

ORAL ARGUMENT — 4/6/99
98-0808
PHILLIPS V. BEABER

LEMKUIL: The question before the court today is, Does the TC have jurisdiction under the ECCJA and the PKPA can modify the powers of primary possession of the child, the right to designate the residence of the child, and the right to receive and give receipt for child support within the confines of the joint managing conservatorship when the home state of the child is other than Texas?

For practical purposes, I will refer to a joint managing conservatorship as a JMC; and a managing conservatorship/possessory conservatorship as MCPC.

If such a modification constitutes a custody determination, as that term is defined at 152.003 of the Texas Family Code, the TC is without jurisdiction. If not, then it has jurisdiction. Therefore, the real question before the court is what constitutes custody within the meanings of the JMC? In Texas we do not usually use the term "custody." We appoint conservators, either possessory managing, or joint. I would suggest that custody is not just a title, ut rather that the title is defined by the powers it supported. Just as the Governor holds the title, the meaning of that office is defined by its constitutional powers. For example: A JMC can be structured by dividing and awarding the rights and powers so that it is nothing more than a MCPC relationship. The title becomes nothing more than form over function.

ABBOTT: We have a JMC here. Now, I think it's clear that under 155.003, had one of the parties wanted to go to court and change the JMC to a SMC, that jurisdiction would lie in Colorado?

LEMKUIL: Yes.

ABBOTT: The statute provides a specific exception that if the modification is to change the conservatorship, the jurisdictional change, but that is not what they sought to do here. The parties didn't seek to change the JMC status did they?

LEMKUIL: You pinpointed the question. Yes, they did. They tried to change form over function. They did not try to change the name JMC to an MCPC relationship. That, they did not do. But instead, they tried to gut the powers of the JMC and effectively change custody.

ABBOTT: You will agree, however, that if the only thing that was sought to be changed were possessory rights with regard to the child, that would fall within the continuing jurisdiction of the court?

LEMKUIL: By possessory if we're talking only about visitation, yes.

ABBOTT: When the statute uses the word "possession" it doesn't define that to mean visitation. You're defining that to mean that aren't you?

LEMKUIL: Yes.

ABBOTT: So you don't have any case law and you don't have any statutory language that equates possession with visitation, do you?

LEMKUIL: Yes, I believe so. I believe both *Hosler v. Hosler* and *Lefholt v. Plass* address that, as does *Ramsey v. Ramsey*. I believe *Ramsey v. Ramsey*, 707 S.W.2d 724, Beaumont 1986, addresses the concept of possession and what is meant by possession. And I think it equates it in forum to visitation.

ABBOTT: It's clear that if one of the parties went in to try to change the JMC status to a SMC status, that would not be within the continuing jurisdiction of the Texas court?

LEMKUIL: I agree.

ABBOTT: So what we have then is to decide whether or not this is a change from JMC to SMC, or merely the change of possession under the confines of the current JMC status. Okay. And the point I'm trying to make and I guess the question I'm trying to ask is, under your interpretation of what possession of the child means under JMC if the change in possession rights or the change in excess to the child is to change the domicile from one JMC parent to the other JMC parent, you're saying that that is not a change in possession that would invoke the continuing jurisdiction of the court. Instead, you're saying that that is a change from JMC status to a SMC status. Am I correct?

LEMKUIL: Yes, with this caveat. The vocabulary with which you stated it, I am uncomfortable with. Under a JMC, there is the primary right of possession, which is one of the powers the court can assess and grant it, also they can grant to one or both parties the right to designate the residence of the child. Traditionally that is the same person that has primary possession of that child. What I am saying is, that under a JMC this court needs to define what is meant by the term "custody." Is it a title only, or is it the substance of the powers? UCCJA speaks in terms of custody. The rest of the Family Code doesn't address custody per se. It addresses conservatorships. The question then is, under UCCJA does custody include the key primary powers that traditionally define what is meant in American Jurisprudence as custody? If it does, the court does not have jurisdiction. The _____ is with the child under the home state designation.

Is the power to designate the residence of the child of such a character and nature that it constitutes custody? If it is undisputed that under this JMC and these facts that if the

father receives that power, he will transfer the domicile of residence to Texas, which means that either mom has to move back to Texas, or dad has custody.

ABBOTT: You're using the word "custody." And I'm looking at §155.003, and I don't see the word "custody" in there. What it says is that the court may not exercise jurisdiction to modify the managing conservatorship, which is something that was not sought here, and the court may not exercise continuing jurisdiction to modify part (c) doesn't come into play because of the other two subparts. It's only part B. It was a battle between part (b) and part (a) of 155.003. And 155.003 comes into play only to modify managing conservatorship. And that is not per se a custody issue.

LEMKUIL: I would respectfully disagree. That's exactly what he's seeking to modify is a joint managing conservatorship. Not change the title names, but substantively change the meaning of the joint managing conservatorship that is in existence. Not change the title names, but in fact, change where the child lives, who has the day-to-day control over the child, all the things that are traditionally custody.

ABBOTT: So then going back to my earlier point, you are equating under a JMC status the change of residence of a child, you are equating that to be a modification of managing conservatorship?

LEMKUIL: Yes. Not just that, but he's seeking modification of all three of the main powers: power to designate where the child lives; primary possession; and right to receive and give receipt for child support. Those three were the subject of the motion to modify in question.

ABBOTT: But you agree that with regard to child support unequivocally that's within the continuing jurisdiction?

LEMKUIL: The amount, yes. But the power to receive and give and receipt for, no. The dollar amount of child support when it's paid, where it's paid, all of those retroactive motion to enforce, all of those, I agree, are child support issues. A custody issue is who gets it and who gives receipt for it?

ABBOTT: If that's the case, define for me the parameters of possession in 155.003(a), where possession, that issue allows or falls within the continuing jurisdiction of the original court?

LEMKUIL: As I understand the law to be, what falls within the continuing jurisdiction of the court under the UCCJA when it comes into play are: when and where visitation takes place; how much that visitation is; and with whom that visitation occurs.

ABBOTT: But that's nowhere to be found in §155.003(a).

LEMKUIL: But that is within the UCCJA, which comes into play and works in

conjunction with 155.003. And under that also the PKPA.

ABBOTT: The provision I'm talking about 155.003(a) it talks about possession of and access to the child. What's the difference between possession of and access to the child?

LEMKUIL: Possession is the present right to possess, to have physical control of the child. Access involves the power of the court to order mom or dad, whoever has possession, to surrender to that particular person.

ABBOTT: Wasn't Mr. Beaver seeking the right to possess the child?

LEMKUIL: Yes.

ABBOTT: And that seemed to fall within your definition of what possession means under 155.003(a), which would mean it would fall within the continuing jurisdiction of the Texas court?

LEMKUIL: As you present it, yes. In fact, he's seeking more than just mere possession. But in addition, he is also seeking possession.

O'NEILL: In a joint managing conservatorship who takes a tax deduction for the child?

LEMKUIL: That's governed under the IRS or it can be adjusted by agreement. Under the tax code, the party who has primary possession of the child for at least ½ of the year, I understand takes the tax deduction. That's governed under the IRS. It can be agreed by the parties, although not ordered by the court, because of the superior jurisdictions of the federal statutes, the parties can execute under the IRS code granting it to one party or the other either on an annual basis or on a permanent basis.

O'NEILL: And did that happen in this case?

LEMKUIL: I don't believe it did. If so, it would have been - no it has not. It would have been at the time of the original divorce.

HANKINSON: Was the original order in this case the result of an agreement between the parties, or was it the result of a jury trial?

LEMKUIL: The original divorce was by agreement as was the modification that permitted the move to Colorado.

HANKINSON: And as well as originally giving the mother primary possession and the right to designate residence, that was by agreement as well?

LEMKUIL: Yes, it was.

HANKINSON: I think that he said that then she moved to Colorado with the child with the father's agreement?

LEMKUIL: Yes, that was the purpose of the motion to modify to remove the residency restriction. And that was the outcome and the purpose was to move to Colorado.

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RESPONDENT

FOSTER: I thought there was two questions that I had to address, and the first one I thought was whether or not this court even has jurisdiction under 152.003. I don't believe that there is any question about that. Because *Little v. Daggett*, I thought left that completely resolved, and I thought that some of the cases that followed that left it completely resolved. And I believe that those cases like *Welborn-Hosler*, 877 S.W.2d 323 was authority for the proposition that Texas does maintain jurisdiction to modify all other aspects of the decree other than custody, as well as does *Oliver v. Boutwell*, 601 S.W.2d 1980.

HANKINSON: How does Texas law define custody?

FOSTER: I don't think they define custody.

HANKINSON: What meaning should this court give to custody then since that term is used in the Texas Family Code?

FOSTER: I'm not sure that custody is used.

HANKINSON: But 152.003(d), talks about a party with custody and whether or not a court may not exercise its continuing jurisdiction to modify custody. What does custody then mean under that provision of the family code?

FOSTER: I believe that what they've said, they used the definition that they used in that same one, and I believe if you will look at that it defined custody is the managing conservatorship of the child. 152.003, definitions. Custody means managing conservatorship of a child. In fact that's the only place they really define that term; however, the courts have later pretty well said that those definitions, particularly in *Hutchings v. Biery*, which I've cited and *Welborn-Hosler*, that they used those definitions throughout. However, it's just in that. But that's what custody, I believe, means in the family code if it's there.

ABBOTT: Did Mr. Beaber seek to change custody in this case?

FOSTER: No. We knew we couldn't do that. We weren't changing managing conservatorship. All we wanted to do was to be able, and we had - that was just an issue that would have to be litigated, but we were only asking that residence be returned to him in Texas, and that he has a right to establish the domicile.

HANKINSON: That's a pretty big deal isn't it? It's not a mere something is it?

FOSTER: I don't think any issue is a mere something. If it was here in Texas it's not a mere something. But anytime you want to change that, obviously that's a big deal. I think you've got to look at the history of this family code that led up to this, because if you accept this argument, what I see is we're going back 10 years to where we started in this.

HANKINSON: What do you mean by that?

FOSTER: 1979 was the first time we had the concept of managing conservatorship. Then in 1987, they granted the court the authority to do a JMC. In 1987, parental preference was abolished. It's no longer the preference for a mother. In 1995, they gave a presumption of JMC. Then there was a best interest to designate the primary physical residence. And then they come along with a public policy as to ensure that children have frequently and continuing contact. 153.001, encourages the parents to share in the rights and duties of their children. There's a history of all these cases that you run up to.

HANKINSON: Your client agreed to let this child move to Colorado.

FOSTER: That's true.

HANKINSON: Just looking generally though at this, if in fact, you have a circumstance like this where one parent has the right to designate the residence of the child and has primary possession as this parent does, and that parent with the agreement of the other parent moves the child to another state, if an interest develops about trying to move primary possession and move the residence of the child, why isn't it best for the child for the state where that child lives to deal with that issue? Why isn't that good public policy under those circumstances?

FOSTER: First of all, public policy, I think the decision of the 14th as far as public policy for a Texas citizen who they all lived here was good.

HANKINSON: But let's talk about the scenario that we've got here where we have the parent with the child going to another state with the Texas parent's consent. And that child has been there now for awhile. Why isn't it good public policy if the issue of primary possession and residence of the child, things have changed, someone needs to look at it, why isn't it better public policy for that state to deal with what's in the best interest of the child since that child lives there now?

FOSTER: There are issues obviously that would be teachers, churches, etc..

HANKINSON: How is the court in Texas going to deal with all that, if in fact, all of the people who were involved in the child's life on a day-to-day basis are in Colorado?

FOSTER: First of all, I don't think you're going to see as many cases like this that is this situation. And second, you have to look at the other side of the story, he is a parent. He is a joint managing conservator. He has all the powers of a parent. He never gave that up and he never intended to give that up.

HANKINSON: I'm focusing on the child right now. Why isn't it good public policy under these circumstances for Colorado to decide these questions?

FOSTER: In this specific one, I would say that if you look at the overall, judges don't have to give access 50/50 or standard possession. That's a minimum.

HANKINSON: I understand that. But going back to my question. Why isn't it good public policy under these circumstances for Colorado to be deciding these issues?

FOSTER: I think that the Texas father should still have his rights and he has the children during the summer, he has them on the holidays, he has witnesses down here, he has witnesses that were life-time people that they know that would testify. He would have to take all of these up there. I guess it's a way if you are talking just pure public policy. I think that public policy really outweighs that issue because of the fact that we're talking about legally 1) that's not a change - you know maybe they need to change the law or something like that, but we would go backwards I think.

HANKINSON: Do you agree that if we look at 152.003, if we look at this statute, we continue to see the legislature emphasizing what the child's home state is. You agree that that's an important consideration in the various provisions of the statute? Doesn't that indicate some intent on the part of the legislature that that should be the designating factor in terms of a lot of the questions about what we do with a child after they've moved?

FOSTER: I think that it deals with only one aspect and that's custody, and I believe the legislature if they had intended that, they've used that term pretty well, and if they had intended to define it as custody and visitation, but they didn't. They said managing conservatorship.

HANKINSON: Mr. Lemkuil has given us how he would interpret the statute. He's walked us through it. Would you do the same thing from your perspective on how you would have us interpret the statute?

FOSTER: I would interpret it as most of the CAs have, and that's I guess why we are here is it hasn't been decided. And there's so much authority that's there and I don't think there's

much authority that would indicate that it's anything other than the powers and rights of a parent. Managing conservators are supposed to be on equal basis. *Dennis v. Smith*, states that both parents have custody and legally shared responsibility, and neither had visitation rights. You gave the father the right to select domicile and the primary possession in that case. You gave her primary, and he got to do that. It says, Just as there is no longer a presumption that a mother should raise a child, there is no presumption that the conservator with the long-period of possession should decide where a child lives.

HANKINSON: Look at the family code and tell us which provision of the family code gave the TC in this instance continuing jurisdiction?

FOSTER: Like I said, it would be 155.003.

HANKINSON: Which subpart?

FOSTER: Exercise or continuing jurisdiction. I think it clearly does. (B) A court of this state may not exercise its continuing exclusive jurisdiction to modify conservatorship. Period. We're not doing that. Managing conservatorship they are joined. They are the same. They are both.

HANKINSON: But which provision in fact confirms that the court had jurisdiction in this case?

FOSTER: Well they had jurisdiction. They had continuing jurisdiction. There was a divorce in Ft. Bend County. There was also the modification. So they have continuing jurisdiction in Texas.

HANKINSON: Under which provision of the family code?

FOSTER: Under the continuing exclusive jurisdiction. §155.001, acquiring continuing exclusive jurisdiction. It says: Except as otherwise provided by the section, the court acquires continuing exclusive jurisdiction over the matters provided for by this subtitle in connection with the child on the rendition of a final order. So they've got it. There was one case that distinguished some of this. Basically what it said was, I believe it was Ex Parte Powell who cited this Beaver case, and it distinguished that because in that case the court never did have continuing jurisdiction. So I think under the law and the facts of the case, that certainly we're not changing managing conservatorship.

ENOCH: You seem to place great weight on managing conservatorship being different than a possessory conservatorship under this statute. In fact, the argument I suppose is that managing conservatorship and possessor conservatorship and custody are all terms of art. They are defined in the statute. Right?

POWERS: I believe managing conservatorship and possessory conservatorship and joint managing conservatorship are words of art defined by the legislature.

ENOCH: And none of these provisions does 152.003(d), or 155.003 refer to joint managing conservator at all do they?

POWERS: They refer to conservator and I believe that the definition of a joint managing conservatory would be...

ENOCH: As a matter of fact, they don't. (B) refers to a managing conservator and (C) refers to a possessory conservator, but no provision refers to a joint managing conservator. Could it just as logically be read that the statute is silent as to what happens with continuing jurisdiction if you're dealing with joint managing conservatorship?

POWERS: I think the history wouldn't support that particularly.

ENOCH: If that's the case then, don't we have to look at the nature of the joint managing conservatorship to determine who's the managing conservator for purposes of continuing jurisdiction and who's the possessory conservator for purposes of jurisdiction?

POWERS: No, because I think neither are of those. There is no possessory conservator. They are parent/joint managing conservators. They had the rights and powers that are designated by the court. To me, what the legislature said is, we have sole managing conservator, we have possessory conservators, and we now starting in 1987, the judge can appoint both parties conservators.

BAKER: Sole managing conservator means that that parent, if designated, that term of art has "all of the powers of control of that child, and that child lives with that sole managing conservator, and the possessory conservator has rights of visitations." Is that a correct characterization?

POWERS: I believe that's true. They have the powers of a parent.

BAKER: But now under the JMC both parents are accorded all the same powers, but the child has to live somewhere with one or the other, would you agree with that?

POWERS: Not really.

BAKER: Well what's primary possession for?

POWERS: They are both appointed parent/joint managing conservators. There is a number of powers that are sole managing: the right to establish their residence; the right to

educational decisions; medical decisions; all of the things that parents have the God given right to do for their children. And they are not taking that way from the parents nowadays. The theory is that when we get a divorce, we are going to try to not involve them in this. And the powers and the judge will allot those powers. If he appoints a joint managing conservator, he will allot those powers equally, or someway.

BAKER: In this case, they were equal?

POWERS: They were joint managing conservators. I think he allotted the primary residence and the right to establish domicile to her, and may have...

BAKER: And your viewpoint is, that is or is not attributes of what we used to call in the old days "custody"?

POWERS: I think - well not really because of the changing concepts and - custody used to be win or lose.

BAKER: Primary possession and right to designate the residence can be or you can argue are attributes of what we used to call "custody" in the old days before the theory and the public policy of joint managing conservatorship came into _____?

POWERS: I would agree with that. I think maybe like comparing apples to oranges today because of the fact that now we - the old days custody, I want custody. I get the kids and you get some kind of visitation or something. I think we've come a long way from that situation where we don't take - these are powers and privileges. I don't think they have anything to do with the conservatorship issue. I think they are joint managing. They are both parents. They are going to get to share in these children. I don't think you are going to see a whole lot of this coming up because of the fact that the courts are taking a close look at letting people go from another state. It's just not going to happen.

BAKER: If the public policy is to look to the best interest of the child, and that's why we have joint managing conservatorship so that each parent has equal say over the traditional things that you do with your child, but would you agree that the recognition of primary possession and designation of residence is an issue that involves the best interest of the child?

POWERS: I agree with that along with all the other powers like educational decisions and things like that. However, before you can change, before you can modify, that's the first thing you look at: Is it in the best interest of the child? So I think that the fact that, yes, all of these are powers of a parent. Nowadays, we don't have to win or lose custody. We can say you're both parents. You can have these rights or you can share these rights. And you don't have to do it 50/50. You can do it, however.

BAKER: Is it a correct conclusion that if Mr. Beaver was successful in this motion, the child would move back from Colorado to Texas, and then he would have the authority to have primary possession and to designate the child's residence?

POWERS: If he prevailed on the modification and he prevailed that it was in the best interest of the child, that would be just exactly what happened back when they got the divorce. That's a right that courts allow in modification in these case to change the circumstances, because we all know that children over the years there's changing conditions.

GONZALES: Your position is, is that having the ability or changing who has primary possession and who can designate domicile does not constitute a modification of managing conservatorship. Is that your position?

POWERS: I think that's just really clear under the law. Yes.

GONZALES: What would be examples where you would be modify managing conservatorship other than simply changing the title of designation? Give me some examples where you have a modification of managing conservatorship.

POWERS: A good example, may not in this case, but a good example is sole managing conservator where a parent has been abusing, where they will limit the access, or if they win sole managing conservator they will get all those powers automatically unless the court doesn't do that. But there's a presumption now that it should be joint managing conservator. That's by law. If there's a presumption that it should be.

OWEN: Is there any kind of modification to managing conservatorship short of changing it to sole managing conservatorship?

POWERS: I know of nothing other than - there is only 3 positions: sole managing; joint managing; and possessory conservator. And there's a presumption that it be a parent.

OWEN: Let me get you to focus on 155.003(b) - Modify managing conservatorship. It doesn't say joint or sole or possessory. Are you saying the word "modify" managing conservatorship only means changing between the three; nothing else constitutes a modification?

POWERS: I think modification means that if I a sole managing conservator, and this one is a possessory, I think that could be _____.

OWEN: So you are joint. Is the only way you can modify a joint managing conservatorship is change it to some other kind of conservator?

POWERS: To sole managing, and then possessory conservator. If there is a sole

managing conservator, then the other parent unless for some good reason is going to be a possessory conservator, and they get standard access. Joint managing conservator doesn't do that. They get a minimum of standard. And it doesn't have to be 50/50. So there are only 3 things a judge or people can agree to and with the presumption now that...

OWEN: If you want to change the time of possession as between managing, joint managing conservators is that a modification of the managing conservatorship?

POWERS: Yes. You can come in besides changing conservatorship. There's a lot of things you can do. You can come in and say, Hey - you're sending those kids to private school and I think they ought to go - and I ought to get that right.

OWEN: Is that a modification?

POWERS: That's a modification. And there's rules about modified. You can't just walk in and modify. You can modify visitation whether it's joint or whether it's sole.

GONZALES: If that is a modification, why wouldn't changing the domicile be a modification or primary possession be a modification?

POWERS: Because that isn't visitation possession. That is a power and a right of a parent. The legislature, I think, in their wisdom and probably because of social change and all kinds of reasons to try to keep people together and be parents, that's what they did.

HANKINSON: But if a parent under a joint managing conservatorship has the right to possession of the child, if the other parent comes into court and wants to change that right of possession to him or herself, is that a modification of the managing conservatorship under 155.003(b)?

POWERS: I don't think so.

HANKINSON: Why not? Aren't you modifying the conservatorship because you're modifying some of the terms of it?

POWERS: To me conservatorship joint, sole, or possessory is clearly defined. The right to establish domicile and primary possession are rights and powers of a parent. There's a standard possession order. All of those have to do with possession and access. You can modify a joint managing conservatorship in other ways besides what we were wanting to do. We can ask for some educational rights, medical rights, all kinds of things. But those are modifications of possession or access.

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REBUTTAL

LEMKUIL: Justice Abbott you questioned me at some length on 155.002. What I would like to clarify about the position of my client is that although 155.002 speaks in terms of continuing jurisdiction of the court, that the UCCJA operates as a limit or a harness on that continuing jurisdiction. The two must work hand-in-hand. I would also encourage the court to look at the express intent and purpose of the UCCJA, specifically 152.001(a)(3). I think that addresses a lot of the specific concerns that Justice Hankinson expressed or questioned about.

I would encourage this court to examine both *Oliver v. Boutwell*, 601 S.W.2d 393; and *Ramsey v. Ramsey*, 707 S.W.2d 724, which both hold for the concept that should the CA be correct and all these elements be within the rubric of visitation, a modification of visitation can be so extreme as to effect a change in custody. For example: the jury comes back and awards primary possession, which is a jury question, to mom, the court having the discretion in its own ____ as to visitation says, Okay, dad gets 360 days of visitation, but mom you won the jury trial, you get 5. Such an extreme modification of visitation is in fact a custody modification.

I would also charge to the court *Lithold v. Plass*, which is a Texas SC case cited by opposing counsel in his brief. It is a 1967 case, but in my opinion it very artfully examines what is meant in Texas by the concept of custody. It does pre-date the statute as they confess. And I would agree. But the argument and the reasoning is still sound today as it was in 1967.

I would also point out to the court as opposing counsel pointed out to me *Wilkinson v. Wilkinson*, as cited in his brief, has been withdrawn.