UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1946

September Term, 2015

CHRISTOPHER CHILDERS

v.

JENNIFER CHILDERS

Berger,
Nazarian,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: June 10, 2016

This case involves an appeal of an order of the Circuit Court for Montgomery County granting a motion to dismiss filed by appellee Jennifer Childers ("Mother"). Christopher Childers ("Father"), appellant, had filed a motion to modify custody and visitation, which Mother subsequently moved to dismiss. Father appeals the circuit court's ruling, presenting two issues for our consideration, which we have rephrased slightly as follows:

1. Whether the circuit court erred by granting Mother's motion to dismiss Father's motion to modify custody after determining that Maryland no longer had exclusive continuing jurisdiction over the custody matter.

2. Whether the circuit court erred in its determination that Maryland was an inconvenient forum.

As we shall explain, the circuit court properly held that Maryland lacked exclusive continuing jurisdiction pursuant to Md. Code (1984, 2012 Repl. Vol.), § 9.5-202 of the Family Law Article ("FL"). Accordingly, the circuit court did not err by granting Mother's motion to dismiss. In light of our determination that the circuit court lacked exclusive continuing jurisdiction, we shall not address the inconvenient forum issue.

FACTS AND PROCEEDINGS

Mother and Father were married on August 9, 2008. The parties met in Savannah, Georgia, where Father was attending school. After their marriage, the parties relocated to Gaithersburg, Maryland. Three minor children were born to the parties as a result of the marriage. Twin boys, E. and D., were born in Maryland on January 16, 2012. In early June of 2013, Mother relocated with the twins to her parents' home in Savannah. The parties' third child, W., was born in Georgia on January 9, 2014. W. has never resided in Maryland.

Father has continued to reside in Maryland since the parties' separation. On August 28, 2013, after Mother had relocated to Georgia and while Mother was pregnant with W., Father filed a complaint for limited divorce in the Circuit Court for Montgomery County.

In May of 2014, the parties resolved the custody issues through a consent custody order.[1] Approximately one year later, Father filed a motion to modify custody and visitation on June 16, 2015 because he alleged, among other things, that Mother interfered with his exercise in Georgia of certain visitation and other child access rights granted him in the May 2014 order. On June 29, 2015, Mother filed a motion to dismiss Father's motion to modify, arguing that Maryland was an inconvenient forum pursuant to the Uniform Child Custody Jurisdiction Act. Father filed an opposition on August 31, 2015.

A hearing on Mother's motion to dismiss was held before the circuit court on September 4, 2015. The circuit court granted Mother's motion to dismiss, ruling that Maryland no longer had continuing exclusive jurisdiction over the custody matter pursuant to FL § 9.5-202. After Mother's attorney requested that the court rule on the inconvenient forum issue "so we don't have to come back,"[2] the circuit court issued an alternative ruling, determining that the Montgomery County Circuit Court was an inconvenient forum under FL § 9.5-207. Father noted a timely appeal.

[1] The consent custody order was dated May 7, 2014. The clerk of the court's date stamp indicates that the order was docketed on May 20, 2014.

[2] Presumably, Mother's attorney wanted the court to issue its finding with respect to the inconvenient forum issue in case the court's ruling on the jurisdictional issue was reversed on appeal.

DISCUSSION

The Maryland Uniform Child Custody Jurisdiction and Enforcement Act governs jurisdiction over child custody matters and is set forth in FL §§ 9.5-101 to 9.5-318. Family Law § 9.5-202(a) provides that when a Maryland court has made an initial custody determination in a case, the circuit court has "exclusive, continuing jurisdiction" of the custody determination until:

> (1) a court of this State determines that neither the child, the child and one 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; or
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> (2) a court of this State 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.

"[P]arties cannot confer jurisdiction upon the court by consent . . . [and] ongoing custody proceedings *themselves* [do not] create a 'significant connection' satisfactory of § 9.5-202(a)(1)." *Kalman v. Fuste*, 207 Md. App. 389, 401 (2012) (emphasis in original). A Maryland court that "has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has

jurisdiction to make an initial determination under § 9.5-201 of this subtitle." FL § 9.5-202(b).[3]

[3] FL § 9.5-201 provides:

> (a) Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State has jurisdiction to make an initial child custody determination only if:
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> (1) 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 person acting as a parent continues to live in this State;
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> (2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:
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> (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
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> (3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or
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> (4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.

(continued...)

Accordingly, a Maryland court's continuing, exclusive jurisdiction over a custody matter terminates upon a finding by a Maryland court "that neither the child, the child and one 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." FL § 9.5-202(a)(1). If a court makes such a finding pursuant to FL § 9.5-202(a)(1), there is no need to consider the alternate basis for terminating jurisdiction set forth in FL § 9.5-202(a)(2).

In this case, the circuit court expressly addressed FL § 9.5-202(a)(1) and considered whether the children, the children and one parent, or the children and a person acting as a parent had a significant connection with the State of Maryland. The circuit court further considered whether substantial evidence was available in Maryland concerning the children's care, protection, training, and personal relationships. With respect to whether the children and Mother had a significant connection to the State of Maryland, the circuit court explained its findings as follows:

> Clearly in this case, the three children and the mother have moved to Georgia and they don't have a significant connection with the [S]tate [of Maryland]. I'm not going to find that the fact that the kids come up here for a week or two during the summer [for Father to exercise custody per the May 2014 order]

[3] (...continued)
Because the children have resided in Georgia for well over six months, Georgia is the children's home state pursuant to the statute. No party has asserted that Maryland has jurisdiction to make an initial custody determination for the children, nor did the circuit court address this issue below.

> is enough to make a finding that there's a significant connection with the [S]tate of Maryland.

With respect to whether there was substantial evidence available in the State of Maryland, the circuit court explained:

> It seems to the [c]ourt that, aside from [Father] still residing here in the [S]tate of Maryland, and perhaps one or two witnesses that [Father] may call who reside here in the [S]tate of Maryland, that everybody else resides in Georgia. The children, the mother, the speech therapist or the doctors, other family members. And I believe that there was testimony that even maybe [Father's] parents reside in Georgia. But I'm not positive about that.
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> In any event, it seems that the substantial evidence relating to this case is in the [S]tate of Georgia. And these are young children, presumably there may be continued issues as these kids grow up and things change with respect to custody and what the kids need and all that. So it seems that the evidence that would be required to make a showing of a material change in circumstances really would be in Georgia.
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> So based on that, the [c]ourt is making a finding that the [c]ircuit [c]ourt here no longer has continuing exclusive jurisdiction over this child custody matter.

The record reflects that the circuit court carefully applied FL § 9.5-202(a)(1) to the evidence presented in this case. Pursuant to FL § 9.5-202(a)(1), the court was required to find that "neither the child[ren], the child[ren] and one parent, nor the child[ren] and a person acting as a parent have a significant connection with" the State of Maryland. Based upon the evidence presented, the court expressly found that the children and Mother had no significant connection with the State of Maryland. Accordingly, the court found that the "significant connection" prong of FL § 9.5-202(a)(1) led toward a finding that jurisdiction

had terminated. The court further applied the "substantial evidence" prong of the FL § 9.5-202(a)(1), finding "that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships." The circuit court explained "the evidence that would be required to make a showing of a material change in circumstances really would be in Georgia." The circuit court's findings with respect to both prongs of FL § 9.5-202(a)(1) were clearly supported by the record. Accordingly, the circuit court properly determined that Maryland no longer had "continuing, exclusive jurisdiction" over the custody matter.[4]

On appeal, Father emphasizes that he remains a resident of the State of Maryland, a fact he asserts the circuit court "completely overlooked." Critically, FL § 9.5-202(a)(2) provides an *alternate basis* for the termination of jurisdiction when a court finds that neither the children, nor a parent, nor a person acting as a parent continues to reside within the State

[4] The circuit court separately addressed Father's argument that the parties had consented to the Montgomery County Circuit Court's jurisdiction. The May 2014 consent custody order provided that if the parties were unable to agree upon a summer visitation schedule for 2016, Father "shall have the right to seek modification of the visitation schedule by filing an appropriate motion with the Circuit Court for Montgomery County Maryland." The circuit court explained that the parties could not confer jurisdiction by consent:

> [I]n considering the fact that the parties in the consent custody agreement agreed that they would go through mediation, there is a paragraph in the *Kalman* case [*see Kalman*, *supra*, 207 Md. App. at 401,] where the Court [of Special Appeals] says that the parties cannot confer jurisdiction upon the [Maryland] [c]ourt by consent. So even if the parties had themselves agreed that the [c]ourt would have jurisdiction, it seems that that would not be permissible.

of Maryland. The statute *does not* require that a court find that *no parent* resides in the State of Maryland in order for exclusive, continuing jurisdiction to be terminated. Nor does the statute require, as Father asserts, that a court make a finding with respect to *Father's connections* with the State of Maryland. Rather, jurisdiction terminates if a Maryland court makes the requisite finding -- as the circuit court did in this case -- pursuant to FL § 9.5-202(a)(1). To the extent that Father suggests that exclusive, continuing jurisdiction is maintained pursuant to FL § 9.5-202(a)(1) if one parent maintains a significant connection to the State of Maryland, Father misreads the statute.

Father asserts that *Harris v. Melnick*, 314 Md. 539 (1989), a case in which a Maryland circuit court determined that Maryland retained jurisdiction over a visitation matter, compels a similar result in this case. We disagree. In *Harris*, a mother and child had resided out of Maryland for several years while the father remained in Maryland. *Id.* at 553. The Court held that the child's visits with the father in Maryland as well as other family members present in Maryland constituted a "significant connection" with Maryland. *Id.* at 544. We do not read *Harris* to compel a similar result in all cases. Indeed, a determination of what constitutes a significant connection requires a fact-specific inquiry. In this case, the circuit court expressly emphasized the children's young ages, the presence of nearly all witnesses outside the State of Maryland, as well as the limited visitation the children

maintained in Maryland.[5] Accordingly, we are unpersuaded by Father's contention that *Harris* compels us to reverse the circuit court's determination.

In the interest of clarity, we comment briefly on the inconvenient forum issue. Because we hold that the circuit court properly dismissed Father's motion to modify custody and visitation for lack of jurisdiction, we shall not address whether Maryland had become an inconvenient forum pursuant to the factors set forth in FL § 9.5-207, which provides that "[a] court of this State *that has jurisdiction under this title* 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.) The inconvenient forum analysis applies only when a court has jurisdiction but declines to exercise its jurisdiction. In this case, the circuit court lacked jurisdiction and, accordingly, the inconvenient forum analysis is irrelevant.

The circuit court properly found, pursuant to FL § 9.5-202(a)(1), that neither the children, the children and one parent, nor the children and a person acting as a parent had a significant connection with this State. The circuit court further properly found that substantial evidence was no longer available in this State concerning the children's care, protection, training, and personal relationships. Accordingly, the circuit court lacked

[5] We further note that in *Harris*, the Court held that the circuit court could have declined to exercise jurisdiction upon a finding that Maryland was not a convenient forum.

exclusive, continuing jurisdiction over the custody matter and properly dismissed Father's motion to modify custody and visitation.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.