

STATE OF MICHIGAN
COURT OF APPEALS

GILLIAN K. SMITH-DENNIS,

Plaintiff-Appellant,

v

DAVID R. DENNIS,

Defendant-Appellee.

UNPUBLISHED

May 28, 2013

No. 313719

Grand Traverse Circuit Court

LC No. 08-5355-DM

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals¹ from the November 20, 2012 order of the trial court denying plaintiff's motion for the release of the trial court's exclusive, continuing jurisdiction over the minor child's custody determination pursuant to MCL 722.1202, and denying plaintiff's motion for

¹ Plaintiff in this action filed both a claim of appeal by right and an application for leave to appeal, which were assigned the docket numbers of 313719 and 313720, respectively. MCR 7.203(A)(1) provides that an appeal by right may be taken from "[a] final judgment or final order of the circuit court . . . as defined in MCR 7.202(6)." A final order includes "in a domestic relations action, a postjudgment order affecting the custody of a minor." MCR 7.202(6)(a)(iii). Plaintiff argues that the order of the trial court is such a final order. However, this Court has treated appeals from orders determining whether the trial court has exclusive, continuing jurisdiction as appeals by leave granted when the orders do not also involve a request for change in custody. See *White v Harrison-White*, 280 Mich App 383, 384; 760 NW2d 691 (2008); cf *Atchison v Atchison*, 256 Mich App 531, 532; 664 NW2d 249 (2003) (appeal by right taken from trial court's denial of petition for change of custody on the grounds that another court had retained continuing, exclusive jurisdiction). Although plaintiff's motion requested that another court obtain jurisdiction over child custody, it did not, itself, seek to change custody; we conclude that the trial court's order thus does not "affect[] the custody of a minor." MCR 7.202(6)(a)(iii). Thus, although this case is before us in the posture of an appeal by right, we conclude that the correct manner of consideration would be consideration by leave granted. Therefore, to the extent that this Court lacks jurisdiction to consider plaintiff's appeal as an appeal by right, we exercise our discretion to consider the appeal as if it were by leave granted. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998).

determination of an inconvenient forum pursuant to MCL 722.1202(2) and MCL 722.1207. We affirm in part, and vacate and remand in part.

I. BASIC FACTS AND PROCEDURE

The parties entered into a consent judgment of divorce on November 3, 2008, which granted both parents joint legal and physical custody of their two minor children. The record reveals that, despite the entry of a consent judgment, the parties continually resorted to the trial court to resolve their disputes, chiefly concerning the property division portion of the judgment, which provided for co-ownership of both the marital home and businesses owned by the parties.² In 2009, the parties agreed to an amendment to the divorce judgment granting plaintiff sole physical custody of the children. In 2010, the parties stipulated to an order changing the domicile of the minor children to the Denver, Colorado metropolitan area and granting defendant parenting time during the summer of each year, on odd-numbered Christmas and spring breaks, and at such other times as mutually agreed upon by the parties.

In 2012, plaintiff filed a motion asking the trial court to release its exclusive, continuing jurisdiction over the children's custody pursuant to MCL 722.1202, or in the alternative to find that Michigan was an inconvenient forum pursuant to MCL 722.1202(2) and 722.1207. Plaintiff alleged that a Colorado court had registered the child custody determination in the State of Colorado. Plaintiff further alleged that defendant had "forfeited much of his parent time" since the move, and had had the children in his care only from December 19-30, 2011 and June 9 through August 3, 2012.

At the motion hearing, at which defendant was not present, the trial court denied plaintiff's motion. The trial court appeared suspicious of plaintiff's motives for bringing the motion:

The COURT: I don't think I'm getting the whole story.

What is the purpose of this? You planning on cutting him off all together?
You want to go to some other Court?

I have a history here with some considerable skepticism about everybody involved in this case, borne upon a healthy experience.

The trial court also noted that defendant had exercised his parenting time the previous summer. The trial court further noted that a Colorado court was capable of enforcing the existing order without this court relinquishing its jurisdiction.

² We share the trial court's amazement at being confronted with a consent judgment that indicates that the parties specifically directed their counsel to prepare this document without allowing their counsel to negotiate or protect their rights, and which was entered, basically, against the advice of the drafting attorney.

Nonetheless, plaintiff maintained that the statutory requirements for relinquishment of exclusive, continuing jurisdiction had been met. The trial court did not conduct a detailed analysis of whether it should release its jurisdiction pursuant to MCL 722.1202. The court stated that plaintiff's motion

doesn't pass the taste test. You don't go to this effort unless you're planning to do something, and I'm suspicious of these parties particularly, both of them. I think there is—I don't trust them and there is something fishy going on. There is a plan and you're not sharing it with me.

The trial court denied the motion as follows:

The Court: We'll deny the motion.

This is a motion to release exclusive continuing jurisdiction over child custody. This was, and remains, an ongoing bitter divorce. I expressed the plaintiff is wrapped very tight and is highly controlling. The defendant is somewhat of a scoundrel. But, in any event, they did have children together and that's not my fault. In any event, they had children together, at some point a year or so ago Ms. Smith-Dennis moved to Denver, I assume it was for good reason, the kids moved with her. And, as part of the arrangement, Mr. Dennis's parenting time was amended to reflect the practicalities of living that far apart, included giving him extensive periods of time in the summer. He in fact apparently, it's alleged, he has not exercised all that time and I'll accept that as true. But, in Paragraph 5 of the motion, it recites that he apparently, Mr. Dennis, did exercise parenting time and were [sic] with the children in his care from December 19 to December 30, 2011, that's a long Christmas break, and from June 9 to August 3, 2012, that's two months in the summer. So in the last twelve months he's exercised a lot of parenting time. You know, the issue is not what the new schedule should be or whether he should have any parenting time at all, the issue is whether the matter ought to be resolved in the Denver Courts because one side has moved to Denver and the kids are out there for primary physical custody and I don't see why that should happen when there obviously is an agenda and nobody will tell me what they are planning to do next, which I assume is to cut Mr. Dennis off from parenting time.

Mr. Dennis lives somewhere in Northern Michigan, and attempts to serve him have supposedly been unsuccessful, although I'm suspicious of that also. In any event, he does live in this area somewhere and that's where the case came from and parties have an arrangement. He's exercising parenting time and I see no reason to relinquish jurisdiction. It is a manipulative attempt to cut him off, which this does have a history which I'm unfortunately inflicted with.

So I'll deny the motion.

Regarding the statutory factors of MCL 722.1202, the trial court stated that it reviewed them as presented in plaintiff's brief. The trial court declined to make findings on the record concerning the statutory factors.

Regarding plaintiff's request for the trial court to find Michigan an inconvenient forum, the trial court stated "This forum is convenient for your client, and all this here. With her attorney the forum in Denver is certainly inconvenient for him, it's no less." The trial court also declined plaintiff's request to make findings regarding specific statutory factors on the record.

II. STANDARD OF REVIEW

A determination under MCL 722.1202(1)(a) involves a determination of whether a trial court has subject-matter jurisdiction, which we review de novo. *White v Harrison-White*, 280 Mich App 383, 387; 760 NW2d 691 (2008). To the extent that issues of statutory construction are present, these are questions of law which we also review de novo. *Id.*

We review a court's determination that another forum is not more convenient for an abuse of discretion. Cf. *Braden v Braden*, 217 Mich App 331, 339; 551 NW2d 467 (1996).

III. MOTION TO RELEASE EXCLUSIVE CONTINUING JURISDICTION

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 et seq., governs child custody proceedings involving a party or proceeding outside of Michigan. See *White*, 280 Mich App at 388; see also *Fisher v Belcher*, 269 Mich App 247, 260; 713 NW2d 6 (2005). The specific statutory provision at issue, MCL 722.1202, was designed to "rectify conflicting proceedings and orders in child-custody disputes," *Atchinson v Atchinson*, 256 Mich App 531, 538; 664 NW2d 249 (2003), and provides in relevant part:

(1) Except as otherwise provided in section 204, a court of this state that has made a child-custody determination consistent with section 201 or 203 has exclusive, continuing jurisdiction over the child-custody determination until either of the following occurs:

(a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

* * *

(2) A court of this state that has exclusive, continuing jurisdiction under this section may decline to exercise its jurisdiction if the court determines that it is an inconvenient forum under section 207.

Here, plaintiff does not dispute that the trial court had jurisdiction to make the initial child-custody determination, as both parties and the child resided in Michigan at the time of the determination and no other court would have jurisdiction to make such a determination. See MCL 722.1201(d). Nor is it disputed that the children's father lives in Michigan. Therefore, the

determination of whether the trial court has exclusive, continuing jurisdiction over the children in this case must be analyzed under MCL 722.1202(1)(a).

Under MCL 722.1202(1)(a), the court of the state that made the initial custody determination “retains exclusive, continuing jurisdiction until neither the child nor the child and one parent . . . ‘have a significant connection with this state’ *and* ‘substantial evidence is no longer available in this state concerning the child’s care, protection, training, and personal relationships.’” *White*, 280 Mich App at 389, quoting MCL 722.1202(1)(a) (emphasis in the original). “The Legislature’s use of the term “and” compels the conclusion that jurisdiction is retained until both the requisite significant connection and the requisite substantial evidence are lacking.” *Id.* Therefore, there are two prongs that must be satisfied before a trial court is stripped of its jurisdiction under this statute.

As this Court has noted, the phrase “significant connection” is not defined in the UCCJEA. *Id.* at 390. In *White*, this Court conducted a review of both the dictionary definition of the relevant terms and how other jurisdictions have interpreted similar phrasing. *Id.* at 390-392. This Court concluded that “the significant connection that permits exercise of exclusive, continuing jurisdiction under MCL 722.1202(1)(a) exists where one parent resides in the state, maintains a meaningful relationship with the child, and in maintaining the relationship, exercises parenting time in the state.” *Id.* at 394. In *White*, this Court found that the significant connection requirement was satisfied when the plaintiff maintained a meaningful relationship with the child, maintained regular telephone contact and regularly exercised parenting time in Michigan. *Id.* at 395. Critically, this Court noted that

pursuant to the custody agreement, plaintiff has regular telephone contact with [the child], parenting time on alternating weekends (at least half of which is exercised in Michigan), alternating holiday parenting time, including, but not limited to, every other spring vacation, half of Christmas vacation, and, beginning in 2008, three consecutive weeks of summer vacation in Michigan. [Id. at 395 (emphasis added).]

Plaintiff acknowledges our holding in *White*, but argues that defendant has not maintained a “meaningful relationship” with the children in this case. We disagree. Plaintiff characterizes defendant’s exercise of parenting time as minimal and claims that defendant has forfeited most of his parenting time with the children. However, as the trial court noted, defendant in fact exercised parenting time for the majority of the previous summer and the last odd-numbered Christmas. Plaintiff asserts that the children joined her in Denver on August 11, 2010. The child custody order provides for defendant to have parenting time “every summer from one week after the children conclude their school year until one week before the children begin their school year” and “in odd numbered years, Christmas break according to the children’s school calendar; and Spring break according to the children’s school calendar.”

Thus, assuming that plaintiff’s allegation of forfeited parenting time is correct, it appears defendant did not exercise his parenting time for the 2011 spring break and summer. Although the forfeiture of this amount of parenting time is not insignificant, we conclude that a significant connection that permits the exercise of exclusive, continuing jurisdiction is present in this case, especially because, by plaintiff’s own admission, defendant has exercised essentially all of his

parenting time for the 2012 year (being an even-numbered year, such parenting time would be confined to the summer). Therefore, defendant had exercised his parenting time “pursuant to the custody order” for at least a full year at the time of the motion hearing; under *White*, we conclude that the trial court did not err in denying plaintiff’s motion on this ground. *Id.* at 395.

Because we determine that a significant connection to this state exists, it is unnecessary to consider whether there is substantial evidence available in this state concerning the child’s care, protection, training, and personal relationships. *Id.* at 396 (when “[o]ne of the two alternative bases for retaining exclusive, continuing jurisdiction under MCL 722.1202(1)(a)” is satisfied, jurisdiction is retained). We affirm the trial court’s denial of plaintiff’s motion for the release of the trial court’s exclusive, continuing jurisdiction.

IV. MOTION TO FIND MICHIGAN AN INCONVENIENT FORUM

“Even if a court of this state determines that it has exclusive, continuing jurisdiction under MCL 722.1202(1)(a) on the basis of either significant connection or substantial evidence, the court may decline to exercise its jurisdiction if it determines that it is an inconvenient forum under MCL 722.1207.” *White*, 280 Mich App at 395; MCL 722.1202(2).

MCL 722.1207(1) provides that a court “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.” Further, MCL 722.1207(2) provides:

Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including all of the following:

- a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.
- (b) The length of time the child has resided outside this state.
- (c) The distance between the court in this state and the court in the state that would assume jurisdiction.
- (d) The parties’ relative financial circumstances.
- (e) An agreement by the parties as to which state should assume jurisdiction.
- (f) The nature and location of the evidence required to resolve the pending litigation, including the child’s testimony.
- (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.
- (h) The familiarity of the court of each state with the facts and issues of the pending litigation.

Michigan's adoption of the UCCJEA repealed the previous statutory scheme governing child-custody matters between states, the Uniform Child Custody Jurisdiction Act (UCCJA), MCL 600.651 et seq., repealed by 2001 PA 195 (effective April 1, 2002). Under the UCCJA, a Michigan court could decline to exercise jurisdiction over custody matters where it determined that another forum was more appropriate or convenient for the parties. MCL 600.657, repealed by 2001 PA 195. Importantly, under the UCCJA, the relevant statutory provision stated that the trial court "may take into account" certain enumerated factors, among others. MCL 600.657(3), repealed by 2001 PA 195 (emphasis added); *Braden*, 217 Mich App at 331.

Were we dealing with the trial court's finding that Michigan was an appropriate forum under the UCCJA, we may have simply affirmed, as this Court did in *Breneman v Breneman*, 92 Mich App 336, 342; 248 NW2d, 804 (1979), where we stated:

Under the *forum non conveniens* section of the act, MCL 600.657; MSA 27A.657, it is stated that a court which has jurisdiction under §§ 651-673 to make an initial or modification judgment may decline to exercise jurisdiction if it finds that it is an inconvenient forum and that a court of another state is a more appropriate forum. *By the use of the word may it is clear the Legislature intended that the question as to whether to decline jurisdiction on such basis is discretionary with the trial court.* Here the trial judge who refused to decline jurisdiction was the same trial judge who heard and granted the original divorce and the same trial judge who on a number of other occasions had heard disputes concerning change of custody and matters relating to visitation rights. In short, the trial judge was extremely familiar with the entire matter and had been for a number of years. He therefore did not abuse his discretion in refusing to decline jurisdiction on the basis of *forum non conveniens*. [Emphasis added.]

However, in adopting the UCCJEA and repealing the UCCJA, the Legislature replaced the above section with MCL 722.1207(2). Notably, the word "may" has been replaced with "shall." Just as the word "may" is "typically permissive," *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008), the word "shall" is "clearly mandatory[.]" *Id.* Thus, although the trial court's ultimate decision on the convenience of the forum is discretionary, MCL 722.1202, the Legislature has directed the court to consider "all relevant factors" in making this determination, including the eight enumerated factors found in MCL 722.1207(2).

The trial court, having presided over the original divorce and many other post-judgment disputes between the parties, may well possess the requisite information to make findings on the relevant factors of MCL 722.1207(2). However, the extreme brevity of the trial court's findings on this portion of plaintiffs motion, consisting of two sentences followed by invocation for plaintiff to "see the Court of Appeals" leave us unable to conclude that the trial court followed the Legislature's mandate that it "shall consider" all relevant factors in making its determination of the convenience of Michigan as a forum. Although no Michigan cases directly address the trial court's failure to make explicit findings pursuant to MCL 722.1207, the general remedy for improper adjudications under the Child Custody Act (CCA), MCL 722.21 et seq. is to remand for reevaluation, at which point the trial court should consider up-to-date information. See *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007).

We conclude that the same standard should apply to determinations of forum convenience under MCL 722.1207(2). As under the CCA, the trial court need not make findings and conclusions that address every piece of evidence and argument raised by the parties. *Foskett v Foskett*, 247 Mich App 1, 12; 634 NW2d 363 (2001). However, the trial court, while not required to engage in “elaborate or ornate discussion,” should attempt to render the record “amenable to appellate review.” *Id.*, see also MCR 2.517(A)(2)(“Brief, definite, and pertinent findings and conclusions on the contest matters are sufficient, without overelaboration of detail or particularization of facts”). Although the trial court was clearly frustrated, and not without cause, by both parties’ continued resort to the court system to resolve their post-judgment disputes, we cannot, on the record before us, affirm the trial court’s denial of plaintiff’s motion to declare Michigan an inconvenient forum. *Foskett*, 247 Mich App at 13 (“A trial court has discretion to be sure, but it does not and cannot have unbridled discretion.”).

However, we do decline plaintiff’s request to rule directly on her motion rather than remand. Plaintiff states that the trial court focused on a “conspiracy theory finding no support in the record” and issued “a clear threat to consider the required statutory factors only after a reversal by this Court and to find against Plaintiff anyway.” Assuming by this statement that plaintiff suggests bias on the part of the trial judge, such bias is not found in the record. “A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise.” *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). An actual showing of prejudice is required for a finding of bias. *In re Contempt of Steingold*, 244 Mich App 153, 160; 624 NW2d 504 (2000).

Here, the record reflects a great deal of exasperation on the part of the trial court judge; however, it is clear that such exasperation was even-handedly directed at *both* parties. The record is devoid of any evidence that the trial judge was partial to either party. In fact, the same trial judge found defendant in contempt in 2009 for violation of his orders. In short, there is no basis for this court to assume that plaintiff will not receive a fair and impartial hearing upon remand from this Court.

We do agree with plaintiff, however, that speedy resolution of this issue is in the children’s best interest. To that end, we remand this case to the trial court to consider relevant factors under MCL 722.1207(2) and create a record amenable to appellate review. If either party requests an evidentiary hearing, the court shall conduct one.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra

Court of Appeals, State of Michigan

ORDER

Gillian K. Smith-Dennis v David R. Dennis

Docket No. 313719

LC No. 2008-005355-DM

Amy Ronayne Krause
Presiding Judge

Elizabeth L. Gleicher

Mark T. Boonstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until after they are concluded. As stated in the accompanying opinion, we remand this case to the trial court to consider plaintiff's motion to find Michigan an inconvenient forum in light of the statutory factors found in MCL 702.1207(2). The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

MAY 28 2013

Date


Chief Clerk