

MSC Opinion: Foster v. Wolkowitz

2. July 2010 By Kevin Kileen

On July 1, 2010, the Michigan Supreme Court published its Opinion in *Foster v. Wolkowitz*, holding a presumptive award of custody in an acknowledgment of parentage (AOP) does not constitute an “initial custody determination” under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.* While a presumptive award of custody is “part of a valid agreement into which the parents entered, and may be set aside only when a custody determination has been made by the judiciary,” the presumptive award of custody was not a court order and cannot be an initial custody determination under the UCCJEA. Therefore, because the UCCJEA requires initial custody determinations take place in the child’s home state, unless the home-state court expressly declines jurisdiction, and Illinois has been found to be the child’s home state, the Michigan courts were without power to act unless and until the Illinois courts declined jurisdiction. The parties, who cohabitated but never married, moved from Illinois to Michigan in early 2007, months before their child was born in Michigan. They executed an Acknowledgment of Parentage (AOP) in Michigan, granting custody to the mother, naming the defendant as the child’s father, and establishing paternity, but returned to Illinois several months later. The following year, the parents’ relationship ended. The mother filed a paternity action in Michigan; shortly thereafter, the father filed a custody action in Illinois. The parties disputed which state had jurisdiction to determine issues of custody. The trial court found both that the parents had consented to jurisdiction in Michigan by executing the AOP here, that the AOP had served as a voluntary grant of “initial custody” to the mother under the Acknowledgment of Parentage act, and that the UCCJEA’s jurisdictional test would accordingly not need to be invoked.

The Court of Appeals affirmed, but with different reasoning. The Court of Appeals held that the properly executed AOP operated as an “initial custody determination” under the UCCJEA, as a matter of law, and that Michigan thus had continuing jurisdiction under the UCCJEA from the moment the AOP was executed. The Court of Appeals therefore found it “not necessary to consider defendant’s argument that Illinois is the home state.”

The Michigan Supreme Court reversed. First, a child custody determination in an AOP is not a custody determination within the meaning of the UCCJEA. Under Michigan’s Acknowledgment of Parentage statute, an agreed grant of initial custody is without prejudice to a separate determination of either parent’s custodial rights, leaving either parent able to seek a court order. Further, the UCCJEA requires that “child-custody determination[s]” take the form of court orders. MCL 722.1102(c). The AOP was simply an agreement between mother and father. Though the parents may have individually consented to personal jurisdiction in Michigan when executing their AOP, the Michigan courts were not involved with that agreement and did not assume UCCJEA jurisdiction over the case.

Because AOPs are valid agreements, the Michigan Supreme Court took care to note the AOP's stipulations with respect to the mother's custody would remain intact pending the outcome of the judicial interstate custody dispute. However, because the UCCJEA requires that the home-state court must decide whether to decline or exercise jurisdiction, the Illinois courts should have been – and now must be – permitted to decide whether to decline jurisdiction before the Michigan courts may act.