

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Custody of A.C.)	
)	
DAVID NAGEL and ANITA)	
BANGERT,)	
Respondents,)	No. 79938-5
)	
v.)	En Banc
)	
HOLLY MARIE CORK,)	
)	
Appellant.)	Filed February 5, 2009
_____)	

CHAMBERS, J. — A child and his mother are from Montana but moved to Washington. The child’s former foster parents, still living in Montana, asked Washington courts to grant them custody. Washington has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), ch. 26.27 RCW; *see also* Unif. Child Custody Jurisdiction & Enforcement Act, 9 pt. 1A U.L.A. 655 (1997). Under that act, because the foster parents live in Montana and seek to modify a custody determination initially made by Montana, and because Montana has never declined

jurisdiction, Washington courts do not have jurisdiction to determine custody. Washington's exercise of jurisdiction in this case both offends the goals and violates the provisions of the UCCJEA. We reverse both the trial court and the Court of Appeals and remand to the trial court with orders to dismiss.

FACTS

A.C. was born to Holly Cork on August 28, 1997, in Montana when Cork was 14.¹ Both A.C. and Cork were placed in foster care by a Montana court. On January 7, 1999, the district court in Montana awarded the State legal custody of both Cork and A.C. On January 27, 2000, the State of Montana petitioned for permanent custody of A.C. and for termination of Cork's parental rights. A.C. was placed with David Nagel and Anita Bangert (the Nagels) as foster parents. The trial court terminated Cork's parental rights but the Montana Supreme Court reversed the termination, concluding that due process required that Cork have an attorney during the formulation of her treatment plan. *In re A.F.-C.*, 307 Mont. 358, 370, 37 P.3d 724 (2001). In 2002, Cork obtained her GED, completed a 75-hour nurse's aide certification, and participated in a transition program for reunification with A.C. Montana's temporary custody of A.C. was terminated, A.C. was returned to Cork's custody, and on May 15, 2002, Cork and A.C. moved to Spokane, Washington.²

¹A.C.'s father is deceased.

² A.C. had resided in Washington for less than six months at the time this case was filed on October 29, 2002, and as such Washington could not have been considered A.C.'s "home state" under the UCCJEA. *See* RCW 26.27.021(7). However, such a determination is

In early October 2002, Washington’s Child Protective Services (CPS) received an anonymous phone call from someone who claimed that A.C. had been punched and thrown around by his mother. The caller claimed that Cork had extensive involvement with Montana’s social services, that she “wasn’t ever interested in parenting but was interested in winning in court,” and that she had received A.C. “back on a technicality” and then “fled the state of Montana.” Ex. R115. Around the same time, the Nagels sent a letter to the Washington Department of Social and Health Services (DSHS) stating that A.C. had been returned to Cork “due to a legal technicality” and offering to provide “foster/adoptive care” to A.C. “should the need arise.” Ex. R114.

DSHS began an investigative assessment of Cork. Ex. R115. A DSHS case worker contacted Cork’s social worker in Montana. The social worker opined that the Nagels had called with the anonymous allegations of abuse, noting the similarities between the call and the Nagel’s letter and stating, “it’s too much information.” *Id.* She said that the Nagels were vindictive when A.C. was returned to his mother. She also mentioned that Cork “is and was interested [in] parenting,” and that “Holly did not flee [to Washington], she had the support of the [Montana] agency.” *Id.* DSHS ended its investigation, finding little or no risk. The case worker concluded that although A.C. was still defiant and did not believe that Cork was his real mother, he was in no danger of abuse and should be fine with counseling. Cork did not provide

unnecessary for us to reach our holding.

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A.C. with the recommended counseling.

On October 29, 2002, although they continued to live in Montana, the Nagels filed a petition in Spokane County for nonparental custody of A.C. The Nagels' petition claimed Cork was not a suitable custodian and requested that she have only limited visitation with her son. The Washington trial court ordered Cork to allow the Nagels visitation with A.C. Later the court appointed a guardian ad litem for A.C. The Nagels then moved for a temporary order of visitation and for a bonding and attachment assessment. In August 2003, the trial court granted temporary custody of A.C. to the Nagels in Montana and set out a schedule of visitation for Cork. In October 2003, Cork obtained new counsel and in January 2004, she moved to dismiss the nonparental custody petition, arguing for the first time that Washington did not have subject matter jurisdiction³ under the UCCJEA. The court denied the motion and at trial awarded custody of A.C. to the Nagels in Montana, with Cork having visitation rights and paying child support. Cork appealed. The Court of Appeals affirmed. *In re Custody of A.C.*, 137 Wn. App. 245, 153 P.3d 203 (2007).

ANALYSIS

³The UCCJEA uses the term "subject matter jurisdiction," and for consistency we use the statutory language. However, Washington courts did, in fact, have subject matter jurisdiction over the parties and the issues. See Const. art. IV, § 6 (describing general jurisdiction of superior courts); *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 316-17, 76 P.3d 1183 (2003) (subject matter jurisdiction concerns the type of controversy, not the facts of an individual case). The statute might have more accurately used the term "exclusive venue" instead of "subject matter jurisdiction."

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The UCCJEA arose out of a conference⁴ of states in an attempt to deal with the problems of competing jurisdictions entering conflicting interstate child custody orders, forum shopping, and the drawn out and complex child custody legal proceedings often encountered by parties where multiple states are involved. UCCJEA prefatory note, 9 pt. 1A U.L.A. at 651; UCCJEA § 101 cmt., 9 pt. 2A U.L.A. at 657. It is, in a sense, a pact among states limiting the circumstances under which one court may modify the orders of another. *See* UCCJEA prefatory note, 9 pt. 1A U.L.A. at 649-51. Most states have adopted the UCCJEA in order to reduce conflicting orders regarding custody and placement of children.

Both Montana and Washington have adopted the UCCJEA, making the act the exclusive basis to determine jurisdiction of this interstate child custody dispute. RCW 26.27.201(2); Mont. Code Ann. § 40-7-201(2). The UCCJEA determines when one state may modify an “initial child custody determination” made by another state. RCW 26.27.201(1), .221. Under the UCCJEA, a Washington court may modify Montana’s initial child custody determination only if either Montana declines jurisdiction or all parties have left that state. RCW 26.27.221.

The UCCJEA provides, in pertinent part:

Except as otherwise provided in RCW 26.27.231, a court of this

⁴ The National Conference of Commissioners on Uniform State Laws is made up of lawyers, judges, legislators, and law school professors appointed by each state. 9 U.L.A. III (1999). The conference works through standing and special committees that draft and consider proposed uniform legislation. *Id.*

state may 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 determination under RCW 26.27.201(1)(a) or (b) and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under RCW 26.27.211 or that a court of this state would be a more convenient forum under RCW 26.27.261; or

(2) A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

RCW 26.27.221.

In essence, the UCCJEA provides that unless all of the parties and the child no longer live in the state that made the initial determination sought to be modified, that state must first decide it does not have jurisdiction or decline jurisdiction. *See id.* Montana has jurisdiction over this dispute because Montana made the initial child custody determination regarding A.C.; the Nagels are persons acting as parents under the act who still reside in Montana; and Montana has not declined jurisdiction. RCW 26.27.221.

The Nagels argue that there is no current Montana custody decree in effect so there is no initial determination to be modified. But the definitions of the UCCJEA are quite broad. The definition of "child custody determination" includes "a judgment, decree, parenting plan, or other order of the court providing for the legal custody, physical custody, or visitation with respect to a child," and includes even temporary orders. RCW 26.27.021(3). Most recently, the Montana district court dismissed the termination case and ended the State's temporary protective custody of A.C.⁵ This order returned

custody to Cork and, therefore, meets the definition of an initial child custody determination. The statutory definition of modification is similarly broad and includes any child custody determination that “changes, replaces, supersedes, *or is otherwise made after* a previous determination concerning the same child.” RCW 26.27.021(11) (emphasis added). Since the trial court’s action in this case occurred after Montana’s prior determination concerning custody of A.C., it was a modification of Montana’s initial determination.

The Nagels also argue that they are not persons acting as parents and thus all relevant parties have left Montana. But a “person acting as a parent” is defined as a person other than a parent who (1) had physical custody of the child for a period of six consecutive months within one year before the commencement of the proceeding and (2) claims a right to legal custody under Washington law. RCW 26.27.021(13). In the year before this action began, the Nagels had custody of A.C. from October 29, 2001 until May 15, 2002, over six months.⁶ In addition, by filing a petition for nonparental custody, they have claimed a legal right to custody under Washington law. *Accord S.B. v. State*, 61 P.3d 6, 13 (Alaska 2002) (nonparent petitioning for custody based on detriment to child is person acting as parent under UCCJEA). The Nagels are persons acting as parents under the act.

The Court of Appeals concluded that Montana did not have continuing

⁵ Contrary to the suggestion by the concurrence, we express no opinion regarding the merits of the decision of the Montana Supreme Court to return A.C. to Cork’s custody.

⁶ The Nagels do not dispute that they had physical custody of A.C. for six consecutive months prior to the commencement of these proceedings. Resp’ts’ Suppl. Br. at 6.

jurisdiction, but it is Montana's courts which must make this determination. RCW 26.27.221(1). Presumably responding to Cork's argument relying on federal law, the Court of Appeals concluded Montana did not have continuing jurisdiction under the federal Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. § 1738A(d) and a Washington Court of Appeals case interpreting that law, *In re Marriage of Murphy*, 90 Wn. App. 488, 496, 952 P.2d 624 (1998). But the UCCJEA, which Washington adopted in 2001, was partially designed to end the confusion created by the interplay of the PKPA and the former uniform statute, the Uniform Child Custody Jurisdiction Act. UCCJEA prefatory note 9 pt. 1A U.L.A. at 650-51. Our conclusion rests not on the PKPA but on current controlling Washington law, which states that "a court of this state *may not* modify a child custody determination made by a court of another state *unless . . . (1) [t]he court of the other state determines it no longer has exclusive, continuing jurisdiction . . . or that a court of this state would be a more convenient forum.*" RCW 26.27.221 (emphasis added). As Montana has also adopted this provision of the UCCJEA, under both Washington and Montana law, the Nagels must petition Montana and obtain an order that Montana has declined jurisdiction before Washington courts have jurisdiction to modify Montana's custody order.⁷

⁷ The comment to the UCCJEA also states that a party seeking to modify a custody determination must obtain an order from the original state stating that it no longer has jurisdiction. UCCJEA § 202 cmt., 9 pt. 1A U.L.A. at 674. Even when the original state continues to have jurisdiction, it may decline to exercise that jurisdiction if it determines that another state is a more convenient forum and in a better position to make a custody determination. RCW 26.27.261; UCCJEA § 207 cmt., 9 pt. 1A U.L.A. at 683. A court

Finally, the Nagels contend that Cork waived any jurisdictional arguments. The Nagels cite RCW 26.27.061, which states, “A child custody determination made by a court of this state *that had jurisdiction under this chapter* binds all persons . . . who have submitted to the jurisdiction of the court.” (Emphasis added.) Because the superior court did not have jurisdiction to modify Montana’s custody determination under chapter 26.27 RCW, this provision does not apply.⁸

CONCLUSION

Child custody cases are often disturbing. We are concerned both for parents who wish to raise their children free from interference and for the welfare of the children who are often bounced from one custodial situation to another. We regret the delay that these proceedings may have had on A.C.’s custody determination; but until Montana has divested itself of jurisdiction over A.C., issues concerning A.C.’s custody are properly for Montana, not Washington, to decide. We reverse and remand to the superior court with instructions to dismiss for want of subject matter jurisdiction consistent with this opinion. Either party may seek a brief stay in order to resolve temporary placement of A.C. while any other issues are resolved.

that declines jurisdiction under section 207 should do so only after considering all relevant factors. *Id.*

⁸ We also note that to permit waiver of the jurisdictional provisions of the UCCJEA would undermine the goals of avoiding conflicting proceedings. *Cf.* UCCJEA § 201 cmt., 9 pt. 1A U.L.A. at 673 (an agreement to confer jurisdiction under the UCCJEA statute is not effective).

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AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Barbara A. Madsen

Justice Debra L. Stephens
