

1991.

APPROVAL, BONDS OF VILLAGE OF WADSWORTH, MEDINA COUNTY,
\$17,500.00, FOR WATERWORKS IMPROVEMENT.

COLUMBUS, OHIO, November 24, 1924.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

1992.

APPROVAL, BONDS OF HARRISON TOWNSHIP RURAL SCHOOL DIS-
TRICT, MONTGOMERY COUNTY, \$9,000.00, FOR SCHOOL IMPROVE-
MENTS.

COLUMBUS, OHIO, November 24, 1924.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

1993.

JURISDICTION OF JUVENILE COURT AND COURT OF COMMON PLEAS
RELATIVE TO DISPOSITION OF CHILDREN DISCUSSED.

SYLLABUS:

The juvenile court may not take jurisdiction of the minor children where the jurisdiction of the Common Pleas Court has attached in a divorce proceeding, unless the minor child is charged with being delinquent.

The Common Pleas Court may make temporary disposition of children pending the hearing of a divorce case or may make final disposition under the juvenile sections.

COLUMBUS, OHIO, November 24, 1924.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

Dear Sir:—

Acknowledgment is hereby made of your recent communication, which reads:

“We ask your opinion as to the proper procedure in cases similar to the following:

John and Mary Doe, his wife, have lived apart for several years. The children of the couple have been living with the wife and, during the period of separation, the husband has given the greater part of his wages for the

support of his wife and children. The wife's conduct became notorious in the community where she lived, and it was alleged that she and her daughter kept late hours at night with men of low character. One daughter did not approve of her mother's conduct and sought shelter with her father who was not so situated in his employment to give her the proper home care. The wife instituted divorce proceedings and asked for the custody of the children. A few days after the institution of these proceedings, the father obtained possession of the other daughter, stating that he did not want his daughter to remain longer with the mother because of her conduct.

An effort was made by interested parties to take the case into the juvenile court, stating that the father could not give the proper care to the daughters in question. The juvenile judge hesitated to give cognizance because of the pending divorce case. He stated that he had doubt as to his authority to act under such circumstances. The juvenile judge sought the advice of the local prosecuting attorney who informed him that the juvenile court could not take the case so long as the divorce petition was pending.

This case is somewhat typical of conditions which the Division of Charities and many other child-caring agencies encounter in their work. It is often necessary that something should be done speedily in order to protect the morals and welfare of the children who are innocently involved while the controversy between the parents is being adjusted.

Your advice is requested on the following questions:

1. May the juvenile court take action under such circumstances as mentioned above?
2. If the juvenile court cannot act, has the divorce court power to make temporary disposition of the children until the pending divorce case is settled?"

The authority for the Common Pleas Court to make orders for the disposition, care and maintenance of children of parents involved in divorce proceedings is found in section 11987 of the General Code, which in part reads:

"The court shall make such order for the disposition, care and maintenance of the children, if any, as is just."

Juvenile courts have ample authority to consider and determine cases involving questions of delinquent, neglected or dependent children.

Section 1647, General Code, provides that:

"Any person having knowledge of a minor under the age of eighteen years who appears to be either a delinquent, neglected or dependent child may file with such juvenile court a complaint, * * *."

Section 1648, General Code, provides that:

"Upon filing of the complaint, a citation shall issue, requiring such minor to appear, * * * at a time and place to be stated in the citation, * * *."

Section 1650, General Code, provides that:

"On the day named in the citation * * *, the judge shall proceed in a summary manner to hear and dispose of the case, * * *."

It is evident from the foregoing sections of the General Code, that either the juvenile court, or the Court of Common Pleas, may exercise jurisdiction over certain minor children.

The real question which you wish determined is: May a juvenile court exercise jurisdiction over children under eighteen years of age after a petition has been filed in a divorce proceeding by a parent, in the Court of Common Pleas, and before said Court of Common Pleas has exercised jurisdiction over said minor children?

The said courts have concurrent jurisdiction over children under eighteen years of age, and therefore, as is said in section 2157 of Rockel's Probate Practice:

"The court first exercising jurisdiction would have jurisdiction to the exclusion of all others."

It was held in *Children's Home vs. Fetter*, 90 O. S., 110, that:

"Probate courts or juvenile courts are courts of record, and their jurisdiction being attached, it is exclusive and cannot be assailed by any other court in an independent proceeding."

In a divorce proceeding a child was awarded to the mother; afterwards a proceeding was brought in the juvenile court on the ground that the child did not have proper care, etc., and was adjudged by the juvenile court to be a dependent child, and ordered committed, etc. It was held in *Orphan Court Asylum vs. Soule*, 5 Ohio App. page 67, that the juvenile court had no jurisdiction, and an action in habeas corpus was sustained; the court using the following language:

"The authority vested by statute in the court of common pleas in an action for divorce is contained in Section 11987 G. C., and empowers that court to make such order for the disposition, care and maintenance of the child as is just. The order which was made in the court of common pleas antedates the order in the juvenile court and was made in direct conformity to the language of the statute.

The child was a ward of the court of common pleas prior to and at the time the proceedings were brought in the juvenile court.

The statutes conferring authority on any court in such matters must be read as limited to children not already provided for by some other court first having obtained jurisdiction."

In the case of *Children's Home vs. Fetter*, 90 O. S., 110, a delinquent child had become a ward of the juvenile court and had been committed to an institution under provisions of the General Code relating to that court. Thereafter proceedings in habeas corpus were brought by a parent of the child and it was held that the order of the juvenile court was effective and controlling, and that the court assuming to take subsequent jurisdiction was without authority. Commenting upon this case, the court of appeals in *Orphan Asylum vs. Soule*, 5 Ohio App. page 67, at page 70, says:

"This is but another enunciation of a principle of law that has been recognized from time immemorial, that the court first obtaining jurisdiction of the subject matter retains exclusive jurisdiction and authority until final disposition, free from interference by any other tribunal.

To hold differently, than in accordance with the rule above stated, would permit a defeated litigant, seeking the custody of a minor child in the common pleas court, to go immediately to the juvenile court and there re-litigate the question just determined in the common pleas court.

It would be doing violence to known rules of procedure to assume, that

the general assembly intended, by the passage of the juvenile law, to confer authority on the juvenile court to relitigate matters already determined in another court, particularly in view of the fact that the orders as to the custody of children are continuing orders."

Concurrent jurisdiction over certain children under eighteen years of age is given to the common pleas court and the juvenile court by statute, but it is the exercise of that jurisdiction that makes it exclusive.

Section 1639, General Code, in part provides:

"Courts of common pleas, probate courts and superior courts, where established shall have and exercise, concurrently, the powers and jurisdiction conferred in this chapter."

It will be seen by the above statute that concurrent jurisdiction is given to both the common pleas and probate court in all juvenile matters. It is the common rule of law that when a court which has concurrent jurisdiction with another court exercises its jurisdiction in a matter brought before it, this jurisdiction is exclusive as relating to this matter. The jurisdiction of a court attaches when such court has the jurisdiction over the subject matter and secures jurisdiction over the person.

In the case of *Callen vs. Ellison*, 13 O. S., p. 446, it was said:

"When a court is moved by one party to enforce a claim, or decide a controversy, and for that purpose brings before it the other party, this is obtaining jurisdiction over the person."

Jurisdiction of the common pleas court over divorce matters is given by Section 11987, General Code, which has been quoted. Jurisdiction over the person has been acquired in the case set out in your letter by the filing of the divorce action and the service of process upon the defendant. The exclusive jurisdiction of the court in the cases referred to, supra, is not based upon the fact that an order had been made by such court and such order is only evidence that such court has taken jurisdiction and that after taking such jurisdiction the court exercised its jurisdiction by making some order. As one of the subjects of the controversy in the divorce proceedings is the custody of the minor children, such matter is properly before such court and the court has exclusive jurisdiction upon the service of summons.

This would work no hardship if the children should be neglected, dependent or surrounded with unsuitable environment, as the court has further jurisdiction in juvenile matters by section 1639. If this condition should arise, it is only necessary that any person having knowledge of the condition appear before the court and file complaint, and this matter could be heard by the court of common pleas independently of the divorce action and such order made as the court sees fit. While Section 11987 provides that the court, upon determining the divorce case, shall make such order for the disposition of the children as it sees fit, this would not preclude the court from making an order prior to the determination of the divorce proceedings.

In answering your first question specifically, it is my opinion that the juvenile court may not take jurisdiction over a minor child where the care and disposition of such child is involved in a divorce proceeding in the common pleas court, unless the minor child is charged with being delinquent.

Second, the Common Pleas Court has power to make a temporary disposition of minor children pending the divorce action or may make such order under its juvenile jurisdiction.

Respectfully,
C. C. CRABBE,
Attorney General.