

STATE OF MICHIGAN
COURT OF APPEALS

TOBIAS JOHN JOHNSON,

Plaintiff-Appellant,

v

KATHY LOU JOHNSON,

Defendant-Appellee.

UNPUBLISHED

March 1, 2005

No. 258062

Jackson Circuit Court

LC No. 04-003827-DC

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Plaintiff Tobias John Johnson appeals as of right from the trial court's order denying his motion for temporary custody of the parties' minor child and holding that it lacked jurisdiction over the case. We reverse and remand. We decided this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

There is no dispute as to the facts of this case. An Idaho court awarded defendant Kathy Lou Johnson primary physical custody of the parties' minor child in a divorce judgment entered on May 10, 1999. In June 2002, the minor child came to Tobias Johnson's home in Michigan for scheduled visitation or parenting time. In August 2002, the military ordered Kathy Johnson, who was a reservist with the United States Army, to prepare for active duty deployment. The parties agreed at this point for the minor child to stay with Tobias Johnson. The military deployed Kathy Johnson in February 2003; she was released from active duty and returned home to the state of Washington a year later. The parties then disagreed regarding whether the minor child should remain living with Tobias Johnson or return to living with Kathy Johnson. In June 2004, the principal at the school the minor child was attending in Michigan released him to Kathy Johnson, and she took the minor child back to Washington with her. Thus, the minor child principally resided with Tobias Johnson in Michigan for a period of two years from June 2002 to June 2004.

After Kathy Johnson took the minor child back to Washington, Tobias Johnson filed the complaint in this case in the Jackson Circuit Court, seeking custody of the minor child. The trial court denied Tobias Johnson's motion for temporary custody of the minor child based on a conclusion that it lacked jurisdiction over the case with the proper venue for issues regarding the

minor child's custody being in Idaho and, alternatively, that there was not a material change of circumstances sufficient to warrant review of the minor child's custody.

II. The Trial Court's Decision

A. Standard Of Review

In a child custody case, the clear legal error standard applies if the trial court errs in its choice, interpretation, or application of existing law.¹ We review a trial court's findings of fact under the great weight of the evidence standard under which we sustain the findings unless "the evidence clearly preponderates in the opposite direction."² We review rulings of a discretionary nature for an abuse of discretion.³

B. Jurisdiction

Tobias Johnson argues that the trial court erred by holding that it did not have jurisdiction to modify the child custody provisions of the parties' judgment of divorce that an Idaho court previously entered. MCL 722.1203, part of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) as adopted in Michigan, provides in relevant part:

Except as otherwise provided in [MCL 722.1204], a court of this state shall 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 child-custody determination under [MCL 722.1201(1)(a) or (b)] and either of the following applies:

* * * *

(b) A court of this state or a court of the other state determines that neither the child, nor a parent of the child, nor a person acting as a parent presently resides in the other state.

Thus, a Michigan court has jurisdiction to modify a child custody determination from another state where (1) the Michigan court has jurisdiction to make an initial child custody determination under MCL 722.1201(1)(a) or (b) and (2) the relevant child resides in and no parent or person acting as a parent to the child resides in the state in which the earlier determination was made.

Considering the first of these jurisdictional prerequisites, MCL 722.1201(1)(a) provides that a Michigan court has jurisdiction to make an initial child-custody determination where:

¹ *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001).

² *Id.*, quoting *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).

³ *Foskett*, *supra* at 5.

This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or a person acting as a parent continues to live in this state.

MCL 722.1102(g) defines “home state” for purposes of the UCCJEA in relevant part as “the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding.” Because Tobias Johnson initiated the present proceeding in June 2004 and it is undisputed that the child lived with him in Michigan for over six consecutive months from June 2002 to June 2004 and that Tobias Johnson continues to live in Michigan, the trial court had jurisdiction to make an initial child-custody determination under MCL 722.1201(1)(a).

With regard to the other requirement, that is, that the child and his or her parents do not live in the state where an earlier child custody determination was made, it is undisputed that neither party nor their child resided in Idaho when Tobias Johnson brought this action. Thus, the trial court erred in holding that it lacked jurisdiction to potentially modify the child custody award previously made by the Idaho court. Strikingly, the trial court did not address the relevant provisions of the UCCJEA in explaining its holding that it lacked jurisdiction in this case. Rather, the trial court effectively relied on its public policy concerns related to those serving or who had served in the military. However, it is plain that nothing in the UCCJEA allows for consideration of such concerns in determining whether a court has jurisdiction to modify a child custody award previously made by a court of another state. “[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.”⁴ Instead, courts must enforce the clear and unambiguous statutory language as written.⁵ Accordingly, we reverse the trial court’s holding that it lacked jurisdiction in this case because it constituted clear legal error.⁶

Kathy Johnson invokes MCL 722.1207(1), which provides that a Michigan court that has jurisdiction under the UCCJEA “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.” However, the trial court did not make a determination that Michigan would be an inconvenient forum, but rather simply determined that, as a Michigan court, it lacked jurisdiction. Further, it is apparent that the decision whether to decline to exercise jurisdiction on the ground that a Michigan court would be an inconvenient forum is a matter initially entrusted by MCL 722.1207(1) to the trial court’s discretion. Thus, while it would be inappropriate for us to decide at this juncture whether the trial court should decline to exercise its jurisdiction under MCL 722.1207(1), the trial court is free to consider on remand whether it would be appropriate to do so.

⁴ *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004), quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

⁵ *Id.*

⁶ *Foskett*, *supra* at 4-5.

C. Change Of Circumstances

In addition to its incorrect jurisdictional ruling, the trial court appears to have relied on other considerations in entering the order being appealed. We agree with Tobias Johnson that those considerations did not justify entry of the order at issue.

First, regardless whether the trial court addressed these matters at an appropriate stage of the proceedings, the trial court's discussion and conclusions related to whether there was a material change in circumstances or an established custodial environment with Tobias Johnson were legally flawed. A "change of circumstances" in the present context requires "that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed."⁷ In its oral remarks, the trial court indicated that Kathy Johnson's deployment by the military did not constitute a material change in circumstances. But this is simply not an appropriate analysis of whether there was a material change in *the child's* circumstances. It is undisputed that, as a result of Kathy Johnson's deployment, the child resided with Tobias Johnson for a two-year period during which he attended school in Michigan. Clearly, moving a young child from residing with one parent to residing with the other parent for a two-year period during which the child attends a new elementary school may constitute a change in circumstances that could have a significant effect on the child. For example, it is readily conceivable that the child may have become so closely bonded with Tobias Johnson and attached to his new school and community over this two-year period that these would be factors weighing heavily in favor of modifying the Idaho court's award of custody by granting primary physical custody of the child to Tobias Johnson.

D. Established Custodial Environment

It is unnecessary to resolve at this point whether the child had an established custodial environment with Tobias Johnson at the time that this case was initiated. The importance of whether an established custodial environment exists is that, if it does, a trial court may change custody only on a showing by clear and convincing evidence that the change serves the best interests of the child.⁸ The trial court never addressed whether a change in custody would be in the child's best interests and, thus, this case must be remanded for further proceedings, regardless of whether an established custodial environment existed with Tobias Johnson. However, the trial court indicated in its oral remarks that it was making a "legal holding" that there was no established custodial environment with Tobias Johnson. Whether such a custodial environment exists is a *factual* inquiry.⁹ The trial court's remarks reflect that it did not undertake such a factual analysis, but rather based its conclusion on its public policy views regarding the treatment of veterans returning from active military service in child custody cases. Accordingly,

⁷ *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003) (emphasis in original).

⁸ *Foskett*, *supra* at 6.

⁹ *Id.* at 8.

on remand, the trial court should consider whether an established custodial environment exists with Tobias Johnson.

E. Policy Considerations

The “public policy” considerations asserted by the trial court and Kathy Johnson essentially related to granting special treatment to returning veterans or not discouraging military service are inappropriate considerations in this child custody dispute. They are extraneous to the child’s best interests, which are paramount by statute. MCL 722.25 expressly directs that, in a child custody dispute between parents, “the best interests of the child control.” Creating some type of special blanket rule to preclude a change of custody in relation to a child having been left in the care of the parent who was not awarded primary physical custody because the parent who had been awarded such custody was called up for active military service would plainly be contrary to this statutory directive because it would place extraneous considerations above the best interest of the child. Because “a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself,”¹⁰ public policy concerns related to military readiness or granting special consideration to veterans cannot properly be considered when a court makes a child custody determination, as they are unrelated to determining the best interest of the child.

Accordingly, the alternative grounds that the trial court articulated do not support the effective result of the order being appealed, that is, a definitive conclusion that a Michigan court will not award primary physical custody of the child to Tobias Johnson. While it is not clear at this stage whether the Idaho judgment awarding custody of the child to Kathy Johnson should be modified, we conclude that the order being appealed should be reversed and this case remanded to the trial court for further proceedings with regard to Tobias Johnson’s petition for custody.

III. Remand To A Different Judge

Tobias Johnson further argues that this case should be remanded to a different trial judge. There is no indication that the original trial judge is personally biased in favor of Kathy Johnson or against Tobias Johnson. Accordingly, we decline to remand this case to a different trial judge.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen

¹⁰ *Halloran, supra* at 577, quoting *Roberts, supra* at 63.