

RENDERED: AUGUST 19, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-001658-ME

JOHN A. KILBURN

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT  
HONORABLE JENNIFER UPCHURCH CLARK, JUDGE  
ACTION NO. 10-CI-00019

HEATHER KILBURN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: John A. Kilburn appeals from an order of the Wayne Family Court assigning jurisdiction of a child custody matter to the Court of Common Pleas in Butler County, Ohio. John contends that the Wayne Family Court erred in failing to conclude that Kentucky was the children's home state for purposes of

establishing jurisdiction. We find no error, and accordingly affirm the order on appeal.

John and Heather were married on February 14, 2009, and separated on August 12, 2009. Prior to the marriage, the parties had three children who are now approximately 5, 6 and 11- years old. On August 26, 2009, Heather, who was then apparently living with the children in Ohio, obtained an Order of Protection from a Butler County, Ohio court.<sup>1</sup> The following month, she obtained from the Ohio court Consent to Change in Custody order, which granted temporary custody of the three children to her mother, Paula Ward.

On January 10, 2010, John filed a Petition for Dissolution of Marriage in Wayne Circuit Court. It appears from the record that at the time of the filing, John was incarcerated at the Eastern Kentucky Correctional Complex in West Liberty, Kentucky, and Heather was residing in Middletown, Ohio. Heather's parents, Kenneth and Paula Ward, were named as Respondents in the Petition because Paula was the temporary custodian of the children. It was alleged that this award of custody was improper because the children had lived in Ohio fewer than 180 days prior to the temporary custody award. On April 1, 2010, John's parents, John A. and Patricia Kilburn, successfully moved to intervene in the Kentucky proceeding for seeking custody of the children. After granting the motion, the Wayne Family Court indicated that it would contact the Magistrate of the Ohio court, which entered the temporary custody order for determining which state had

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<sup>1</sup> The protection order is not found in the appellate record. Both parties, however, cite the order and acknowledge that it was rendered.

ongoing custody jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), KRS 403.800 et. seq.

Finally, on June 8, 2010, John, who continued to be incarcerated, filed with the Wayne Family Court a *pro se* motion for custody of the children. In response, the court rendered an order the following day ruling that jurisdiction of custody issues shall remain in Butler County, Ohio. The court then granted a motion to make the issue final and appealable, and bifurcated the dissolution action (which continued in Kentucky) and the custody proceeding (which continued in Ohio). This appeal followed.

John now argues that the Wayne Circuit Court erred in assigning jurisdiction of the custody proceeding to Butler County, Ohio. He maintains that pursuant to the UCCJEA, Kentucky was the children’s “home state” where jurisdiction over custody matters must properly vest. As a basis for this claim, John notes that a state - whether it is Kentucky or Ohio - may exercise jurisdiction over custody matters if the children have resided in the state for at least 180 days, or if it is necessary to protect the children from actual or threatened mistreatment or abuse.<sup>2</sup> John argues that the children did not reside in Ohio for at least 180 days prior to the Ohio custody proceeding, and that the record contains no support for Heather’s claim that she and the children were subject to actual or threatened mistreatment or abuse justifying Ohio’s exercise of jurisdiction. He maintains that Heather’s claim of abuse, and the resultant protective order, were merely a ruse to

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<sup>2</sup> In support of this contention, John cites to KRS 403.410 to KRS 403.620, which have been repealed.

establish jurisdiction in Ohio. He goes on to note that he and his parents were denied access to the Ohio proceeding, and contends that the purposes of the UCCJEA were thwarted by the exercise of jurisdiction outside of the children's home state. In sum, he maintains that Kentucky is the children's home state where jurisdiction should properly vest, and that the Wayne Family Court erred in failing to so rule.

We have closely examined John's argument on this issue, and find no error. John's claim of error centers on his assertion that the UCCJEA does not support the exercise of jurisdiction in Ohio. We are not persuaded by this argument. Kentucky and Ohio have each adopted the UCCJEA and incorporated its provisions into the extant statutory law. KRS Chapter 403 and Ohio Revised Code Chapter 3127. KRS 403.828 provides in relevant part that,

(1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

It is uncontroverted that on August 26, 2009, and while the children at issue were present in Ohio, Heather sought and obtained a Domestic Violence Civil Protection Order barring John from contacting Heather or the children. The Magistrate found that the Ohio Court of Common Pleas, Division of Domestic Relation, had personal and subject matter jurisdiction over the matter, and determined that the

order was warranted based on Heather's allegation of John's abuse or threatened abused. The court found by a preponderance of the evidence that Heather and/or her children were in danger or had been a victim of domestic violence or sexually oriented offenses, and that the order was equitable, fair and necessary to bring about a cessation or the prevention of such violence.

We are without the authority to draw any conclusion as to the veracity of Heather's claims in support of the Ohio Civil Protection Order, nor whether such order was warranted. Additionally, we regard as well taken John's argument that he was in prison at the time and therefore incapable of directly threatening Heather. The question, however, is whether Heather's claim before the Ohio court was sufficient to establish jurisdiction. We must answer that question in the affirmative. Heather appeared in Ohio, affirmed that the children were located in Ohio, and claimed that she and/or the children were victim of domestic violence. The facts, in the context of the UCCJEA, are sufficient to establish temporary jurisdiction. KRS 403.828; *Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky. App. 2007)

Additionally, Ohio may exercise ongoing jurisdiction over child custody matters if it was the home state of the child on the date of the commencement of the proceedings. See Kentucky's statutory analog at KRS 403.822(1) ("a court of this state shall have jurisdiction to make an initial child custody determination only if: (a) This state is the home state of the child on the date of the commencement of the proceeding"). The Wayne Family Court

determined that ongoing jurisdiction over the child custody matter was properly found in Ohio where the children resided. The presumption is that a court conducts its proceedings according to law, and renders the correct judgment under the facts developed before it. *City of Jackson v. Terry*, 302 Ky. 132, 194 S.W.2d 77 (Ky. 1946). As such, the burden rests with John to overcome this presumption by demonstrating by reference to the record that Kentucky rather than Ohio was the children's home state when the Wayne Family Court assigned jurisdiction to the Magistrate Judge in Butler County, Ohio on August 4, 2010. He has not met this burden. Accordingly, we find no error.

For the foregoing reasons, we affirm the August 4, 2010 order of the Wayne Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas G. Simmons  
Monticello, Kentucky

BRIEF FOR APPELLEE:

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