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**IN THE
COURT OF APPEALS OF INDIANA**

MONICA CONN BAKER,
Appellant-Respondent,

vs.

DELBERT L. BAKER, JR.,
Appellee-Petitioner.

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No. 10A01-0702-CV-86

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Nicholas L. South, Special Judge
Cause No. 10D01-0602-DR-23

October 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Monica Conn Baker (“Mother”) appeals the trial court’s determination regarding child custody in the dissolution of her marriage to Delbert L. Baker, Jr. (“Father”). She raises several issues, which we consolidate and restate as: whether the trial court abused its discretion when it determined that it had the authority to make the child custody decision in the parties’ dissolution action.

We affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father were married on April 12, 2003 in Louisville, Kentucky, where they resided until July 27, 2005 when Father moved to Indiana. During the marriage, the parties had two children, Ah. B., born July 15, 2003, and Av. B., born August 7, 2005. Father filed a petition for dissolution of marriage in Indiana on February 3, 2006. The petition alleged that he had been a resident of Clark County for more than three months and a resident of Indiana for more than six months at the time of the filing.

Mother’s counsel entered an appearance on her behalf on February 10, 2006, and on February 13, 2006, the trial court granted counsel’s motion to withdraw. Mother’s counsel did not file any responsive pleading or preliminary motions before withdrawing from the case. On February 23, 2006, a provisional hearing was held, where the issues of custody and parenting time were addressed. Mother was present and represented by counsel and participated in the hearing. Mother subsequently hired a second attorney to represent her in the dissolution, who entered an appearance and filed her answer to the dissolution petition on March 28, 2006. The answer to the petition expressly stated, “[b]oth of the children lived

with the [Mother] until January 6, 2006 and any issues concerning custody should be determined by their home state of Kentucky.” *Appellant’s App.* at 3.

When Father moved to Indiana in July 2005, the children remained living with Mother in Louisville. The parties worked out an agreement that the children would stay with Father every Saturday night until Sunday night and go to church with Father on Sunday. During the weekdays, the children were cared for by Father’s parents while Mother and Father worked, and the children would return to Mother’s home each evening. On January 6, 2006, the parties decided that the children would begin living with Father for a six-month period.

After Father filed his petition for dissolution, an evidentiary hearing was held regarding the petition. The trial court took the matter under advisement, and on October 20, 2006, it entered an order dissolving the marriage and awarding joint custody of the children to both parents. Additionally, Father was to have physical custody of the children from Saturday to Wednesday, and Mother was to have physical custody from Wednesday until Saturday. The trial court also found that when the children reached school age, it would be in their best interest to attend school in Indiana, so at that time, primary physical custody would go to Father. Mother now appeals.

DISCUSSION AND DECISION

Mother argues that the trial court lacked jurisdiction to determine the custody of the children because it failed to follow the jurisdictional provisions of the Uniform Child Custody Jurisdiction Act (“UCCJA”). Specifically, she contends that Kentucky was the children’s home state pursuant to IC 31-17-3-3, and therefore, the trial court in Indiana did

not have jurisdiction over this particular case. She also claims that she did not waive her objection to the trial court's assertion of jurisdiction in this particular case.

An Indiana court's jurisdiction to decide custody matters having interstate dimensions is governed by the UCCJA. *Meyer v. Meyer*, 756 N.E.2d 1049, 1051 (Ind. Ct. App. 2001). A trial court must first determine whether it has jurisdiction, and if it does, whether to exercise that jurisdiction. *Id.* In determining whether a trial court has improperly exercised jurisdiction under the UCCJA, we apply an abuse of discretion standard. *Christensen v. Christensen*, 752 N.E.2d 179, 182 (Ind. Ct. App. 2001). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.*

Generally, jurisdiction over a child custody matter is governed by IC 31-17-3-3, which states:

- (a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
 - (1) this state (A) is the home state of the child at the time of commencement of the proceeding, or (B) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;
 - (2) it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

- (3) the child is physically present in this state and the child has been abandoned; or
 - (4) (A) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (B) it is in the best interest of the child that this court assume jurisdiction.
- (b) Except under paragraphs (3) and (4) of subsection (a) physical presence in this state of the child, or of the child and one (1) of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.
- (c) Physical presence of the child, while desirable, is not prerequisite for jurisdiction to determine his custody.

Until recently, jurisdiction in Indiana was described as being comprised of three elements: (1) jurisdiction of the subject matter; (2) jurisdiction of the person; and (3) jurisdiction of the particular case. *In re Custody A.N.W.*, 798 N.E.2d 556, 560 (Ind. Ct. App. 2003), *trans. denied*. However, our Supreme Court has clarified that there are only two types of jurisdiction in Indiana, subject matter jurisdiction and personal jurisdiction, and that the phrase “‘jurisdiction over a particular case’ confuses actual jurisdiction with legal error.” *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006). Jurisdiction over the particular case refers to the failure to meet procedural requirements and is better characterized as one of legal error and not one of exercise of jurisdiction. *Packard v. Shoopman*, 852 N.E.2d 927, 929-30 (Ind. 2006). These procedural errors are waived if not raised at the appropriate time and must be raised at the first opportunity to avoid waiver. *Id.* at 930; *In re Custody of A.N.W.*, 798 N.E.2d at 561.

Here, Father filed his petition for dissolution on February 3, 2006, and a provisional hearing was held on February 23, 2006, where the issues of custody and parenting time were addressed. Mother appeared at this hearing, was represented by counsel, and participated in the hearing. The record does not reflect that Mother made any objection at that time to the trial court's jurisdiction for determining custody matters. Mother filed an answer to the petition on March 28, 2006, which included a statement that both of the children had lived in Kentucky until January 2006 and that any issues regarding custody should be determined by a court in Kentucky. *Appellant's App.* at 3. Therefore, because Mother did not challenge the trial court's assumption of jurisdiction at the February 23, 2006 hearing, she did not raise her challenge at the first opportunity and has consequently waived any objection regarding the children's home state under the UCCJA.

Affirmed.

ROBB, J., and BARNES, J., concur.