

NOT DESIGNATED FOR PUBLICATION

No. 104,813

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN RE THE MATTER OF:

JAIME ANNA GRACE, *et al.*,  
*Appellant*,

and

KEVIN LEE BISHOP,  
*Appellee*.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS E. FOSTER, judge. Opinion filed September 2, 2011. Affirmed.

*Marc H. Berry*, of Olathe Legal Clinic, LLC, of Olathe, for appellant.

*Durant S. Abernethy*, of Earnshaw-Hobbs Law Firm, P.C., of Lee's Summit, Missouri, for appellee.

Before MCANANY, P.J., LEBEN and KNUDSON, JJ.

LEBEN, J.: Jaime Grace challenges the district court's ruling that Kansas wasn't her child's home state when Jaime filed a paternity action here. For a child less than 6 months old, as was the case here, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), K.S.A. 38-1336, *et seq.*, makes the child's home state the one "in which the child lived from birth" with a parent. K.S.A. 38-1337(8). The district court ruled correctly because the child went with her parents to Missouri immediately after her birth at a

Kansas hospital, and the child spent most of the time living with one or both parents in Missouri from then until legal actions were filed.

Jaime alternatively argues that the child's father, Kevin Bishop, acquiesced to jurisdiction in the Kansas courts. But although Kevin accepted service of process in the Kansas paternity lawsuit, which is required for jurisdiction here, he did so by filing a motion to dismiss based on his claim that Kansas did not have subject-matter jurisdiction under the UCCJEA. Kevin was entitled to raise his jurisdictional defense by motion, and he didn't waive that claim by appearing for later hearings in Kansas before the Kansas court dismissed the suit for lack of jurisdiction.

Before we discuss these legal principles in additional detail, let's first sort out the background facts. Sydney Bishop was born October 14, 2009, at Shawnee Mission Medical Center. Sydney's parents are Jaime and Kevin, and Sydney lived with both parents at Kevin's house in Missouri for between 2 and 3 months after she was born. Jaime and Kevin then separated, and Jaime and Sydney went back and forth for a time between Kevin's house in Missouri and Jaime's mother's house in Kansas. Jaime and Sydney had stayed at Jaime's mother's house for about 20 days total before Jaime filed the paternity action on April 1, 2009. Kevin filed a separate action in Missouri a few days later.

Kevin filed a motion to dismiss the Kansas action on May 6. He contended that Kansas did not have jurisdiction under the UCCJEA because Missouri was the child's home state. Kevin also noted that he had filed a paternity action in Missouri.

There were some other proceedings in a separate protection-from-stalking action Jaime filed against Kevin in Kansas. The Kansas district court held a hearing in both cases on June 3. Temporary custody and parenting-time orders were entered by agreement, and the court set a hearing for June 8. At that hearing, the district court

determined that Missouri, not Kansas, was the home state of the child and thus the proper state in which to bring any child-custody action. The district court entered temporary orders for custody and parenting time that would remain in effect until modified by a Missouri court; the Kansas district court said that it was authorized to do so under the UCCJEA's provisions for emergency jurisdiction.

Jaime has appealed, raising two issues. First, she contends that Kansas truly is Sydney's home state because (a) Sydney has always lived with Jaime and (b) Jaime's legal residence has been her mother's home in Kansas at all times. Second, she contends that Kevin acquiesced to the jurisdiction of the Kansas court by voluntarily accepting service of process and by agreeing to the entry of temporary custody orders. On these questions of statutory interpretation and jurisdiction, we must review the matter independently, without any required deference to the district court. See *Louisburg Building & Development Co. v. Albright*, 45 Kan. App. 2d 618, 643, 252 P.3d 597 (2011) (appellate court exercises unlimited review over statutory-interpretation questions); *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, Syl. ¶ 1, 210 P.3d 105 (2009) (appellate court exercises unlimited review over jurisdiction questions).

Jaime's first argument misconstrues the provisions of the UCCJEA that define a child's "home state," which is the state in which custody actions may be brought. For a child under 6 months old, the home state is the one "in which the child lived from birth" with a parent. K.S.A. 38-1337(8). Everyone recognizes that Sydney spent by far the most days in Missouri, which is why Jaime tries to merge the concept of legal residence into home-state analysis. In Jaime's view, Jaime has always had her legal residence in Kansas, so she argues that Sydney, like her, should be considered to be a legal resident of Kansas.

But the words of the UCCJEA, "in which the child lived," do not suggest any concepts of legal residence, which is governed by an intention to stay or to return to a location. See *In re Marriage of Brown*, 247 Kan. 152, 158-59, 795 P.2d 375 (1990)

(residence is based on intent; a person doesn't lose a residence by mere physical presence elsewhere unless that's combined with the intent to establish a new residence). Newborn babies have no intention about their residence, and any custody dispute between parents will involve parents with different intentions. Here, for example, Kevin was a Missouri resident, while Jaime claimed a Kansas residence. Sydney spent most of her days from birth to the filing of a paternity case living with both parents. So imputing legal-residence concepts into the determination of a home state wouldn't lead to a clear answer and could introduce added uncertainty, while the UCCJEA seeks to definitively determine a single home state.

Caselaw from other states confirms that the UCCJEA's use of "the state in which the child lived from birth" incorporates concepts of physical presence, not legal residence. See *Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 585-86 (Tex. App. 2006) (court looks at child's physical presence in state, not legal residency of the parents under UCCJEA); *Hangsleben v. Oliver*, 502 N.W.2d 838, 843 (N.D. 1993) (same; interpreting identical language in earlier uniform child-custody jurisdiction act); *Dist. Ct. in & for Jefferson Cty*, 671 P.2d 953, 955-56 (Colo. 1983) (same). We agree, and that means that the district court correctly ruled that Sydney's home state was Missouri, not Kansas.

Jaime's second argument is countered by a basic concept of modern civil-procedure rules. Those rules apply to paternity cases. K.S.A. 38-1120(a).

Before the adoption of the current Kansas rules in 1963, parties had to enter special, limited appearances under which they sought to litigate only the jurisdiction issue or risk waiving that defense by appearing generally. The new rules eliminated that practice, so that a party could both contest jurisdiction and file pleadings related to the merits of the suit. *Small v. Small*, 195 Kan. 531, 538, 407 P.2d 491 (1965); *Fisher v. DeCarvalho*, No. 104,644, 2011 WL 2507833, at \*\*11-12 (Kan. App. 2011).

Kevin filed a motion to dismiss on jurisdiction grounds on May 6; that was Kevin's first appearance in this case. K.S.A. 60-212(b) expressly provides that a party may assert a jurisdictional defense by motion, and Kevin did so. The appearances by Kevin and his attorney after filing the motion to dismiss asserting a jurisdiction defense do not waive the jurisdiction defense. See *City of Hutchinson v. Hutchinson, Office of State Employment Service*, 213 Kan. 399, 406, 517 P.2d 117 (1973). Thus, even assuming that Kevin could acquiesce to child-custody jurisdiction in Kansas, he did not do so.

The judgment of the district court is therefore affirmed.