

FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ALAEELDIN MAHMOUD ILAYAN,

Petitioner,

v.

SAMAR MOHAMED ALLWER,

Respondent.

FAM. NO. SX-18-CS-2

ACTION FOR CUSTODY

Appearances:

RONALD RUSSELL

The Russell Law Firm. LLP

St. Croix, VI 00851

For Petitioner

LAURA CASTILLO NAGI, ESQ.

Attorney and Counselor at Law, PLLC

St. Thomas, VI 00802

For Respondent

MEMORANDUM OPINION

HINDS ROACH, Judge

THIS MATTER came before this Court on October 15 and 18, 2018 for a hearing on Samar Allwer's Motion to Dismiss for Lack of Jurisdiction filed September 17, 2018.

This Court, having considered the premises, enters the following Findings of Fact and Conclusions of Law.

PROCEDURAL POSTURE

The parties are the parents of a four (4) year old daughter referred to herein by the letters "AI" to protect her identity.

On February 7, 2018, Alaeldin Mahmoud Ilayan (Mr. Ilayan) filed for custody in the VI.

Five days later, on February 12, 2018, Samar Mohamed Allwer's (Ms. Allwer) filed for custody in Hawaii (HI). Thereafter, on August 6, 2018, Ms. Allwer entered a limited appearance in the Superior Court of the Virgin Islands (VI Court) to contest jurisdiction. Consistent therewith, Ms. Allwer, on September 17, 2018, moved to dismiss this action in the VI for lack of jurisdiction wherein she asserted that the VI both lacked jurisdiction over this action under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) and was an inconvenient forum.

In accordance with Title 16 Virgin Islands Code sections 127 – 133, which govern child custody jurisdiction and enforcement in cross-jurisdictional cases and requires that courts formally communicate to resolve jurisdictional issues, this Court held a telephone conference on September 24, 2018 with the Honorable Kevin Morikone, of the Family Court of the First Circuit, State of Hawaii. 16 V.I.C. 127 – 133. Both Courts agreed that a jurisdictional hearing should proceed in the VI to determine jurisdiction and the appropriate forum in the instant action.

FINDINGS OF FACT

The parties were married on July 9, 2012 in Palestine.

Within weeks after the parties were married, the parties took up residence in the VI (specifically, St. Croix) in Mr. Ilayan's father's home. The couple, and ultimately AI, shared the home with members of Mr. Ilayan's extended family, including two of Mr. Ilayan's brothers, a nephew and a sister in law – a household of seven.

On May 18, 2017, Ms. Allwer and AI travelled from St. Croix to Palestine to attend Ms. Allwer's brother's wedding. Ms. Allwer testified that she led Mr. Ilayan to believe her departure from the VI was temporary whereas her true intention was to permanently relocate to HI to reside with her family. Per Ms. Allwer, her relocation was motivated by a desire to escape alleged emotional and physical abuse by Mr. Ilayan towards Ms. Allwer and AI.¹

After having arrived in Dubai (while en route to Palestine), Ms. Allwer had her father call Mr. Ilayan to inform him that she (Ms. Allwer) did not intend to return to Mr. Ilayan or the marriage.

~~Ms. Allwer initiated divorce proceedings in Palestine in May, 2017 shortly after her arrival in Palestine. Per Ms. Allwer, she remained in Palestine for approximately two months.~~

Mr. Ilayan initially remained in St. Croix after Ms. Allwer travelled with AI to Palestine. However, he eventually travelled to Palestine after the divorce was filed to seek visitation with AI.

¹ The parties are blood relatives as Ms. Allwer's grandmother and Mr. Ilayan's father are siblings. However, the parties appear to refer to their respective "families" along paternal lines. For example, when Mr. Ilayan refers to his "family" he refers to his father lineage residing in St. Croix; and, Ms. Allwer refers to her father's lineage residing in HI.

Ms. Allwer and AI travelled to HI (from Palestine) on July 25, 2017, where she and AI remain at present. Mr. Ilayan claims Ms. Allwer's travel to HI was in violation of an order from Palestine, which Ms. Allwer disputes.

Mr. Ilayan argued at the hearing that Ms. Allwer's presence in HI is temporary because, according to Mr. Ilayan, Ms. Allwer has been in the state solely to attend school and pursue a nursing degree presumably ultimately to return to the VI. Per Mr. Ilayan, although he and Ms. Allwer argued in the days before her departure, they reconciled before Ms. Allwer departed for Palestine and they both agreed to work on their marriage.

Ms. Allwer was born in HI and raised between HI and Palestine. She has extended family in HI, including cousins and siblings.

Ms. Allwer filed for divorce in HI (which included a claim for legal and physical custody) on August 17, 2017 while a divorce action was pending in Palestine because, according to her, she did not know what was "happening" in the case filed in Palestine. Mr. Ilayan was served with the HI divorce complaint on March 6, 2018.

Per Ms. Allwer, she was not personally served in Mr. Ilayan's VI action nor did she consent to waiver of service.

Unsuccessful settlement negotiations were undertaken in the HI matter between Mr. Ilayan's VI counsel and Ms. Allwer's HI counsel.

The Palestinian divorce was ultimately finalized on August 28, 2017.²

On February 7, 2018, Mr. Ilayan filed for custody in the VI (St. Croix).

Five days later, on February 12, 2018, Ms. Allwer filed a motion to establish custody in HI seeking sole legal and physical custody.

Currently, Ms. Allwer is attending nursing school in HI and working as a part time sales associate in her father's business. ~~She resides with her mother and father. AI is enrolled in head start and, per Ms. Allwer, is doing well in school.~~

² The divorce was granted by a foreign tribunal, the Sharia Court of Ramallah & Al Bireh, Palestinian National Authority, Supreme Judge Bureau. Ms. Allwer domesticated/registered the foreign decree in HI on January 25, 2018, making it fully enforceable in HI and subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of the HI Court. Haw. Rev. Stat. 636C-3 (LexisNexis 2018).

Mr. Ilayan works in St. Croix, VI in his family's retail business which is owned by his brother and mother. Per Mr. Ilayan, he earns \$1,500 per month. At present, but for child support and unspecified spousal support, his expenses appear to be minimal. He does not pay rent.

Mr. Ilayan has had several cyber-visits with AI which went well.

LAW AND DISCUSSION

The issue to be determined by this Court is which State/Territory (HI or VI) has jurisdiction over this child custody action pursuant to the UCCJEA and is the appropriate forum for this proceeding.³

The UCCJEA was adopted by the VI in 2005 and codified as 16 V.I.C. Chapter 4. The UCCJEA provides the basis for determining jurisdiction for child custody proceedings, as well as the criteria for assessing whether a forum is inconvenient. 16 V.I.C. Ch. 4.

³ Mr. Ilayan raised a number of ancillary issues which he submitted in support of his argument that jurisdiction should lie in the VI. In so far as this Court finds that said "arguments" do not bear any relevance to the jurisdictional issue at bar, they shall be addressed summarily:

Mr. Ilayan argued the Court has jurisdiction because Ms. Allwer had been served under 5 V.I.C. 4911 when Ms. Allwer's HI attorney accepted settlement negotiation documents and documentation filed in the VI on Ms. Allwer's behalf. However, 5 V.I.C. 4911(3) specifies service can be made "by any form of mail addressed to the person to be served and requiring a signed receipt[.]" Here, all of the correspondence was addressed and mailed to Ms. Allwer's attorney, who was not the party to be served, and Ms. Allwer's testimony indicated she did not authorize her attorney to accept service nor did she waive service.

Mr. Ilayan argued the time for filing his action and the 6-month timeline should be extended because of ~~the hurricanes in 2017 and the administrative order 2017-0005 which temporarily extended filing~~ timelines. See In re: Order Further Extending Legal Time Limits Due to Hurricane Maria, Admin. No. 2017-0005 (V.I. September 29, 2017). This Court has taken judicial notice that the Courthouse was open and able to accept pleadings on November 24, 2017 and that the administrative order only temporarily extended filing deadlines until the end of November of 2017. Therefore, Mr. Ilayan has not shown that he was unable to file his petition because of the hurricane and the timeline will not be tolled.

Mr. Ilayan argued Ms. Allwer violated a Palestinian decree to not travel with AI without Mr. Ilayan's consent and is therefore in HI wrongfully. However, that matter is not relevant to the jurisdictional matters before this Court as the parties may litigate the purported violation in Palestine or HI.

1. Jurisdiction

Title 16 V.I.C. section 127, which empowers the Superior Court of the Virgin Islands to make a child custody determination, states:

(a) Except as otherwise provided in section 130, a court of this State has jurisdiction to make an initial child-custody determination only if:

(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 six 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;

(2) a court of another State does not have jurisdiction under paragraph (1), 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 § 133 or § 134, and:

(A) 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

(B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) 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 § 133 or § 134; or

(4) no court of any other State would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

16 V.I.C. 127 (emphasis added).

The Court's first inquiry is whether the VI is the home "state" of AI. Each factor of 16 V.I.C. 127(a)

need not be met, as these factors are written in the disjunctive.⁴ Therefore, establishing the home state of AI is sufficient to establish jurisdiction.

Title 16 V.I.C. 116(7) of the Virgin Islands Code defines “home state” 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. . . [A] period of temporary absence . . . is part of the period.” 16 V.I.C. 116(7).

As to what is meant by “live” under 16 V.I.C. 116(7), neither the statute nor the Virgin Islands Supreme Court has adopted a standard for purposes of a definition of home state. However, this Court in Gayanich v. Gayanich, 66 V.I. 205 (Super. Ct. 2017) *aff’d in part and rev’d in part*, Gayanich v. Gayanich, No. 2017-0065, 2018 V.I. Supreme LEXIS 19 (V.I. July 18, 2018),⁵ based upon the prevailing position of the majority of United States jurisdictions, adopted a physical presence standard rather than a domicile or residence inquiry standard. Under this approach, the intent of the parties is not relevant in determining the home state of a child under UCCJEA.⁶

⁴ See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (“Cannons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise”); Friedman v. Eighth Jud. Dist. Ct. of Nev., 264 P.3d 1161, 1166 n.4 (Nev. 2011) (noting that when paragraphs are joined by “or” and not “and” they should be considered in the disjunctive.)

⁵ In Gayanich the husband filed for divorce and custody in the Virgin Islands. Thereafter the wife filed for divorce and custody in Oklahoma. Gayanich v. Gayanich, 66 V.I. 205, 207-208 (V.I. June 23, 2017). As in the instant case, the wife entered a special appearance and sought to dismiss the VI action claiming lack of jurisdiction and inconvenient forum pursuant to the UCCJEA. Id. A jurisdictional hearing was held, and the VI Court ultimately decided that while the VI had jurisdiction, Oklahoma was the more appropriate forum. Id. This process mirrors our jurisdictional hearing held on October 15 and 18, 2018. The Superior Court in Gayanich found that the child’s home state was the Virgin Islands based on the timeline, but that this Court was an inconvenient forum. Id. at *13. The Gayanich case was appealed and later remanded for issue unrelated to the jurisdictional analysis. Gayanich v. Gayanich, 2018 V.I. Supreme LEXIS 19, *22-25 (V.I. July 18, 2018) (remanding for determination of remaining divorce matters).

⁶ See Ocegueda v. Perreira, 181 Cal. Rptr. 3d 845, 850-52 (Cal. Ct. App. 2015) (following the physical presence standard and rejecting consideration of a parent’s subjective intent to remain in a particular state); Slay v. Calhoun, 772 S.E.2d 425, 430 (Ga. Ct. App. 2015) (determining home state based on physical presence and declining to consider legal residence); Dekinderen v. Dekinderen, 2010 Mich. App. LEXIS 56, at *7 (Mich. Ct. App. 2010) (unpublished opinion) (finding physical presence test, which does not require intent, to be appropriate rather than residence or domicile); Sajjad v. Cheema, 51 A.3d 146, 154 (N.J. Super. Ct. App. Div. 2012) (finding consideration of legal residence or domicile unnecessary and interpreting “lived” as physical presence regardless of intent to remain); Carter v. Carter, 758 N.W.2d 1, 9 (Neb. 2008) (quoting Consford v. Consford, 711 N.Y.S.2d 199, 205 (N.Y. App. Div. 2000) (noting that the home state inquiry is separate and distinct from a legal residence determination)); Powell v. Stover,

Mr. Ilayan argued at the hearing that Ms. Allwer's presence in HI is temporary because, according to Mr. Ilayan, Ms. Allwer has been in the state solely to attend school and pursue a nursing degree presumably ultimately to return to the VI. Per Mr. Ilayan, although he and Ms. Allwer argued in the days before her departure, they reconciled before Ms. Allwer departed for Palestine and they both agreed to work on their marriage.

Regardless of the position offered by Mr. Ilayan as to the parties' intent, this Court declines to consider intent, as the relevant inquiry to this Court is where AI was physically present in the six months before Mr. Ilayan filed for custody.

Undertaking the physical presence standard, the evidence has shown that Mr. Ilayan filed for custody in the VI on February 7, 2018. Ms. Allwer and AI travelled to HI on July 25, 2017, where she and AI remain to present – more than 6 months before Mr. Ilayan filed his February 7, 2018 petition in the VI.

Jurisdiction lies with HI.

2. Forum

Mr. Ilayan further argued that HI was an inconvenient forum and that litigation in VI was more convenient and appropriate. Ms. Allwer disagreed.

Per 16 V.I.C. 133(b) an inconvenient forum is evaluated as follows:

(b) 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:

(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;~~

165 S.W.3d 322, 326 (Tex. 2005) (establishing physical location as the central factor to be considered and rejecting a subjective intent inquiry); In the Interest of S.A.H., 465 S.W.3d 662, 666 (Tex. App. 2014) (recognizing home state based on child's physical presence and not the legal residence of the parents); In re Burk, 252 S.W.3d 736, 739 (Tex. App. 2008) (finding a child's physical location to be the central factor in determining home state); In re Tieri, 283 S.W.3d 889, 893 (Tex. App. 2008) (recognizing home state is based on physical presence and declining to consider parental intent); In re Brown, 203 S.W.3d 888, 891 (Tex. App. 2006) (rejecting a subjective intent or totality of the circumstances test and acknowledging the adoption of a physical presence standard).

- (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.

In determining whether the VI would be an inconvenient forum, this Court looked at all applicable factors and found factors (1), (2), (4), and (6) to be most relevant in this matter.

Regarding Ms. Allwer's claim of domestic violence, Ms. Allwer's testimony of physical and emotional abuse and Mr. Ilayan's text messages indicate that at the very least domestic violence threats were made towards her in the marriage.⁷ This factor militates in favor of HI being the appropriate jurisdiction.

As to the length of time AI resided out of state, AI at this age has spent relatively considerable time in both the VI and HI. As to financial resources, both parties have been supported by their extended families and appear to have limited financial resources. As such, none of these factors militate in favor of either jurisdiction.

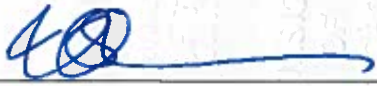
When this Court looked at the nature and location of the evidence, the factor militates in favor of HI being the more appropriate forum. In so far as AI currently attends school, is engaged in extracurricular activities, and (as is the case in the VI) is surrounded by extended family, this Court is persuaded that the majority of the witnesses in AI's life, as well as the evidence necessary to litigate this proceeding, lie in HI.

⁷ By way of example, Mr. Ilayan provided the Court with text messages in Exhibits 1, 2, 3, and 5 introduced during rebuttal and admitted to making threats but indicated that he was not seriously considering carrying them out; to wit, "Wallah I will break ur face and send u to ur parents . . . I won't even send u in one peace I'll make sure handicap." Mr. Ilayan's Exhibit 1.

CONCLUSION

The Virgin Islands (VI) does not have jurisdiction pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). 16 V.I.C. Ch. 4. HI is the home state of AI pursuant to 16 V.I.C. Chapter 4 and therefore jurisdiction in this matter lies with the HI Court. Furthermore, HI is the proper forum to hear the proceeding.

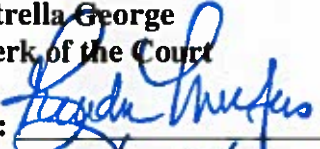
Dated: October 25, 2018



DENISE A. HINDS ROACH, JUDGE

A T T E S T:

Estrella George
Clerk of the Court

By: 

Court Clerk Supervisor
10/25/18