NOT DESIGNATED FOR PUBLICATION

No. 110,058

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BRANDY KARA L. STEWART,
*Appellee,*

v.

TIMOTHY A. STEWART,
*Appellant.*

MEMORANDUM OPINION

Appeal from Ellsworth District Court; RON SVATY, judge. Opinion filed January 16, 2015. Affirmed.

*Jennifer A. Wagle* and *Stephen M. Turley*, of Cleary, Soderberg, Wagle & West, of Wichita, for appellant.

*Carey Hipp*, of Sherman, Hoffman & Hipp, LC, of Ellsworth, for appellee.

Before SCHROEDER, P.J., MCANANY, J., and LARSON, S.J.

*Per Curiam*: This case involves the validity of certain provisions relating to child and spousal support in a protection from abuse (PFA) order issued in May 2013 in favor of Brandy Kara L. Stewart and against her husband, Timothy A. Stewart, pursuant to the PFA Act, K.S.A. 60-3101 *et seq.* The court's orders for temporary child custody, maintenance, and child support were entered pursuant to K.S.A. 2013 Supp. 60-3107(a)(4) and (6). The controlling issue is whether the district court had personal jurisdiction over Tim so as to allow it to enter a personal judgment against him for these items of support.

The Stewarts met in Missouri and married in 2004. During their marriage they resided in Missouri, Arizona, Tennessee, and Texas. The family resided together in Texas from 2009 until late October 2012 when, while Tim was away on business and without his knowledge, Kara took the children to Kansas where her parents reside. Texas was the children's home state at the time. Tim has never lived in or had any connection to the State of Kansas except for two brief family visits.

On October 29, 2012, Kara sought a PFA order from the Ellsworth County District Court. That same day, the district court issued an ex parte temporary PFA order against Tim, which included provisions granting Kara sole custody of her three sons, two of whom are Tim's biological children. The court also ordered Tim to pay maintenance and child support. Meanwhile, on that same day, Tim commenced a divorce action against Kara in the District Court of Guadalupe County, Texas.

On November 21, 2012, Tim filed with the Ellis County District Court a special appearance and a motion to dismiss the Kansas petition for lack of jurisdiction. Two days later, on November 23, 2012, Kara had Tim served with process in the Kansas case when he appeared in court in San Antonio, Texas, in the divorce case.

Tim then filed an answer in the Kansas case, subject to his objections to the court exercising personal jurisdiction over him. Shortly thereafter, he filed a counterclaim seeking temporary custody of the children. In it, he asserted: "If this case is not dismissed for lack of jurisdiction, K.S.A. 60-3107(a)(4) allows the court to award temporary custody and residency and establish temporary parenting time with regard to minor children." He concluded:

> "WHEREFORE, Respondent prays that the court dismiss this case for lack of jurisdiction but in the alternative grant Respondent custody of the minor children and that

Respondent be granted all other and further relief in the premises as may be legal, equitable and just."

On December 11, 2012, when it became apparent that there were cases pending in both Kansas and Texas, the Kansas and Texas judges conferred by telephone, and the Texas judge stated she would decline jurisdiction over the Texas case and the Kansas judge agreed to resolve the PFA issues in Kansas. On December 13, 2012, the Texas court formally declined jurisdiction to make a child custody determination, finding that Texas was an inconvenient forum.

The final hearing in the PFA action was scheduled for Thursday, March 14, 2013. Tim came to Kansas to attend the hearing and arrived early so he could visit with the children. This was his first visitation with the children since they left Texas in October 2012. On Tuesday, March 12, 2013, 2 days before the final hearing, Kara arranged for Tim to be personally served in Kansas while he exercised court-sanctioned supervised parenting time with the children.

Following the March 14, 2013, hearing, the court took the matter under advisement and issued its decision on May 13, 2013, finding that Kara was entitled to a final PFA order. The court entered orders with respect to child custody, residency, placement of the children, and supervised parenting time. Tim was ordered to complete the Batterers Intervention Program. The court adopted Kara's recommendations for child support and spousal maintenance and made them the order of the court. The court also ordered Tim to pay part of Kara's attorney fees.

This appeal followed.

*Mootness*

After the parties' appellate briefs were submitted it became apparent that the PFA order which is the subject of this appeal had expired by its own terms on May 13, 2014. We issued an order requiring the parties to show cause why the matter is not now moot. Tim filed a response to the show cause order. Kara did not. One of Tim's arguments was as follows:

> "If the District Court had jurisdiction to enter the support orders in this matter, then [Kara] may execute on the judgments, and Timothy could be found in indirect contempt of court for non-payment of support. See K.S.A. 60-701 *et seq.*, K.S.A. 23-3101 *et seq.*; *Cyr v. Cyr*, 249 Kan. 94, Syl. ¶ 6, 815 P.2d 97 (1991). The potential for execution of the judgments and a finding of contempt are potential adverse consequences for Timothy. Therefore, this appeal is not moot."

Given this response, we agreed to proceed with oral argument on the appeal.

We have unlimited review over whether an issue is moot under court policy. *State v. Montgomery*, 295 Kan. 837, 841, 286 P.3d 866 (2012). The mootness doctrine was described as follows in *Smith v. Martens*, 279 Kan. 242, 244, 106 P.3d 28 (2005):

> "'The general rule is that an appellate court does not decide moot questions or render advisory opinions. The mootness doctrine is one of court policy which recognizes that it is the function of a judicial tribunal to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case properly brought before it and to adjudicate those rights in such manner that the determination will be operative, final, and conclusive.'" (Quoting *Board of Johnson County Comm'rs v. Duffy*, 259 Kan. 500, Syl. ¶ 1, 912 P.2d 716 [1996].)

The ultimate test is that there must be some "real, immediate, adverse legal interest before this court which is amenable to conclusive relief." *In re A.E.S.*, 48 Kan. App. 2d 761, 766, 298 P.3d 386 (2013). If there is not, then the appeal is moot.

The principles underlying the mootness doctrine have been applied by our courts to dismiss appeals as moot in various contexts. Most significant to our case, they have been applied to dismiss as moot the following:

- An expired PFA order where appellant husband did not allege he suffered any collateral consequence as result of entry of the order. *Rice v. Rice*, No. 101,372, 2010 WL 922966 (Kan. App. 2010) (unpublished opinion).

- An expired PFA order because appellant's contention that the PFA order would continue to affect his right to possess firearms under federal and state law was contrary to state and federal firearm possession statutes, which apply only while a PFA order is in effect. *Skillett v. Sierra*, 30 Kan. App. 2d 1041, 1046-47, 53 P.3d 1234, *rev. denied* 275 Kan. 965 (2002).

- An expired order issued under the Protection From Stalking Act (PFS Act), K.S.A. 2003 Supp. 60-31a01 *et seq.*, at least as to appellant's challenge to the constitutionality of the PFS Act as applied, evidentiary issues, and the trial court's issuance of an injunction. *Smith*, 279 Kan. at 245.

But, to the contrary, our court retained an appeal from an expired stalking order when the appellant argued that "'the historical existence of the stalking order could adversely affect his re-credentialing for his license [to practice medicine in the State of Kansas] this September, 2004.' . . . [This court did so] even though any ruling . . .

regarding the stalking order [would] be unenforceable due to the lapse of time." *Piazza v. Piazza*, No. 90,593, 2004 WL 1443899, at *1 (Kan. App. 2004) (unpublished opinion).

Here, the real, immediate, and adverse legal interest before this court which is amenable to conclusive relief is the existence of a personal money final judgment for child support and spousal maintenance against Tim which may be executed upon as any other money judgment. Such proceedings, brought by private litigants holding personal money judgments for support or maintenance or by the Secretary of the Kansas Department for Children and Families pursuant to the State's IV-D public assistance program, are daily fare for judges handling domestic matters in our district courts or in courts where Kansas judgments have been registered. Hence, we conclude the issue is not moot, and we will consider the issue of personal jurisdiction.

*Review Standards*

We have unlimited review of jurisdictional issues and statutory interpretations made by the district court. *McNabb v. McNabb*, 31 Kan. App. 2d 398, 403, 65 P.3d 1068 (2003). Kara bears the burden of establishing personal jurisdiction over Tim. See *Merriman v. Crompton Corp.*, 282 Kan. 433, 439, 146 P.3d 162 (2006).

*Personal Jurisdiction Generally*

Personal jurisdiction is the court's power over the defendant's person and is required before the court can enter a judgment. *In re Marriage of Salas*, 28 Kan. App. 2d 553, 555, 19 P.3d 184 (2001). Personal jurisdiction over a defendant is acquired by issuance and service of process in the method prescribed by statute or by the defendant's voluntary appearance. *Carrington v. Unseld*, 22 Kan. App. 2d 815, 818-19, 923 P.2d 1052 (1996).

We apply a progressive, two-step inquiry in determining whether the district court had personal jurisdiction over Tim. First, we must determine if Kansas statutes or caselaw provide a basis for the exercise of jurisdiction over Tim. Second, if statutory and other requirements have been met, we must determine if the exercise of personal jurisdiction complies with the due process requirements of the Fourteenth Amendment to the United States Constitution. *Loeffelbein v. Milberg Weiss Bershad Hynes & Lerach*, 33 Kan. App. 2d 593, 597, 106 P.3d 74, *rev. denied* 280 Kan. 983 (2005).

*Personal Jurisdiction in This Case*

There are three potential bases upon which the district court could rely in asserting personal jurisdiction over Tim. The first was when he was personally served in Texas using the Kansas long-arm statute. The second was when Tim sought modification of the temporary orders after answering the petition. The third was when Tim was personally served in Kansas when he came to Kansas for the hearing on his motion to dismiss for lack of personal jurisdiction.

*Personal Service in Texas*

The first possible basis for asserting personal jurisdiction over Tim was the personal service on Tim when he attended court proceedings in Texas on his divorce action. In conducting this review, we first determine if there was jurisdiction under K.S.A. 2013 Supp. 60-308(b)(1), the Kansas long-arm statute. In doing so, we liberally construe K.S.A. 2013 Supp. 60-308(b)(1) to assert personal jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Caring Hearts Personal Home Services v. Hobley*, 35 Kan. App. 2d 345, 348, 130 P.3d 1215 (2006) (citing *Kluin v. American Suzuki Motor Corp.*, 274 Kan. 888, Syl., 56 P.3d 829 (2002). In our due process analysis we apply the "minimum contacts" standard from *Internat. Shoe Co. v. Washington*, 326

U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), requiring the nonresident defendant to have certain minimum contacts with the forum state in order for the exercise of personal jurisdiction to be constitutional. *Midwest Manufacturing, Inc. v. Ausland*, 47 Kan. App. 2d 221, 226, 273 P.3d 804 (2012).

Kara contends service on Tim in Texas was proper under the Kansas long-arm statute, K.S.A. 2013 Supp. 60-308(b). She concedes that Tim did not submit to the jurisdiction by doing any of the specific acts enumerated in the statute, such as transacting business in the state, committing a tort in the state, and so on. She relies on K.S.A. 2013 Supp. 60-308(b)(1)(L): "[H]aving contact with this state which would support jurisdiction consistent with the constitution of the United States and of this state."

From what little we know of Tim's two brief family visits to Kansas prior to this action, those visits could not possibly support a finding that it is "reasonable and fair" to expect Tim to defend himself in Kansas based on those contacts, nor would such a finding comport with traditional notions of fair play and substantial justice.

But Kara contends that Tim was subject to personal service under the terms of the Uniform Interstate Family Support Act (UIFSA), K.S.A. 2013 Supp. 23-36,101 *et seq.* A child support order is broadly defined under UIFSA to include the support orders entered here. See K.S.A. 2013 Supp. 23-36,101(b). Kara contends that the Ellsworth District Court could exercise personal jurisdiction over Tim because her children now reside in Kansas "as a result of the acts or directives" of Tim. K.S.A. 23-36,201(e). She bases this contention on the assertion that she was forced to move to Kansas to escape the domestic violence Tim visited upon her and the children over the years.

The district court found that Tim physically abused Kara and the children. The reader will recall that Kara and the children fled to Kansas in October 2012. The first instance of abuse found by the district court was in Branson, Missouri, about 8 years

earlier. The second incident was in Shreveport, Louisiana, in the spring of 2010. The third incident was in the summer of 2011. The district court found other instances of abuse in 2006, June 2011, and other unspecified times. The court found the abuse to be ongoing, such that Kara "could not stay in Texas as she feared for her safety and the safety of her children."

In *McNabb*, a panel of our court addressed a similar claim relating to personal jurisdiction under UIFSA based on abusive conduct but concluded that the plaintiff's move to Kansas was not prompted by the defendant's single reported instance of abusive conduct which occurred more than a year before the move. 31 Kan. App. 2d at 409. Here, the early instances of abuse in Missouri and Louisiana cited by the district court would not in themselves have supported personal jurisdiction over Tim pursuant to UIFSA. But the court found the abuse to be pervasive and ongoing and made the specific finding that Kara's move to Kansas was caused by the abuse. There is substantial evidence to support this finding, and we do not substitute our own analysis of the record on this point over that of the trial judge who heard the testimony and saw the demeanor of the witnesses first-hand.

Based on the district court's finding that Kara and the children fled to Kansas to escape Tim's abuse, we conclude that the district court had personal jurisdiction over Tim pursuant to K.S.A. 2013 Supp. 23-36,201(e) to enter the support and money judgment orders against Tim which are the subject of this appeal. We find support for this basis for personal jurisdiction in decisions from other states. See *In re Marriage of Malwitz*, 99 P.3d 56, 59 (Colo. 2004); *Powers v. District Court of Tulsa County*, 227 P.3d 1060, 1081 (Okla. 2009); *Sneed v. Sneed*, 164 Ohio App. 3d 496, 503, 842 N.E.2d 1095 (2005).

*Other Bases for Asserting Personal Jurisdiction*

Having determined that the district court obtained personal jurisdiction over Tim when he was personally served in Texas, we need not fully address whether Tim waived the issue and submitted to the district court's jurisdiction by his participation in this action thereafter or whether service of process on Tim was effective when he came to Kansas for a hearing on his motion challenging personal jurisdiction.

We do briefly note, however, that the manner in which Tim sought custody of the children in the Kansas court may not have constituted a waiver of his personal jurisdiction claim. We are mindful that

> "[a] party is not permitted to invoke the jurisdiction and power of a court for the purpose of securing important rights from an adversary through its judgment, and then, after obtaining the benefits sought, to repudiate or question the validity of that adjudication on the ground the court was without jurisdiction. [Citations omitted.]" *Aguilera v. Corkill*, 201 Kan. 33, 38, 439 P.2d 93 (1968).

But here, Tim moved to dismiss Kara's petition for lack of personal jurisdiction pursuant to K.S.A. 2013 Supp. 60-212, and he asserted lack of personal jurisdiction in his answer to Kara's petition. Thereafter he filed his counterclaim seeking custody of the children. The counterclaim specifically provided that he was asserting it only in the event that the district court found that it had personal jurisdiction over him.

With respect to the purported personal service on Tim in Kansas when he came to Kansas for a hearing on his motion to dismiss for lack of personal jurisdiction, to recognize this as valid personal service would vitiate a party's right to challenge personal jurisdiction in any case. Though we have abandoned the formality of a litigant having to make a special appearance to challenge personal jurisdiction, if we were to recognize the service on Tim in Kansas as valid, a nonresident litigant moving to dismiss for lack of

personal jurisdiction under the Kansas long-arm statute could never come to a Kansas court to be heard on the motion without facing the prospect of a process server standing at the courthouse door. Recognizing personal service in such a fashion would seem to make a mockery of a nonresident litigant's right to challenge personal jurisdiction. See *Clemens v. Clemens*, No. FA 990170802, 1999 WL 997882, at *3 (Conn. Super. 1999) (unpublished opinion).

Affirmed.