

NOT DESIGNATED FOR PUBLICATION

No. 99,183

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

KELLI D. NADEAU,
Appellee,

and

LAWRENCE R. NADEAU, II,
Appellant.

MEMORANDUM OPINION

Appeal from Bourbon District Court; MARK ALAN WARD, judge. Opinion filed July 3, 2008. Reversed and remanded with directions.

J. Richard Showalter, II, of Topeka, for appellant.

Sara S. Beezley, of Girard, for appellee.

Before BUSER, P.J., MARQUARDT and STANDRIDGE, JJ.

Per Curiam: Lawrence R. Nadeau appeals the district court's denial of his motion challenging the court's jurisdiction to enter orders regarding child custody and parenting time related to his Maine divorce from Kelli D. Nadeau. We reverse the district court's January 2007 decision that it had jurisdiction to modify the State of Maine's custody determination. We also vacate any custody modifications made before February 27, 2007, and remand with directions to enforce the custody arrangements set forth in the registered Maine divorce decree.

A. Facts

On March 19, 2002, the marriage of Lawrence and Kelli Nadeau was dissolved pursuant to a divorce decree entered by the Kennebec District Court in the State of Maine. On that same day, and without objection from Lawrence, Kelli and L.N., the couple's son, moved to Kansas.

The divorce decree set forth a number of provisions related to custody of L.N. L.N.'s primary physical residence would be with Kelli, who was relocating to Kansas. Lawrence would have custody during Thanksgiving and Kelli during Christmas. Lawrence also would have custody for 2 consecutive unspecified months beginning in

2004. The parties were to share equally the transportation costs for all contact by Lawrence with L.N.

On May 27, 2004, Kelli filed a petition in Bourbon District Court asking it to assume jurisdiction of the Maine case and modify the custody order. The same day, Kelli also filed a request to register the Maine custody decree with the district court in Kansas.

On June 14, 2004, a letter from Lawrence was filed in Bourbon District Court. In the letter, Lawrence asked that it be accepted "as my special appearance to raise jurisdictional issues and to mark my opposition to the registration of the Maine divorce judgment in Kansas. I also signal my opposition to the Petition that seeks modification of the divorce judgment." Lawrence attached to the letter copies of two motions he had filed with the Maine court. In the first, he asked the Maine court to communicate with the Kansas court regarding which state should resolve the custody disputes. In the second, Lawrence asked the Maine court to modify the custody provisions to set a date certain for his upcoming 2-month visit with L.N., because Kelli had refused to cooperate in setting the custody dates.

On July 1, 2004, counsel entered an appearance on behalf of Lawrence in Bourbon District Court.

After a hearing held on July 23, 2004, in Bourbon County, Kansas, the court held it was in the child's best interest to enforce the Maine divorce decree (now registered in Kansas) and allow Lawrence 2 consecutive months of parenting time beginning August 22, 2004. The court also ordered Lawrence and Kelli to share the costs of Headstart enrollment and Kiddie Corral. The court then ordered that all other provisions of the Maine divorce decree were to remain in full force and effect.

In November 2004, Kelli requested the court reconsider its decision to enforce the Maine divorce decree, as amended on July 23, 2004, due to the great expense involved in transporting L.N. to Maine for Thanksgiving. Kelli later filed a motion to increase child support and to modify custody by reducing Lawrence's parenting time from 10 weeks to 6 weeks, a motion requesting the court order Lawrence to pay for outstanding medical bills incurred when L.N. was born, and a motion seeking to modify the portion of the custody order requiring the parties to split travel expenses and the portion of the order permitting Lawrence to claim L.N. as a tax dependent.

On August 11, 2006, Kelli filed a motion for the immediate return of L.N., alleging that Lawrence refused to send L.N. back to Kansas pursuant to the agreed schedule. The Kansas court held a hearing on this motion. The court directed Lawrence to return the child immediately, warned him that he would be responsible for any costs

incurred by Kelli for L.N.'s return, and authorized Maine law enforcement officers to aid in enforcement of the order.

Kelli subsequently filed a motion for sole custody of L.N., citing Lawrence's refusal to return L.N. In response, Lawrence filed a motion requesting the Kansas court set aside its assumption of jurisdiction and find all orders previously issued in this case to be void. On October 25, 2006, the Kansas court held a hearing on pending motions and took all matters under advisement until the court in Maine ruled on Kelli's motion to dismiss.

In January 2007, Kelli communicated to the Kansas court that the hearing on her motion to dismiss in Maine had been postponed until the jurisdictional issue was resolved. To that end, the Kansas court issued a memorandum finding that the Kansas court was a more convenient forum for L.N.'s custody proceedings and that Kansas was a more appropriate forum, since Kelli and L.N. resided in Kansas. The court also found Lawrence "has acquiesced in the jurisdiction of this Court by participating on several occasions in proceedings leading to orders relating to the custody of the parties' child without objecting to this Court's jurisdiction."

Lawrence filed a motion to reconsider and later notified the Kansas court that, in a decision dated February 27, 2007, the court in Maine had surrendered jurisdiction of the matter to Kansas.

On June 15, 2007, the Kansas court held a hearing on the motion for reconsideration and the motions it had taken under advisement at the previous hearing. The court denied Lawrence's motion for reconsideration and found that the court had jurisdiction of the matter in 2004, granted Kelli's motion for sole custody, granted Kelli's motion for monetary judgment in the amount of \$3,000 plus \$500 for attorney fees, denied Kelli's motions for payment of daycare expenses and medical bills, and granted Kelli's request to claim L.N. as an exemption.

Lawrence appeals, arguing the Kansas court was without jurisdiction to modify L.N.'s custody arrangements until the State of Maine surrendered jurisdiction on February 27, 2007. Based on this, Lawrence argues any orders issued prior to February 27, 2007, were void for lack of jurisdiction and must be set aside.

B. Analysis

The primary issue presented is whether Kansas had jurisdiction to modify the Maine custody order before the Maine court surrendered jurisdiction on February 27, 2007. The existence of jurisdiction is a question of law over which this court's scope of review is unlimited. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006). In addition to jurisdictional issues, this case presents questions regarding the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), which was adopted by the Kansas Legislature effective July 1, 2000. See K.S.A. 38-1336 *et seq.* This court's review of the district court's statutory interpretation is *de novo*. *McNabb v. McNabb*, 31 Kan. App. 2d 398, 403, 65 P.3d 1068 (2003).

1. The Parties Cannot Confer Jurisdiction by Consent or Waiver

As a preliminary matter, Kelli contends Kansas had jurisdiction under the UCCJEA because Lawrence "submitted to jurisdiction." Parties to a suit, however, "cannot confer subject matter jurisdiction by consent, waiver, or estoppel, nor can parties convey jurisdiction on a court by failing to object to its lack of jurisdiction. [Citation omitted.]" *Bruch v. Kansas Dept. of Revenue*, 282 Kan. 764, 773, 148 P.3d 538 (2006).

2. K.S.A. 38-1348 is Not Applicable Here

Although K.S.A. 38-1350 is the Kansas statute governing jurisdiction to modify an existing child-custody order, Kelli does not rely on this statute to support her position that the Kansas court had jurisdiction to modify the existing Maine custody order. Instead, Kelli argues that jurisdiction to modify the existing custody order in this case flows from K.S.A. 38-1348(1), which confers initial child-custody jurisdiction if the state is the home state of the child on the date of the commencement of the proceeding. In support of this argument, Kelli asserts Kansas was L.N.'s home state at the time the action was filed.

We reject Kelli's argument. Even if we assume Kansas was L.N.'s home state at the time the child-custody action was filed, which it likely was not, this fact would not confer jurisdiction on the Kansas court to modify the existing Maine child-custody order. This is because the statute upon which Kelli relies relates to jurisdiction of a particular court to make an *initial* child-custody determination. K.S.A. 38-1337(9) defines "[i]nitial determination" as "the first child-custody determination concerning a particular child." "Child-custody determination" is defined as "a judgment, decree or other order of a court providing for the legal custody, physical custody or visitation with respect to a child." K.S.A. 38-1337(4).

In this case, there is no dispute that the initial determination regarding child-custody was made by the Maine court in its divorce decree. In fact, the very terms of

Kelli's petition filed with the Kansas court acknowledge that she was seeking a custody modification, not an initial determination. Simply put, K.S.A. 38-1348 is not applicable to the facts presented here; the proper jurisdictional requirements for modification are found in K.S.A. 38-1350, which addresses jurisdiction to modify a child-custody determination.

3. *Pursuant to K.S.A. 38-1350, the Kansas Court Did Not Have Jurisdiction to Modify the Maine Child-Custody Order Prior to the Time the Court in Maine Surrendered Jurisdiction*

K.S.A. 38-1350 requires that a Kansas court seeking to modify another state's custody determination meet one of two additional requirements beyond the basic jurisdictional requirements for initial custody determinations. First, the court of the other state must already have determined that it no longer has exclusive, continuing jurisdiction or that the Kansas court would be a more convenient forum. K.S.A. 38-1350(1). Alternatively, the Kansas court or the court of the other state must already have determined that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. K.S.A. 38-1350(2).

Here, the record reflects that Maine did not surrender jurisdiction to Kansas until February 27, 2007. The record further reflects that Lawrence continued to live in Maine

at all times relevant to this action. Thus, neither of the additional jurisdictional requirements listed in K.S.A. 38-1350 was met here.

The UCCJEA prohibits simultaneous custody proceedings in two different states, except for temporary emergency situations. The Kansas court was required to first determine whether a custody proceeding had been commenced in another state having jurisdiction substantially in conformity with the UCCJEA. K.S.A. 38-1353(a). Kelli's request to have the Kansas court modify the existing child-custody determination of the Maine court was an attempt to do the very thing that the UCCJEA was designed to eliminate, *i.e.*, dueling state custody proceedings. *Cf. In re Marriage of Ruth*, 32 Kan. App. 2d 416, 423, 83 P.3d 1248, *rev. denied* 278 Kan. 845 (2004) ("The mere filing of a motion without a jurisdiction determination defeats the purpose of the UCCJEA."). Accordingly, we find the Kansas court was without jurisdiction to make any orders modifying L.N.'s custody arrangements before the Maine court surrendered jurisdiction on February 27, 2007.

4. *Although the Kansas Court Did Not Have Jurisdiction to Modify the Maine Custody Order, the Kansas Court Did Have Authority to Enforce the Maine Order*

Kelli filed a request for registration of the Maine divorce decree with the Kansas court on the same day as she filed her petition. Under K.S.A. 38-1362 and K.S.A. 38-

1363, another state's child-custody determination may be registered in Kansas, and such determination may then be enforced, *but not modified*, by a Kansas court, which "may grant any relief normally available under the law of this state." K.S.A. 38-1363(a).

Notably, the jurisdiction requirements of K.S.A. 38-1350 do not apply to the registration and enforcement of a child-custody determination. Thus, we find the Kansas court had authority to enter orders that enforced, but not modified, the Maine custody determination.

5. Accordingly, All Orders Prior to February 27, 2007, Entered by the Kansas Court Modifying the Maine Order Are Void and Must Be Vacated, but Orders Merely Enforcing the Terms of the Decree Are Valid

Lawrence argues any orders to modify made without jurisdiction are void and must be set aside. We agree. A judgment made without subject matter jurisdiction is void. *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 718, 89 P.3d 573 (2004). A void judgment is a nullity and may be attacked and vacated at any time. *Waterview Resolution Corp. v. Allen*, 274 Kan. 1016, 1024, 58 P.3d 1284 (2002); *In re Marriage of Hampshire*, 261 Kan. 854, 862, 934 P.2d 58 (1997).

Accordingly, it is clear that any Kansas orders entered prior to February 27, 2007, modifying the custody arrangements established in the Maine divorce decree are void and must be vacated, but those Kansas orders merely enforcing the terms of the decree are

valid. What is less clear, though, is how to implement this directive. More specifically, it is not entirely clear from the record which Kansas orders relate to modification and which relate to enforcement of the Maine divorce decree, as the Kansas court handled the two with some overlap. The court's awarding of sole custody to Kelli appears to be the most obvious modification order. Due to lack of clarity in the record, however, we are unable to determine which of the other orders must be vacated and which must be upheld. To that end, the Kansas district court appears to be in a better position to identify the relevant orders and apply this directive.

Based on the discussion above, we reverse the district court's January 2007 decision that it had jurisdiction to modify the State of Maine's custody determination. To that end, we remand with directions to (1) determine which orders entered prior to February 27, 2007, give rise to modification of the Maine custody determinations made by the Maine court and which merely enforce the Maine divorce decree; (2) vacate any orders made prior to February 27, 2007, that resulted in modification of the Maine custody determination; and (3) enforce the custody arrangements set forth in the registered Maine divorce decree.

Reversed and remanded with directions.