

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE**

IN THE MATTER OF:)	
AMANDA JEAN O'DANIEL,)	Sumner Circuit
)	No. 11214-C
JOHN JULIAN O'DANIEL and wife)	
LAQUITTA GAIL O'DANIEL,)	
)	Appeal No.
Plaintiffs/Appellees,)	01A01-9604-CV-00180
)	
VS.)	
)	
JEANETTE MARIE MESSIER,)	
)	
Defendant/Appellant.)	

FILED

October 25, 1996

Cecil W. Crowson
Appellate Court Clerk

**APPEAL FROM THE CIRCUIT COURT OF SUMNER COUNTY
AT GALLATIN, TENNESSEE**

HONORABLE THOMAS GOODALL, JUDGE

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REVERSED AND REMANDED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE
BEN H. CANTRELL, JUDGE

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OPINION

The captioned defendant has appealed from the judgment of the Trial Court denying her petition for visitation with her minor child, now in the custody of the plaintiffs as foster parents.

On November 11, 1988, Amanda Messier was born to defendant, Jean Messier, unmarried.

In 1992, the Juvenile Court finding Amanda to be dependent, neglected and abused, removed her from the custody of her mother. The Court placed her in the custody of plaintiffs, John Julian and Laquitta Gail O'Daniel.

On June 24, 1993, the Circuit Court ordered the adoption of the child by the O'Daniels, but the mother appealed to this Court.

On April 5, 1995, this Court reversed the adoption, and remanded to the Circuit Court for further proceedings. The O'Daniels applied to the Supreme Court for permission to appeal.

In May, 1995, the defendant mother petitioned the Juvenile Court for visitation. The O'Daniels moved for dismissal because jurisdiction was in Circuit Court by the adoption proceedings.

On June 7, 1995, the Juvenile Court overruled the motion to dismiss, and set a hearing on the petition for June 21, 1995. The O'Daniels appealed to the Circuit Court from the June 7, 1995, ruling of the Juvenile Court.

On June 30, 1995, the mother moved the Circuit Court to restrain the O'Daniels from removing the child from the jurisdiction of the Court.

On July 3, 1995, the Circuit Court entered an order reading as follows:

This cause came on to be heard on the 19th day of June, 1995, before the Honorable Thomas Goodall, Judge of the Circuit Court for Sumner County, Tennessee, on the appeal of John Julian O'Daniel and Laquitta Gail O'Daniel from the Juvenile Court for Sumner County, Tennessee, seeking to reverse the ruling of that court that it had jurisdiction with respect to issues of custody and visitation for the minor child, Amanda Jean O'Daniel ("Amanda"). Based on the statements of counsel, pertinent statutes, and the record as a whole in this matter, the Court determined as follows:

1. By judgment entered in 1993, in *O'Daniel v. Messier*, Number 11214-C, this Court awarded an adoption of the minor child, Amanda, to the O'Daniels; this judgment was reversed by the Court of Appeals in April, 1995, and an application for permission to appeal is pending before the Supreme Court of Tennessee.

2. In May, 1995, Jeanette Marie Messier, the biological mother of the minor child, Amanda, filed a petition in the Juvenile Court for Sumner County, Tennessee, seeking visitation with Amanda.

3. The O'Daniels moved for dismissal of the petition in Juvenile Court, arguing that T.C.A. § 36-1-123 gives jurisdiction to this Court, rather than to the Juvenile Court upon dismissal of the action for adoption; the Juvenile Court denied the motion, and this appeal followed.

4. Given the dismissal of the action for adoption, T.C.A. § 36-1-123 grants this Court exclusive jurisdiction to

determine issues of custody and visitation with respect to the minor child, Amanda; the contrary ruling of the Juvenile Court is reversed, and the petition for visitation privileges will be heard in this Court.

On August 28, 1995, the Supreme Court denied the O'Daniels application for permission to appeal in the adoption proceedings, and mandate was issued to the Trial Court to implement the April 5, 1995, opinion and judgement of this Court. On the same date, the Circuit Court issued an order restraining the O'Daniels from removing the child from the jurisdiction of the Court.

On August 30, 1995, the mother moved the Circuit Court for visitation.

On December 7, 1995, pursuant to the April 5, 1995, order of this Court mandated on August 23, 1995, the Trial Court dismissed the petition of the O'Daniels to adopt the child.

On December 29, 1995, the Circuit Court entered an order stating:

1. Custody of Amanda, who is now seven (7) years old, has been retained by John Julian O'Daniel and Laquitta Gail O'Daniel ("the O'Daniels") throughout these proceedings, beginning several months prior to the action for adoption filed by the O'Daniels against Ms. Messier in 1992 in this court, Case Number 11214-C.

2. The petitioner, Ms. Messier, has had no contact with Amanda in more than three years.

3. During the period in which custody of Amanda has been retained by the O'Daniels, Amanda has thrived, has become a well-adjusted and happy child, and is now an excellent student in the first grade of school.

4. Based on Ms. Messier's history, the past relationship between Ms. Messier and Amanda, and the child's current status, visitation at this time would likely endanger Amanda's emotional health.

ACCORDINGLY, IT IS ORDERED, ADJUDGED, AND DECREED THAT, consistent with the guidelines set forth in T.C.A. § 36-6-301, visitation of Amanda by Ms. Messier shall not be allowed at this time.

From this order, the mother has appealed and presented a single issue as follows:

Did the Trial Court correctly determine that APPELLANT's visitation with APPELLANT'S minor child should be Denied?

Prior to addressing appellant's issue, it is necessary for this Court to resolve a preliminary issue relating to the jurisdiction of the Circuit and Juvenile Courts under the unusual circumstances of this case, which are, in summary as follows:

1. The Juvenile Court first acquired and exercised jurisdiction over the subject child in 1992, placing the child with foster parents. At that time, T.C.A. § 37-1-103 contained the following provisions:

(a) The juvenile court has exclusive original jurisdiction of the following proceedings which are governed by this part.

(1) Proceedings in which a child is alleged to be . . . dependent and neglected

(c) When jurisdiction has been acquired under the provisions of this part, except as provided in §§ 37-1-136 and 37-1-137, such jurisdiction shall continue for the purposes of this part until the child has attained the age of nineteen. (In 1994, the section was amended to substitute 37-1-137 and 37-1-147 for 37-1-136 and 37-1-137. These changes do not affect the present case.) (Emphasis supplied)

2. On June 24, 1993, when the Circuit Court ordered the adoption of the child, T.C.A. § 36-1-105 provided that petitions for adoption may be filed in Circuit or Chancery Court. (In 1995, this provision was moved to § 36-1-115.) § 36-1-123 contained the following:

(c) Upon dismissal of an adoption proceeding, the custody of the child shall revert to the department of child-placing agency having custody immediately before the filing of the petition. In all other cases, when a petition is dismissed, non-suited, or withdrawn, the child remains a ward of the court with jurisdiction to adjudicate the child's guardianship according to the best interest of the child; and the court shall order the department or or licensed child-placing agency, to make further investigation and report to the court regarding a suitable plan for any child who may be in the custody of unrelated persons. (By Public Acts of 1995, Chapter 532, § 1, this section was repealed effective January 1, 1996.) (Emphasis supplied)

In May 1995, when O’Daniels appealed from the interlocutory order of the Juvenile Court overruling their motion to dismiss, and in July 1995, when the Circuit Court ruled on their appeal, T.C.A. § 37-1-159 provided:

(a) The Juvenile Court shall be a court of record and any appeal from any final order or judgment in a . . . dependent and neglect proceeding . . . may be made to the Circuit Court which shall hear the testimony of the witnesses and try the case de novo . . .
(Emphasis supplied)

No statutory authority is found for an appeal to the Circuit Court from an interlocutory (non-final) order of the Juvenile Court. The appeal to the Circuit Court was from an order overruling a motion to dismiss and setting the cause for hearing leading to a final judgment upon the merits of the controversy at which stage an appeal to the Circuit Court would have the above statutory authority.

It appears from the judgment of the Circuit Court, quoted above, that the Circuit Court exercised sua sponte a “reach down” authority to remove pending, undecided litigation from the Juvenile Court to the Circuit for trial and disposition as a matter of original jurisdiction rather than to await the final judgment of the Juvenile Court upon the merits of the controversy and exercise the appellate jurisdiction authorized by statute.

No statutory authority is found for the exercise of such “reach down” jurisdiction by a Circuit Court, except the writ of certiorari which was not invoked, or exercised in the present case.

In *Hall v. Honeycutt*, Tenn. App. 1972, 489 S.W.2d 37, 39, this Court held that, when the dismissal of an adoption proceeding left the appellant’s custody petition pending, the Trial Court had jurisdiction to try the issue of custody.

In the cited case, it does not appear that the child had ever been the subject of a Juvenile Court proceeding; but a custody proceeding was pending before the Circuit Court at the time of the dismissal of the adoption petition. On these grounds, the cited authority is distinguishable.

If it be said that the two quoted statutes §§ 36-1-123 and 37-1-103 confer concurrent original jurisdiction upon the Circuit and Juvenile Court, than priority of inception would determine priority of jurisdiction. Where suit on the same subject matter is pending between the same parties before a court of this state having jurisdiction of the subject matter a second suit before another court is subject to abatement. *Cockburn v. Howard Johnson, Inc.*, 215 Tenn. 254, 385 S.W.2d 101, 102 (1964).

On this basis, the Circuit Court proceeding for visitation was subject to dismissal because of the previously filed suit in Juvenile Court on the same subject.

For all the foregoing reasons, this Court concludes that it was error for the Trial Court to:

- 1) entertain an appeal from the interlocutory order of the Juvenile Court overruling the motion to dismiss;
- 2) to assume jurisdiction of and rule upon the petition for visitation filed in the Juvenile Court;
- 3) to accept and rule upon the motion for visitation filed in Circuit Court.

The judgment of the Trial Court is reversed and vacated. All costs including costs of this appeal are taxed against the appellees. The cause is remanded to the Trial Court for entry of an order remanding the cause to the Juvenile Court for further proceedings.

REVERSED AND REMANDED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE