STATE OF MICHIGAN

COURT OF APPEALS

TODD MICHAEL DEKINDEREN, Plaintiff-Appellant,	UNPUBLISHED January 12, 2010
v	No. 293443 Oakland Circuit Court Family Division
RENEE MARY DEKINDEREN, Defendant-Appellee.	LC No. 2008-743369-DM

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion to decline jurisdiction. We reverse.

Plaintiff argues that Michigan had jurisdiction to make an initial custody determination pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., because the parties' minor child did not reside in any single state for six months and, therefore, did not establish residency in any other state sufficient to confer jurisdiction. Plaintiff thus contends that the trial court erred when it failed to consider MCL 722.1202(1), which provides that once a Michigan court has made a child custody determination, as in the case at bar, that court has continuing jurisdiction. We conclude that the trial court did not have jurisdiction to make the initial custody determination during the divorce proceeding because Michigan was not the child's home state. Nevertheless, the trial court abused its discretion in failing to analyze whether it could exercise continuing jurisdiction to consider plaintiff's motion to change custody, in light of the possibility that no other state had jurisdiction or all states having jurisdiction had declined to exercise it.

"Whether a trial court has subject-matter jurisdiction presents a question of law that this Court reviews de novo. However, the determination whether to exercise jurisdiction under the UCCJEA [is] within the discretion of the trial court, and would not be reversed absent an abuse of that discretion." *Nash v Salter*, 280 Mich App 104, 108; 760 NW2d 612 (2008) (internal citations omitted). "Generally, an appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Jamil v Jahan*, 280 Mich App 92, 100; 760 NW2d 266 (2008). In addition, this court reviews issues of statutory construction de novo as questions of law. *Nash*, *supra* at 108-109.

This matter involves the UCCJEA, which "prescribes 'the powers and duties of the court in a child-custody proceeding involving this state and a proceeding or party outside of this state . . . .'" *Fisher v Belcher*, 269 Mich App 247, 260; 713 NW2d 6 (2005).

> "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate." [*White v Harrison-White*, 280 Mich App 383, 387; 760 NW2d 691 (2008), quoting *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996) (internal citations omitted).]

Plaintiff is a Michigan resident. However, neither defendant nor the child has ever lived in Michigan. Thus, the current action constitutes an interstate custody dispute and "MCL 722.1201 sets forth the basic jurisdictional requirement for making an initial custody determination." *Nash*, *supra* at 109. MCL 722.1201 provides:

> (1) Except as otherwise provided in [MCL 722.1204, which concerns temporary emergency jurisdiction], a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [MCL 722.1207, which concerns an inconvenient forum, or MCL 722.1208, which concerns unjustifiable conduct of the parties], and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
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> (c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under [MCL 722.1207 or MCL 722.1208].

(d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination.

Pursuant to MCL 722.1102(h), "'Initial determination' means the first child-custody determination concerning a particular child." Under MCL 722.1102(c),

> "Child-custody determination" means a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support or other monetary obligation of an individual.

Thus, in this case, the provisions of the divorce judgment that addressed custody and parenting time of the parties' minor child constituted an initial custody determination.

Under the UCCJEA, home-state jurisdiction is the sole focus for an initial custody determination. See *White*, *supra* at 388 (noting that replacing the Uniform Child Custody Jurisdiction Act with the UCCJEA was designed, in part, to rectify jurisdictional issues by prioritizing home-state jurisdiction). Plaintiff's claim that a child under six months old has no home state ignores the plain language of the statute. MCL 722.1102(g) states,

> 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. *In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent.* A period of temporary absence of a parent or person acting as a parent is included as part of the period. [Emphasis added.]

In this case, the child was born on June 7, 2008, in North Carolina. Although plaintiff's amended complaint, filed on July 1, 2008, stated that the child *resided* in Orion, Michigan, in fact, at the time the complaint was filed through the time the divorce judgment was entered on August 27, 2008, the child *lived* in North Carolina.

"When interpreting a uniform act, . . . it is appropriate for this Court to look for guidance in the caselaw of other jurisdictions in which the act has been adopted." *Heritage Resources, Inc v Caterpillar Financial Services Corp*, 284 Mich App 617, 632; 774 NW2d 332 (2009). Texas has also adopted the UCCJEA, and we agree with the Texas Supreme Court that

> The word 'lived' strongly connotes physical presence. *See* Webster's Third New International Dictionary, 1323 (1961) (defining "live" as "to occupy a home"). We think it significant that the Legislature chose the word 'lived' as opposed to 'resided' or 'was domiciled.' The test for 'residence' or 'domicile' typically

> involves an inquiry into a person's intent. In our view, the Legislature used the word 'lived' "precisely to avoid complicating the determination of a child's home state with inquiries into the states of mind of the child or the child's adult caretakers." [*Powell v Stover*, 48 Tex Sup Ct J 780; 165 SW3d 322, 326 (2005) (internal citations omitted).]

"The purposes behind the UCCJEA further suggest that a child's physical location is the central factor to be considered when determining a child's home state. The UCCJEA was intended to make the determination of jurisdiction more straightforward." *Id.* Therefore, pursuant to MCL 722.1102(g), despite whether plaintiff was a resident of Michigan, the child's home state was North Carolina, and Michigan courts did not have jurisdiction to make an initial custody determination[1] under MCL 722.1201(1)(a) by virtue of being the child's home state.

We cannot necessarily fault the trial court for exercising jurisdiction, however, because plaintiff's amended complaint represented that the child's "primary residence" was in Orion, Michigan. There is no transcript of any hearing that took place before entry of the default judgment and, therefore, we cannot know whether the trial court was aware that the child was living in North Carolina at the time.[2] This is relevant, however, because plaintiff later claimed that North Carolina refused to hear his divorce action since neither he nor defendant had established a residence there. If plaintiff's claim were true (and no proof was offered to establish or negate this), then the Michigan court might have exercised jurisdiction to make an initial custody determination under MCL 722.1201(b) or (c), as provided above.

The conundrum, of course, is that despite what appears to be a lack of jurisdiction, the Michigan court made an initial custody determination, by which the parties abided until June 3, 2009, when plaintiff filed his emergency petition for extended parenting time pending the hearing on his motion for change of custody. "Once an initial child-custody determination occurs, exclusive, continuing jurisdiction generally remains with the decreeing court." *Atchison v Atchison*, 256 Mich App 531, 538; 664 NW2d 249 (2003). A court's exercise continuing jurisdiction under the UCCJEA is explained in MCL 722.1202, which provides in pertinent part,

> (1) Except as otherwise provided in [MCL 722.1204], a court of this state that has made a child-custody determination consistent with [MCL 722.1201 or MCL 722.1203] has exclusive, continuing jurisdiction over the child-custody determination until either of the following occurs:
>
> (a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent have a significant connection with

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[1] The parties do not dispute that Michigan had jurisdiction to enter the divorce decree.

[2] However, it seems unlikely that the trial court knew where the child was living when the default judgment was entered given that at the later hearing on defendant's motion for Michigan to decline jurisdiction, the court asked whether the child was born in Michigan or had ever lived in Michigan.

this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

(b) A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state.

(2) A court of this state that has exclusive, continuing jurisdiction under this section may decline to exercise its jurisdiction if the court determines that it is an inconvenient forum under [MCL 722.1207].

(3) A court of this state that has made a child-custody determination and that does not have exclusive, continuing jurisdiction under this section may modify that child-custody determination only if it has jurisdiction to make an initial child-custody determination under [MCL 722.1201].

Thus, because the initial custody determination was not made consistently with MCL 722.1201 (that is, Michigan was not the child's home state at the time the trial court made the initial custody determination and plaintiff did not argue at that time that the child's home state declined jurisdiction), the trial court could not exercise continuing jurisdiction pursuant to MCL 722.1202(1)(a). However, MCL 722.1202(3) indicates that the trial court could have potentially exercised continuing jurisdiction if it were true that pursuant to MCL 722.1201(b), (c), or (d), no other court qualified as the child's home state or all other states with jurisdiction had declined to exercise it.

At the time plaintiff filed his emergency petition on June 3, 2009, the child, then just shy of his first birthday[3], was apparently living in Quantico, Virginia, although it is unclear how long he had been there. At the hearing on defendant's motion for the trial court to decline jurisdiction, defense counsel stated that defendant (who had custody of the child) "lived in North Carolina from August 2007 until just the last few months she's moved to Virginia . . . ." However, when asked to clarify what she meant by "the last few months," defense counsel answered, "Two or three months, I'm not exactly sure." Defendant never complied with MCL 722.1209(1), which provides in pertinent part,

> Subject to the law of this state providing for confidentiality of procedures, addresses, and other identifying information, in a child-custody proceeding, each party, in its first pleading or in an attached sworn statement, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period."

[3] The child's date of birth is June 7, 2008.

The trial court's position appeared to be that since plaintiff conceded that defendant lived in North Carolina at the time the child was born, no further information was necessary. However, for the trial court to properly decide whether it could exercise continuing jurisdiction, it was necessary to determine whether the child had a home state and whether another court or courts had jurisdiction.

It appears from defense counsel's statements that the child had lived in North Carolina for at least six months before moving to Virginia and, thus, North Carolina would remain the child's home state (now that the child was over six months old). However, no proof was offered to support this assertion, nor did the trial court ask for any. Therefore, it is possible that Virginia could have been the child's home state at the time of the hearing. Moreover, plaintiff alleged at the motion hearing that defendant had also lived in California for some period of time after the child's birth. Therefore, it is also conceivable that, having not lived in any one place for at least six months, the child had no home state. In addition, at the motion hearing, plaintiff's attorney claimed that North Carolina declined jurisdiction over both the initial divorce action and allegations that defendant abused the child, but again, no proof was offered and the trial court did not request any.

It is worth noting that had a North Carolina court considered hearing plaintiff's motion to change custody, the guiding provision would be MCL 722.1203, which provides:

> Except as otherwise provided in [MCL 722.1204], a court of this state shall not modify a child-custody determination made by a court of another state *unless a court of this state has jurisdiction to make an initial child-custody determination* under [MCL 722.1201(1)(a) or (b)] and either of the following applies:
>
> (a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under [MCL 722.1202] or that a court of this state would be a more convenient forum under [MCL 722.1207].
>
> (b) A court of this state or a court of the other state determines that neither the child, nor a parent of the child, nor a person acting as a parent presently resides in the other state. [Emphasis added.]

If North Carolina was no longer the child's home state, one can see why the North Carolina court might have concluded that it did not have jurisdiction to modify an initial custody determination made by a Michigan court.

One would have hoped that the Oakland Circuit Court or a court in North Carolina or elsewhere might have inquired whether some court, somewhere, had assumed jurisdiction over this case, given the allegations of abuse.[4] Although communication between courts is not

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[4] Attached to plaintiff's petition for extended parenting time are photographs of the child with what appear to be human bite marks on his leg and arm. Plaintiff alleges that defendant made
(continued…)

required unless proceedings have been filed in two different states, MCL 722.1206(2), pursuant to MCL 722.1110(1), "[a] court of this state may communicate with a court in another state concerning a proceeding arising under this act." Further, MCL 722.1112 states, in pertinent part:

> (1) A court of this state may request the appropriate court of another state to do any of the following:
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> (a) Hold an evidentiary hearing
>
> (b) Order a person to produce or give evidence under procedures of that state.
>
> (c) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding.
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> (d) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and an evaluation prepared in compliance with the request.
>
> * * *
>
> (2) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (1).

We are also somewhat troubled that, despite the fact that the Oakland County Friend of the Court (FOC) was in the process of conducting an investigation, there is no indication that the court reviewed the report or the conclusions; rather, once the court determined that it did not have jurisdiction, it ordered the investigation closed. Plaintiff claims that during an interview with the FOC, defendant admitted to biting the child. At the very least, if the child were actually in the state of Michigan at the time of the motion hearing (which is not clear from the lower court record or the brief), the trial court could have exercised temporary emergency jurisdiction pursuant to MCL 722.1204(1), which states,

> 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*."

Although any error in failing to move for the exercise of such jurisdiction, if appropriate, would have been plaintiff's, for all of the above stated reasons, we find that the trial court abused its discretion in failing to consider whether it could properly exercise continuing jurisdiction in light of the possibility that no other state had jurisdiction over the child or other states having such jurisdiction had declined to exercise it.

(…continued)

these marks on the child.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot