

BARBARA J. MOUNTJOY

ATTORNEY AT LAW

310 CHESTNUT STREET, SUITE 332

MEADVILLE, PA 16335

PHONE: 814/332-0032 FAX: 814/332-0033

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TO: Chad Hower

FROM: B. Mountjoy

COMPANY:

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COMMENTS:

CHAD ZACHARY HOWER, : IN THE COURT OF COMMON PLEAS,
: VENANGO COUNTY, PENNSYLVANIA
: vs. :
: NANCY SUE OBERLANDER, formerly :
NANCY SUE OBERLANDER-HOWER, : Civ. No. 1751-2004

OPINION OF THE COURT

Before the court, on this 5th day of September, 2006, is the respondent's, Chad Hower, objection to this court assuming jurisdiction over the petitioner's, Nancy Sue Oberlander, petition to modify custody. After careful consideration, this court is assuming jurisdiction.

On December 8, 2003, the parties entered into a parenting plan in Knox County Tennessee. On that same day, the Honorable Daryl R. Famsler adopted the parenting plan as an order of that court. In the parenting plan, the parties agreed upon the custody arrangement of their son, Aarys Charles Oberlander, born in Crawford County, Pennsylvania. The petitioner moved with the child from the State of Tennessee to her parents' home in Venango County, Pennsylvania, on September 13, 2004. Thereafter, the respondent sought to modify custody. On December 22, 2004, this court entered an order compelling the petitioner to relinquish custody of the child until the Tennessee Court had resolved the issue of custody.

On March 19, 2005, the Tennessee Court determined that the petitioner's move to the Commonwealth of Pennsylvania and the enrollment of the child in public school was a material and substantial change in circumstances which required a modification of the custody arrangement. The past custody arrangement was changed to permit the petitioner to have primary custody of the child during the school year; and in the summer after the school year was complete, the respondent was to have custody of the child. On June 9, 2005, the petitioner filed

in this court a petition to modify custody. She asserted that during the time that the respondent had custody, she was unable to communicate with the child. She also asserted that this court should assume jurisdiction of the matter. The respondent on June 13, 2005, filed a motion in contempt with the Tennessee Court because the petitioner failed to transfer the custody of the child to him pursuant to the Tennessee order of court on March 19, 2005. The respondent also filed with this court a motion to dismiss the petitioner's petition to modify custody.

On August 12, 2005, the Tennessee Court determined that the petitioner was in contempt for failing to abide by its previous orders. The Tennessee Court changed the custody order arrangement to the respondent having primary custody during the school year and the mother having custody during the summer. The mother had failed to appear at the August 12, 2005, hearing in the State of Tennessee. On August 19, 2005, this court entered findings of fact and an order of court deferring jurisdiction to the Tennessee Court so long as the Tennessee Court held a hearing where the mother's statements would be heard and a best interest analysis would be entered on the record. On October 11, 2005, the Tennessee court entered an identical order to its August 12, 2005, order. The judge in the State of Tennessee relied on the record established there and did not hold an evidentiary hearing where the mother or the child's interest were heard. The Tennessee Court also concluded that it had exclusive continuing jurisdiction in this matter until the child reached the age of eighteen (18) years.

On August 11, 2006, the petitioner filed the present petition for modification of custody. She asserts that the respondent is now moving from Cyprus to Turkey and she has been unable to communicate with her child. She requests that this court assume jurisdiction over the case. A hearing was held in this court on August 29, 2006, where both parties entered evidence and

arguments were heard. At the conclusion of the hearing in open court, we entered findings of fact on the record which are incorporated by reference.

A court of the Commonwealth of Pennsylvania may assume jurisdiction to modify a custody order of another state's court,

Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth may not modify a child custody determination made by a court of another state unless a court of this Commonwealth has jurisdiction to make an initial determination under section 5421 (a)(1) or (2) (relating to initial child custody jurisdiction) and...

23 Pa.C.S.A. §5423. A Pennsylvania Court must also determine that the original state court no longer has exclusive continuing jurisdiction of the custody matter pursuant to 23 Pa.C.S.A. §5422, or the court of the Commonwealth of Pennsylvania is a more convenient forum pursuant to 23 Pa.C.S.A. §5427. 23 Pa.C.S.A. §5423(1). Also jurisdiction may be assumed by a court of the Commonwealth of Pennsylvania, if this court determines that "the child, the child's parents and any person acting as a parent do not presently reside in the other state." 23 Pa.C.S.A. §5423(2).

To determine whether this court has jurisdiction to make an initial conclusion on custody, the court must find that the Commonwealth of Pennsylvania is the home state of the child on the date of commencement of the proceedings or the Commonwealth has been the home state of the child at least six months before commencement of proceedings. 23 Pa.C.S.A. §5421(a)(1). Home state is defined as,

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 six months of age or younger, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

23 Pa.C.S.A. §5402, *See also Lucas v. Lucas*, 882 A.2d. 523, 527 (Pa.Super. 2005). The child moved with the petitioner to the Commonwealth of Pennsylvania in September of 2004. In December of 2004, this court compelled the mother to transfer custody to the respondent who was in the State of Tennessee. In March of 2005, the Tennessee court gave the petitioner custody of the child and she remained the primary custodian until the Tennessee court's order in October of 2005. At that time, the respondent became the primary custodian; however, the respondent no longer resided in the State of Tennessee, but at an unknown address in Cyprus. In June of 2006, the child returned to the Commonwealth of Pennsylvania to reside with the petitioner and has resided here until September 1, 2006. We find that at the commencement of the current controversy the child has not resided in the Commonwealth of Pennsylvania for six months.

Though, the "home state" is the preferred jurisdictional analysis for a custody matter, its not the sole means by which the court assumes jurisdiction. *Favacchia v. Favacchia*, 769 A.2d. 531, 539 (Pa.Super. 2001). The court is required to continue the analysis to determine whether the child has significant connections with the Commonwealth of Pennsylvania. *Dincer v. Dincer*, 701 A.2d. 210, 215 (Pa. 1997). Before addressing the child's significant connections to the Commonwealth of Pennsylvania, we will address the second part of the analysis for jurisdiction on the initial determination of custody, which requires the court to determine whether another state is the "home state" of the child. 23 Pa.C.S.A. §5421(a)(2).

We conclude that no other state in the United States of America is the "home state" of the child. The State of Tennessee has not been the "home state" of the child since March of 2005. *See*, 23 Pa.C.S.A. §5402 Since March of 2005, the child has either resided with the petitioner in the Commonwealth of Pennsylvania or with the respondent in Cyprus. The child has only

traveled through the State of Tennessee pursuant to the court orders and custody exchanges issued from that state.

The next step in the analysis in assuming jurisdiction requires the court to determine that the child and at least one parent has significant connections with the Commonwealth of Pennsylvania and that there is substantial evidence within this jurisdiction concerning "child care, protection, training and personal relationships". 23 Pa.C.S.A. §5421(a)(2)(i) and (ii). "Significant connections must be applied flexibly, taking into account the unique circumstances of the particular child or children." *Dincer v. Dincer*, 666 A.2d. 281, 285 (Pa.Super. 1996). The child's connections to this jurisdiction are determined only from the time before commencement of the current proceedings. *Dincer v. Dincer*, 701 A.2d. 210, 215 (Pa. 1997). The analysis does not balance the child's connections to one state over that of the connections with the Commonwealth of Pennsylvania. *Id.*

The petition for modification of custody was filed on August 11, 2006, so we are only permitted to view the significant connections made by the child and the petitioner before that date. *Id.* First, we find that the petitioner moved to the Commonwealth of Pennsylvania because her parents reside here. The petitioner as of September 2003, had no reason to reside in the State of Tennessee. By that time, the respondent and she had acquired a divorce order and the respondent was working overseas. We find that the petitioner moved back to be near her extended family to create a more stable financial setting for herself and her child. Finally, the petitioner has not relocated her residence outside of the Commonwealth of Pennsylvania since her move in September of 2004. Thus, we find that the petitioner is a resident and has significant connections to the Commonwealth of Pennsylvania.

We also find that the child has significant connections to the Commonwealth of Pennsylvania. His mother and both his paternal and maternal grandparents reside in the Commonwealth of Pennsylvania. He also attended public schools within the Commonwealth of Pennsylvania during the 2004-2005 school year. In the summer of 2006, he resided with the petitioner and at the August 28, 2006, hearing the child's court appointed advocate asserted that the child desired to stay here in the Commonwealth of Pennsylvania with his mother. The Commonwealth of Pennsylvania is also the location that evidence can be acquired to the child's care, protection, training, and personal relationships with family, teachers, and school mates.

The third portion of the analysis on whether this court has jurisdiction to determine the initial custody is that the original state court must relinquish jurisdiction. 23 Pa.C.S.A. §5421(a)(3). The Tennessee Court who had original jurisdiction of this matter has not relinquished jurisdiction to this court. In fact, the Tennessee Court has stated the contrary when the Tennessee judge asserted that the State of Tennessee had exclusive continuing jurisdiction in this matter until the child reached eighteen (18) years of age.

Our analysis does not end there. If the original state court will not relinquish jurisdiction, then this court must determine whether the Tennessee Court has jurisdiction of the matter pursuant to 23 Pa.C.S.A. §5421(a)(1), (2), or (3). 23 Pa.C.S.A. §5421(a)(4). We conclude that the State of Tennessee does not have jurisdiction of this matter. As stated above, the child's "home state" is not the State of Tennessee. *See*, 23 Pa.C.S.A. §5421(a)(1). The child has not resided in the State of Tennessee since March of 2005. In addition, neither the child nor does either parent currently reside in the State of Tennessee. *See*, 23 Pa.C.S.A. §5421(a)(2). Neither the child nor the parents have significant connections with the State of Tennessee. *See*, 23 Pa.C.S.A. §5421(a)(2)(i). The respondent works and resides in Cyprus. The petitioner works and

resides in the Commonwealth of Pennsylvania. The child resides with either party during the year. The State of Tennessee has no evidence of child care, protection, training, or personal relationships provided to the child from that state because the child does not reside there to receive any of those services. *See*, 23 Pa.C.S.A. §5421(a)(2)(ii). Finally, the only states assuming jurisdiction of this matter is the Commonwealth of Pennsylvania and the State of Tennessee. This court is not relinquishing jurisdiction to the State of Tennessee. *See*, 23 Pa.C.S.A. §5421(a)(3).

Thus, we conclude that this court has jurisdiction for an initial determination of custody pursuant to 23 Pa.C.S.A. §5421. Next, we must determine whether the State of Tennessee has exclusive continuing jurisdiction; whether either parent or child lives in Tennessee, or whether this is the most convenient forum. 23 Pa.C.S.A. §5423. Though this court only needs to satisfy one of three to assume jurisdiction for modification of another state's child custody order, we will address all three requirements. 23 Pa.C.S.A. §5423.

Exclusive continual jurisdiction is governed by 23 Pa.C.S.A. §5422, which directs that the court who issues the initial order for child custody maintains exclusive continuing jurisdiction. Exclusive continuing jurisdiction is only interrupted if it is determined;

- (1)...that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with [the State of Tennessee] and that substantial evidence is no longer available in [the state of Tennessee] concerning the child's care, protection, training and personal relationships or
- (2) a court of this Commonwealth 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 [the State of Tennessee].

23 Pa.C.S.A. §5422(a). We have previously stated in this opinion our finding that the child and the child's parents have no significant connections with the State of Tennessee. We have also found that the substantial evidence of the child's care, protection, training, and personal

relationships is not available in the State of Tennessee. Finally, we have found that the parents and child do not presently reside in the State of Tennessee. Thus, we conclude that the Tennessee Court no longer has exclusive continuing jurisdiction.

The court pursuant to 23 Pa.C.S.A. §5423(2) is required to determine whether the child or the parents currently reside in the State of Tennessee. As stated above, we have found that the parents and the child no longer reside in the State of Tennessee. The petitioner resides in the Commonwealth of Pennsylvania. The respondent resides in Cyprus. The child lives with either the petitioner or the respondent depending on who has custody.

Finally, for this court to assume jurisdiction, we must determine whether the State of Tennessee is an inconvenient forum pursuant to 23 Pa.C.S.A. §5427. The factors to be determined for an inconvenient forum are,

- ___ (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) the length of time the child has resided outside this [Tennessee];
- (3) the distance between the court in this Commonwealth and the court in the state that would assume jurisdiction;
- (4) the relative financial circumstances of the parties;
- (5) any agreement of the parties as to which state should assume jurisdiction;
- (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

23 Pa.C.S.A. §5427(b). The first factor is not relevant in this case since neither party has alleged the occurrence of domestic violence. As to the second factor, the child last resided in the State of Tennessee before the month of March in 2005. Thus, we find that the child has resided outside of the State of Tennessee for seventeen (17) months.

In addressing the third and fourth factor stated above under 23 Pa.C.S.A. §5427(b), we find that the distance and the financial cost to travel to either the Tennessee Courthouse or to the Venango County Courthouse is equivalent for the respondent. However, we find that the distance to travel to the Tennessee Courthouse is a financial burden on the petitioner. We find that petitioner's finances make her indigent by our state standards so forcing her to travel to the State of Tennessee to litigate this matter is overly burdensome. In addition, the petitioner is afforded appointed counsel here in Venango County, whereas in the State of Tennessee she has been forced to litigate this complicated custody matter pro se.

At the present moment, neither party agrees to which state should have jurisdiction in this matter. The Tennessee court did note that the parties in their parenting plan did agree to jurisdiction being held in the Tennessee Courts. Though when considering the seventh factor under 23 Pa.C.S.A. §5427(b), we find that the Tennessee Court cannot expeditiously resolve the issues of this custody dispute or provide the necessary procedures. The Tennessee Court has in the past two years been forced to issue orders that later must be enforced by this court because the petitioner and the child reside or at least been physically present in this county. The petitioner has failed to comply with these orders issued by the Tennessee court, which creates additional proceedings that are held in this court. The evidence and the parties that must testify are also located here. We find that this court has the authority, the proceedings, and the evidence available to resolve the issues in this matter expeditiously. We will have the capacity to enforce our orders.

Finally, we had found in the previous several proceedings that the Tennessee Court has more familiarity with the parties and the issues in this case. We had given deference to the Tennessee Court in the past and may have even given the same orders as the Tennessee Court.

However, we find from the above facts as applied to the factors pursuant to 23 Pa.C.S.A. §5427(b) that the most convenient forum for the parties is here in the Commonwealth of Pennsylvania and that the State of Tennessee is an inconvenient forum.

Before concluding our analysis, we must address 28 U.S.C. §1738A, which gives full faith and credit to child custody determinations made by another state. Also it states,

The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

28 U.S.C. §1738A(a). Pursuant to 28 U.S.C. §1738A(f), a court may modify a custody order of another state if that court has jurisdiction and the state court which issued the order no longer has jurisdiction. We have determined through our above analysis that this court has jurisdiction to modify the custody order and that the Tennessee Court no longer has jurisdiction in this matter.

Next, the statute directs that this court cannot exercise jurisdiction in this matter if there are still proceedings pending in the Tennessee Court. 28 U.S.C. §1738A(g). At the current moment, the petition to modify custody in this court is the only pending proceeding. The parties do not currently have any issue or proceedings pending in the State of Tennessee. The final part of the analysis to modify another state's custody order states,

A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

28 U.S.C. §1738A(h). Custody is at issue in the present case; but as stated above we have found that jurisdiction lies with this court and not with the Court of Tennessee. Any future issues involving custody or visitation lies with this court so long as this court has exclusive continuing jurisdiction.

In assuming jurisdiction, we are giving full faith and credit to the Tennessee Court's order of October 11, 2005. Pursuant to that order, the respondent shall maintain primary custody. This opinion only addresses our reasoning for assuming jurisdiction and is not a determination on the petition to modify custody. In our order of August 30, 2006, we have scheduled a hearing so that both parties can be heard and that a best interests analysis for the child is completed. At that point, this court will determine whether custody should be modified.

Therefore, for the above reasons, this court is assuming jurisdiction in this matter.

BY THE COURT,


 H. WILLIAM WHITE, President Judge

CHAD HOWER, : IN THE COURT OF COMMON PLEAS
 vs. : VENANGO COUNTY, PENNSYLVANIA
 :
 :
 NANCY OBERLANDER, : CIV. NO. 1751 - 2004

FINDINGS OF FACT

AND NOW, this 29th day of August 2006, there is a petition to modify custody filed on behalf of the mother in this proceeding. There is a petition to dismiss the petition to modify custody and preliminary objections to said petition filed on behalf of the father. The court did, on motion of counsel for the mother, appoint counsel for the child, Aarys Charles Oberlander-Hower, born June 5, 1996, in this case, Elissa Stuttler, Esquire. Elissa Stuttler has met with the child and has argued this matter as the child's advocate and has contended that it is in the child's best interest that this court assume jurisdiction.

This case has been in and out of this court for a couple years. Generally speaking we have been asked to enforce orders emanating from Tennessee Chancellery Court. Most recently this court did in 2005 make findings and did direct at some point that the mother take the child to Tennessee so that the proceedings could be resolved in the Tennessee Chancellery Court. The Chancellery Court in Tennessee did conduct a hearing in October of 2005 and notwithstanding his prior orders in which he had given primary physical custody to the mother during the school year and physical custody for all but two weeks of the child's summer from school

with the father, the judge "flip-flopped" the custody order, in part because the mother, he found, had been throwing up barriers to the father getting his time with the child. That court, we find, did not conduct a full evidentiary hearing, but in its findings did substantially do a "best interests assessment" and while the chancellor did not interview the child and determine what the child wanted, the child at the time would have been 9 years old, did not interview the step mother, and allowed the mother, who is indigent, to litigate the matter without counsel even though we suggested he secure counsel for her, nevertheless couched his findings principally on the fact that the mother had thrown up barriers to the father spending time with the child, had for diverse reasons not fully complied with court orders, and therefore awarded primary custody during the school year to the father. The court is not clear on how much testimony was received. The mother told us that she did testify and that the father testified. The mother did not have counsel at that proceeding. We had asked the Tennessee court to try to secure counsel for her for that proceeding because she was indigent, at least by Pennsylvania standards, and could not afford counsel here. We were disappointed to learn the Tennessee court did not afford her counsel because we do view having counsel in custody trials as very beneficial to a party and where one party has counsel and the other does not, because of indigency, we see some unfair advantage. We are disappointed that the Tennessee court did not interview the child and the step mother in doing its "best

interest assessment". On the other hand we certainly understand that the Tennessee court appropriately heavily weighted in its opinion the mother's not promoting the time between the child and the father.

Significantly, the mother had resided in Venango County, Pennsylvania since September of 2004. Both the mother and the father grew up in Pennsylvania; the mother in the Erie area, the father in the Edinboro, which is near Erie, area. The mother's extended family generally resides in the Erie, Pennsylvania area. The father's extended family generally resides, the paternal grandmother, in Cambridge Springs, which is in Crawford County, and the paternal grandfather of the child, in Hadley, which is in Mercer County, Pennsylvania. It is unlikely, based on what we can tell from the evidence adduced in the several hearings in this court or from what we have read in the Tennessee court's findings, that Tennessee would in the future have any connection with the case other than the fact that the Tennessee court has historically heard the custody proceedings. The father, as best we can determine, now lives in Cyprus.

The father at this point is employed by Microsoft and has for the past years traveled extensively in Europe and the Middle East; in the past year he has been in Amsterdam, Istanbul and Turkey, Cyprus, Greece, and perhaps in Bahrain. The child attended school this past year while in the father's custody in Cyprus. The father did conscientiously return the child to the mother at the contemplated time as per the Tennessee order. The child

has been with the mother since June of this year and she is due to return the child to the father, pursuant to the Tennessee order, on September 1, 2006.


There is no question that as far as contacts are concerned and the prospects of future contacts, that Pennsylvania has a greater interest in the child and in the family. On the other hand we have to weigh against that the fact that the Tennessee court conducted two evidentiary hearings in 2005 and had dealt with the family even before 2004 when the mother returned to Pennsylvania.

The highly experienced, court appointed child advocate has told us that the child is mature for his age, very personable, thriving, loves both parents, and has told her that he wants her to advocate for him to stay with the mother and attend schools in Pennsylvania.

Whether the child has continuously lived in Pennsylvania for six months (one of the tests for "home state") is problematic. The Tennessee court addresses that in his findings and the child was physically present in Pennsylvania after September of 2004 for periods vastly in excess of six months. The Tennessee court was not inclined to treat the child's time as six months because during part of that period the mother was in defiance of the Tennessee Order; part of that time was probably attributable to this court because this court dealt with the matter and attempted to communicate with the Tennessee court but did not do so promptly and took

longer to resolve the matter in Pennsylvania than we should have. Nevertheless, the Tennessee judge has found that the child has not been six months continuously in Pennsylvania. Notwithstanding the Tennessee court's finding, the child had been with the mother in Pennsylvania from September 13, 2004, principally until the Tennessee judge awarded custody to the father in October of 2005. The child was again in Pennsylvania from June of 2006 to the end of August 2006. Since September of 2004, the child has been in Tennessee, at best, a few days.

BY THE COURT,


 H. WILLIAM WHITE, President Judge

cc: Court Recorder, ckr
 Barbara Mountjoy, Esquire
 F. Walter Bloom, III, Esquire
 Elissa M. Stuttler, Esquire
 Tennessee Court