IN THE COURT OF APPEALS

CHRISTINE CALLAHAN,	)	KNOX CIRCUIT
	)	C.A. NO. 03A01-9603-CV-00116
Plaintiff-Appellant	)	
vs.	)	HON. BILL SWANN
	)	JUDGE
PATRICK MICHAEL CALLAHAN,	)	REVERSED AND REMANDED
Defendant-Appellee	)	

LARRY C. VAUGHAN, Vaughan and Zuker, Knoxville, for Appellant.

GEORGE F. LEGG, Stone and Hinds, P.C., Knoxville, for Appellee.

OPINION

McMurray, J.

The parties to this appeal were divorced in Alabama. At the time of the divorce, the parties had one minor child. Custody was

given to the plaintiff. Plaintiff and the minor child moved to Tennessee and at the time of the hearing in this cause had been living here for some eighteen months. The plaintiff filed a "Petition for Contempt and Petition for Modification of Visitation" in the Fourth Circuit Court of Knox County, Tennessee. After a hearing (on argument only), the court ruled that it did not have jurisdiction touching matters of child support.[1] The court further ruled that it did have jurisdiction on those matters concerning custody and visitation but declined "to exercise jurisdiction ... until Alabama deferred to Tennessee." Plaintiff's petition was dismissed. This appeal resulted. We reverse the judgment of the trial court.

The sole issue before us is whether the trial court erred in declining to exercise jurisdiction under the Uniform Child Custody Jurisdiction Act (T.C.A. § 36-6-201, et seq., and Ala. Code Ann. § 30-3-20, et seq.) and the Federal Parental Kidnaping Prevention Act of 1980, 28 U.S.C.A. § 1738, and all relevant Tennessee Law.[2]

For all practical purposes and insofar as this case is concerned the Alabama and Tennessee statutes are identical. We

[1]There is no issue on this appeal as to child support.

[2]While all fifty states have passed a version of the "Uniform Child Custody Jurisdiction Act" and have generally labeled them as the uniform act, the acts of the several jurisdictions are far from uniform. There is no significant difference between the acts of Tennessee and Alabama.

have set out the pertinent parts of the applicable statutes from each jurisdiction in the attached appendix.

Under the Tennessee Act, "home state" is defined in T.C.A. § 36-6-202 as follows:

> (5) "Home state" means the state in which the child immediately preceding the time involved lived with such child's parents, a parent or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six (6) months or other period;
>
> * * * *

Section 30-3-22(5) of the Alabama code defines "home state" as follows:

> Home state. The state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period;

It is readily apparent that these definitions for all practical purposes are identical. It is undisputed that the child has lived in Tennessee more than six months. Without question, under either the Alabama or Tennessee statute, Tennessee is the

"home state" of the child involved in this case, however, we note that "home state" is not sufficient, alone, to authorize the exercise of jurisdiction by the courts of the home state. A "home state" is denied the authority to exercise its jurisdiction if at the time of the filing of a petition in the home state, a proceeding concerning custody of the child was pending in a court of another state and that state was exercising jurisdiction substantially in conformity with the Uniform Custody and Visitation Act. See T.C.A. § 36-6-207; Ala. Code § 30-3-26; and, U.S.C. § 1738A(g) — all of which contain identical provisions. See also Culp v. Culp, 917 S.W.2d 233 (Tenn. App. 1995).

In Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993) the Supreme Court granted permission to appeal to examine jurisdiction of the Tennessee courts in interstate child custody disputes under the Uniform Child Custody Jurisdiction Act. The court in Brown noted that the Tennessee Act like the Federal Parental Kidnaping Prevention Act prioritizes grounds for the exercise of child custody jurisdiction. The first priority under both Tennessee Law and the Federal Act is to grant jurisdiction to the "home state." We would go one step further. Both the Alabama statute (Section 30-3-23 Ala. Code) and the Tennessee statute (Section 36-6-203, T.C.A.) not only prioritize jurisdiction, they deny jurisdiction to their own courts when the circumstances therein enumerated are met. Otherwise stated, if the circumstances enumerated in the statute

are not met then there is no jurisdiction. We believe this to be in keeping with the legislative intent in all applicable statutes, federal and state.

Since the Alabama statute is, for all practical purposes, identical to Tennessee's, we must conclude that Alabama has similarly prioritized jurisdiction in the same way and manner as Tennessee and the Federal Act and upon Tennessee becoming the home state, Alabama lost jurisdiction.

Since the Tennessee Code, the Alabama Code and the U.S. Code all give first priority to the "home state" concept, it is unnecessary to discuss other manners in which a state other than the "home state" may exercise jurisdiction.

The appellee argues vigorously that Alabama retains jurisdiction of the custody of the child in question under Alabama Law. It is insisted by the defendant that in Ex parte J.R.W, 667 So.2d 74 (Ala. 1994), the Alabama Supreme Court determined that "once a state had obtained jurisdiction and rendered an initial custody determination, then that state retains preferential jurisdiction over subsequent proceedings in another state pursuant to Section 30-3-23 of the Alabama Code." The error of this argument is demonstrated by own Supreme Court's opinion in In re State of

Tennessee ex rel. Cooper v. Hamilton, 688 S.W.2d 821 (Tenn. 1985) wherein it is said:

T.C.A. § 36-6-203(a) provides as follows:

> 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:
>
> (1) This state:
>
> (A) Is the home state of the child at the time of the commencement of the proceeding... .

> Clearly, in the case of a modification proceeding, the statute has reference to the period of time prior to the institution of that proceeding, not to the months preceding the initial custody determination. Otherwise, no state other than that which originally rendered the custody decree could have authority under either the federal or the state statute to modify an initial award.

Since T.C.A. § 36-6-203(a) and Ala. Code § 30-3-23(a) are identical in this respect, we must respectfully disagree with the position taken by the defendant.

We must disagree with the argument as advanced by the defendant for yet another reason. In Ex parte J.R.W., the court was dealing with a case wherein Texas had assumed jurisdiction at a time when Alabama was actively exercising jurisdiction, i.e., the exception to the "home state" rule noted earlier in this opinion.

Insofar as we are able to ascertain from the record, such is not the case here.

Absent ongoing litigation in Alabama under prioritized jurisdiction, Tennessee, as the home state, has jurisdiction — Alabama does not. The trial court here apparently relied on a statement in the Alabama decree that "[j]urisdiction be and hereby is retained in this cause as to any further or future orders or decrees as to care, custody and maintenance of said minor child as the court may deem proper and as changed conditions may require."[3] It should be remembered that child custody cases are different from most other cases in that a court which has jurisdiction to render a custody decree, ordinarily has the inherent authority to retain the case on its docket for future custody questions until the child reaches its majority. Thus, a recitation of the court in its judgment that it is retaining jurisdiction for that purpose is pure surplusage. If such a provision in a decree of a sister state were sufficient to retain jurisdiction in that state, it would nullify the purposes of both the Federal Parental Kidnaping Prevention Act and the Uniform Child Custody Jurisdiction Act. It is elementary jurisprudence that if there is a conflict between a state law and a federal law, the federal law must prevail under the Supremacy Clause of the United States Constitution. We believe that it is implicit in the Alabama decree that the Alabama Court intended to

[3]This statement is not incorporated into the final judgment of the trial court but appears in the court's announcement of its decision from the bench.

retain jurisdiction only as long as the decree did not conflict with the Federal Parental Kidnaping Prevention Act and the Uniform Child Custody Jurisdiction Act. Since Alabama had statutorily prioritized jurisdiction granting to the "home state" first priority, jurisdiction vested in Tennessee upon Tennessee becoming the "home state."

It, therefore, must follow that the "home state" under the prioritized jurisdiction scheme has jurisdiction notwithstanding a provision in a sister state's decree that jurisdiction is retained unless the jurisdiction is being actively exercised as in Ex parte J.R.W. In this case, as previously noted, we cannot from the record before us, determine whether the Alabama court was or was not actively exercising its jurisdiction at the time this action was instituted. It is incumbent upon the trial court to ascertain, in a manner consistent with existing law, whether the Alabama court was actively exercising its jurisdiction before deferring to Alabama. See T.C.A. § 36-6-210.

Jurisdiction is limited to one state at a time. See Wilcox v. Wilcox, 862 S.W.2d 533 (Tenn. App. 1993) and Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993). We believe our analysis is in keeping with Wilcox and Brown.

The defendant vigorously asserts that U.S.C. § 1738A(d) provides for the continuing jurisdiction of a state court which has made an initial custody determination.

Section 1738A(d) provides as follows:

> (d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirements of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

It seems clear that the defendant's argument has merit if the requirements of subsection (c)(1) continued to be met at the time of the filing of the present action. Therefore, it is incumbent upon us to examine subsection (c)(1).

Subsection (c)(1) provides as follows:

> A child custody determination made by a court of a State is consistent with the provisions of this section only if —
>
> (1) such court **has** jurisdiction under the law of such State; (emphasis added).
>
> and
>
> * * * *

We respectfully disagree with the defendant. As pointed out above, Alabama in adopting its version of the Uniform Child Custody Jurisdiction Act, did not simply defer to a "home state" but denied to its courts jurisdiction when a sister state became the "home state" of the child under the plain terms of Ala. Code § 30-3-23. Alabama does not have jurisdiction as contemplated in Section 1738A(c)(1) of the Federal Parental Kidnaping Prevention Act.

We find that subsection (c)(1) does not apply and, therefore, it does not preserve the jurisdiction of the Alabama court.

In a final argument, the defendant question the correctness of the Court's decision in Brown, asserting that the earlier decision in Cooper has not been overruled and that the analysis contained therein is correct and in accordance with federal case law. We are not at liberty to question the decision in Brown. Any conflicts in Brown and Cooper must be resolved in favor of Brown since Brown is the latest authority. As an intermediate appellate court we are not at liberty to disregard the teachings of our Supreme Court.

In conclusion, we note that a Tennessee Court, possessing jurisdiction, may defer to Alabama if proper conditions are met. See T.C.A. §36-6-208 and Brown, supra. Tennessee courts possessing jurisdiction, however, may not wait for another state lacking jurisdiction to defer to Tennessee. We do not express any opinion

as to whether this is a proper case to defer to another jurisdiction.

We hold that it was error for the trial court to decline to exercise its jurisdiction until Alabama deferred to Tennessee. We reverse the judgment of the trial court. This case is remanded for such other and further action as may be necessary in conformity with this opinion.

Costs are taxed to the defendant.

_____
Don T. McMurray, J.

CONCUR:

_____
Houston M. Goddard, Presiding Judge

_____
Charles D. Susano, Jr., Judge

APPENDIX

THE TENNESSEE CODE

T.C.A. § 36-6-203 provides follows:

36-6-203 Jurisdiction to make custody determinations. — (a) 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:

(1) This state:

(A) Is the home state of the child at the time of commencement of the proceeding; or

(B) Had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(2) (A) It appears that no state has jurisdiction under subdivision (a)(1), or each state with jurisdiction under subdivision (a)(1) has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child; and

(B) The child and at least one (1) contestant have a significant connection with this state; and

(C) There is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationship; and

(D) It is in the best interest of the child that a court of this state assume jurisdiction; or

(3) It appears that no state has jurisdiction under subdivision (a)(1) or (2) or each state has refused jurisdiction on the ground that this is the more appropriate forum to determine child custody, and

it is in the best interest of the child that a court of this state assume jurisdiction.

(b) Except under subdivision (a)(3), physical presence in this state of the child, or of the child and one (1) of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his or her custody.

(d) Jurisdiction shall not be exercised to modify an existing custody decree except in accordance with § 36-6-215.[4]

T.C.A. 36-6-208 provides as follows:

36-6-208. Proceedings under finding of inconvenient forum (a) A court which has jurisdiction under this part to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum. The court may appoint a guardian ad litem to represent the child if the court finds such appointment to be in the best interest of the child. The court may, in its discretion, order that the guardian ad litem's fee be paid by one (1), or in part by both, of the contesting parties.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) If another state is or recently was the child's home state;

[4] In view of our analysis of the law hereinafter discussed, § 36-6-215 has no application to this case.

(2) If another state has a closer connection with the child and family or with the child and one (1) or more of the contestants;

(3) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) If the parties have agreed on another forum which is no less appropriate; and

(5) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in § 36-6-201.

(d) Before determining whether to decline or retain jurisdiction, the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(e) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate consent and submission to the jurisdiction of the other forum.

(f) The court may decline to exercise its jurisdiction under this part if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(g) If it appears to the court that it is clearly an inappropriate forum, it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(h) Upon dismissal or stay of proceedings under this section, the court shall inform the court found to be the more appropriate forum of this fact or, if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(i) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction, the court of this state shall inform the original court of this fact.

Section 36-6-209 provides in pertinent part as follows:

36-6-209. Declining jurisdiction. (a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child and subject to § 36-6-215(a), the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state, the court, subject to § 36-6-215(a), may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases, a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

The Alabama Code provides as follows:

ARTICLE 2. UNIFORM CHILD CUSTODY JURISDICTION ACT.

Section 30-3-23 Jurisdiction to make child custody determination; effect of physical presence of child.

(a) 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:

(1) This state:

a. Is the home state of the child at the time of commencement of the proceeding; or

b. Had been the child's home state within six months before commencement of the proceeding and the child is absent from this 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

(2) It is in the best interest of the child that a court of this state assume jurisdiction because:

a. The child and his parents, or the child and at least one contestant, have a significant connection with this state; and

b. There is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this state and:

a. The child has been abandoned; or

b. It is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) a. It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivisions (1), (2), or (3), 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

b. It is in the best interest of the child that a court of this state assume jurisdiction.

(b) Except under subdivisions (3) and (4) of subsection (a), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

IN THE COURT OF APPEALS

CHRISTINE CALLAHAN,	)	KNOX CIRCUIT
	)	C.A. NO. 03A01-9603-CV-00116
	)	
Plaintiff-Appellant	)	
	)	
	)	
	)	
	)	
	)	
vs.	)	HON. BILL SWANN
	)	JUDGE
	)	
	)	
	)	
	)	
	)	
PATRICK MICHAEL CALLAHAN,	)	REVERSED AND REMANDED
	)	
Defendant-Appellee	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Knox County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

We hold that it was error for the trial court to decline to exercise its jurisdiction until Alabama deferred to Tennessee. We reverse the judgment of the trial court. This case is remanded for such other and further action as may be necessary in conformity with this opinion.

Costs are taxed to the defendant.

PER CURIAM