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# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2004-CA-002323-MR

CINCINNATI INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 03-CI-00065

DAMON OSBORNE;
AND DALLAS OSBORNE, A MINOR — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

KNOPF, JUDGE: Cincinnati Insurance Company appeals from a declaratory judgment by the Daviess Circuit Court finding that a minor child is a resident of the households of both separated parents for purposes of underinsured motorist (UIM) coverage. Cincinnati Insurance asserts that the undisputed facts of the case would preclude a finding that the child is a resident of his father's household. In the alternative, Cincinnati Insurance

argues that the issue of the child's residence is a genuine issue of material fact which precluded summary judgment. Because we agree with Cincinnati Insurance on the latter argument, we reverse the trial court's summary judgment and remand for additional proceedings.

Angela Yeckering and Damon Osborne are the parents of Dallas Osborne, a minor. Yeckering and Osborne were never married, but they were living together at the time of Dallas's birth. After they separated, Yeckering brought a paternity action against Osborne in district court. Once paternity was established, the district court awarded joint custody of Dallas, designated Yeckering the child's residential custodian, granted Osborne reasonable visitation, and ordered Osborne to pay child support.

On February 25, 2001, Yeckering was involved in a motor vehicle accident. Dallas was a passenger in the vehicle and suffered injuries as a result of the accident. Yeckering, on Dallas's behalf, filed a claim for UIM benefits under a business auto policy issued by Cincinnati Insurance Company to "Damon T. Osborne d/b/a Osborne Masonry." Thereafter, Cincinnati Insurance filed a complaint for a declaration of rights requesting a finding whether Dallas is an insured under its policy with Osborne.

After the depositions of Yeckering and Osborne were filed in the record, both parties moved for summary judgment. In an order entered October 18, 2004, the trial court found that Dallas is covered under the policy. Cincinnati Insurance now appeals.

The issue of coverage in this case turns on the definition of "insured" in the Cincinnati Insurance policy. In relevant part, the UIM provision of the insurance policy defines "insured" to include "family members" of the named insured. The term "family member" is further defined to mean:

> a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

Cincinnati Insurance notes that there is no dispute concerning the underlying facts. Although Yeckering and Osborne have joint legal custody, Yeckering is designated as the child's residential custodian. Pursuant to the custody order, Osborne has parenting time with Dallas every other weekend. In his deposition, Osborne testified that he would usually spend those weekends with Dallas at the home of Osborne's parents, rather than at Osborne's condominium. Consequently, Cincinnati Insurance asserts that, as a matter of law, Dallas is not a resident of Osborne's household. In the alternative, Cincinnati Insurance argues that the issue of Dallas's residence is a question of fact and was not appropriate for summary judgment.

Yeckering responds that the parties' joint custody of Dallas, combined with Osborne's regular support of and visitation with the child, are sufficient to warrant a finding that Dallas is a resident of both households.

This specific issue has never been addressed by a Kentucky court. In Perry v. Motorists Mutual Insurance Co.,[1] the Kentucky Supreme Court discussed the issue of residency for purposes of UIM coverage. In Perry, the father of a daughter who died in automobile accident twelve hours after her wedding filed suit for underinsured motorist benefits against his insurer. The parties agreed that the daughter had not lived in her father's house for several weeks prior to the wedding, but she still kept most of her belongings there. Furthermore, the newlyweds' living arrangements had not been settled at the time of their deaths. The UIM carrier argued that, as a matter of law, the daughter could not be considered a resident of her father's household. The Kentucky Supreme Court disagreed, holding:

> Residency and intent are questions of fact and not of law where the evidence supports more than one inference upon which reasonable minds may differ. Therefore, this case was properly submitted to the jury on the question of whether the deceased was a resident of her father's house. Under the facts of this case, the intent of the

[1] 860 S.W.2d 762 (Ky. 1993).

> decedent was primary in determining her residence. Where different inferences can be drawn from undisputed facts, intent is a question of fact and not of law.
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> Legal residency is based on fact and intention. . . . As to what is or was one's residence often presents difficult questions and each case must be disposed of on its own peculiar facts. . . . Kentucky case law has previously defined residence as a factual place of abode or living in a particular locality. . . . Whether a new residence has been acquired or an old residence abandoned is dependent on the totality of all facts and circumstances. . . . Several other jurisdictions favor the role of the jury and not the bench to determine residency. . . . [2]

In Perry, the issue of residence turned on the intent of the daughter, who was an adult at the time of her death.[3] The residence of a minor whose parents have joint custody is a more difficult question. In Fenwick v. Fenwick,[4] the Kentucky Supreme Court noted that a "child cannot simultaneously reside with both

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[2] Id. at 764 (*citations and internal quotations omitted*).

[3] *See also* James v. James, 25 S.W.3d 110 (Ky. 2000) In James, the driver, the named insured's son-in-law, stayed with his in-laws three to five nights a week, but also maintained a separate residence pending the sale of that house. The Supreme Court affirmed the jury's finding that the driver did not reside with the named insured, even though he planned to permanently reside with his in-laws after the house was sold. The Court concluded that the driver's present conduct, not his intention for the future, controlled the issue of residency. Id. at 115. Curiously, the Court's opinion in James does not cite Perry in reaching this conclusion.

[4] 114 S.W.3d 767 (Ky. 2003).

parents, and in most cases, the child will spend more time with one parent than the other."[5] However, the Supreme Court was discussing the nature of joint custody and the general necessity for designating a primary residential custodian, and we do not believe that the Court intended for this language to have broader implications for the question of insurance coverage.

The general rule in other jurisdictions is that a child of divorced parents can be a resident of two separate households for purposes of insurance coverage, particularly in cases involving joint custody.[6] Like the Kentucky Supreme Court in Perry, most jurisdictions look to the facts of the particular case, but recognize that a child of divorced parents who has regular visitation with a non-custodial parent is a resident of both households for purposes of the UIM coverage.

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[5] Id. at 778.

[6] *See* Carolyn Kelly MacWilliam, Annotation, Who is a "Member" or "Resident" of same "Family" or "Household," within No-Fault or Uninsured Motorist Provisions of Motor Vehicle Insurance Policy, 66 A.L.R.5th 269 (1999 & 2004 Supp.). *See also* Walbro Corp. v. Amerisure Companies, 133 F.3d 961, 969-70 (6th Cir. 1998) (discussing cases). *Contra* Amica Mutual Insurance Co. v. Donegal Mutual Insurance Co., 376 Pa.Super. 109, 545 A.2d 343 (1988); and Griffith v. Security Insurance Co. of Hartford, 167 Conn. 450, 356 A.2d 94 (1975). *See also* B.D.B. v. State Farm Mutual Automobile Insurance Co., 814 So.2d 877 (Ala. Civ. App. 2001); Carbon v. Allstate Insurance Co. 719 So.2d 437 (La. 1998); strictly applying policy provisions requiring a child's physical presence in the insured parent's household.

However, the other jurisdictions which have considered this issue have set out varying standards for determining the ultimate issue of fact. Mississippi has adopted a blanket rule that a minor child qualifies as a 'resident' in both households of divorced parents, even if the named insured has no custody over the child.[7] Some courts do not impose a blanket rule, but nonetheless hold that a minor child of divorced parents who has regular visitation with a non-custodial parent is a resident of both households for purposes of UIM coverage.[8] Several courts base the factual determination on the totality of the circumstances involving the child's custody and living arrangements.[9] And yet other courts focus on the intention of the parties, physical presence, and permanency of abode in each case.[10]

In Perry, the Kentucky Supreme Court noted that, where the facts are conflicting, the issue of residence is a mixed

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[7] Aetna Casualty and Surety Co. v. Williams, 623 So.2d 1005, 1009 (Miss. 1993).

[8] Dusharm v. Nationwide Insurance Co., 92 F. Supp.2d 353 (D.Vt. 2000). (child had regular visitation with non-custodial parent).

[9] Countryside Casualty Co. v. McCormick, 722 S.W.2d 655, 658 (Mo.Ct.App. 1987). *See also* Garrison v. Travelers Insurance Co., 261 N.J.Super. 209, 618 A.2d 387 (Law Div. 1992).

[10] *See* Coriasco v. Hutchcraft, 245 Ill.App.3d 969, 185 Ill.Dec. 769, 771, 615 N.E.2d 64, 66 (Ill. App. 5th Distr. 1993). *See also* American Family Mutual Insurance Co. v. Thiem, 503 N.W.2d 789, 790 (Minn. 1993).

question of law and fact but when the facts are settled, it is a question of law. "So far as it involves questions of fact, including the ascertainment of the intention of the party, it is a question for the jury and its determination is conclusive unless clearly against the weight of the evidence."[11] At the same time, we recognize that, given today's society, more and more children are raised in separate households and thus, more and more children, in certain justified factual situations, will need to be provided protection through insurance benefits.[12] Furthermore, there are strong public policy grounds for recognizing that a child may be a resident of both households for purposes of insurance coverage.[13] Finally, Kentucky has consistently recognized that a policy of insurance should be construed liberally in favor of the insured, and, if there is doubt or uncertainty as to its meaning and it is susceptible to

[11] Perry, *supra* at 765.

[12] Garrison v. Traveler's Ins. Co., *supra* at 389.

[13] *See* Aetna Casualty and Surety Co. v. Williams, *supra*, and Tokley v. State Farm Insurance Cos., 782 F. Supp. 1375, 1381 (D.S.D. 1992), recognizing that the dual residency rule serves several purposes. First, the rule furthers the statutory obligation of both parents to support the child. Furthermore, the rule recognizes that the non-custodial parent is often in a better financial position to maintain insurance on the minor children. Thus, to thwart the non-custodial parent's ability to provide insurance for his children and recover under any policies he holds could serve not only to limit the protection available to the child, but also adversely impact the custodial parent. Williams, *supra* at 1011; Tokley, *supra* at 1381.

two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted.[14]

Therefore, we conclude that a child of separated parents may be a resident of both households, depending upon the facts of the particular case. In making this determination, the finder of fact should look to the following factors set out in Countryside Casualty Co. v. McCormick:[15] (1) the age of the child at the time of the accident, (the younger the child the greater the chances that it will be a resident of both households); (2) whether the parent had reasonable visitation rights; (3) whether the parent was current with child support; (4) whether the parent and the child have a good relationship; and (5) whether the child had a bedroom or separate wardrobe at the non-custodial parent's house. These factors should be considered in the aggregate in order to justify the awarding of insurance benefits.[16]

Using this standard, we believe that the facts of the current case would justify a finding that Dallas is a resident of Osborne's household. Dallas was only six-years old at the time of the accident; Osborne has joint custody of the child with

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[14] St. Paul Fire & Marine Insurance Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 227 (Ky. 1994).

[15] *Supra.*

[16] Id. at 658.

Yeckering; Osborne apparently is current with his child support and exercises regular parenting time with Dallas. On the other hand, at the time of the accident Osborne usually exercised his parenting time with Dallas at his parents' household.[17] Dallas keeps a change of clothes and some toys at Osborne's condominium, but does not have a full wardrobe there.

While these latter facts would not preclude a finding that Dallas is a resident of Osborne's household, they are sufficient to present a genuine issue of material fact concerning the child's residence. Consequently, we agree with Cincinnati Insurance that the trial court erred by granting summary judgment on the issue of coverage.[18] On remand, the issue of Dallas's residence must be submitted to the trier of fact.

Accordingly, the summary judgment granted by the Daviess Circuit Court is reversed and this matter is remanded for additional proceedings as set forth in this opinion.

COMBS, CHIEF JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

BUCKINGHAM, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I agree with the majority that the summary judgment

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[17] In his deposition, Osborne testified that since the accident, he and Dallas spend about half their time at the condominium.

[18] CR 56.03. *See also* Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

determining that Dallas Osborne was a resident of the household of Damon Osborne was error and should be reversed. However, rather than remanding the case to the circuit court for a factual determination, I would remand for the entry of a summary judgment in favor of Cincinnati Insurance.

Under the joint custody order, Damon has parenting time with Dallas every other weekend. Damon testified that he would usually spend those weekends with Dallas at the home of his parents rather than at his condominium.

In Kentucky Farm Bureau Mut. Ins. Co. v. Gray, 814 S.W.2d 928 (Ky.App. 1991), this court held that "[i]n Kentucky, the term 'household' has, for insurance purposes, been generally defined as 'persons dwelling together as a family under the same roof.'" Id. at 929, citing Hanover Ins. Co. v. Napier, 641 S.W.2d 47 (Ky.App. 1982). Under these circumstances, I conclude that there was no genuine issue as to any material fact and that, as a matter of law, Dallas was not a resident of Damon's household.

In my opinion the circuit court should have awarded summary judgment to Cincinnati Insurance. Thus, I concur in part and respectfully dissent in part.

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