NOT DESIGNATED FOR PUBLICATION

No. 95,728

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LYNETTE SUZANNE YISRAEL,
a/k/a LYNETTE SUZANNE JOLLY,
Appellee,

and

YERICHO Y. YISRAEL,
a/k/a RICHARD JOLLY,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JANICE D. RUSSELL, judge. Opinion filed March 16, 2007. Affirmed.

Yericho Y. Yisrael, appellant pro se.

No appearance by appellee.

Before MARQUARDT, P.J., ELLIOTT, J., and KNUDSON, S.J.

Per Curiam: Yericho Yisrael, a/k/a Richard Jolly, appeals the trial court's child custody and support rulings following his divorce from Lynette Suzanne Yisrael, a/k/a Lynette Suzanne Jolly. We affirm.

Yericho and Lynette were married in Illinois and have four children. Lynette filed her divorce petition in Johnson County, Kansas, and Yericho eventually moved to dismiss for lack of personal jurisdiction. At some point in time, Yericho filed a pro se divorce petition in Tennessee.

After consulting with the divorce judge in Tennessee, the trial court determined it had jurisdiction to grant the divorce and to issue custody, visitation, and support orders pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), K.S.A. 38-1301 *et seq.* (now repealed), and the Uniform Interstate Family Support Act (UIFSA), K.S.A. 23-9,101 *et seq.* The trial court also ruled the Tennessee court had jurisdiction to divide the property and debts of the parties.

Following a subsequent evidentiary hearing at which Yericho did not appear, the trial court granted Lynette's divorce petition and awarded her sole custody of the children. The trial court also determined any supervised visitation by Yericho would be solely at Lynette's discretion, specifically finding unsupervised visitation would endanger the

children's physical, mental, moral, and emotional health under K.S.A. 60-1616.

The trial court also entered judgment for child support arrearage, set future child support, and assessed attorney fees.

Some 5 years later in 2005, Yericho moved for relief from the 2000 orders pursuant to K.S.A. 60-260(b)(4), (5), and (6). Following a hearing at which Yericho appeared, the trial court denied Yericho relief and set the amount of past due child support at some $80,000.

Yericho appeals, Lynette's attorney has withdrawn, and Lynette has not filed a response to this appeal. According to the record, Lynette and the children currently reside in Washington state.

We review rulings on 60-260(b) motions for an abuse of discretion. *In re Marriage of Leedy*, 279 Kan. 311, 314, 109 P.3d 1130 (2005). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880 (1998).

In order to obtain relief from the trial court's order, Yericho must establish the

judgment and order were void, no longer equitable, or that there is some other reason justifying relief from the judgment. Yericho must also show his motion filed 5 years after the fact, was filed within a reasonable time.

Yericho first claims the trial court did not have personal jurisdiction over him. Whether jurisdiction exists is a question of law over which we have unlimited review. *McNaab v. McNaab*, 31 Kan. App. 2d 398, 403, 65 P.3d 1068 (2003). Child custody and child support present different jurisdictional issues; we will, therefore, address them separately.

Child custody under UCCJA

The trial court entered its divorce decree on July 10, 2000, relying in part on the UCCJA, K.S.A. 38-1301 *et seq.* The legislature repealed the UCCJA as of July 1, 2000, in favor of the adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), K.S.A. 38-1336 *et seq.* See 31 Kan. App. 2d at 403.

Yericho argues because the trial court's order was not filed until July 10, 2000, after the UCCJEA went into effect, the custody and support orders, which relied on the UCCJA, are void. We disagree.

Yericho's argument ignores K.S.A. 38-1377 which provides: "A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before the effective date of this act is governed by the law in effect at the time the motion or other request was made."

Since the UCCJA was in effect at the time Lynette filed her request in 1999, the trial court properly relied on the UCCJA.

K.S.A. 38-1303(a), prior to July 1, 2000, provided in part:

> "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 the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
>
> . . . .

> "(4)(A) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (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 this court assume jurisdiction."

As defined in K.S.A. 38-1302(e) prior to July 1, 2000, home state means "the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as a parent, for at least six consecutive months" before commencement of the proceeding.

Here, it is undisputed Lynette filed her petition in May 1999. At the jurisdiction hearing, the trial court heard testimony the children had lived with Lynette in Kansas for 13 months preceding the filing. Yericho failed to appear at this hearing to provide any evidence to the contrary. The trial court also consulted with the Tennessee judge.

Kansas, as the children's home state, was the proper forum under the statutes in place at the time of filing. The analysis would remain the same under the UCCJEA. See K.S.A. 38-1337(8), which defines home state.

Yericho claims the 6-month home state rule violates his equal protection rights,

claiming the custody issues should be tried in Tennessee because Lynette abducted the children to Kansas. Other than this raw allegation, Yericho presents nothing to support his claim Lynette abducted the children.

The trial court properly held Kansas to be the home state of the children and properly exercised jurisdiction under the UCCJA.

Child support under UIFSA

Child support determinations are governed by UIFSA, K.S.A. 23-9,101 *et seq.* The UIFSA was designed to address the problem of multiple support orders under the prior act and it established a priority scheme for the recognition and enforcement of multiple existing support obligations. See *McNaab*, 31 Kan. App. 2d at 407-08.

Here, the trial court exercised jurisdiction over Yericho for child support purposes based on K.S.A. 23-9,201(c), which provides: "In a proceeding to establish, enforce or modify a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if: . . . (c) the individual resided with the child in this state."

At the jurisdiction hearing, Lynette argued Yericho had resided with her and the children from October to December 1998 in McPherson and that he had provided sole support for the family during that time.

Yericho did not appear at this hearing to challenge this evidence. Accordingly, based on the record before us, the trial court properly exercised jurisdiction under K.S.A. 23-9,201(c).

Yericho argues the UCCJA, the UCCJEA, and the UIFSA are unconstitutional because they were, in effect, passed by the National Conference of Commissioners on Uniform State Laws. Yericho claims the National Conference is an illegal confederacy of states, comparing it to the Southern Confederacy.

The constitutionality of a statute is presumed and all doubts must be resolved in favor of its validity. *State v. Brown*, 280 Kan. 898, 899, 127 P.3d 257 (2006).

Yericho provides us with no support for his argument the National Conference is an illegal confederation of states. See *In re Marriage of Harris*, 20 Kan. App. 2d 50, 57, 883 P.2d 785, *rev. denied* 256 Kan. 995 (1994); *In re Wicks*, 10 Kan. App. 2d 124, 128, 693 P.2d 481 (1985).

In any event, the trial court could have exercised jurisdiction over Yericho pursuant to K.S.A. 23-9,201(b), which provides personal jurisdiction may be exercised over a nonresident individual if "the individual submits to the jurisdiction of this state by consent, by entering a general appearance or by filing a responsive document having the effect of waiving any contest to personal jurisdiction."

Yericho answered Lynette's divorce petition in June 1999 and did not object to the court's jurisdiction at that time. Some 4 months later in October 1999, Yericho moved to dismiss on jurisdictional grounds. Under K.S.A. 60-212(h)(1), Yericho waived this defense by filing an answer that did not challenge jurisdiction. And see *Rose v. Via Christi Health System, Inc.*, 279 Kan. 523, 525, 113 P.3d 241 (2005).

The trial court properly exercised jurisdiction over Yericho with respect to child custody and support and did not err in denying his motion for relief from judgment.

Next, Yericho claims the trial court erred in granting Lynette sole custody of the children while also providing her with sole discretion in allowing his visitation. The paramount consideration of the court is the welfare and best interests of the children. The trial court is in the best position to make that inquiry and determination and absent an abuse of discretion, the trial court's judgment will not be disturbed on appeal. *In re*

Marriage of Rayman, 273 Kan. 996, 999, 47 P.3d 413 (2002); *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 419, 119 P.3d 684 (2005).

The trial court's findings regarding visitation include the following:

"11. The Court further finds that any visitation by Respondent in this case shall be solely in the discretion of the Petitioner. However, the court finds that unsupervised visitation is not recommended, and supervised visitation is preferable.

"12. Whereas the Court normally orders extensive visitation to the noncustodial parent, in this case extensive or unsupervised visitation is specifically found to be not in the best interest of the children, based on concerns that such visitation would seriously endanger the children's physical, mental, moral and emotional health, pursuant to K.S.A. 60-1616.

"13. The Court specifically notes the following factors in its decision: First, the Respondent has a history of rootlessness, including his pattern of frequent moves, residing with different friends for temporary periods, frequent job changes, and his interest in living abroad, whether in India or South or Central America or Europe. This suggests a serious danger of his absconding with the children and hiding them from their mother, and the court finds that it is appropriate to order that the Respondent not be permitted to take the children outside the continental United States.

"14. Respondent has an apocalyptic world view, not conducive to raising healthy, well-adjusted children.

"15. Respondent has in the past focussed [*sic*] primarily on teaching the children the Bible and music, whereas the court believes that it is in the best interest of the children to learn reading and math and all the other subjects taught in public schools.

"16. Respondent has a pattern of unpredictable behavior.

"17. The Court specifically finds that the children should not spend lengthy periods of time with the Respondent in light of his history of inappropriate discipline, including his use of physical discipline that leaves bruises on the children and his shouting for evil spirits to depart from the children, his history of not providing appropriate food and supplementing his family's food by raiding garbage dumpsters, his practice of isolating the children from family, friends and neighbors, and his practice in holding excessively lengthy devotional services on a daily basis.

"18. The Petitioner shall have sole discretion to structure Respondent's visitation, attach conditions, and impose whatever requirements she believes are most suitable under the circumstances."

Essentially, Yericho is arguing the trial court's custody/visitation orders terminated his parental rights. This is simply not the case. Lynette was granted custody of the children and was also granted discretion to determine Yericho's visitation. But the trial court did not terminate Yericho's parental rights.

Further, we have trouble understanding Yericho's argument his due process rights were violated with respect to custody and visitation when he failed to attend several

hearings on the subject, including the June 21, 2000, hearing on the divorce petition. The record reflects Yericho had notice of the hearings and was encouraged by the trial court to attend and participate, yet chose not to attend to controvert Lynette's claims or to present evidence of his own.

Additionally, a complete transcript of the evidentiary hearing of June 21, 2000, is not included in the record of appeal. Without a complete record, we must assume there was ample evidence presented to support the trial court's findings regarding custody and visitation. Without that adequate record, the claim of error fails. See *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172, 61 P.3d 687 (2003).

Because the trial court made specific findings pursuant to K.S.A. 60-1616(a), we cannot say it abused its discretion with respect to custody and visitation matters.

Finally, Yericho claims the parent/child relationship is so fundamental, it should be evaluated by a jury rather than be left to the subjective discretion of a trial judge. The right to a jury trial is not absolute but exists only as it existed under the common law, unless modified by statute. See *Jenson Int'l, Inc. v. Kelley*, 29 Kan. App. 2d 836, 843, 32 P.3d 1205 (2001), *rev. denied* 273 Kan. 1036 (2002).

Section 5 of the Kansas Constitution Bill of Rights guarantees a right to jury trial as that right existed at common law. At common law, a party was not entitled to a jury trial as a matter of right in equity suits. *Vanier v. Ponsoldt*, 251 Kan. 88, 104, 833 P.2d 949 (1992). Because a divorce proceeding is equitable in nature, there is no right to a jury trial.

The trial court did not err in denying Yericho's motion for relief from judgment. He has also failed to show the motion was filed in a reasonable time or otherwise provide justification for the 5-year delay in filing the motion.

Affirmed.