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No. 69107-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of

WENDY A. MCDERMOTT
Appellant

and

JUSTIN J. MCDERMOTT
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

REPLY BRIEF OF APPELLANT

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II. ARGUMENT IN REPLY

A. THE UCCJEA DEPENDS ON CLARITY IN THE DEFINITION OF ITS TERMS.

The main achievement of the UCCJEA is to establish priority jurisdiction in the home state. The UCCJEA prioritizes the use of the child's "home state," as the exclusive basis for jurisdiction of a custody determination, regardless of the residency of the parents. *Sajjad v. Cheema,* 51 A.3d 146 (N.J. App.Div. 2012). This does not render all UCCJA cases erroneous, but does mean they should be

viewed cautiously. Br. Respondent, at 13. In particular, pertinently here, the statute should be interpreted so as not to not muddy the bright line of the home state definition. To do otherwise is to invite the same kind of fact-intensive, time-consuming litigation the UCCJEA seeks to avoid.

This kind of clarity works both to include and exclude, meaning that a functional definition will necessarily exclude some cases. This is one of those cases. A clear definition of home state means that the child here has no home state.

1) The "temporary absence" provision does not apply.

Washington has not addressed the precise issue raised in this case by Judge Krese's ruling that the infant H.J.M. was temporarily absent from Kansas during the first six weeks of his life, which he spent in Costa Rica. However, the Texas court rejected an argument identical to Justin's, noting that "[r]egardless of how we define the word 'live,' at the very least one must be physically present in a place to live there." *In re Calderon-Garza,* 81 S.W.3d 899, 904 (Tex. App. El Paso 2002). In *Calderon,* the mother attended medical school in Mexico. She returned to Texas, where she had lived and where her parents lived, for the birth of the child.

The court declined to construe the time spent in Texas as the child's "temporary absence" from Mexico.

Justin argues H.J.M. was on vacation when he was in Costa Rica, which is a nice way to think of being born. Br. Respondent, at 20. But there is no apparent support for this proposition in the case law, and Justin makes no effort to engage with the authorities cited by Wendy on the question of temporary absence. These authorities helpfully focus on physical presence, in light of the statute's use of the term "lived" as opposed to "resided" or "domiciled." This is the only sensible approach, given the complex fact issues that arise with questions of domicile and residence. *See, e.g., In re Marriage of Myers,* 92 Wn.2d 113, 594 P.2d 902 (1979) (our supreme court noting problems with using domicile in child custody proceedings and noting with approval the anticipated passage of the UCCJA with its home state rule). Indeed, as another court put it, the proposition that a child's home state status follows the parent's residence is "nonsensical," and would render "meaningless" the UCCJEA. *In re K.R.,* 735 S.E.2d 882, 891 (W. Va. 2012). H.J.M. was more than six months old when these proceedings commenced.

In making a home state determination, Washington should take this same sensible approach to the question of temporary absence and the child's physical presence.

2) The "from birth" provision does not apply.

Justin argues in the alternative that the "from birth" prong of home state definition should apply here. Br. Respondent, at 20-22. Again, he cites no authority, and the statute's plain language refutes his argument. The "from birth" prong explicitly applies to "a child less than six months of age ..." RCW 26.27.021(7). This provision has been strictly interpreted. *Carl v. Tirado,* 945 A.2d 1208 (D.C. 2008) (and cases cited therein).

3) The child here has no home state.

For most cases, the home state definition and prioritization will settle the question of jurisdiction. In a minority of cases, there will be no home state. This is one of those cases.

Even so, the UCCJEA works in an orderly fashion, when courts and parties comply with it. As discussed further below, the trial court failed to adhere to the statute, resulting in conflicting orders, not only between states, but between the different judicial officers in the Washington superior court.

B. THE ORDER UNDER REVIEW IS THE JUDGE'S, ALTHOUGH APPELLANT ALSO ADDRESSES THE ERRORS IN THE COMMISSIONER'S ORDER.

Justin defends Commissioner Stewart's decision to decline jurisdiction, which Wendy will briefly address on the merits below. Br. Respondent, at 24-33. However, it appears this Court should not reach the commissioner's order. Justin argues otherwise, relying on Judge Krese's somewhat bifurcated ruling, i.e., revising on the home state analysis and denying revision on the order declining jurisdiction. Br. Respondent, at 33-35. This does not really make sense, since a judge on revision has a duty "to take jurisdiction of the *entire* case as heard before the commissioner." *In re Smith*, 8 Wn. App. 285, 288-89, 505 P.2d 1295 (1973) (internal citation omitted) (emphasis the court's). Moreover, as Wendy pointed out in her opening brief, Judge Krese's home state decision forecloses any other analysis under the UCCJEA. Br. Appellant, at 14-16. The judge made no findings on inconvenient forum presumably because they would be superfluous, since the home state ruling is determinative. Thus, by implication, the judge's ruling also negated the commissioner's inconvenient forum analysis, even if Judge Krese did not say so.

Apparently, Justin argues that if Judge Krese was wrong about the home state, then the "un-revised" portion of the commissioner's order should be resurrected. He cites no authority for this particular proposition and there does not appear to be any. Rather, authority for the contrary proposition is implicit in *In re Custody of E.A.T.W.,* 168 Wn.2d 335, 348, 227 P.3d 1284 (2010). There, the commissioner found adequate cause for a non-parental custody petition based on various facts. On revision, a judge held that adequate cause could be satisfied by one fact: the fact of the child being out of the parent's custody. That is, the judge did not so much say the commissioner was wrong, but that less was needed than the commissioner thought. This Court reversed the judge's legal error, a decision the Supreme Court affirmed. Notably, when the court ordered a remedy, it did not order reinstatement of the commissioner's finding of adequate cause, but a new adequate cause hearing "using the proper legal standard." *E.A.T.W.,* 168 Wn.2d at 350. Likewise, here, the matter should go back to the judge.

In any case, Wendy has preserved any challenge to the commissioner's ruling, if needed. See Br. Appellant, at 15-16. She also addresses the merits below, after first explaining why the

commissioner should never even have engaged in an inconvenient forum analysis.

C. THE ORDER DECLARING TEMPORARY EMERGENCY JURISDICTION REMAINED IN EFFECT.

A week before Commissioner Stewart undertook the inconvenient forum analysis, Judge Ellis had found domestic violence and declared Washington had temporary emergency jurisdiction. CP 37. The judge's order revised Commissioner Stewart's earlier order finding Wendy had not proven domestic violence, a finding that was perhaps based on a misunderstanding of the law. CP 164. (Moving for revision, Wendy vigorously argued the legal definition. CP 142-147.) The UCCJEA provision invoked by Judge Ellis authorizes jurisdiction "if the child is present in this state and ... it is necessary in an emergency to protect the child because the child, or a sibling or a parent of the child, is subjected to or threatened with abuse." RCW 26.27.231(1). That is, the reason for jurisdiction is "to protect the child."

Furthermore, under the statute, temporary emergency jurisdiction "remains in effect" unless and until certain conditions are met justifying deferring to a court in another state. (Under temporary jurisdiction, the state also can become the home state. RCW 26.27.231(1).) None of the conditions requiring (or allowing)

Washington to defer to Kansas are met here because the ex parte orders entered in Kansas were not entered in compliance with the UCCJEA. RCW 26.27.241(1) and (2). The fact of an order alone is not meaningful under the UCCJEA unless it was entered in compliance with the statute. *Id.* The same is true for full faith and credit under the PKPA. 28 U.S.C. § 1738A(g). While proceedings had been commenced in Kansas, the Kansas court had not made a "child custody determination that is entitled to be enforced under this chapter, ..." RCW 26.27.231(3). Again, because there had been no service on Wendy, i.e., no notice or opportunity to be heard, the ex parte orders entered by the Kansas court on April 2 were not in compliance with the UCCJEA and, therefore, were not "entitled to be enforced." Otherwise, orders obtained improperly would wreak havoc with the statutory scheme. Neither Commissioner Stewart nor Judge Krese had authority to alter or amend Judge Ellis's order declaring jurisdiction in Washington, except as provided by the statute. RCW 26.27.231.[1]

Because of the statute and because of Judge Ellis's order, Commissioner Stewart and Judge Krese were required to

[1] It is particularly odd and irregular for Commissioner Stewart to countermand Judge Ellis's order, since the judge's order revised Commissioner Stewart's contrary ruling. In effect, Commissioner Stewart re-revised Judge Ellis's ruling.

communicate with the Kansas court. Even Justin recommended this step. CP 91. This communication would likely have revealed that there was no activity in the case, after the initial filing, and there had not even been service on Wendy.[2] Accordingly, under the statute, Judge Ellis's order declaring temporary emergency jurisdiction remained in effect. Moreover, for this reason, the simultaneous proceedings provision of the UCCJEA does not apply. RCW 26.27.251 (applies "[e]xcept as otherwise provided in RCW 26.27.231...").[3]

This is the point at which the case went off the rails in the lower court. So it bears repeating that once Judge Ellis found temporary emergency jurisdiction, and that order was not

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[2]Justin claims Wendy was "properly served" (Br. Respondent, at 46), which Wendy does not dispute. But Justin ignores that she was not served until after Commissioner Stewart ordered that Washington decline jurisdiction. Justin injects this same chronological confusion a page later, when he discusses proceedings in Kansas that occurred after Wendy was served and after the orders entered by Commissioner Stewart and Judge Krese. Br. Respondent, at 47. Wendy's point is that, during the relevant time period, the Kansas court had not entered an order in compliance with the UCCJEA.

[3] If the simultaneous proceedings provision applied (i.e., if there was no temporary emergency jurisdiction), then the UCCJEA uses a "first in time" rule, as did the UCCJA. *C.L. v. Z.M.F.H.,* 18 A.3d 1175, 1181 (Pa. Super. Ct. 2011). Here, unusually, the petitions were filed on the same day, though Justin earlier agreed he filed his petition in Kansas after Wendy did. CP 58. This is complicated by the fact he also seems to have his dates mixed up. In his brief, Justin argues he is "first in time" because of the time difference between Washington and Kansas. Br. Respondent, at 9. He offers no support for this metaphysical proposition. In any case, only Wendy's petition was promptly served, whereas Justin waited three months to serve his. For this reason, should it come to this, Wendy's petition should be considered "first in time."

challenged, adherence to the UCCJEA required the Washington judicial officers to comply with the provisions within that section of the statute, including the requirement they confer with Kansas. RCW 26.27.231(4). When Commissioner Stewart and Judge Krese leapfrogged over these steps, they violated the UCCJEA.

Moreover, because Kansas was not the home state, the Washington court also had significant connection jurisdiction. RCW 26.27.201(1)(b). *See, In re Marriage of Hamilton,* 120 Wn. App. 147, 158, 84 P.3d 259 (2004) (mother's contacts with Washington more significant than with other state). Accordingly, Washington could decline jurisdiction in favor of Kansas only if Washington was an inconvenient forum and Kansas was a more appropriate forum. RCW 26.27.261.

In his discussion of the temporary emergency jurisdiction provisions, Justin makes several mistakes, some worth correcting. First, he misstates the general rule under the UCCJEA as being "that Washington has jurisdiction ... 'only if' it is the child's home state." Br. Respondent, at 36. In fact, where there is no home state, Washington may (and, here, does) have jurisdiction under the significant connection provision. RCW 26.27.201(1)(b). Judge Ellis seemed to acknowledge this when, in addition to finding

temporary emergency jurisdiction, noted an "other" basis for jurisdiction (i.e., no home state and present in the state). CP 37.

Justin also mistakenly argues that the Kansas orders precluded the exercise of temporary emergency jurisdiction by the Washington court. Br. Respondent, at 37-38. In fact, no matter what the status of proceedings in other states, Washington may act under the temporary emergency jurisdiction provision "to protect the child." RCW 26.27.231.

What the Washington court does next depends on what has happened in the other state, including what kind of jurisdiction the other state may or may not have. First, and foremost, the Washington court has to confer with the court in the other state. RCW 26.27.231(4). Of course, Judge Ellis did not do this because it appears Justin did not inform her of the Kansas proceedings. CP 112. Presumably this is also the reason Judge Ellis did not "specify ... a period that the court considers adequate" to allow Justin to obtain orders from Kansas. RCW 26.27.231(3). When Justin faults her for this failure (Br. Respondent, at 39 and 42), he seems to forget that he caused this confusion.

Finally, Justin claims the Washington court "did not properly exercise temporary emergency jurisdiction." Br. Respondent, at 41-

43. As a procedural matter, this challenge is barred. Justin did not appeal this ruling. Accordingly, Judge Ellis's order is res judicata and law of the case. As discussed previously, Commissioner Stewart's and Judge Krese's subsequent rulings that there was no emergency jurisdiction (see Br. Respondent, at 42) are ineffective; the order entered by Judge Ellis remains "in effect" under the statute.

Justin's brief also includes some factual inaccuracies that bear noting. For example, he claims "Wendy never asked the trial court to confer, repeatedly denying that there was a Kansas action." Br. Respondent, at 43. This claim is not supported by the record, including not by the citations Justin provides. For one thing, it appears Wendy did not know about the Kansas proceedings before Justin mentioned them in his pleadings. See, e.g., CP 102 (Kansas order noting that Wendy was not represented by counsel). What Wendy did, once Justin made mention of the Kansas proceeding, was point out that he offered no proof (CP 48, on June 11, and CP 25, on June 21) and that she had not been served (CP 24, on June 21). She also cited to the court the requirement for a judicial conference. CP 25. In other words, the record flatly contradicts Justin's assertions.

Justin also claims he "plainly informed the Washington Court that he had an open action in Kansas, ..." Br. Respondent, at 43. Not only was this information not "plain," it was not timely. Justin first mentioned the Kansas proceeding on June 5, in his motion to dismiss. CP 58. And he did nothing more than mention it, saying only that he had filed for divorce in Kansas. Id. He provided no further detail or proof. He made no mention of whether Wendy was served. Shortly thereafter, on June 14, he again declared, again without any proof, that there is "an open divorce case in Kansas." CP 91. He did not provide any proof until July 6, a week after effecting service on Wendy. CP 95-111.

D. THE INCONVENIENT FORUM ANALYSIS.

As discussed above, for several reasons, the commissioner's ruling on inconvenient forum is not before this Court. (That is, because temporary emergency jurisdiction remained in effect, the inconvenient forum analysis was premature. Moreover, the commissioner's ruling was superseded by Judge Krese's order on revision.) Nevertheless, Wendy briefly addresses the merits of this issue.

While a decision whether to decline jurisdiction on inconvenient forum basis is reviewed for an abuse of discretion, a

court abuses its discretion whenever it fails to apply the proper legal standard. *In re Marriage of Littlefield,* 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). That is what happened here.

The UCCJEA inconvenient forum analysis involves two steps, the court "must specifically determine two things: (1) 'that it is an inconvenient forum under the circumstances,' and (2) 'that a court of another state is a more appropriate forum.'" *Prizzia v. Prizzia,* 707 S.E.2d 461, 469 (Va. Ct. App. 2011); RCW 26.27.261(1). The statute mandates consideration of at least eight factors. RCW 26.27.261(2) (court "shall consider") (emphasis added). This consideration should be made on the record. *See In re Marriage of Horner,* 151 Wn.2d 884, 896, 93 P.3d 124 (2004) ("only when it clearly appears what questions were decided by the trial court, and the manner in which they were decided," can meaningful review occur). Here, the trial court did not address some of these factors, addressed several of them with speculation, not evidence, and completely dismissed one of the most important factors, the domestic violence. See Br. Appellant, at 28-32. See, also, CP 24-26 (trial brief detailing defects in commissioner's analysis). Certainly, the domestic violence, and the fact of the

mother being protected in Washington by a court order, militated in favor of Washington jurisdiction.[4]

In short, sparing repetition, there was nothing inconvenient about Washington as a forum, since the child under consideration is an infant whose primary caregiver is a resident and since the child had lived roughly half its short life in places other than Kansas (i.e., Costa Rica and Washington), both being places where the mother has family. Moreover, it seems the court could and should have considered the additional contacts established in Washington for the months subsequent to commencement of the proceedings. *See Hamilton,* 120 Wn. App. at 158 (noting that such contacts may be considered where there is no home state and such consideration does not defeat the priority jurisdiction under the UCCJEA). The approach commended in *Hamilton* is particularly appropriate here because the mother and child were residing in Washington with the father's agreement.

More obviously, Kansas is not a more appropriate forum, if only because the proceeding there was essentially dormant. Justin did not even inform the Washington court about the Kansas

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[4] Wendy stands by her argument comparing the approaches to parenting issues and domestic violence in Kansas and Washington (Br. Appellant, at 30), notwithstanding Justin's arguments. Br. Respondent, at 27-29.

proceedings until June 5, after two months of actively litigating in Washington. Rather, at the outset of the Washington case, Justin sensibly agreed it would be "easier" to resolve the entire dispute in the Washington court. CP 75-76, 190-191. Presumably, for that reason, he asked the Washington court for affirmative relief in the form of dissolving the marriage and entering a parenting plan. CP 75-76, 190-191. His agreement is one of the factors for the court to consider in the inconvenient forum analysis. RCW 26.27.261(2)(e). This is one of the factors Commissioner Stewart completely ignored. CP 32-34.

In his brief, Justin construes Wendy's references to his agreeing to litigate in Washington as having to do with waiver. Br. Respondent, at 22-24. Wendy nowhere takes the position that the parties can confer subject matter jurisdiction. Rather, as noted above, the statute makes Justin's agreement relevant to the inconvenient forum analysis. Further, his litigation conduct perhaps helps to explain some of the confusion in the lower court.

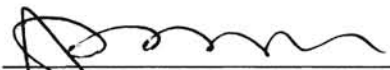
III. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, Wendy respectfully asks this Court to vacate the order

entered by Judge Krese and remand this matter for compliance with the UCCJEA.

Dated this 29th day of March 2013.

RESPECTFULLY SUBMITTED,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of: WENDY A. MCDERMOTT Appellant and JUSTIN J. MCDERMOTT Respondent	**No.** 69107-4-I DECLARATION OF SERVICE

Jayne Hibbing certifies as follows:

On March 29, 2013, I served upon the following true and correct copies of the Reply Brief, and this Declaration, by:

__✓__ depositing same with the United States Postal Service, postage paid
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