

RENDERED: JANUARY 5, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001003-ME

WESS ROBERTS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANGELA J. JOHNSON, JUDGE  
ACTION NO. 16-CI-502108

CHELSEA ALLEN AND  
RICHARD PORTER, FRIEND OF THE COURT

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: CLAYTON, DIXON, AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Wess Roberts appeals the Jefferson Circuit Court's dismissal of his petition for custody of his daughter for lack of jurisdiction. The issue is whether the trial court failed to determine whether Kentucky is the home state of the child under the Uniform Child Custody Jurisdiction Enforcement Act, hereinafter, the UCCJEA. Having reviewed the record, we conclude that the trial

court improperly and prematurely declined to exercise jurisdiction. Consequently, we reverse and remand the matter for further proceedings.

## **I. FACTUAL AND PROCEDURAL HISTORY**

Chelsea Allen, hereinafter Chelsea, gave birth to the parties' child in 2008, but Wess' paternity was not formally established until 2010. At the time, both parties and the child lived in Collins County, Texas. After establishing paternity, the Texas court named both parents to be "joint managing conservators," which is the equivalent to joint custody in Kentucky. Wess relocated to Louisville in 2015, and in September of that year, Chelsea asked Wess to come and get the child as she was "having some trouble" with the child, and that it "would be good" if Wess took her.<sup>1</sup> Wess did so and the daughter moved to Kentucky with him. He enrolled the child in school in Jefferson County.

On July 11, 2016, Wess filed a petition in Jefferson Family Court to obtain full custody of the child. Chelsea filed a response in early 2017, seeking dismissal of the petition for lack of jurisdiction. After a hearing at which the trial court entertained only legal argument and took no evidence, it granted Chelsea's motion, basing its ruling on the twin conclusions that it did not have jurisdiction to make the original custody determination and that the Texas court which did issue that initial ruling had not ceded jurisdiction to Kentucky. The trial court noted that "no party has motioned for this Court to conference with Texas in order for the courts to determine which state may be the proper jurisdiction for this custody

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<sup>1</sup> The report of the Friend of the Court appointed by the Jefferson Family Court included these admissions from Chelsea in his report, based on his interview with her.

matter[.]” As soon as the order denying Wess’ petition was entered, Chelsea’s mother checked the child out of school in Louisville and moved her back to Texas, where she has remained since.

Wess filed a motion to alter, amend, or vacate, and a motion to supplement the record with evidence of the child’s substantial connection to the Commonwealth, both of which the trial court denied. This appeal followed.

## II. ANALYSIS

Resolving this appeal requires this Court to examine several statutory provisions. Because interpretation of statutory language is a matter of law, we apply a *de novo* standard of review. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky Transp. Cab.*, 983 S.W.2d 488 (Ky. 1998).

The parties agree that the first issue to be examined in determining jurisdiction under the UCCJEA (Kentucky Revised Statutes (KRS) 403.800 *et seq.*) is the child’s “home state.” For the purposes of this appeal, KRS 403.800(7) defines a child’s home state as the state in which the child has lived with a parent for a continuous period exceeding six months which immediately precede the initiation of custody proceedings.

Wess argues that his custody of the child, which began in Kentucky in September of 2015 and culminated in his filing of a petition for full custody in July of 2016, conclusively established Kentucky as the child’s home state. Extending that argument, because the home state is established, jurisdiction is also conclusively established.

Chelsea argues that the language of KRS 403.800(7) simply defines the term for later use in Chapter 403, and KRS 403.824 is the truly operative statute for these circumstances.

KRS 403.824 provides that the state which had initial jurisdiction to issue a custody order retains continuing and exclusive jurisdiction over the matter until a court determines the child or custodian lacks a significant connection with this state (KRS 403.824(1)(a)), or a court of this state or of another state determines that the child or the custodian do not presently reside within the state (KRS 403.824(1)(b)). That provision specifically uses the phrasing “presently reside in this state” rather than “home state,” and we must presume the legislature intended this distinction to have legal effect. *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 730 (Ky. 2012) (“The plain meaning of the statutory language is presumed to be what the legislature intended[.]”). Another provision, KRS 403.826, forbids Kentucky courts from modifying out-of-state custody orders until the foreign court cedes jurisdiction or determines the child and/or custodian do not reside in another state.

This Court has previously held that the state having original jurisdiction over custody maintains exclusive and continuous jurisdiction, even if the child’s home state changes, unless a court can find no significant connections between the child and the putative forum state. *Wallace v. Wallace*, 224 S.W.3d 587, 590 (Ky. App. 2007).

Here, the state with original jurisdiction over custody of the child is Texas, the state which issued the initial order. The analysis must then shift to whether the child has significant connections to Kentucky. However, the trial court failed to do so, as it took no evidence on the issue, and denied Wess' request that he be allowed to offer such evidence.

Moreover, the trial court admitted that it had not conferred with the Texas court to see if ceding jurisdiction to Kentucky was proper, simply because neither party had moved for it to do so. No provision precludes the trial court from doing so *sua sponte*, and, in fact, the UCCJEA not only encourages interstate communication between state courts, its provisions mandate it. KRS 403.828(4) states:

A court of this state which has been asked to make a child custody determination [on an emergency basis to protect a child from abuse, neglect, or abandonment], upon being informed that a child custody proceeding has been commenced in . . . a court of a state having jurisdiction under KRS 403.822, 403.424, and 403.826 **shall** immediately communicate with the other court.

(Emphasis added). Because Texas has also enacted the UCCJEA, the Texas court would be under that same obligation to immediately contact the Kentucky court upon being informed of the Kentucky action. We agree with the concurring opinion of our sister court in Florida, which noted that “[w]here interests of children are held to be of the utmost urgency, it does not serve that interest [for the courts] to say, ‘I’ll wait for him/her to call me.’” *Giventer v. Giventer*, 863 So.2d 438, 440 (Fla. Dist. Ct. App. 4th Dist. 2003) (Polen, J., specially concurring). This

case reflects an instance where the statutorily mandated immediate communication and the interests of justice could have been served if the trial court had complied and made a simple phone call.

To that end, we hold the trial court's dismissal of Wess' petition to have been premature, occurring before the Texas court having original jurisdiction here could even consider ceding jurisdiction over the child to Kentucky, where she had resided for more than six months by the time of the hearing on February 15, 2017.

### **III. CONCLUSION**

After reviewing the record, it is clear that the trial court acted too hastily in dismissing Wess' petition. We must vacate the order dismissing it, remand the matter for further proceedings, and instruct the trial court confer with the Texas court regarding jurisdiction under the UCCJEA.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael R. Slaughter  
Louisville, Kentucky

BRIEF FOR APPELLEE:

James K. Murphy  
Louisville, Kentucky

Richard Porter, Jr.  
Louisville, Kentucky