

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001793-MR

DAVID NEIL WELLMAN

APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT  
HONORABLE DANIEL SPARKS, JUDGE  
ACTION NO. 00-CI-00185

SHELLY IRENE CHRISTIAN

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, BUCKINGHAM, and COMBS, Judges.

COMBS, JUDGE: David Neil Wellman appeals the July 10, 2001 order of the Martin Circuit Court dismissing his petition for custody of his children for lack of subject matter jurisdiction. After a review of the record and an examination of the prerequisites to jurisdiction contained in the Uniform Child Custody Jurisdiction Act (UCCJA), set out in KRS<sup>1</sup> 403.400 to 403.630, we affirm.

Wellman and the appellee, Shelly Irene Christian, a resident of Maryland, are the parents of two children, Lester and Paul, born in 1993 and 1994, respectively. The parties were never married; both children were born in Maryland and resided with Christian in that state continuously from their birth until July 2000, when Wellman brought them to Kentucky. The parties offer different versions of the events leading to the arrival of

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<sup>1</sup>Kentucky Revised Statutes.

the children in Kentucky. Wellman alleges that the children were abandoned by their mother and that relatives prevailed upon him to take responsibility for the boys. Christian denies the allegation that she abandoned the children; she claims that she allowed Wellman to have the boys for a two-week period of visitation at his residence, which was in Ohio at that time.

On August 23, 2000, Wellman filed a petition in the Martin Circuit Court seeking custody of the children. He alleged that he and the children were residents of Kentucky. The court issued an order giving Wellman temporary custody of the children. Christian, *pro se*, filed an answer to the petition, alleging that: (1) Wellman actually resided in Ohio; (2) the Kentucky address which Wellman listed in the petition was that of his brother; (3) the children were not residents of Kentucky but had lived their entire lives with her in Maryland; and (4) she was the proper custodian for the children. Christian sought the return of her children and the dismissal of Wellman's petition.

After obtaining legal counsel, Christian moved the trial court to set aside its temporary custody order and to return the children to her custody. In response to these motions, Wellman alleged that while Christian had custody of them, the children

were in a drug-infested environment, and were exposed to drugs, drug use and the accompanying lifestyle . . . which pose[d] a very real and serious threat to their physical, mental, moral and emotional health.

In light of these allegations, the trial court determined that it had jurisdiction to entertain the custody dispute pursuant to KRS

403.420(1)(c) and (4)(a)(2). On October 25, 2000, it denied Christian's motion for immediate custody and ordered an assessment of Wellman's home by the county child services agency.

On December 7, 2000, about two months after having been awarded temporary custody of the children, Wellman was sentenced in federal court to serve sixty months in prison following a plea of guilty to charges of drug trafficking. Wellman's sister, Jean Fannin, a resident of West Virginia, had possession of the children after Wellman's incarceration. Fannin moved to intervene in the custody action and sought temporary custody of the children. Meanwhile, Christian had commenced a custody proceeding in the circuit court for the City of Baltimore, Maryland. She renewed her motion for immediate entitlement to custody and requested that the Martin Circuit Court relinquish jurisdiction of the proceeding pending on its docket.

The circuit court initially denied Christian's motions and placed the custody of the children with the Commonwealth of Kentucky, Cabinet for Families and Children (Cabinet), which in turn kept the children with Fannin. Christian then filed a motion to vacate, and the Martin Circuit Court reconsidered its order and determined that it should decline to exercise ongoing jurisdiction over the matter. In analyzing the jurisdictional issue, the circuit court reasoned as follows:

The situation as it now exists is that the children have been residing in the State of West Virginia for a substantially similar amount of time as they resided in the State of Kentucky. Regardless, however, the lengthiest period of residence of the minor children has been in the State of Maryland. The Court is of the opinion that the children

would have the closest connection to the State of Maryland and it would be in the State of Maryland where significant evidence concerning the childrens' [sic] care, protection, training, and personal relationships is most readily available.

On July 10, 2001, the circuit court granted Christian's motion to vacate its previous order, terminated its award of temporary custody to the Cabinet, and dismissed the case from its docket. In so ruling, the Martin Circuit Court expressed its hope that the Maryland courts would place the children "in a caring and nurturing environment." This appeal followed.

Wellman first argues that he acted properly in bringing the children to Kentucky and that the Martin Circuit Court was correct in assuming jurisdiction under the emergency provisions of KRS 403.420(1)(c). However, any issue relating to the grant of temporary custody is now moot. Neither the propriety of Wellman's actions nor the initial exercise of jurisdiction by the circuit court in ordering temporary custody is before us for review. Rather, the judgment presented for our review raises the issue of the propriety of the circuit court's surrender of its jurisdiction in favor of another forum.

Wellman next contends that once the circuit court elected to exercise jurisdiction over the custody dispute, it had "an affirmative duty, and an obligation to the minor children, to provide for their care and safety." No authority is cited in support of this proposition. On the contrary, the provisions of the UCCJA affirmatively encourage a trial court to make a comparative analysis in cases where jurisdiction may exist in more than one state:

A court which has jurisdiction . . . to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum. (Emphasis added.)

KRS 403.460(1). The statute then sets forth a series of factors which the trial court should consider and weigh in reaching such a determination:

- (a) If another state is or recently was the child's home state;
- (b) If another state has a closer connection with the child and his family or with the child and one (1) or more of the contestants;
- (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- (d) If the parties have agreed on another forum which is no less appropriate; and
- (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in KRS 403.400. KRS 403.460(3).

After reviewing the record of this case in conjunction with the statutory criteria, we conclude that the Martin Circuit Court correctly held that jurisdiction should return to Maryland. Maryland is the home state of the children (see KRS 403.410(5)); it is the state where their mother resides; Maryland is the location of all the witnesses and the evidence pertaining to Wellman's claims that Christian is unfit to be entrusted with the children's care and custody. Indeed, the retention and exercise of jurisdiction by the Martin Circuit Court would tend to undermine many of the purposes of the UCCJA expressed in KRS

403.400 (criterion (e) of KRS 403.460(3)). Regardless of Wellman's motives for bringing his children to Kentucky, the Martin Circuit Court properly found that Maryland has a "closer connection" with the children and that it has superior access to evidence regarding their care. We find no error in its analysis.

In Wood v. Graham, Ky., 633 S.W.2d 404, 406 (1982), a factually congruent case, our highest court issued a writ prohibiting the circuit court from proceeding with a custody dispute.

The child had lived its entire life in Ohio, and was brought, in a surreptitious manner, to Kentucky two days prior to the filing of the marriage dissolution action. Kentucky is not now, and never has been, the home state of the child in question. The child's residence was, and is, in Ohio. Moreover, there is no evidence in the record to show that it would be in the best interest of the child for Kentucky to assume jurisdiction. To the contrary, the record shows that the best interest of this small child would be served by leaving his future to the authorities in Ohio, who have cared for him, supervised him and provided for him since his birth.

Consistent with Wood and with the policies underpinning the UCCJA, we believe that the circuit court committed no error in relinquishing jurisdiction in this matter and that it would have acted erroneously had it elected to retain jurisdiction.

Wellman has acknowledged that Maryland is the home state of the children and that they have a connection with it. Nonetheless, he contends that the Martin Circuit Court erred in failing to consider the children's best interest in deferring to Maryland. He argues that Kentucky is the only place where his children "had a real home and a safe, loving environment." He

also believes that the current residence of the children in West Virginia does not affect the ability of the Martin Circuit Court to retain jurisdiction.

With the enactment of the UCCJA, Kentucky intended and endeavored to restrict its jurisdiction in interstate custody disputes. Turley v. Griffin, Ky., 508 S.W.2d 764 (1974). In cases where Kentucky is not the home state of the child, KRS 403.420(1) allows our courts to exercise jurisdiction in the following limited circumstances:

- (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
- (c) The child is physically present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
- (d) It appear that no other state would have jurisdiction . . .(Emphasis added.)

These provisions essentially contemplate an emergency situation as justifying intervention by a Kentucky court. Once the emergency has passed, it is appropriate for the Kentucky court to relinquish that jurisdiction in favor of the more appropriate forum. Cabinet for Human Resources v. McKeenan, Ky.App., 672 S.W.2d 934 (1984). After Wellman was incarcerated and after the children were removed to West Virginia, the circuit

court re-assessed the jurisdictional aspect of this case and deferred to the Maryland courts, declining to address the merits of the custody dispute. We agree that the circuit court correctly determined that it should not continue to exercise jurisdiction based on an emergency that no longer existed – particularly since the parties and their children were either absent from the state and/or incarcerated. See Reeves v. Reeves, Ky.App., 41 S.W.3d 866 (2001).

In summary, the record supports the findings and conclusions of the trial court with respect to the appropriate forum for resolving this dispute. We find no abuse of discretion in the decision to relinquish jurisdiction in this matter. Although Wellman raises the specter that the best interests of his children will not be properly served by the Maryland courts, we believe that the courts of Maryland are capable, conscientious, and significantly connected to the interests of these children. We assume the competence and diligence of the court system of our sister state.

The order of the Martin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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