengthy history, but the issues relevant to this appeal primarily concern the residences of the parties and Trinity's residential history. Because appellant has limited his assignment of error to the sole question of jurisdiction based on the parties' respective locations, we shall recite only the elements of the procedural history bearing on those topics at issue.

{¶ 3} The parties' contact with the trial court began on May 30, 2006, when Johnson filed a complaint in the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, to establish parentage of Trinity (who was then known as Trinity Demps). At that time, Kelly and Trinity lived together in Canal Winchester, Ohio, and Johnson lived in Middletown, Ohio. On December 12, 2006, the trial court issued an agreed judgment entry finding that Johnson was the father of Trinity and changing the child's last name. In anticipation of the agreed judgment entry, on November 22, 2006, the parties signed a shared parenting plan. The plan provided, among numerous other provisions, that the mother, Kelly, would be the custodial parent. The plan also provided that Trinity would reside with her father during the entire summer. On December 12, 2006, the trial court approved the parenting plan, issued a shared parenting decree that incorporated the plan, and filed an agreed judgment entry.

{¶ 4} Approximately one and one-half years later, on or about July 23, 2008, Johnson filed a motion to terminate or modify the shared parenting decree on grounds that Kelly had moved out of state to an unknown address, had taken Trinity with her, and was denying Johnson his parental rights under the decree. In affidavits in support of the motion, Johnson averred that Kelly had first moved to Orlando, Florida and then to Las Vegas, Nevada, but he did not know her exact address at the Las Vegas location or her current address. Johnson also asserted by affidavit that he was a cook in the United States Army and as a result was no longer stationed in Ohio, but, instead, at Fort Campbell in Kentucky. Citing these circumstances, Johnson asserted to the trial court that neither the parents nor Trinity, was residing in the state of Ohio.

{¶ 5} Because Johnson averred that he was unaware of Kelly's address, service was attempted on Kelly by publication. On December 15, 2008, the court held a hearing that Kelly did not attend. Following the hearing, on December 26, 2008, the court issued an entry terminating the shared parenting decree adopted in 2006 and in its place named Johnson the new custodial parent.

{¶ 6} On January 9, 2009, Kelly filed objections to the decision and entry together with a motion to vacate the judgment on grounds that she had not been served or notified despite the fact that Johnson knew where she lived and how to reach her. Kelly filed a number of exhibits in support of her motion, including chat and e-mail records showing that she and Johnson had been communicating with each other in September, October, and December 2008. These documents indicated that Kelly had explicitly said that neither she nor her attorney had received any notification of filings and that Johnson failed to indicate that he had initiated any new court proceedings, even when asked about it and even though he exchanged numerous chat messages with Kelly the day before the December 15, 2008 hearing. The record also revealed that in October 2008 (well before the December hearing) Kelly informed Johnson that she was living with her parents in Michigan. Based on this material, on March 10, 2009, the court sustained Kelly's objections to the decision and entry modifying custody of Trinity and vacated the December 26, 2008 entry. Thereafter, the original parenting decree from 2006 went back into effect and Kelly was once again the custodial parent. The court noted at that time, in a September 1, 2009 order reinstating the original decree, that none of the parties "currently resides in the state of Ohio."

{¶ 7} On February 5, 2010, following hearings with the participation of both parties on the merits of Johnson's motion to modify or terminate, the trial court again terminated the prior decree and shared parenting plan and made Johnson the residential parent and legal custodian of Trinity. After the parties requested the trial court issue findings of fact and conclusions of law, the court did so on May 24, 2010, and cited Kelly's actions and behavior in frequently moving as reasons for its decision to award custody to Johnson. On August 13, 2010, the trial court overruled Kelly's objections to the February 5, 2010 decision.

{¶ 8} In January 2011, Johnson moved to North Carolina. Approximately six months later, on July 26, 2011, Kelly moved the trial court for a modification of parental rights and requested that she be made the custodial parent. This request was apparently motivated in part by the fact that Johnson was shortly to be deployed to Afghanistan, in part because Johnson frequently relocated (as a result of his military service), and in part because Johnson allegedly failed to honor court-ordered parenting time between Trinity and Kelly. Before the trial court could rule on this motion, the parties agreed to a temporary order allowing Trinity to live with Kelly for the duration of Johnson's deployment and appointing a guardian ad litem to ensure that Kelly did not relocate again without notice. The temporary order was to terminate upon Johnson's return from deployment in Afghanistan.

{¶ 9} Sometime near the end of September 2012, Johnson returned from deployment and traveled to Middletown, Ohio to marry his fiancée (not Kelly). While in Middletown, Johnson was involved in an incident outside a bar and as a result was indicted for felonious assault. Based on the indictment, on December 11, 2012, the trial court gave temporary custody to Kelly. Johnson was ultimately convicted of inducing panic, a misdemeanor of the second degree. The record does not reflect exactly when Johnson's criminal law matters resolved, but Trinity was returned to him on January 1, 2013.

{¶ 10} On November 18, 2013, Kelly renewed her motion to modify parental rights. On July 7, 2014, the guardian ad litem filed a report recommending custody of Trinity be awarded to Kelly. In her report, the guardian ad litem supported her reasons for recommending custody of Trinity to Kelly, in part due to increased stability in Kelly's living situation, another military relocation by Johnson (this one to Hawaii in August 2014), the wishes of Trinity, Johnson's criminal indictment and conviction from 2012, and a record of domestic disturbance calls between Johnson and his new wife. The next day, July 8, 2014, Johnson filed a motion to dismiss Kelly's motions to modify parental rights on grounds that the common pleas court no longer had continuing subject-matter jurisdiction over the issues in the case when neither the parties nor Trinity resided in Ohio.

{¶ 11} On September 19, 2014, the trial court denied Johnson's motion to dismiss and issued a decision and entry designating Kelly residential parent and granting her legal custody of Trinity. Johnson, on October 2, 2014, filed objections to the decision. On November 17, 2014, the trial court overruled the objections, affirmed the prior decision, and ordered Johnson to comply with the September 19, 2014 decision and cooperate in delivering Trinity into the custody of Kelly. Johnson now appeals.

II. ASSIGNMENT OF ERROR

{¶ 12} Johnson argues a single assignment of error for our review:

The Court erred in overruling Plaintiff-Appellant's Objections to Magistrate's Decision because the Court lacked subject matter jurisdiction over the custody issues relating to the minor child.

III. DISCUSSION

{¶ 13} When reviewing a determination of subject-matter jurisdiction we use a de novo standard of review. *Slaughter v. Slaughter*, 10th Dist. No. 11AP-997, 2012-Ohio-3973, ¶ 14, citing *Kingsley v. Ohio State Personnel Bd. of Rev.*, 10th Dist. No. 10AP-875, 2011-Ohio-2227, ¶ 27; *Mulatu v. Girsha*, 12th Dist. No. CA2011-07-051, 2011-Ohio-6226, ¶ 26.

{¶ 14} R.C. 3127.15 sets forth the grounds for invoking the subject-matter jurisdiction of the Ohio Courts of Common Pleas in child custody proceedings. It is undisputed that the trial court properly exercised jurisdiction at the outset of this litigation when both parents and Trinity resided in Ohio. The threshold question presented in this appeal is whether, when the parties and Trinity no longer resided in Ohio, the trial court lost jurisdiction.

{¶ 15} R.C. 3127.16 provides for exclusive continuing jurisdiction over cases in which a custody determination has been made as follows:

Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state that has made a child custody determination consistent with section 3127.15 or 3127.17 of the Revised Code 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 was enacted pursuant to the successor to the Uniform Child Custody Jurisdiction Act, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). 2003 S.B. No. 185. The Supreme Court of Ohio has recognized that the purposes of these acts were " 'to avoid jurisdictional competition and conflict with courts of other jurisdictions' in custody matters" and to give " 'jurisdictional priority and exclusive continuing jurisdiction to the home state.' " *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, ¶ 20-21, quoting *In re Palmer*, 12 Ohio St.3d 194, 196 (1984) and Annotation, Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act (2002), 100 A.L.R.5th 1, 20, Section 2[b].

{¶ 16} Ohio courts of appeals have held that an Ohio court must relinquish continuing exclusive jurisdiction under R.C. 3127.16 when the parents and child do not reside in Ohio and where another court is claiming jurisdiction over the custody issues. *See Slaughter* at ¶ 22-37 (finding that the Ohio trial court properly determined that it lacked jurisdiction where neither parents nor child resided in Ohio, and a court in Florida, where mother and child resided, had asserted jurisdiction); *Lafi v. Lafi*, 2d Dist. No. 2007 CA 37, 2008-Ohio-1871, ¶ 4-5, 13 (finding no error in a determination that an Ohio trial court lacked jurisdiction where neither parents nor child resided in Ohio and a Michigan court, where mother and child resided, had indicated an intent to exercise jurisdiction).

{¶ 17} However, Ohio courts of appeals have also held that where another court has *not* indicated an intent to take jurisdiction, R.C. 3127.16 does not completely deprive an Ohio court of jurisdiction but merely deprives it of "exclusive" jurisdiction. *Robinette v. Bryant*, 4th Dist. No. 12CA20, 2013-Ohio-2889, ¶ 12-19 (affirming a trial court's assertion of jurisdiction despite the fact that both parents and child resided out of state where "the magistrate communicated with the Kentucky court [where one parent had filed a second custody action] and 'proceeded with the case understanding Kentucky's agreement that Ohio was properly exercising its jurisdiction regarding this case' "); *Mulatu* (reversing a decision wherein a trial court held there was no subject-matter jurisdiction, because even though neither parents nor child resided in Ohio no other court had asserted jurisdiction).

{¶ 18} In this case Johnson currently resides in Hawaii and Kelly resides in Michigan. Neither the child nor the parties have been located in Ohio for several years.

This fact existed and was recognized by the trial court in September 2009 when the trial court stated that none of the parties "currently resides in the state of Ohio." Notwithstanding the fact that neither the parties nor the child resided in Ohio, the parties continued to litigate in Ohio for several years, and the record shows no evidence that either party has ever sought to bring proceedings in the courts of any other state. There is also nothing in the record to indicate that the courts of any other state manifested an intent to exercise jurisdiction over custody matters related to Trinity.

{¶ 19} In these circumstances Ohio does not have exclusive jurisdiction. R.C. 3127.16. However, Ohio courts do have continuing jurisdiction. R.C. 3127.16; *Robinette* at ¶ 16. As the court in *Mulatu* reasoned, "the Uniform Act provides an open door to the judicial system so that issues related to child custody can be determined and enforced despite a parent's choice to relocate around the country, or the world. Despite the mobility of parents, there should never be a 'no-man's land' for children." *Id.* at ¶ 15. Johnson's motion to dismiss the then-pending custody proceeding, when no other court had manifested an intention to assert jurisdiction, would have had a tendency to relegate this matter to the "no-man's land" if granted. This does not serve the purpose of the UCCJEA; nor does it comport with Ohio appellate courts' interpretations of R.C. 3127.16. In the absence of another court's assertion of jurisdiction, even though neither parents nor child resided in Ohio, the trial court was correct to exercise jurisdiction in the matter under review. *Robinette* at ¶ 16 ("R.C. 3127.16 sets forth the possibility that Ohio is not the only state with jurisdiction and does not strip it of total jurisdiction."); *Mulatu* at ¶ 45 ("R.C. 3127.16 simply sets forth the terms under which Ohio no longer has exclusive jurisdiction.").

{¶ 20} Johnson's assignment of error is overruled.

IV. CONCLUSION

{¶ 21} We overrule Johnson's single assignment of error and affirm the decision of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
