NOT DESIGNATED FOR PUBLICATION

No. 109,079

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DANITRA Y. CAIN,
Appellant,

v.

KENDYL L. JACOX,
Appellee.

MEMORANDUM OPINION

Appeal from Riley District Court; MERYL D. WILSON, judge. Opinion filed November 22, 2013. Affirmed.

David P. Troup, of Weary Davis, L.C., of Junction City, for appellant.

Blake Johnson, of Oleen Law Firm, of Manhattan, for appellee.

Before LEBEN, P.J., MCANANY and POWELL, JJ.

Per Curiam: Danitra Cain and Kendyl Jacox are the parents of the child for whom Jacox was ordered to pay child support. Jacox became delinquent in his child support payments, and Cain sought to enforce the district court's child support order by registering it in Texas under the Uniform Interstate Family Support Act (UIFSA) in order to levy on Jacox's assets in Texas and by further action in the district court in Kansas. The district court in Kansas concluded that because of the proceedings in Texas, Cain's claim for postjudgment interest on the child support arrearage was barred under the doctrine of res judicata. In this appeal, Cain argues that the doctrine of res judicata did not apply. We disagree and affirm the district court.

Procedural History

Cain and Jacox's child was born in January 1998, and Cain assigned her child support rights to the Department of Social and Rehabilitation Services (SRS) in exchange for certain public benefits. In May 1998, SRS commenced this action against Jacox in the Riley County District Court to have him declared to be the father of Cain's child and to obtain an order requiring him to pay one-half the child's birth and medical expenses; requiring him to pay ongoing child support; and requiring him to provide health insurance coverage for the child. The district court imputed to Jacox a minimum wage income and ordered Jacox to pay one-half of the child's medical expenses and $122 a month in child support beginning February 1998.

In August 1998, Cain's assignment of child support benefits to SRS was terminated because she was no longer receiving public assistance. In March 1999, Cain, now represented by private counsel, moved to increase Jacox's child support because he was employed as a professional football player with a gross monthly wage of $16,458. Several weeks later, the district court issued an agreed order increasing Jacox's monthly child support obligation to $1,851 beginning April 1, 1999. An income withholding order was directed to Jacox's employer, the San Diego Chargers. Jacox's payments thereafter were sporadic.

In April 2003, Cain moved the district court for an order determining the amount of Jacox's arrearage in child support payments. In August 2003, she moved to increase child support, claiming that Jacox had experienced a 400% increase in income since the court's last order. No action was taken on either of these motions. Cain's counsel withdrew in August 2004.

In July 2008, SRS filed a notice with the court that it was providing child support enforcement services to Cain under 42 U.S.C. §§ 651 *et seq.* (2006). SRS moved to modify the existing income withholding order claiming that Jacox was in arrears in the amount of $173,654.52. An amended income withholding order was issued in September 2008. Between September 2008 and July 2009, SRS unsuccessfully attempted to garnish various banks for payment of the child support judgments.

In December 2008, Cain's claims for child support were referred to enforcement officials in Texas. For unknown reasons, no immediate action was apparently taken. Then, in February 2011, an SRS official sent to Texas a spreadsheet itemizing Jacox's support payment obligations and payments actually received from 1998 to February 2011. The spreadsheet did not include any calculations of postjudgment interest on the separate past-due obligations.

In April 2011, the Texas Attorney General, as that State's support enforcement agent under UIFSA, filed an amended notice of registration of a foreign support order in the district court in Texas and requested its enforcement. The Attorney General cited the two prior Kansas child support orders and asserted there was an arrearage of $133,110.10 as of April 1, 2011, and that no interest had accrued on the support obligations since February 1, 1998. The Attorney General requested, among other things, a "judgment for all support arrearage and accrued interest as of the hearing date." The Attorney General also requested the issuance of a qualified domestic relations order (QDRO) "to collect the aforesaid judgment for all support arrearage and accrued interest due and payable as of the hearing date."

On April 24, 2011, the Texas district court held a hearing on the Attorney General's enforcement action. Jacox appeared with his counsel. Cain appeared pro se. Thereafter, the Texas court issued an order finding that Jacox was in arrears in the amount of $136,562.10 as of June 1, 2011. The court entered judgment against him in

that amount. Cain signed the Order as "Pro Se, Obligee," with the court noting that Cain "agreed to entry of these Orders as to form only as evidenced by [her] signature."

No appeal was taken in Texas from the district court's judgment. No motion was filed with the district court in Texas to alter or amend this judgment.

In July 2011, Jacox moved the district court back in Riley County, Kansas, to reduce his ongoing child support obligation because of a decrease in his income when his career as an NFL professional football player ended in 2007 due to injury. Following a hearing on September 1, 2011, the court reduced Jacox's monthly child support obligation to $899 effective August 1, 2011.

In October 2011, Jacox paid in full the amount of the Texas judgment entered in June 2011.

In March 2012, Cain, now represented by private counsel, moved the district court in Riley County, Kansas, for a determination of the amount of the outstanding child support arrearage. She alleged that the Texas Attorney General had collected the principal amount due at the time but had declined to recover the interest due because "it was not a liquidated sum." Cain claimed she was advised, however, "that Texas would enforce a judgment for the interest provided it was determined by the Court issuing the original child support order." She asked the district court to determine that $64,940.23 was owed on the support judgment as of October 14, 2011. In July 2012, Cain moved to increase this amount to included $3,336.83 for Jacox's share of the child's medical expenses.

At the May 2012 hearing on Cain's motions, she testified about the Texas enforcement proceedings. She stated that "we spent pretty much at least six, seven times last year down in Texas" in connection with the enforcement proceedings. She stated that

the judge in Texas did not attempt to determine the amount of interest owed on the child support judgments. She introduced a spreadsheet showing her calculation of postjudgment interest owed. But the district court judge noted, "Well, we don't have a journal entry from Texas. I don't even know if I have any authority to make any ruling on this. I don't know what the judge ruled down there. The judge may have ruled that was maybe res judicata on the whole issue." When counsel noted that Jacox had come to Kansas from Texas for the hearing, the judge added, "Well, I will leave that up to counsel if they want to proceed with his testimony today or not, but I'm obviously gonna need a certified copy of the judge's order in Texas before I make any determination." Neither counsel had further questions for Cain. Jacox was not called to testify. The matter was continued for another hearing after a copy of the Texas judgment was obtained.

At the next hearing the court established a briefing schedule for the issues presented. Picking up on the court's earlier comments, Jacox argued in his brief that Cain's claims for accrued unpaid interest were barred by the doctrine of res judicata based upon the prior Texas judgment, which had been paid in full.

In the court's order of October 19, 2012, the district court granted relief on Cain's claim for Jacox's share of the child's medical expenses but denied relief on Cain's claim for unpaid postjudgment interest because it was barred by the doctrine of res judicata.

Cain appeals. She claims that Jacox failed to raise res judicata in a timely fashion and that the district court erred in denying relief based upon that defense.

Timeliness of Res Judicata Issue

Cain contends that Jacox failed to raise res judicata as a defense in a timely manner. She asserts that although she filed her motion seeking unpaid interest in March 2012, Jacox failed to raise the res judicata issue until after the August 31, 2012, hearing

on her motion. Our review of this issue of statutory construction is de novo. *Jeanes v. Bank of America*, 296 Kan. 870, 873, 295 P.3d 1045 (2013).

K.S.A. 2012 Supp. 60-208 requires a party responding to a *pleading* to affirmatively state any affirmative defenses, including res judicata. In our code of civil procedure, the exhaustive list of pleadings consists of the petition, answer, reply to a counterclaim, answer to a cross-claim, third-party petition, third-party answer, and (upon court order) the reply to an answer or third-party answer. K.S.A. 2012 Supp. 60-207.

A motion is not a pleading. Thus, no response setting forth affirmative defenses is required. In fact, a party is not required to file any written response to a motion. See Supreme Court Rule 133(b) (2012 Kan. Ct. R. Annot. 238), which provides that an "adverse party *may* file a memorandum in opposition to a motion." (Emphasis added.)

The issue was first raised by the district court during Cain's testimony. Cain's counsel had the opportunity to inquire further into the matter before Cain's testimony concluded, and Cain's counsel could have called Jacox as a witness. Cain had the opportunity to address the issue further at the next hearing but again failed to do so. Cain does not argue on appeal that she was unfairly surprised when Jacox argued res judicata in his brief or that she was in any way precluded from adequately addressing the issue. Accordingly, this argument about Jacox's timeliness fails.

Application of the Doctrine of Res Judicata

Cain claims the district court erred in finding that the Texas judgment barred her present claim in Riley County under res judicata principles. Whether the doctrine of res judicata applied is a question of law over which we exercise unlimited review. *In re Tax Appeal of Fleet*, 293 Kan. 768, 777, 272 P.3d 583 (2012); *In re Marriage of Ormsbee*, 39 Kan. App. 2d 715, 718, 186 P.3d 806 (2008).

Res judicata, frequently referred to as claim preclusion, is a common-law doctrine designed to prevent relitigation of a final judgment. In Kansas, four elements must be met to invoke the doctrine. Simply stated, claim preclusion requires (1) the same claim, (2) the same parties, (3) claims that were or could have been raised, and (4) a final judgment on the merits. *In re Tax Appeal of Fleet*, 293 Kan. at 777-78.

- *The Same Claim*

Cain argues that the claim underlying the Texas judgment was not the same as her current claim in Kansas. She argues that the Texas judgment modified the Kansas child support order, which it lacked authority to do under UIFSA.

In the Texas Attorney General's enforcement action the arrearage was specified as $133,110.10 as of April 1, 2011. The amount of accrued interest since 1998 was specified as $0, apparently because the SRS documents sent to Texas did not calculate interest due on the outstanding child support judgments. The Texas calculations mirror the Kansas document except that the Texas calculations added a child support payment owed for April 2011 and made an adjustment for a small payment Jacox made in February 2011.

Under UIFSA, when only one tribunal has issued a child support order, that order must be recognized as controlling. See K.S.A. 2012 Supp. 23-36,207; Tex. Family Code Ann. § 159.205 (West 2008). Moreover, a registering state (Texas in this case) is required to recognize and enforce a support order but may not modify that order unless the issuing state lacked jurisdiction to issue the order. K.S.A. 2012 Supp. 23-36,603; Tex. Family Code Ann. § 159.603. See *In re Marriage of Ormsbee*, 39 Kan. App. 2d at 718.

Once a child support order is issued, UIFSA permits the order to be registered in the tribunal of other states. See K.S.A. 2012 Supp. 23-36,601; Tex. Family Code Ann. § 159.601 (West 2008). The law of the initiating state controls the nature and extent of

support as well as the computation of the payments, the amount of the arrearage, and the amount of interest that has accrued on any arrearage. K.S.A. 2012 Supp. 23-36,604; Tex. Family Code Ann. § 159.604 (West 2008). See *In re Marriage of Ormsbee*, 39 Kan. App. 2d at 720.

In its order, the Texas court recognized that Kansas had continuing exclusive jurisdiction over the child support issue. The court calculated the arrearage as of June 1, 2011, to be $136,562.10. The Texas order did not modify the Kansas child support orders. Nothing in the order indicates an intent to do so. The Texas court entered judgment for all arrearages due between February 1998 and June 2011.

In the motion Cain later filed in Riley County, Kansas, she asserted that Jacox owed more than the Texas court had determined for the same time period, because of the Texas court's failure take into account the interest on the accumulated arrearage. Cain's present motion is essentially the same claim that was litigated in the Texas court. Although the calculations by SRS and the Texas authorities appear to have been erroneous, errors corrected neither by posttrial motions nor on appeal, the claims asserted were the same for res judicata purposes.

- *The Same Parties*

Cain argues that she was not a party to the Texas proceedings. But she was present at the hearing and participated pro se. She said she was in Texas six or seven times in connection with these proceedings. She was treated as a party to the extent that she signed the Texas court's order indicating her approval of its form.

Cain relies on *In re Marriage of Hartman*, 305 Ill. App. 3d 338, 712 N.E.2d 267 (1999), for support. In *Hartman*, an Illinois court issued a divorce decree and order requiring Hartman to pay child support. Several years later, Hartman moved to Florida

and defaulted on this obligation. The Illinois authorities sent the matter to Florida for enforcement under UIFSA. Hartman settled with the Florida enforcement agency based on a child support arrearage of nearly $19,000. When Hartman failed to make payments on the arrearage, his ex-wife moved the Illinois court to hold him in contempt, alleging that his actual arrearage exceeded $21,000. The trial court agreed.

On appeal, Hartman argued that res judicata barred his ex-wife from relitigating the amount of the arrearage. The appellate court rejected this argument, finding that the ex-wife had not been provided notice of the Florida proceedings and did not participate in the Florida proceedings. 305 Ill. App. 3d at 347.

The concept of privity was discussed in another Illinois case cited by Cain, one which did not involve UIFSA, *In re Marriage of Mesecher*, 272 Ill. App. 3d 73, 650 N.E.2d 294 (1995). In *Mesecher*, the mother was on public assistance. The State of Illinois, through its Department of Public Aid, sought to recover from the father the aid the State provided on the children's behalf. Later, the children's mother filed a petition seeking in excess of $17,000 for unpaid child support and medical insurance costs that accrued before the State's action. Father raised the defense of res judicata.

On appeal, the court noted that res judicata required that the parties in the two actions be the same or that the State of Illinois and the mother be in privity with one another. Privity exists between parties advocating the same interests. In *Mesecher*, the State only sought to recoup public aid monies expended upon behalf of the children, and it was unconcerned with child support arrearages that had accrued prior to the mother's receipt of public aid. Thus, there was no privity between the State and the mother to support a defense of res judicata. 272 Ill. App. 3d at 77-78. *Cf. State ex rel. Moore v. Shepard*, 213 S.W.3d 234, 236-37 (2007) (prior California judgment denying state enforcement agency's request for reimbursement from father of public funds for child

was not res judicata to petition to register California support order in Missouri for child support arrearages).

Hartman and *Mesecher* do not apply to the facts now before us. In *Hartman*, the mother was not informed of, and did not participate in, the registering state proceeding. In *Mesecher*, the prior proceedings by the State agency only sought to recoup expenses the State made on behalf of the children, not the child support arrearages due the mother. In contrast, Cain actually participated in the Texas proceeding, made numerous trips to Texas, appeared pro se, claims she talked with the Texas judge about the need to include accrued interest, and signed and approved the form of the Texas court's journal entry. Moreover, it is clear the Texas Attorney General was seeking recovery of more than expenditures SRS made on behalf of the child. The Texas Attorney General was seeking unpaid child support from the date of the issuance of the original support order.

The interest the Texas Attorney General was pursuing was Cain's entitlement to the unpaid amounts due on the Kansas court's support order. There was an identity of interests between the Texas Attorney General and Cain such that the two were in privity with one another. Thus, the parties were in essence the same in the Texas and later Riley County proceedings.

- *Claim Could Have Been Raised in Texas*

Cain argues that the issue of accrued interest on child support could not have been raised in the Texas action. She asserts that Texas did not have the authority to address any issue beyond the information transmitted by Kansas officials; thus, she asserts the Texas court could not have included the accrued interest, even if it had applied Kansas law as required by Tex. Family Code Ann. § 159.604(a)(2). Cain fails to cite anything from the record or any controlling case or statutory authority to support this assertion.

While UIFSA requires the initiating state to provide information about arrearages, nothing in its provisions prohibits the registering court from ensuring the initiating agency's calculations are correct and current under the law of the initiating state. In fact, it appears that the Texas officials modified the calculations received from the SRS by adding a child support payment due in April 2011 and a payment made in February 2011.

Cain's reliance on *Davis v. Davis*, 148 Kan. 211, 81 P.2d 56 (1938), is misplaced. *Davis* involved the doctrine of acquiescence to a judgment when a parent accepted payment of the principle of a judgment from the court clerk. The case did not involve the doctrine of res judicata.

Likewise, *Summitt v. Summitt*, 31 Kan. App. 2d 812, 74 P.3d 584 (2003), is not helpful. That case involved interstate claims brought under the Uniform Reciprocal Enforcement of Support Act (URESA), not UIFSA. URESA allowed a responding court to vacate or modify a support obligation created in another state. UIFSA was designed to eliminate the multiple support order system that had evolved under URESA. Similarly, *Wornkey v. Wornkey*, 12 Kan. App. 2d 506, 511-12, 749 P.2d 1045, *rev. denied* 243 Kan. 782 (1988), involved two Kansas counties issuing differing child support order under URESA.

Cain also relies on *Ormsbee*, 39 Kan. App. 2d 715. In *Ormsbee*, the ex-wife had obtained an Illinois order against Ormsbee for maintenance and child support and a separate Illinois order determining the amount of the arrearage on the maintenance award. She sought to register these Illinois orders in Kansas and requested a judgment for arrearages, interest, and attorney fees. Ormsbee argued that his ex-wife was barred by the doctrine of res judicata from seeking interest and attorney fees on her maintenance award because the amount of arrearage previously determined in Illinois did not specifically include interest or attorney fees. A panel of this court held that the amount of outstanding maintenance could not be relitigated in Kansas where the judgment was registered, but

the court in Kansas could, under UIFSA, impose attorney fees on the previously determined maintenance arrearage and award interest on the maintenance arrearages. *Ormsbee*, 39 Kan. App. 2d at 719-20.

The Kansas court where the judgment was registered in *Ormsbee* corresponds to the Texas court where Cain's judgment was sent for enforcement proceedings. The Illinois court where the *Ormsbee* judgment originated corresponds to the Kansas court whose judgment was sent to Texas for enforcement. Just as the Kansas court had the power to calculate Ormsbee's obligation on the Illinois orders, including interest on the arrearage, the Texas court had the power to take into account the interest due on Jacox's arrearage under Cain's Kansas child support order. *Ormsbee* does not support the proposition that the Texas court was without authority to calculate and add interest to Cain's Kansas judgment. In fact, it supports a contrary result.

The only case that appears to clearly support Cain's arguments—which neither party cites—is *Dial v. Adkins*, 265 Ga. App. 650, 595 S.E.2d 332 (2004). In that case, Adkins and Dial were divorced in Tennessee. Dial was obliged to make child support payments to Adkins. He defaulted and Adkins obtained a $9,000 judgment for the arrearage. Adkins filed the Tennessee judgment in Georgia under UFISA and sought to have Dial held in contempt due to his failure to pay past-due child support and other amounts due under the decree. Dial purged himself of contempt by paying a lump sum of $30,000 and agreed to pay the balance in installments. Thereafter, Adkins filed another enforcement action in a different county in Georgia seeking accrued interest on Dial's delinquent child support payments. The second Georgia court found Dial owed nearly $40,000 in accrued interest on the past-due child support and rejected Dial's res judicata defense.

The Georgia appellate court affirmed, finding that "even if the statutory interest was a matter which could have been put in issue in the contempt proceeding, as a matter

of public policy, the doctrine of res judicata is less strictly applied in divorce and alimony cases, including cases dealing with child support issues. [Citation omitted.]" 265 Ga. App. at 651. Instead, under Georgia precedent, res judicata in divorce cases was limited to matters which were "actually put in issue and decided." 265 Ga. App. at 651.

Because of the district court's ongoing jurisdiction during minority over child custody, placement, and support issues in divorce cases, Kansas applies some special exceptions to the doctrine of res judicata. For example, when a child custody decree is entered in a default proceeding and the facts are not substantially developed, the trial court may later consider evidence of facts existing at the time of the earlier order and may enter a new custody order regardless of whether a "change of circumstances" has occurred. *Hill v. Hill*, 228 Kan. 680, 685, 620 P.2d 1114 (1980). Likewise, when post-divorce motions deal solely with a change of child custody and the issue of child support was not litigated prior to the entry of the child custody decree, res judicata does not bar consideration of a subsequent motion for child support. *Stovall v. Stovall*, 10 Kan. App. 2d 521, 522, 707 P.2d 1082 (1985). See also *Irwin v. Irwin*, 211 Kan. 1, 7, 505 P.2d 634, 639 (1973) (child custody order is res judicata "'only as to matters as they existed when the order was made and does not bar later inquiry into the issue of custody where circumstances have changed'"). But these limited Kansas exceptions to the application of res judicata in divorce cases do not extend to claims for interest on child support arrearages.

The res judicata exception found in *Dial* is based on a matter of public policy which has not been enunciated in Kansas. Accordingly, we are unable to grant relief based upon the rule announced in *Dial*. Because the elements of res judicata are present to bar Cain's attempt to relitigate an issue that was before the Texas court and could have been pursued there, we conclude that the Riley County District Court did not err in dismissing Cain's claim based on the doctrine of res judicata.

While the Texas court, at the invitation of Kansas SRS and the Texas Attorney General, erred in its calculation of the total amount due under the Kansas child support order, this error was not a modification of the Kansas support order. The Texas court had the power to make this calculation, and Cain could have revisited the issue of postjudgment interest in postjudgment proceedings before the Texas court or by an appeal.

We note that in *In re T.J.*, No. 12-03-00331-CV, 2005 WL 588875, at *3-4 (Tex. App. 2005) (unpublished opinion), the court in Texas registered a Michigan support order and the Texas court entered judgment. Thereafter, Michigan recalculated the arrearages and attempted to reregister the recalculated support judgment in Texas. Texas refused to give full faith and credit to the recalculated Michigan judgment but granted the Attorney General's subsequent motion to vacate the original Texas judgment.

Here, Cain could have sought postjudgment relief in the Texas court or appealed the erroneous judgment, but she failed to do so, a lapse which very well may have been caused not by her own neglect but by incorrect advice she obtained in the Texas proceeding. The unfortunate consequence for her is that the Texas judgment was a final judgment and the issue of postjudgment interest could not be relitigated later in Riley County.

To allow Cain to avoid the effect of res judicata because of a calculation error flies in the face of the purpose of UIFSA and of the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. 4, § 1. UIFSA was adopted in order to avoid the confusion of conflicting support order from different jurisdictions. *Gentzel v. Williams*, 25 Kan. App. 2d 552, 556-58, 965 P.2d 855 (1998). Allowing an obligee like Cain to return to the initiating state (Kansas) to challenge the order of the registering state (Texas) simply re-creates the situation where potentially conflicting support judgments are issued by different states.

The Constitution's Full Faith and Credit Clause requires that the judgment of a state court should have the same credit, validity, and effect in every other court of the United States which the judgment had in the state where it was pronounced. *Underwriters Assur. Co. v. N.C. Guaranty Ass'n*, 455 U.S. 691, 704, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982). Unless the judgment was entered without jurisdiction, a judgment from a sister state cannot be impeached for irregularities in the proceedings or erroneous rulings but must be regarded as binding. *Master Finance Co. of Texas v. Pollard*, 47 Kan. App. 2d 820, 826, 283 P.3d 817 (2012). See Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B (2000) (established to facilitate the enforcement of child support orders, to discourage continuing interstate controversies over child support, and to avoid conflict among State courts in the establishment of child support orders). For all these reasons, we find Cain's arguments unpersuasive.

Affirmed.