

RENDERED: January 21, 2000; 10:00 a.m.  
TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001797-MR

HOLLY M. CLENDENIN

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE ROBERT J. JACKSON, JUDGE  
ACTION NO. 96-CI-00015

GEORGE W. PRIVETT, JR.

APPELLEE

and

1998-CA-002394-MR

GEORGE W. PRIVETT, JR.

CROSS-APPELLANT

CROSS-APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE ROBERT J. JACKSON, JUDGE  
ACTION NO. 96-CI-00015

HOLLY CLENDENIN

CROSS-APPELLEE

OPINION  
VACATING AND REMANDING WITH DIRECTIONS

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BEFORE: COMBS, JOHNSON, AND MILLER, JUDGES.

JOHNSON, JUDGE: The appeal of Holly Clendenin and the cross-appeal of her former husband, George Privett, Jr., contain issues of first impression concerning the proper interpretation of Kentucky Revised Statutes (KRS) Chapter 385 et seq., the Kentucky Uniform Transfers to Minors Act (UTMA). However, as it is apparent that the Jessamine Circuit Court lacked subject matter jurisdiction over this controversy, this Court is unable to reach the merits of the appeal and cross-appeal. Accordingly, the only action appropriate for this Court to take is to vacate the judgment and remand this matter to the circuit court with directions that it be dismissed.

In 1987, prior to the dissolution of their marriage, the parties deposited marital funds into two savings accounts in the names of each of their two children. At the time of these transfers, the parties contemplated that the accounts would be used to pay, in part, for the children's college educations. In 1988, Clendenin, as the custodian of the accounts, transferred the funds from the savings accounts to a mutual fund. Although neither party contributed additional sums to the accounts, their value increased considerably between 1988 and the commencement of this action in 1996.<sup>1</sup>

The parties' marriage was dissolved in 1991. There is no dispute that after the dissolution, Clendenin used her own funds to pay the costs associated with the maintenance of the accounts, including the preparation of the yearly tax returns,

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<sup>1</sup>The accounts, opened by Clendenin, as custodian, in 1988 with \$14,494.53 and \$16,586.34, grew to \$33,307.60 and \$38,509.12, respectively, by the fall of 1995.

that she paid the taxes owed by the children on the accounts' earnings, and that she did not seek reimbursement for her out-of-pocket expenses. Privett did not inquire about the status of the accounts until the fall of 1995. At that time, Clendenin informed Privett of the account balances and of the fact that she had withdrawn nearly \$2,000 from each account to help defray the costs associated with sending the children on a trip to England and France earlier that spring. The trip, organized and led by one of the children's teachers at the Jessamine County Middle School, was designed for gifted students. Clendenin accompanied the children on the trip at her own expense.

Privett filed a petition in the Jessamine Circuit Court on January 12, 1996, pursuant to KRS 385.182(6) and 385.192(1), portions of the UTMA, in which he alleged that by using \$4,000 of the children's funds "for a [sic] European family vacation," Clendenin had not observed the standard of care "that should be observed by a prudent person, dealing with property of another." He further alleged that Clendenin's use of the funds for the trip "was not for the benefit of the minors, but for her benefit," and further, that she had failed to furnish him with an accounting of the funds as required by the UTMA. Privett demanded that Clendenin be removed as the custodian of the accounts, that she be required to reimburse the accounts for the \$4,000 removed, plus an amount representing the earnings lost by virtue of her withdrawals, and for a full accounting.

The matter proceeded to trial by the court in January 1998. The trial court accepted Privett's argument that despite

the broad statutory authority provided to the custodian to use the property transferred to the minor for the minor's "benefit",<sup>2</sup> Clendenin's use of the funds "was not for college and [was] improper." It ordered that Clendenin reimburse the funds a total of \$7,000, and that a successor custodian be named. On July 7, 1998, the trial court denied Clendenin's motion to dismiss the action as it applied to the funds transferred to the parties' daughter, Heidi, who had turned 18, and her motion to alter, amend or vacate the judgment, and held in abeyance Privett's motion to name his daughter by a previous marriage, Deborah Privett, as the successor custodian. After Clendenin filed her notice of appeal and posted a supersedeas bond on July 17, 1998, the trial court ruled that it had lost jurisdiction to appoint a successor custodian. This ruling is the subject of Privett's cross-appeal.

The direct appeal presents interesting questions, novel to this jurisdiction, about the proper construction of the UTMA. The UTMA was enacted in 1986, and its provisions became effective on July 15 of that year. The act contemplates a gift to a minor

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<sup>2</sup>KRS 385.142 provides:

(1) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to:

(a) The duty or ability of the custodian personally or of any other person to support the minor; or

(b) Any other income or property of the minor which may be applicable or available for that purpose.

that is "irrevocable",<sup>3</sup> and which is controlled by a single custodian.<sup>4</sup> The statutory scheme provides that ownership of the property is "indefeasibly vested in the minor," but is delivered to a custodian who is sui juris and can pass title.<sup>5</sup> The UTMA gives custodians broad power over the minor's property and, regardless of the amount of property or money transferred to the minor, does not require that the custodian give a bond.<sup>6</sup> The extent of the custodian's authority to deal with the property is set forth in KRS 385.132, which states that

[a] custodian, acting in a custodial capacity, has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers, and authority in that capacity only.

Essentially, a custodian can do anything with the property, without court approval, including consuming it, as long as she

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<sup>3</sup>KRS 385.120(2).

<sup>4</sup>KRS 385.122(1) reads: (1) "A custodian shall: (a) Take control of custodial property; (b) Register or record title to custodial property if appropriate; and (c) Collect, hold, manage, invest, and reinvest custodial property." KRS 385.102 directs that "only one (1) person may be the custodian."

<sup>5</sup>The idea for the Model Act was conceived in New York by stockbrokers "to encourage the giving of securities to minors by providing 'a simple, inexpensive method of permitting minors to own securities in a manner that would protect the minor and third parties dealing with property owned by the minor and would at the same time permit the donor the advantage of the gift tax exclusion.'" Gordon v. Gordon, 70 A.D.2d 86, 89, 419 N.Y.S.2d 684, 687 (1979), aff'd 52 N.Y.2d 773, 417 N.E.2d 1009, 436 N.Y.2d 621 (1980) (quoting Newman, The Uniform Gift to Minors Act in New York and Other Jurisdictions-Tax Consequences, Possible Abuses, and Recommendations, 49 Cornell L.Q. 12, 32 (1963)); see also Ferdinand S. Tinio, Annotation, Construction and Effect of Uniform Gifts to Minors Act, 50 A.L.R.3d 528, 533 (1973).

<sup>6</sup>KRS 385.152(3).

believes it is "advisable, and as long as it "benefits" the minor.<sup>7</sup>

The UTMA replaced the Kentucky Uniform Gifts to Minors Act (KUGMA) which was repealed by the Legislature contemporaneously with the passage of the UTMA. The UTMA validates all transfers made under the KUGMA, and applies to those transfers except to the extent that its application would impair vested rights.<sup>8</sup> A major difference in the UTMA from the KUGMA is contained in the definitional section of the respective statutory schemes. The KUGMA defined "court" as the "chancery division of the circuit court."<sup>9</sup> However, the UTMA now defines "court" as "district court."<sup>10</sup> We do not know why the Legislature changed jurisdiction over such matters to our district courts; however, we suspect that the Legislature may have desired to achieve consistency between the UTMA and other similar statutory provisions pertaining to minors and their guardians.<sup>11</sup> In any event, it is obvious that while the Legislature gave remedies to transferors, such as Privett, to petition the court for an accounting, or for a determination that the custodian is personally liable "for claims against the

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<sup>7</sup>See note 2 *infra*.

<sup>8</sup>KRS 385.222(2).

<sup>9</sup>KRS 385.011(4) (repealed effective July 15, 1986).

<sup>10</sup>KRS 385.012(5).

<sup>11</sup>For example, KRS 387.020 provides that "District Courts shall have exclusive jurisdiction for the appointment and removal of guardians, limited guardians, and conservators for minors, and for the management and settlement of their accounts."

custodial property," or to have the custodian removed for cause,<sup>12</sup> the Legislature specifically assigned such tasks to the district courts and not to our circuit courts.<sup>13</sup> Further, because the UTMA does not contain any provision for concurrent jurisdiction in the circuit courts, the authority of district court to entertain and resolve issues arising under the UTMA is "deemed" to be "exclusive."<sup>14</sup> Clearly, Privett was required to file his petition in the Jessamine District Court, and then, if aggrieved, seek review in the Jessamine Circuit Court.<sup>15</sup>

The trial court's lack of jurisdiction is not a matter that can be cured. Although the parties proceeded as though the

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<sup>12</sup>KRS 385.192.

<sup>13</sup>Privett cited Priestley v. Priestley, Ky., 949 S.W.2d 594 (1997), and Lee v. Porter, Ky.App., 598 S.W.2d 465 (1980), in support of his contention that the Jessamine District Court was without jurisdiction to entertain either his claim that Clendenin had mismanaged the UTMA accounts, or his plea that she be required to reimburse the accounts. We are not persuaded that these cases are applicable as both concerned testamentary fiduciaries and claims of mismanagement of estate property governed by KRS 395.510 (which vests jurisdiction in circuit court). By utilizing the procedure contained in the UTMA in making an irrevocable gift to his minor children, Privett is deemed to have accepted the provisions of the act, including the specific provisions governing the custodian's fiduciary obligations and the statutory standards by which her actions are to be judged. There is no question in our minds that the Legislature intended to vest the district courts with jurisdiction to determine whether a UTMA custodian, such as Clendenin, has breached the standard of care as defined by the Act, and further, that it is empowered to order all the relief Privett requested, including reimbursement of the accounts, if indeed the district court determines she has breached those duties.

<sup>14</sup>See KRS 24A.020.

<sup>15</sup>See Cabinet for Human Resources v. Lexington-Fayette Urban County Government, Ky.App., 679 S.W.2d 244 (1984).

Jessamine Circuit Court had jurisdiction, such jurisdiction "may not be waived or conferred by agreement of the parties." <sup>16</sup>

Accordingly, the decision of the trial court is vacated and the matter is remanded with directions that the action be dismissed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT/CROSS APPELLEE:

Donald Duff  
Frankfort, KY

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE/CROSS-APPELLANT:

David T. Enlow  
Charles D. Cole  
Lexington, KY

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<sup>16</sup>Commonwealth, Department of Highways v. Berryman, Ky., 363 S.W.2d 525, 526 (1962); and, Cann v. Howard, Ky.App., 850 S.W.2d 57, 59 (1993).