

RENDERED: OCTOBER 17, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000283-ME

HUONG LUU

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 13-CI-00216

SHELLEY MURPHY AND
VICKIE BURCHAM

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Huong Luu has appealed from the orders of the Boyd Circuit Court that ultimately awarded custody of her daughter to Shelley Murphy and Vickie Burcham (collectively, “the appellees”), who had earlier been designated as *de facto* custodians. Luu contends that the circuit court did not have jurisdiction in this case, that the appellees were not the child’s *de facto* custodians,

that the appellees should not have been granted custody of the child, and that her visitation should not have been restricted. We have carefully considered the record and the parties' respective arguments, and we hold that the circuit court improperly determined that it had jurisdiction. Therefore, we must reverse the orders on appeal.

Luu is a Vietnamese immigrant who has lived in the United States for approximately eight years. Luu is the biological mother of Stella Nguyen, who was born on December 11, 2011, in the state of Oregon. Jimmy Nguyen is the child's father, and he is not a party to the present appeal. Luu and Nguyen were never married. Luu had been living in West Virginia and moved to Oregon while she was pregnant. After the birth, Luu moved to Florida for several months, leaving the child with relatives in Oregon. Luu moved back to West Virginia in April 2012, taking the child with her. She worked for a nail salon in Barboursville, West Virginia, and she would take the child with her to work. Luu worked with a person named Chelsea Tackett. Ms. Tackett knew the appellees, and in early August 2012, she introduced the appellees to Luu when they traveled from their home in Ashland, Kentucky, twenty-five miles away to meet the child. Ms. Tackett did not believe that the child should be kept at the nail salon. At that point, the appellees began watching the child while Luu was at work. This included having the child spend the night with the appellees. While they had the child in their care, the appellees and Luu would maintain communication through text and Facebook messages. In November 2012, Luu completed paperwork to give the

appellees guardianship over the child while she moved to Florida to work and take a course in permanent makeup. Luu remained in Florida for a period of time until she ran out of money. She left Florida and moved to Indiana in December 2012, where she stayed with relatives. Luu went on vacation with the child and the appellees in January 2013. In late January, Luu returned to West Virginia and sought to retrieve her child, but the appellees refused to return her. Luu filed a motion to set aside the guardianship order on March 8, 2013.

The present action began when the appellees filed a petition for custody in Boyd Circuit Court on March 4, 2013, naming Luu and Nguyen as respondents. In the petition, the appellees stated that the child had lived with them at their home in Ashland since August 1, 2012, and that they had guardianship of her pursuant to a November 9, 2012, order of the Boyd District Court.¹ They claimed to be the child's *de facto* custodians pursuant to Kentucky Revised Statutes (KRS) 403.270(1) because she had lived with them since August 2012 and they had provided the primary support and care for the child. They also asserted that they were the fit and proper persons to be awarded custody. Luu and Nguyen were served via a warning order attorney.

In addition to the petition, the appellees filed an *ex parte* motion seeking emergency custody of the child. In an attached affidavit, Murphy stated that Luu essentially gave the child to them after meeting at a nail salon on August 1, 2012; that Luu agreed to grant them guardianship in November 2012 when she

¹ The November 9, 2012, order of appointment ordered the appellees to provide for the child's medical, education, and safety needs.

relocated to Florida to attend a tattoo school and also gave them the child's information, including her birth certificate; that Luu then moved to Indiana before returning to West Virginia; that Luu wanted to take the child with her to West Virginia because her friends and family were not happy that she was not raising the child; that Luu had had little to no contact with the child since August 2012; and that the child had been neglected, had developmental delays, was not up to date on her immunizations, was in therapy, and was gaining weight in their care. The court granted the emergency motion for custody the day the petition and motion were filed and set the matter for a status conference on March 21, 2013.

In an order entered March 28, 2013, the circuit court indicated that the matter came before it on March 21, 2013, for a status conference, when the appellees appeared, but Luu did not. The court stated that Luu had appeared before the Boyd District Court on March 14, 2013, related to a guardianship case involving the child and was notified of the present action at that time. On April 5, 2013, the appellees filed a motion to request that the court contact the Mingo County Family Court in West Virginia pursuant to KRS 403.816, stating that Murphy had been served with a court action involving custody of the child, Civil Action No. 13-D-138, filed on March 21, 2013. On May 3, 2013, the court set the matter for a hearing on the issue of jurisdiction.

On May 6, 2013, Luu filed a *pro se* response to the petition for custody only for the purposes of objecting to jurisdiction and to move to dismiss the action. In her response, Luu stated that she was a resident of West Virginia;

that she had never lived in Kentucky or given permission for her child to live in Kentucky or with any other caretaker; that she had made a temporary arrangement with the appellees to watch the child while she worked and went to Florida for school; that she had hired the appellees to babysit for the child, paying them with cash and gift cards; that she kept in contact with the appellees throughout the relevant time; that statements in Murphy's affidavit were false; that she had no notice of the guardianship proceedings; that the appellees refused to let her retrieve the child when she attempted to do so in January; and that she had never been served with any pleading filed with the circuit court.

Two weeks prior to the scheduled hearing, Chelsea Tackett testified by deposition. Ms. Tackett worked with Luu at the nail salon, and she introduced her to the appellees at the beginning of August 2012. The first day, the appellees took the child with them to babysit. The appellees continued to watch the child in Kentucky, where they lived, while Luu worked. Ms. Tackett testified that since August 2012 she had only seen the child at the salon with Luu a handful of times. She stated that the child's biological father had not been a part of her life. Before the appellees began watching her, Luu would keep the child in the back room of the salon. Luu or one of the other employees would feed her. Ms. Tackett was concerned with the child staying in the back room of the salon while Luu worked. She stated that the child had lived with the appellees since August 2012.

On May 30, 2013, the parties appeared at the hearing, and Luu was the first witness to testify. She was currently living in Williamson, West Virginia,

with her boyfriend. Luu had moved to the United States in 2006. She lived and went to school in Portland for one year prior to moving to West Virginia. Luu is married, and her husband lives in California. Her husband is not the father of her daughter, who was born in December 2011 in Portland, Oregon. She said she and the child's father broke up when she was six months' pregnant, and she moved to Oregon to stay with family. She went to Florida for two months after the child was born. Her aunt took care of the baby while she went back to work in Florida. In April 2012, Luu went back to Oregon to get the child and took her to West Virginia after she left Florida. She and the child lived with her boss, his wife, and their baby in Barboursville, West Virginia. Luu moved to Florida in November 2012 to attend school and to work part time. She moved to Portage, Indiana, several weeks later when she could not find a job in Florida. She is licensed in West Virginia as a nail technician. Luu obtained a medical card for the child in West Virginia.

Luu met the appellees in August 2012. Ms. Tackett told her about the appellees, who thought the baby was cute and wanted to watch her. Luu agreed to meet them after Ms. Tackett told her that Vickie worked for her father and that they were good people. They loved kids and did not have any of their own. Luu let the appellees take the child for a few hours to a place for babies to play. In September, the appellees asked her if they could take care of the child; Luu said they could take care of her three or four days a week when she was busy working. The appellees asked her if she was going to put the child in daycare or continue

with babysitters. They told her that the government would take the baby away if Luu kept the child in the salon. Murphy told her it was dangerous to leave the child there because of the smell. Because she did not have any family in the area, the appellees offered to continue watching her. When the child came back to stay with Luu, the appellees would call and text her to tell Luu they wanted her back. Luu said she was concerned when she left for Florida that the child's father could come to get her, so she signed the guardianship documents at Murphy's house the night before she left for Florida. The child stayed in Kentucky while Luu was in Florida. Luu had always intended to return to West Virginia after she finished school; she had left her suitcase at Murphy's house and told them she would be back. Luu was unable to find a job in Florida, and it was expensive to live there. Because there was no work for her in West Virginia, she went to Indiana where a friend lived to find work. When she had earned enough money, Luu moved back to West Virginia in February 2013. Luu reported a lot of text messaging with the appellees between August and February.

Luu testified about the funds she gave to the appellees while they watched the child. When the appellees began to take care of the child six days a week, Luu told them she would pay them, but they refused. She talked to her boss about this, and she decided to give them \$200.00 gift cards from Macy's and Wal-Mart. She gave them \$200.00 in cash every two weeks. This started in September and ended when she went to Florida. When she went to Florida, she told them she was going to give them the money she made. In January 2013 when she was in

Indiana, Luu offered to give them \$1,600.00, which they refused. The appellees agreed to take \$800.00, and they all traveled to Indiana for a vacation. Luu paid for the hotel. She wrote them another check for \$1,200.00 in February, but she stopped payment on the check because they never cashed it.

In February 2013, Luu had stayed with the appellees for three days, and she told them she wanted to take the child back with her. They told her it was not fair because they had been taking care of her for almost six months. When they refused to give the child back, Luu left the house and later contacted the police. The police spoke with the appellees, who showed them the guardianship papers. The police told her she could not get the child back because of the guardianship. Luu hired an attorney in March to file documents to end the guardianship.

Shelley Murphy was the next witness to testify. She has lived in Boyd County since 2002. She met the child on August 2, 2012, through Ms. Tackett when she introduced her to Luu at the nail salon. The purpose was to meet them and take the child for the evening. She kept her overnight, and returned the child the next day. Murphy told Luu she lived in Kentucky and provided Luu with her name and phone number. She got the child back the following Monday (August 6th) and kept her for a period of time through August 11th. She began to keep track of how long the child was in her home and in West Virginia. She was in West Virginia for nine days in August, for three days in September, and for two days in October. The child had been in the appellees' care from November 2012

through March 2013. After August 13, 2012, Murphy no longer believed that she was babysitting for the child. By that time, the child had been spending much of her time in their house, and Luu was having conversations with them about raising her. Later, Murphy testified that she had let Luu know that others had reported, or were going to report, that she had been keeping the child in the back room of the salon. She went to the nail salon in August with the sole purpose to meet Luu and take the child back to Kentucky with her. She had no relationship with the child or Luu, and she had never met Luu before.

Murphy received guardianship of the child in November 2012 in Boyd District Court. Luu told her she was leaving West Virginia at the end of October to attend a makeup tattoo school that was starting in February. When they completed the guardianship documents, Luu gave her copies of the child's birth certificate and her social security card, telling her that she would need these to enroll the child in school. The child was eleven months old at the time. The guardianship documents were signed at the old courthouse before a notary, not at her house. Murphy took Luu to the airport afterwards, and she continued to communicate with Luu while she was in Florida. Luu stayed in Florida less than three weeks. Murphy let Luu know in November 2012 that she had changed the child's medical card from West Virginia to Kentucky. Luu let the appellees know via text message that she had moved to Portage, Indiana, in mid-November 2012 to live and work. Luu did not indicate how long she would be there. Luu also mentioned that she might move to Texas and Pennsylvania.

The parties started discussing the child's baptism in October 2012.

The appellees planned to baptize the child Catholic and bought a baptism gown for her. Luu told her that she did not mind if the child was baptized Catholic because the child's father was Catholic and her mother did not mind. The child was baptized on her first birthday, and Murphy sent photos to Luu.

Regarding resources, Murphy stated that Luu gave her a \$100.00 gift card for Macy's in August. Luu also wrote a \$500.00 check in November before she left for Florida, and she wrote Murphy a check for \$800.00 to pay for half of Murphy's trip to see her. She did not receive \$200.00 every two weeks.

Regarding the child's medical care, Murphy stated that she attended the September 17, 2012, doctor's appointment along with Luu and took the child back to Kentucky after the appointment.

Luu returned to the area on February 21, 2013, and Burcham picked her up from the airport. Luu stayed at the appellees' house until Sunday, February 24, 2013. Luu said she was going to Lewisburg, West Virginia. Murphy refused to let Luu take the child back to West Virginia after she told them she wanted to take the child for a month and then bring her back. Luu left, and then returned on Sunday and called the police. Murphy talked to the police and gave them the guardianship documents.

Vickie Burcham was the next witness to testify. She had been in a relationship with Murphy for seven years. She had known Ms. Tackett for five years, and Ms. Tackett had spoken with Burcham about the child a couple of times.

Ms. Tackett asked her if she and Murphy would want to meet the child because she stayed in the back of the nail salon, and she and another nail salon employee felt like they could not work because they were always taking care of the baby. The appellees had not met Luu before August 2, 2012. On that day, they met with Luu for ten or fifteen minutes before taking the child to their home in Kentucky where she stayed overnight. They stopped on the way home to get items they needed because Luu had not given them enough supplies to keep her overnight. Once they started watching her more regularly, the appellees would take the child back when Luu asked, but there were no scheduled times to do so. Prior to August 18th, she and Luu had a discussion regarding social services. This came about after a dinner her boss was attending when the group looked at pictures of the child and some of the dinner attendees expressed a plan to call social services. Burcham was concerned that if this was reported, there would be issues. She and Luu also discussed daycare.

When she left for Florida in November, Luu did not indicate when or if she would be returning to the area, or how long she wanted the appellees to keep the child. In addition to the birth certificates and social security card, Luu also provided copies of all of the child's pictures and created a baby book. The parties also discussed what type of school the child should attend; Luu preferred public school. They discussed college and started a college fund for her, using the \$500.00 check Luu gave them. Luu told her she was going to claim the child for

tax purposes in 2012 and that Burcham could do so in 2013. When Luu left for Florida, she left a suitcase of winter clothes to use if she came back.

On rebuttal, Luu testified that she gave the child's papers to the appellees when she left for Florida because they asked for them in case the child got sick due to her food allergies and they had to take her to the emergency room. Luu said she intended to come back before the child started school. She thought the appellees were just going to help her raise the child because she did not have any family members in the area. She considered them to be a second family in keeping with the Vietnamese culture. She said that she gave the appellees cash and supplies. Luu stated that the appellees had asked her to have a baby boy for them with a friend of theirs, which she refused to do.

Following the hearing, the court ordered the parties to submit case law and authority regarding jurisdiction and the calculation of time for *de facto* custodian purposes within ten days. In their filing, the appellees argued that Kentucky was the child's home state and that they were her *de facto* custodians pursuant to KRS 403.270. They stated that the child had lived with them in their home for six months prior to the filing of their petition in March and that temporary absences while the child was with Luu in West Virginia did not interrupt the six-month period. In her filing, Luu stated that the appellees provided paid babysitting services for her and that she continued to provide for the child during that time, including taking her to the doctor, providing food, clothes, and diapers, and keeping the child at work on occasion. Luu also maintained contact

via text and Facebook messages with the appellees, some of which she claimed were “thinly veiled threats” indicating that if she did not return the child to their care, the child would be taken by social services. Luu admitted that she voluntarily left the child with the appellees from November 2, 2012, until February 2013, when she went to Florida to further her education. However, the appellees refused to let her take the child back when she returned home. Luu contended that both she and the child were residents of West Virginia and that the child was staying with the appellees only on a temporary basis, meaning that the six-month requirement had not been met. Luu also suggested that the court should decline jurisdiction pursuant to KRS 403.836 based upon the appellees’ unjustifiable conduct.

The certified record includes pleadings and documents from the action Luu filed in West Virginia, including the May 17, 2013, order ruling that West Virginia was the child’s home state and that it was the appropriate forum to determine custody. The West Virginia family court determined that the child was a resident of West Virginia from April 2012 until the Kentucky court entered an emergency custody order in March 2013, that Murphy had not acted in good faith and had taken advantage of Luu’s unfamiliarity with the American legal system, that the child was in Kentucky for childcare purposes, that Luu never intended Murphy to be anything more than a caregiver for the child, that Luu was acting as the child’s parent while she was in Murphy’s care, and that it had communicated with the Boyd Circuit Court.

On July 26, 2013, the Boyd Circuit Court entered its findings of fact, conclusions of law, and order, concluding that pursuant to clear and convincing evidence, the child had lived with Luu in West Virginia for less than six months, from April 2012 through August 2012, meaning that her home state remained Oregon. The court then found that the child had lived with the appellees in Kentucky for more than six months, from August 30, 2012, to March 21, 2013, and that appellees were her primary caregivers and financial supporters during that time. Therefore, the court concluded that Kentucky was now the child's home state and that the appellees qualified as *de facto* custodians. Luu filed a notice of appeal from the circuit court's ruling, which was later dismissed as interlocutory. By later order, the court referred the matter to the Domestic Relations Commissioner for a hearing.

The DRC held a hearing on the issue of custody on November 5, 2013. Luu testified through an interpreter that she had been living in St. Albans, West Virginia, for the last four or five weeks. Prior to that, she had lived in Williamson, West Virginia. She had not worked for the last two or three months due to stress. She was currently living with her boyfriend, Daniel Reynolds, who owned a nail salon. She was still married to her husband who lived in California. Luu stated that the child was allergic to eggs, milk, green beans, and crab meat, and that she had taken her to the emergency room the previous July before meeting the appellees. She did not know how to drive or have a driver's license. She looked to her family for financial support, which was a normal part of her family's

and Vietnamese culture. Her oldest sister was planning to fly in from Florida that day. Her sister told her that they could not let the appellees care for the child because they were not blood relatives. Luu was going to continue to live in West Virginia. Luu stated that the child had a room at the house she was living in, and she had purchased a bed and clothes for her. She was currently seeing the child for two hours each Sunday.

Jimmy Nguyen, the child's father, testified next. He was living in Louisville, Kentucky. He had never seen the child or provided any financial support for her. He said Luu moved around all the time and changed her telephone number. He wanted to get a paternity test to see if he was the child's father. If she was his child, he wanted to raise and support her.

Murphy was the next witness to testify. She described her daily routine with the child, which included dealing with the child's food-related and medical issues. Murphy also described visitations with Luu. She expressed concerns related to Luu's ability to care for the child, including her medical needs and food allergies. She was also concerned with Luu's instability because Luu had moved to multiple places, and Luu told her that her boyfriend bought drugs off the street. She had never seen Nguyen prior to that day, and he had never contacted them.

Burcham testified next. She said that the child had lived in their home since August 2012. She worked during the day, and watched the child in the evening. She described their routines, including taking her to dance class on

Tuesday nights and walking in the neighborhood. She and Murphy purchased all of the child's necessities, including clothing and diapers, although Luu had purchased some clothing recently. The father had never purchased anything for the child. She denied receiving any cash from Luu, but she had received two checks. She wanted custody of the child, and she testified that she and Murphy were able to care for her and meet her medical and educational needs.

On January 9, 2014, the DRC filed a report setting forth the procedural history of the case, findings of fact, and conclusions of law related to custody. After considering the evidence from the hearing as well as from the earlier hearing in May, the DRC set forth his conclusions with respect to the best interest of the child pursuant to KRS 403.270(2):

In this case, the minor child has resided in the non-relative home of the Petitioners' for more than six months. The minor child is clearly bonded to the Petitioners, and the Petitioners have dealt with the child's health issues and need for therapy. The Court has concerns regarding whether the Respondent mother understands the significance of these health issues. The Respondent mother clearly does not understand the significant food allergies that the minor child has by providing food to her that will cause an allergic reaction. The parties must comply with any medical recommendations regarding the child's medical treatment, to include compliance with any list of allergies that the child currently has. Also, the Respondent mother's history of instability in her living arrangements is of concern. Since the birth of the minor child, the Respondent mother lived in Oregon, has moved to Florida for two months, moved to West Virginia for approximately nine months, moving back to Florida for

less than a month, moving to Portage, Indiana for approximately three months, then to Williamson[,] West Virginia for less than six months and then moving to Kanawha County, West Virginia. The minor child would have had seven homes in twenty-two and a half months, with some of these living arrangements being less than a few months, if she had been in the care of the Respondent mother.

The minor child has clearly established a very close bond with the Petitioners who have provided for her daily care and who have met her medical needs since September 1, 2012. She has clearly adjusted to their home and has a stable routine with them. The Respondent mother acknowledges that the minor child was voluntarily in the Petitioners' care from September 1, 2012 through the end of February 2013. At that time, she verbally demanded that the minor child be returned to her care. During this period of time, the mother was aware of the change in the medical card from West Virginia to Kentucky in November, and was aware in October with respect to decisions on baptizing the child. The Respondent mother further testified that it was at the end of February when the child was in their care against her wishes. However, her request for the child to be returned to her through court proceedings was after the Petitioners filed the pending action in the Boyd Circuit Court.

Since the child's birth over 22 months ago, the Respondent mother has provided less than six months of parental care for this child. This six months is based upon the partial month of December of 2011, and April 2012 through August 2012, the child only being in her care for part of the month of August.

The DRC went on to recommend that custody be granted to the appellees and that Luu have restricted visitation with the child. The DRC expressed concern over unrestricted timesharing "based upon the instability of the mother's lifestyle and the numerous moves as well as her inability to understand the minor child's health

issues.” Luu was permitted two hours of visitation per week, and the visitation “must be in eye sight and ear shot of the Petitioners at all times. Further, the mother is not to feed the minor child any food unless she has the food approved by the Petitioners prior to the child consuming any food.”

Luu filed an objection to the DRC’s report, disputing many of the findings, and the appellees responded to Luu’s objection. By order entered January 31, 2014, the circuit court overruled Luu’s objections to the DRC’s report, thereby adopting the DRC’s report and recommendation. This appeal now follows.

On appeal, Luu argues that the circuit court did not have jurisdiction in this matter, erred in determining that the appellees were *de facto* custodians, abused its discretion in awarding custody to the appellees, and erred when it restricted her visitation to two hours of supervised visitation per week.

An appellate court may set aside a lower court’s findings made pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 “only if those findings are clearly erroneous.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). In order to determine whether findings of fact are clearly erroneous, the reviewing court must decide whether the findings are supported by substantial evidence:

“[S]ubstantial evidence” is “[e]vidence that a reasonable mind would accept as adequate to support a conclusion” and evidence that, when “taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men.” Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, “due regard shall be given to the opportunity of the trial court to judge the credibility of

the witnesses” because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, “[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal,” and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted).

The first issue we shall address is whether Kentucky had jurisdiction of this case. This determination requires that we interpret KRS 403.822 and KRS 403.828.

It is well-settled that the interpretation of a statute presents an issue of law for the court, and our review proceeds de novo. *City of Worthington Hills v. Worthington Fire Prot. Dist.*, 140 S.W.3d 584 (Ky. App. 2004). When interpreting a statute, the intent of the legislature is paramount and controls. And, words are afforded their ordinary meaning unless a contrary intent is apparent. *Old Lewis Hunter Distillery Co. v. Ky. Tax Comm'n*, 302 Ky. 68, 193 S.W.2d 464 (1945).

Wahlke v. Pierce, 392 S.W.3d 426, 429-30 (Ky. App. 2013).

In 2004, the General Assembly adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), KRS 403.800, et seq. “[T]he fundamental purpose of the UCCJEA remains the avoidance of jurisdictional competition and conflict with other states in child custody matters[.]” *Wallace v. Wallace*, 224 S.W.3d 587, 589 (Ky. App. 2007). KRS 403.822 addresses initial custody jurisdiction:

(1) Except as otherwise provided in KRS 403.828, a court of this state shall have jurisdiction to make an initial child custody determination only if:

(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 six (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; or

(b) A court of another state does not have jurisdiction under paragraph (a) of this subsection, 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 KRS 403.834 or 403.836; and

1. The child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

2. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships; or

(c) All courts having jurisdiction under paragraph (a) or (b) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under KRS 403.834 or 403.836; or

(d) No court of any other state would have jurisdiction under the criteria specified in paragraph (a), (b), or (c) of this subsection.

(2) Subsection (1) of this section 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 not necessary or sufficient to make a child custody determination.

KRS 403.828 confers temporary emergency jurisdiction upon a court:

(1) 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.

(2) If there is no previous child custody determination that is entitled to be enforced under KRS 403.800 to 403.880 and a child custody proceeding has not been commenced in a court of a state having jurisdiction under KRS 403.822, 403.824, and 403.826, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under KRS 403.822, 403.824, and 403.826. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under KRS 403.822, 403.824, and 403.826, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

.....

(4) A court of this state which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under KRS 403.822, 403.824, and 403.826, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to KRS 403.822, 403.824, and 403.826, upon being informed that a child custody proceeding has been commenced in, or a child custody determination had been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

In this case, Luu contends that the Boyd Circuit Court's jurisdiction to enter the emergency custody order was based upon KRS 403.828 and would only remain in effect until the West Virginia court had entered a ruling on jurisdiction. Kentucky's jurisdiction therefore ended when the West Virginia court claimed jurisdiction over the child. The appellees disagree with the argument, pointing out that they filed the custody action in Kentucky before Luu filed her custody action in the West Virginia family court. KRS 403.832 addresses simultaneous proceedings:

(1) Except as otherwise provided in KRS 403.828, a court of this state shall not exercise jurisdiction under Article 2 if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with KRS 403.800 to 403.880, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under KRS 403.834.

(2) Except as otherwise provided in KRS 403.828, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to KRS 403.838. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with KRS 403.800 to 403.880, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with KRS 403.800 to 403.880 does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

Pursuant to this statute, we must agree that because the appellees filed their custody action in Kentucky on March 4, 2013, prior to Luu filing her action in West Virginia on March 21, 2013, it was up to Kentucky to decide the jurisdictional issue, and the West Virginia family court should have waited until the circuit court in Boyd County entered its jurisdictional ruling. Accordingly, the circuit court properly held a hearing and entered an order regarding jurisdiction.

However, we disagree with the circuit court's conclusion that Kentucky was the child's home state and, accordingly, that it had jurisdiction.

KRS 403.800(7) defines "home state" as:

[T]he state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six (6) months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period[.]

KRS 403.800(13) defines a "person acting as a parent" as "a person, other than a parent, who:"

(a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and

(b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state[.]

KRS 403.800(14) defines "physical custody" as "the physical care and supervision of a child[.]"

The circuit court determined that from August 30, 2012, to March 21, 2013, a period in excess of six months, the child resided with the appellees and that the appellees were her primary caregivers and primary financial supporters during that time. We disagree and hold that the substantial evidence of record does not support such a conclusion. The court appears to have based its ruling on the testimony of the appellees that they “believed” they were no longer just babysitting the child, but that they were keeping her on a permanent basis. However, Luu’s testimony and actions throughout the case establish that she never intended the appellees to keep her child on a permanent basis, but rather she intended that they help her out with childcare on a temporary basis, as was the custom in her culture and with her family. Luu and the appellees kept in contact throughout the applicable time period with text messages and social media, and there is no dispute that Luu provided gift cards in payment at least at the beginning of the process. While the appellees certainly kept the child for many days and nights during the months of August, September, and October 2012, it was clear that this was meant to be a temporary caregiving or babysitting arrangement while Luu was working and in place of other daycare or her keeping the child at the salon. Nothing more permanent was put in place until Luu signed the guardianship documents prior to leaving for Florida to attend school, which occurred in early November 2012. Prior to that time, if not during that time until the circuit court granted emergency custody in March, Luu maintained her status as the child’s parent, and the child’s

temporary absences from West Virginia did not count against the six-month period required to establish the child's home state.

After the child's birth in December in Oregon, Luu and the child moved back to West Virginia in April 2012, thus starting the clock for the home state determination. Luu did not sign the guardianship papers and leave for Florida until November 2012, more than six months later. Therefore, West Virginia became the child's home state. Furthermore, less than five months elapsed from the time Luu signed the guardianship documents and the time she sought to regain custody by filing an action in West Virginia. Accordingly, the circuit court erred as a matter of law in determining that Kentucky was the child's home state and in retaining jurisdiction of the appellees' custody action.

While this analysis is not necessary, we also hold that even if Kentucky retained jurisdiction, the appellees could not be declared *de facto* custodians because they had not been her primary caregivers and financial supporters for six months before Luu sought to regain custody. Therefore, the appellees were not eligible for this status pursuant to KRS 403.270(1).

Accordingly, the circuit court erred as a matter of law in retaining jurisdiction of this custody action and declaring the appellees to be *de facto* custodians, and abused its discretion in awarding custody to the appellees and restricted visitation to Luu.

We recognize and appreciate the fact that the appellees have played a large part in the child's life since they began caring for her in August 2012 and that

the child's life may be altered as a result of this ruling. However, that consideration cannot and should not sway this Court's duty to uphold the law as we have applied it to the facts of this case.

For the foregoing reasons, the orders of the Boyd Circuit Court are reversed, and this matter is remanded to the Boyd Circuit Court for dismissal of the custody action, with the West Virginia family court continuing to exercise jurisdiction in Luu's custody action.

ALL CONCUR.

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