

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000050-MR

WILLIAM PAUL CASH

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 00-CI-00403

SUN CHA CASH

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: EMBERTON, Chief Judge; BARBER and COMBS, Judges.

COMBS, JUDGE. William Paul Cash appeals from the order of the Oldham Circuit Court which dismissed this action to determine child custody for lack of subject matter jurisdiction. At issue is the custody of the parties' youngest son, Daniel Cash. We vacate and remand for further proceedings.

William and Sun Cha Cash were married in Florida in 1983, and they moved to Kentucky in 1995. When they separated in 1999, the Cashes had three sons: Neil (fifteen years of age), Kenny (thirteen years of age), and Daniel, (nine years of

age). At the time of the separation, Sun Cha and Daniel moved to Oregon, where they resided with Sun Cha's relatives. William remained in Kentucky with his sons, Neil and Kenny.

On August 11, 2000, William filed a petition for the dissolution of the parties' marriage in the Oldham Circuit Court. He sought custody of all three minor children. Sun Cha responded that she should be awarded the sole custody of the children. Prior to the hearing to determine custody, scheduled for July 2001, Sun Cha moved for a continuance. In her affidavit,¹ she stated that she and Daniel resided in Oregon and that Daniel would be graduating from elementary school in June. She continued as follows:

I intend to relocate to Louisville, Kentucky, following Daniel's graduation on June 27, 2001. Through family members and friends, who reside in Louisville, Kentucky, I have arranged an apartment in Middletown, Kentucky, where I plan to live upon my arrival.

Sun Cha's attorney also filed an affidavit in support of the motion for a continuance in which he made the following representation to the trial court:

[I]t has come to my attention that [Sun Cha] instead of living in Oregon is going to return to Kentucky with the youngest child of the marriage sometime around middle or late June. (Page 3, Appellant's brief)

¹This affidavit is incorrectly cited as appearing at Tab 5 to the Appendix to Appellant's brief. Instead, it is contained in the text of that brief at page 3.

At Sun Cha's request, the hearing was continued until August. In June 2001, Sun Cha returned to Kentucky and signed a one-year lease on an apartment in Jefferson County. In August, she enrolled Daniel in school in Jefferson County.

The Domestic Relations Commissioner (the DRC) conducted a hearing on the custody issue on August 27, 2001.² Prior to the hearing, the parties had resolved many of the issues arising from their marital relationship -- including an agreement that William would have custody of Neil and Kenny. Although the parties agreed to joint legal custody of Daniel, they could not agree as to which one would serve the primary care custodian with whom Daniel would reside during the school year.

After interviewing Daniel in the presence of his court-appointed guardian *ad litem*, the DRC heard the evidence presented by the parties. William testified that Sun Cha had interfered with his efforts to visit with Daniel and that he believed that he and Daniel's brothers were losing any connection with Daniel. Sun Cha testified that Daniel did not like going to school in Kentucky and that he wanted to return to Oregon. She further testified that it was also her desire to return to Oregon, where she could find employment in a business

²On the same date as the Commissioner's hearing, the Circuit Court issued an order that prohibited Sun Cha from removing Daniel from Kentucky.

owned by members of her family. However, she also stated that the final outcome as to her residence would depend upon the resolution of the custody dispute in the Oldham Circuit Court.

The DRC recommended that the parties share custody of Daniel. While acknowledging Daniel's expressed desire to remain with his mother, the DRC nonetheless recommended that the child reside primarily with William during the school year, finding that such an arrangement would give Daniel "the ability to continue to interact and strengthen his relationship with his other siblings." That recommendation was bolstered by concerns expressed by Daniel's guardian *ad litem* that Sun Cha had allowed Daniel to "call the shots" while in her care.

Sun Cha filed exceptions to the Commissioner's report and for the first time alleged that the Oldham Circuit Court lacked subject matter jurisdiction over the dispute. She also cited the alleged failure of the DRC to consider Daniel's wishes regarding custody. She alleged that she had returned to Kentucky only out of fear that she would otherwise lose custody of all three children and that she had never intended to make Kentucky her permanent residence. William responded that Kentucky had the more significant contacts with Daniel and his care, arguing that the Commissioner had appropriately taken jurisdiction over the matter.

In the order from which William has appealed, the trial court determined that it lacked subject matter jurisdiction to determine the proper custodian of Daniel:

The Court disagrees that there are maximum contacts between [Daniel] and the state of Kentucky. The child has been gone for a period of two (2) years living with his mother in Oregon and returning once briefly [in December 1999]. The mother has had some contact with the two oldest boys that have gone to visit her in Oregon, and William has had similar sporadic contact with Daniel.

All relevant evidence pertaining to the mother's ability to care for Daniel, Daniel's performance in school, Daniel's home life in Oregon, witnesses including his aunt and uncle with whom Daniel lives in Oregon, and any pertinent medical records, are all located in Oregon. While it is true that Daniel did reside in Kentucky up until 1999, the court finds that those contacts are more remote, and the contacts established in the last two years are much more relevant to a determination of the child's custody.

As such, this court finds that it no longer has subject matter jurisdiction over the issue of custody pertaining to the parties' youngest child, Daniel, and that the issue should be heard before the appropriate court in Daniel's home state of Oregon.

In his appeal, William argues that the trial court erred in concluding that it did not have subject matter jurisdiction to preside over and to resolve the issue of Daniel's custody. We agree. Jurisdiction to entertain matters

involving interstate custody disputes is set forth in KRS³
403.420 (Kentucky's version of the Uniform Child Custody
Jurisdiction Act (UCCJA)), as follows:

- (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
 - (a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from the state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
 - (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 this child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

³ Kentucky Revised Statutes.

- (d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

There is no dispute that Sun Cha and Daniel had been living in Oregon for one year when the petition for dissolution was filed in Kentucky and that Oregon was Daniel's home state under the UCCJA. However, Sun Cha and Daniel had moved back to Kentucky and purported to re-establish residency in Kentucky prior to the Commissioner's hearing. Therefore, the dispute ceased to be an interstate contest, a fact that removed the matter the scope of the UCCJA with respect to the issue of jurisdiction:

[T]he UCCJA is not the only doctrinal basis for the power of circuit courts to decide child custody cases. When the custody dispute is wholly intrastate, the issue is not jurisdiction, it is venue. In such circumstances, any circuit court in Kentucky possesses jurisdiction to decide the case; the only question is which of Kentucky's 120 circuit courts is the appropriate venue. (Emphasis added.)

Pettit v. Raikes, Ky., 858 S.W.2d 171, 172 (1993). Thus, while subject matter jurisdiction may not be waived or even cured by consent of the parties (Gullett v. Gullett, Ky.App., 992 S.W.2d

866 (1999)), it can be rendered moot and eliminated by a change in the residency that eliminates any interstate tug of war.

See, Dillard v. Dillard, Ky.App., 859 S.W.2d 134 (1993).

In ruling that Kentucky lacked subject matter jurisdiction to determine custody in this case, the trial court impliedly found that Sun Cha and Daniel continued to reside in Oregon. In her exceptions to the Commissioner's report, Sun Cha had alleged that Daniel was an "unwilling resident" of Kentucky and that she had returned to this state only after her attorney advised her that she would suffer adverse consequences if she did not do so. However, despite these contentions, the record indicates clear contradictions and supports her expressions of a clear intent to reside in Kentucky.

Sun Cha had declared by affidavit that she intended to relocate to Kentucky. Accordingly, she moved back to Kentucky, signed a one-year lease for an apartment, and enrolled Daniel in school. Later, at the hearing, she testified that she wanted to return to Oregon. However, her testimony was equivocal as she also indicated that she had not made a final decision with respect to her future place of residence. It is a fact that Sun Cha challenged Kentucky's jurisdiction and changed her position as to her intended future residence only after she lost her bid for custody of Daniel. It is also a fact that the UCCJA was designed to prevent that kind of forum shopping. We cannot

agree with the implied finding of the court that Sun Cha and Daniel continued to be residents of Oregon. Therefore, the provisions of the UCCJA were not implicated in the parties' dispute.

Even if we were to apply UCCJA to this matter, we would find no error in the exercise of jurisdiction by the DRC. The Commissioner's hearing occurred at a time when neither of the parents nor their children had any apparent significant connection with Oregon. There was no pending litigation in Oregon; in fact, the jurisdiction of the Oregon courts had never been invoked. Daniel was not merely physically present in Kentucky; rather, he had been living here for two months and had been enrolled in school here. Furthermore, the parties had lived in Kentucky as a family in the not-too-distant past. Daniel's father and siblings had lived here continuously since 1995 (four years prior to his parents' separation in 1999) and from 1999 to the present. Thus, numerous and significant contacts concerning Daniel's custody did exist in Kentucky. KRS 403.420(1)(b).

It is true that Daniel had not been in Kentucky for six months prior to the Commissioner's hearing. Under that criterion, Oregon was technically Daniel's home state as defined by the UCCJA. However, after Sun Cha left Oregon and moved to Kentucky with Daniel, Oregon no longer had any contact or

interest in the outcome of the matter. Thus, Kentucky was the proper jurisdiction under the default provision in the UCCJA:

It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction. KRS 403.420(1)(d).

No other state -- including Oregon -- was in a position to exercise jurisdiction to decide this critical issue, and under the facts of this case, we believe that it was in the best interest of Daniel to do so. KRS 403.420(1)(d).

Accordingly, whether we analyze this case under the UCCJA or the general jurisdiction of our circuit courts, we hold that the Oldham Circuit Court erred in concluding that it lacked subject matter jurisdiction to entertain this matter and in declining to make a custody determination. Thus, the judgment is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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