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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

RAFAL BONISLAWSKI, on behalf of)	Appeal from the Circuit Court
I.R.L., a Minor,)	Of Cook County.
)	
Petitioner-Appellee,)	No. 17 D 079959
)	
v.)	The Honorable
)	Naomi H. Schuster,
AGNIESKA LUBOWICKA,)	Judge Presiding.
)	
Respondent-Appellant.)	

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

ORDER

- ¶ 1 *Held:* In a dispute between two citizens of Poland concerning custody of a minor child who is also a citizen of Poland, the trial court has abused its discretion when it denies a motion to dismiss where there is a pending action in Poland for custody of the same child and Illinois courts provide an inconvenient forum.
- ¶ 2 Rafal Bonislowski, father of I.L., petitioned the court for allocation of parental responsibilities between Rafal and I.L.'s mother, Agnieszka Lubowicka. The circuit court granted Rafal's subsequent motion under the Illinois Parentage Act (Parentage Act) (750

ILCS 46/101 *et seq.* (West 2016)) for an injunction ordering Agnieszka to bring I.L. to Illinois from Poland. On appeal, Agnieszka argues that the injunction does not comport with the Parentage Act, and the circuit court should have granted her motion to dismiss because Illinois is an inconvenient forum. In this dispute between citizens of Poland over the custody of a citizen of Poland, where the mother and child have returned to Poland in compliance with their visas and the father has violated the terms of the visa that permits him to remain in the United States, Illinois is an inconvenient forum and the circuit court abused its discretion when it denied Agnieszka's motion to dismiss. We vacate the circuit court's order and remand for the court to dismiss Rafal's petition.

¶ 3

BACKGROUND

¶ 4

Agnieszka, a citizen of Poland, gave birth to I.L. in Warsaw, Poland, in 2010. In December 2015, Agnieszka and I.L. came to Illinois on a tourist visa, visiting Agnieszka's mother. Agnieszka obtained a student visa and extended her stay. Rafal, also a citizen of Poland, also came to Illinois in December 2015 on a tourist visa and later obtained a student visa to extend his stay.

¶ 5

In the spring of 2017, Agnieszka told Rafal she intended to return to Poland with I.L. Rafal initiated the case now on appeal by filing a document titled, "Emergency Petition for Allocation of Parental Responsibilities, and Emergency Possession of Child." The circuit court entered an *ex parte* order granting Rafal temporary custody of I.L., and enjoining Agnieszka from removing I.L. from Illinois.

¶ 6

Agnieszka filed a motion to vacate the temporary custody order. In her affidavit in support of the motion, she averred that after a recent visit with Rafal, I.L. said "he did not

like visiting [Rafal] because he has to sleep in RAFAL BONISLAWSKI's bed and they sleep very close." Agnieszka added that I.L.'s "discomfort after staying with his father, particularly the issues of sleeping in the same bed as his father, needs to be addressed" in any allocation of custody. The circuit court vacated the order for temporary custody and ordered Rafal to return I.L. to Agnieszka's custody.

¶ 7 Agnieszka and I.L. returned to Poland in July 2017. Agnieszka then filed a motion to dismiss Rafal's petition for allocation of parental responsibilities, contending that Illinois courts should decline jurisdiction and permit the Polish courts to resolve the custody dispute. The circuit court denied the motion to dismiss, without prejudice.

¶ 8 Rafal filed an "Emergency Petition for Return of Minor Child to State of Illinois, and Temporary Possession," seeking an injunction under section 502 of the Parentage Act, which authorizes a court to "enjoin a party having physical possession or an allocation order or judgment from temporarily relocating the child from this State pending the adjudication of the issues of parentage, the allocation of parental responsibilities, and parenting time." 750 ILCS 46/502 (West 2016). In the verified pleading, Rafal said he was "gainfully employed" in Illinois. Rafal filed a supplemental petition on August 23, asking the court to "order ANGIESZKA to either return to the United States with the minor child, or permit RAFAL to take possession of the minor child in Poland and return to the State of Illinois." Rafal's attorney signed an affidavit averring that Rafal had applied for permanent resident status in the United States, and that if Rafal returns to Poland, he will apply for yet another visa to reenter the United States.

¶ 9 Agnieszka renewed her motion to dismiss on grounds that Illinois was an inconvenient forum. She supported her motion with a document in Polish apparently filed in a Polish court. She alleged that the document proved that "[t]here is pending, in the parties['] home country, a proceeding to address the issues Father seeks to have this Court address. *** [The Polish court] has jurisdiction regarding the matters sought to be adjudicated herein." Agnieszka separately filed a motion to stay the circuit court proceedings because Rafal had filed with the United States Department of State an application under the Hague Convention for custody of I.L. Agnieszka attached a copy of Rafal's application to her motion to stay proceedings.

¶ 10 The circuit court set the matter for a hearing on October 27, 2017. Agnieszka filed a motion for video conferencing to permit Agnieszka to participate in the hearing. She alleged she "does not have the financial means of returning to Cook County solely to attend the above-referenced hearing; nonetheless, her testimony will be necessary." She alleged that she could arrange to have the necessary video equipment set up in Poland on October 27, 2017. The circuit court denied the motion for video conferencing and for a stay.

¶ 11 Only Rafal testified at the hearing on October 27, 2017. Rafal admitted that he must leave the United States when his visa expires, and Agnieszka similarly had a duty to leave before her visa expired. He admitted that I.L. visited the United States on Agnieszka's visa, and therefore I.L. could not remain here when Agnieszka's visa expired.

¶ 12 The following exchange occurred on cross-examination:

"Q. *** Are you gainfully employed? Yes or no?

A. What's mean gainful? I don't know.

Q. Do you have a job? Do you work?

A. No.

Q. Okay. So the representation to that effect in the document is a mistake?

A. Yes.

[Q.] You have an email address in the domain for PDM Cleaning, correct?

A. No. I don't remember. I have to check.

MR. GANCARCZYK [Rafal's attorney]: Judge, I'm going to instruct my client not to answer any more questions on the grounds of Fifth Amendment. What Mr. Daubach [Agnieszka's attorney] is trying to show is that [employment] might [a]ffect his immigration status. *** So I'm going to instruct my client not to answer any more questions concerning any employment.

Q. And at no point in time have you ever been employed by PDM, Inc.?

MR. GANCARCZYK: Objection. Fifth Amendment.

MR. DAUBACH: Q. And all the checks that were written and have your name on the memo that were written by people at PDM, Inc., those checks were not paychecks for you; is that correct?

MR. GANCARCZYK: Objection. Fifth Amendment.

MR. DAUBACH: Q. Sir, you are aware that if you are employed here and the Department of Homeland Security learns of your employment they could violate all of your visa rights and deport you?

MR. GANARCZYK: Objection. Fifth Amendment."

¶ 13 Rafal admitted that he did not know whether the United States would grant his application for permanent residence.

¶ 14 The court said:

"I don't know if the child can be returned to Illinois.

Do I think the child should be returned to Illinois for the purposes of determining the allocation of parental rights and responsibilities? Yes. ***

*** It has been argued that mother is not able to come back to this country and that her status would prohibit her from returning the minor child to Illinois. If that is in fact the case, then the request for a mandatory injunction becomes moot ***.

But in the event mother can return to Illinois with the minor child, I'm going to order that she do so within the next seven days. If mother is unable to return ***, then I will allow father *** to return to Poland for the purpose of returning to Illinois with the minor child in order that an adjudication of parental rights and responsibilities can occur.

*** I am not here to make any determination regarding the immigration status or the rights of the U.S. immigration authorities to allow a minor child to travel *** and what documentation *** is required in order to do so."

¶ 15 The court entered a written order dated October 30, 2017, stating:

"1. The minor child *** shall be returned by Agnieszka Lubowicka (mother), within SEVEN (7) days to the State of Illinois.

2. In the event Agnieszka Lubowicka cannot or will not return the minor child to the State of Illinois, Petitioner Rafal Bonislowski (father) may travel to the Country of Poland for the purpose of taking possession of the minor child and returning the minor child to the State of Illinois, Country of United States of America."

¶ 16 Agnieszka now appeals.

¶ 17 JURISDICTION

¶ 18 Because the circuit court entered an injunction pursuant to section 502 of the Parentage Act, supreme court rule 307(a)(1) gives this court jurisdiction over the appeal. Ill. S. Ct. R. 307(a)(1) (eff. Nov. 1, 2017); see *In re Marriage of Jawad*, 326 Ill. App. 3d 141, 151 (2001); *In re Marriage of Strauss*, 183 Ill. App. 3d 424, 430 (1989).

¶ 19 ANALYSIS

¶ 20 On appeal, Agnieszka argues that the factors listed in section 502(c) of the Parentage Act do not support the entry of the injunction, and the circuit court should have declined jurisdiction because Illinois provides an inconvenient forum within the meaning of section

207 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (750 ILCS 36/207 (West 2016)).

¶ 21 The Parentage Act provides:

"(b) A temporary restraining order or preliminary injunction under this Act shall be governed by the relevant provisions of Part 1 of Article XI of the Code of Civil Procedure." 750 ILCS 46/502(b) (West 2016).

We review preliminary injunctions entered under Article XI of the Code of Civil Procedure for abuse of discretion. *Roxana Community Unit School District No. 1 v. WRB Refining, LP*, 2012 IL App (4th) 120331, ¶ 27. We also review decisions on *forum non conveniens* motions for abuse of discretion. *Horgan v. Romans*, 366 Ill. App. 3d 180, 185 (2006).

¶ 22 Rafal has not filed an appellee's brief. We consider the appeal on the basis of the record and appellant's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 23 The UCCJEA establishes that, when a party contends that Illinois is an inconvenient forum,

"the court shall allow the parties to submit information and shall consider all relevant factors, including:

(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 State;

(3) the distance between the court in this State 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." 750 ILCS 36/207(b) (West 2016).

¶ 24 Decisions of other jurisdictions under the UCCJEA help guide our interpretation of that act. *Siegel v. Siegel*, 84 Ill. 2d 212, 221-22 (1981). The term "state" in section 207(b) may refer to a foreign nation. *Miller v. Miller*, 965 A.2d 524, 529-30 (Vt. 2008).

¶ 25 We note that the circuit court here effectively prevented Agnieszka from submitting relevant information when it denied her motion to testify remotely. Illinois Supreme Court Rule 241 provides: "The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location." Ill. S. Ct. R. 241 (eff. Oct. 4, 2011).

¶ 26 The language of Federal Rule of Civil Procedure 43 (Fed. R.Civ.P. 43) closely matches the language of Illinois Supreme Court Rule 241. A court applying the federal rule held that

"[t]he cost of international travel can provide good cause for contemporaneous transmission of testimony." *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479–80 (D. Md. 2010). Courts considering a motion for remote transmission of testimony from a foreign country should also consider the difficulties a witness may face in obtaining a visa. See *Dagen v. CFC Grp. Holdings Ltd.*, No. 00 CIV. 5682 (CBM), 2003 WL 22533425, at *1–2 (S.D.N.Y. 2003). "The legal infeasibility of attending a deposition or trial in person because of one's immigration status rises to the level of compelling circumstances since [a party] cannot be compelled to attend without either securing requisite authorization or violating immigration laws." *Angamarca v. Da Ciro, Inc.*, 303 F.R.D. 445, 447 (S.D.N.Y. 2012).

¶ 27 Because the circuit court foreclosed Agnieszka from testifying, the record includes only her allegations and affidavits to use in assessing the statutory factors the court must consider for determining whether Illinois qualifies as an inconvenient forum. I.L. lived his first 6 years in Poland, stayed in Illinois for 18 months, and returned to Poland in 2017. Apart from Rafal's admission that he obtained employment in Illinois, an admission he tried to deny when he testified in court, the record has scant evidence of the parties' financial circumstances. The parties have no agreement about which court should assume jurisdiction.

¶ 28 Courts have accorded particular weight to the location of evidence for determining whether a state provides an inconvenient forum. See *Pieri v. Superior Court*, 1 Cal. App. 4th 114, 120-122, 1 Cal. Rptr. 2d 742, 745-46 (1991). Much evidence concerning I.L.'s upbringing and health remains in Poland, while some evidence concerning his health and education for the 18 months he lived in the United States is in Illinois.

¶ 29 Agnieszka alleged in her pleadings, filed in July 2017, "[t]he authority under which [Agnieszka] and the children are in this country has or soon will expire. She, and they, need to leave and return home to Poland. If they do not, they are at great risk of summary seizure and arrest." She added, "Mother and this child must return to their home country. Failure to do so renders their presence here 'illegal' and exposes them to adverse actions by the government." She said in her memorandum to the court, filed after her return to Poland, that she and I.L. "no longer have 'legal status' in this country as their visa status has expired. [Agnieszka], accordingly, as mandated by Federal law planned to, and ultimately has, returned to Poland."

¶ 30 Rafal's reply to Agnieszka's memorandum does not dispute any of her assertions about her immigration status. In an affidavit, Rafal detailed the steps he planned to take to obtain a new visa for I.L. so that I.L. could legally return to the United States. Rafal admitted that the American Consul in Poland had discretion to deny his request for new visas for I.L. and Rafal. Rafal did not contest Agnieszka's allegation that her immigration status required her to return to Poland soon after May 2017. In his "Emergency Petition for Return of Minor Child to State of Illinois, and Temporary Possession," Rafal alleged that Agnieszka "clearly demonstrated an ability to pay for a plane ticket to Poland at the [midnight hour]. She is young and in great health, and has many family members in the Chicago area." Agnieszka repeated, in response, that she "was required by United States law to return to Poland. The suggestion that she should return here in direct contravention of that law, and that doing so would have no impact on her, is preposterous."

¶ 31 We find that the record supports Agnieszka's claim that the terms of her visa for entry into the United States compelled her and I.L. to return to Poland. The courts of Poland now have far better access than Illinois courts to the testimony of Agnieszka and I.L.

¶ 32 Rafal judicially admitted in his verified pleading that he was "gainfully employed" in the United States. See *American National Bank & Trust Co. of Chicago v. Erickson*, 115 Ill. App. 3d 1026, 1029 (1983). Rafal's attorney at the hearing admitted that Rafal's employment could adversely affect his immigration status. Rafal asserted that the fifth amendment protected his right not to respond to questions about his employment. " [I]t is *** permissible for the trier of fact to draw adverse inferences from the invocation of the [f]ifth [a]mendment in a civil proceeding." *Jacksonville Savings Bank v. Kovak*, 326 Ill. App. 3d 1131, 1135 (2002), quoting *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir.1995). Rafal's verified pleading and his refusal to answer questions at trial shows that Rafal "violated a cardinal prohibition regarding the maintenance of lawful non-immigrant tourist [or student] status by accepting employment." *Ramirez v. Immigration & Naturalization Service*, 338 F. Supp. 398, 400 (N.D. Ill. 1972).

¶ 33 We find helpful guidance in *S.B. v. G.M.B.*, 84 A.3d 1030 (N.J. Super. App. Div. 2014). In that case, Glenda divorced Stephen in New Jersey and moved with their children to Canada. Stephen filed a motion in New Jersey for enforcement of the visitation rights set out in the divorce decree. Stephen presented evidence that he sought to enter Canada to see his children, but because of his criminal record Canada denied his request to enter. The trial court found that "Stephen might be able to secure entry into Canada to appear in its courts for a limited purpose" (*id.* at 1036), and held that New Jersey was "an inconvenient forum within

the meaning of [the UCCJEA] and that it is appropriate for Ontario to exercise jurisdiction."

Id. at 1034. The appellate court said:

"[A]t the very least, Stephen would be relegated to an application process, and perhaps additional litigation, just to obtain the right to enter Canada. And, of course, because entry into Canada, if at all permitted, would undoubtedly rest in the discretion of Canadian officials, Stephen may very well—at the conclusion of any such proceedings—ultimately be denied access. ***

*** In short, as matters presently stand, there is no guarantee that Stephen will either be permitted to leave New Jersey or enter Canada for the proceedings to which the trial judge relegated him.

As a result, we conclude that the record does not support a finding that Canada constitutes 'an appropriate forum,' let alone 'a more appropriate forum' than New Jersey. Multiple obstacles stand in the way of Canada constituting an adequate forum for the resolution of the parties' disputes." *Id.* at 1036-37.

¶ 34 Here, the circuit court's order acknowledges that the court cannot compel the federal government to permit Agnieszka and I.L. to reenter the United States, and if Rafal goes to Poland, the court cannot compel the federal government to allow him to return to the United States.

¶ 35 Weighing all the factors listed in section 207(b) of the UCCJEA (750 ILCS 36/207(b) (West 2016)), we find that, like the Canadian court in *S.B.*, Illinois courts do not provide an appropriate forum, let alone a more appropriate forum than the courts of Poland. The circuit court abused its discretion by denying the motion to dismiss the case because Illinois

provides an inconvenient forum. Accordingly, we vacate the circuit court's order and remand for the circuit court to dismiss the case. In light of our finding on inconvenience, we need not address Agnieszka's other arguments.

¶ 36

CONCLUSION

¶ 37

In this dispute between two citizens of Poland concerning custody of a third citizen of Poland, two of the principals returned to Poland in accord with the terms of their visas, and the third, who remains in the United States, has violated the terms of his visa, making him deportable. In light of the immigration status of the litigants, the circuit court abused its discretion when it denied the motion to dismiss the case on grounds of the inconvenience of Illinois as a forum for resolution of the dispute. Accordingly, we vacate the circuit court's order and remand for dismissal of the case.

¶ 38

Order vacated and cause remanded with directions.