IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 0-451 / 98-1385
Filed October 25, 2000

Upon the Petition of
KARNA LEIGH JORGENSEN,
Petitioner-Appellee,

And Concerning
MAURICE JOSEPH VARGAS,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Father appeals from an order in which an Iowa court modified the child custody provisions of a New York judgment of divorce. Father contends the Iowa court lacked subject matter jurisdiction to modify the New York decree. **REVERSED AND DISMISSED.**

Maurice J. Vargas, Babylon, New York, pro se.

Diane L. Dornburg, Des Moines, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

Vaitheswaran, J. dissents.

SACKETT, C.J.

Respondent-Appellant, Maurice Joseph Vargas, appeals from the district court's decision modifying the child custody provisions of a May 25, 1994 New York judgment of divorce from Petitioner-Appellee, Karna Leigh Jorgensen. Maurice contends the Iowa district court lacked subject matter jurisdiction to modify the New York judgment of divorce. We reverse and dismiss.

Maurice and Karna were married in California in August of 1985. They moved to the state of New York in September of 1985. They had one child, Isaiah, born in December of 1989 in New York. Following a period of marital difficulties, Karna and Isaiah moved to Iowa in January of 1993 with Maurice's understanding that they would return to New York in one month. According to her testimony, Karna had no intention of returning to New York. During Maurice and Karna's separation, Isaiah visited his father in New York from May 4, 1993 to June 6, 1993, and again from August 15, 1993 to September 24, 1993. Isaiah then returned to Iowa where he continually resided with his mother until June, 1994.

Maurice and Karna were divorced in Dutchess County, New York on May 25, 1994. The judgment of divorce incorporated a stipulation of settlement between Maurice and Karna providing for joint legal custody of Isaiah with an

agreed upon schedule[1] regarding Isaiah's living arrangements. The parties agree the stipulation could be submitted to the Supreme Court of New York state as a settlement of their divorce action. With a few minor exceptions, Maurice and Karna followed the schedule agreed upon and incorporated into the judgment of divorce until January 1998. Karna's affidavit regarding child custody jurisdiction outlined specific dates in which Isaiah was either living in Iowa or New York. A summary of Karna's affidavit indicates the following:

1) Isaiah resided with his mother in Iowa from September 1993 until June 1994.
2) Isaiah resided with his father in New York from June 1994 until October 31, 1994.
3) Isaiah resided with his mother in Iowa from October 31, 1994 until December 15, 1994.
4) Isaiah resided with his father in New York from December 15, 1994 until May 25, 1995.
5) Isaiah resided with his mother in Iowa from May 25, 1995 until September 1, 1995.
6) Isaiah resided with his father in New York from September 1, 1995 until June 14, 1996.
7) Isaiah resided with his mother in Iowa from June 14, 1996 until May 25, 1997.
8) Isaiah resided with his father in New York from May 25, 1997 until August 11, 1997.
9) Since August 11, 1997 Isaiah has lived with his mother in Iowa.

. . .

[1] Schedule C from the stipulation of settlement incorporated in the judgment of divorce outlines Isaiah's living arrangements as follows:

Child to reside with father from May 1994 to October 31, 1994.
Child to reside with mother from October 31, 1994 to December 5, 1994.
Child to reside with father from December 5, 1994 to June 1, 1995.
Child to reside with mother from June 1, 1995 to August 30, 1995.
Child to reside with father from September 1, 1995 to June 1, 1996.
Child to reside with mother from June 1, 1996 to June 1, 1997.
Child to reside with father from June 1, 1997 to August 30, 1997.
Child to reside with mother from August 30, 1997 to June 1, 1998.
Child to reside with father from June 1, 1998 till the child attains age 21.

Between the age of 8 and 21, the child will reside with the father, with visitation to the mother from June 1st and August 30th each year; holidays with the child will alternate between age 8 and age 21, including all major holidays.

On January 14, 1998, Karna filed an application in Iowa district court to modify the custody provision of the New York judgment of divorce. On February 24, 1998, Maurice filed a motion to dismiss for lack of personal and subject matter jurisdiction. The motion to dismiss was denied. A trial on the issue of custody was held, and following the trial, Karna submitted a motion to amend the pleadings to conform to the evidence. The amended pleading contended the custody provisions incorporated into the judgment of divorce were invalid because the New York court did not have subject matter jurisdiction to determine the custody of Isaiah.

On August 10, 1998 the district court filed findings of fact and conclusions of law ruling the Iowa district court had jurisdiction in the custody modification matter. The district court declined to rule upon Karna's motion to amend the pleadings. The district court held "[t]he court has assumed for purposes of this ruling that the New York divorce decree is valid in all respects, and that the New York court had subject matter jurisdiction to enter the custody order." The district court then modified the New York judgment of divorce and placed primary physical care of Isaiah with Karna and outlined a visitation schedule for Maurice. The district court also ordered Maurice to pay child support in the amount of $345.39.

We first address Karna's contention that New York did not have subject matter jurisdiction to determine the custody of Isaiah.

Our review of the proceedings concerning subject matter jurisdiction is at law, not de novo. *Tigges v. City of Ames*, 356 N.W.2d 503, 512 (Iowa 1984); *Jansen v. Harmon*, 164 N.W.2d 323, 326 (Iowa 1969). Subject matter jurisdiction

is the court's power to hear and determine cases of the general class to which the particular proceedings belong. *See In re Guardianship of Matejski*, 419 N.W.2d 576 (Iowa 1988).

The limitations which the UCCJA and the Federal Kidnapping Prevention Act place on a court's jurisdiction to modify a foreign child custody decree do not touch upon a court's jurisdiction to permit a collateral attack upon a foreign decree. *In re Marriage of Leyda*, 398 N.W.2d 815, 820 (Iowa 1987). "Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings belong." *Green v. Sherman*, 173 N.W.2d 843, 846 (Iowa 1970). "When a court acts without legal authority to do so, it lacks jurisdiction of the subject matter." *Wederath v. Brant*, 287 N.W.2d 591, 595 (Iowa 1980).

The fact that Karna did not raise the issue of subject matter jurisdiction until after trial does not preclude our review. "The court's jurisdiction of the subject matter, however, may be raised at any time and is not waived even by consent." *Green*, 173 N.W.2d at 846. This court even though not raised in the appellate briefs of either party will decide subject matter jurisdictional issues. *See Swets Motor Sales, Inc. v. Pruisner*, 236 N.W.2d 299, 302 (Iowa 1975). We examine the grounds for jurisdiction on our own motion before proceeding further. *Qualley v. Chrysler Credit Corp.*, 261 N.W.2d 466, 468 (Iowa 1978). If we determine subject matter jurisdiction is absent, an order dismissing the petition is the only appropriate disposition. *Lloyd v. State*, 251 N.W.2d 551, 558 (Iowa 1977).

Section 598A.13 provides that Iowa courts shall recognize and enforce an initial decree of a court of another state, which has assumed jurisdiction under statutory provisions substantially in accordance with this chapter. We look to Iowa Code sections 598A.3(1)(b)(1997)[2] and 598A.3(3)(1997)[3] for guidance in determining proper jurisdiction.

We agree with the district court that New York had jurisdiction to enter the custody order. Both Karna and Maurice were parties to the divorce actions. They appeared and were both represented by counsel. They agreed that the Supreme Court of New York should decide among other things the issue of Isaiah's custody. On May 25, 1994, the Supreme Court of New York made a custodial award.[4] The facts indicated Karna, Maurice and Isaiah had lived in New York, the custody of Isaiah had not been decided and Isaiah had been moving between his father in New York and his mother in Iowa. The decree that was entered provided Isaiah was to spend the next nine months in New York, and he did. Up until the time Karna sought to employ the jurisdiction of the Iowa courts custody

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[2] Iowa Code § 598A.3(1)(b) provides:

> 1. A court of this state which is competent to decide child custody matters has jurisdiction to make a custody determination by initial or modification decree if:
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> *b.* It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

[3] Iowa Code § 598A.3(3) provides:

> 3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine custody.

[4] The Family Court of the State of New York on June 2, 1994, entered an order finding in September of 1993 when Maurice filed a petition for custody and the child was in New York state that Maurice only had him for visitation and that at the time this petition was filed New York was not the child's home state and Iowa was the child's home state. The court dismissed Maurice's petition upon the specific condition that Karna institute a proceedings for custody in Iowa within thirty days of the order. Kara did not meet the condition. Though the family law court order was subsequent to the order of the New York Supreme Court we give it no credence because its finding as to jurisdiction was only as of September of 1993 some eight months prior to the New York Supreme Court decree.

of Isaiah had been transferred in accordance with the provisions of the New York Supreme Court decree. Foreign decrees are presumed to be valid, the party contesting such decrees has the burden to prove the absence of jurisdiction. *Slidell v. Valentine*, 298 N.W.2d 599, 602 (Iowa 1980). Karna has failed to show New York was without subject matter jurisdiction to enter the custody decree.

We next address Maurice's claim that Iowa did not have jurisdiction to modify the New York decree. Maurice filed a motion to dismiss Karna's petition. Maurice contended (1) the judgment of divorce entered on May 25, 1994 in the Supreme Court of New York provided that the family court should have concurrent jurisdiction with the supreme court with respect to future issues of custody, visitation, maintenance and support, (2) New York would be the more appropriate forum, (3) Iowa should avoid re-litigating the New York decisions, and (4) the presence of the child in Iowa was not sufficient to confer custody jurisdiction under Iowa Code section 598A.3(2). The Iowa district court denied the motion. The court made a finding that Iowa was the child's home state and the child had significant connection at that time with the state of Iowa and had been seeing counselors and doctors in Iowa.

Maurice contends New York had exclusive and continuing jurisdiction and the Iowa decision should be vacated and the matter should be remanded to the New York courts. When considering a question of subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act, we review de novo review. *S.R. by M.J.R. v. M.R.*, 401 N.W.2d 221, 233 (Iowa App. 1986).

To resolve the issue we look first to the Uniform Child Custody Jurisdiction Act, Iowa Code 598A, which has been enacted in both Iowa and New York.

Section 598.21 provides that orders relating to child custody "shall" be subject to the provisions of chapter 598A. It is necessary that all jurisdictional requirements under chapter 598A be met where that chapter is applicable to a proceeding to modify a custody decree. The provisions of chapter 598A.1 the Uniform Child Custody Jurisdiction Act, applies to Karna's petition to modify the New York custody decree. *See* Iowa Code § 598A.1 (1997). Section 598.21 provides that orders relating to child custody "shall" be subject to the provisions of chapter 598A. It is therefore necessary that all jurisdictional requirements under chapter 598A be met where that chapter is applicable to a proceeding to modify a custody decree. The provisions of chapter 598A, the Uniform Child Custody Jurisdiction Act, obviously apply to this request by Karen to modify the New York decree. *Pierce v. Pierce*, 287 N.W.2d 879, 884 (Iowa 1980)

Because we are addressing a petition to modify the child custody decree of another state, we need consider the provisions of Iowa Code section 598A.14. which in pertinent part provides:

> If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter or has declined to assume jurisdiction to modify the decree, and the court of this state has jurisdiction.

Under this uniform legislation. two conditions must be satisfied before a court may disturb a custody determination made by a court of another state. These are: (1) the court, which rendered the decree, must lack jurisdiction (at the time of the requested modification) or decline to exercise jurisdiction, and (2)

the court in the foreign state must have jurisdiction under the provisions of the Act. *Leyda*, 398 N.W.2d at 820; *In re Marriage of Mintle*, 294 N.W.2d 564, 566 (Iowa 1980).

The district court should have addressed these factors in ruling on the motion to dismiss before it established jurisdiction by finding that Iowa is the child's home state. The fact the Isaiah's home state is Iowa standing alone may not be sufficient to confer jurisdiction on the Iowa court to modify the New York decree. While it can be argued that Isaiah's residence in Iowa for more than six months results in Iowa becoming his home state, significant connection jurisdiction continues in New York, the state of the prior decree, where the court record and other evidence exists and Maurice continues to reside. *See Leyda*, 398 N.W.2d at 819; *see also Kumar v. Superior Court*, 32 Cal.3d 689, 652 P.2d 1003, 186 Cal.Rptr. 772 (1982); *Hamill v. Bower*, 487 So.2d 345, 347-48 (Fla. Dist. Ct. App.1986); *Funk v. Macaulay*, 457 N.E.2d 223, 227 (Ind. Ct. App.1983); *Clarke v. Clarke*, 126 N.H. 753, 758, 496 A.2d 361, 364 (1985); *Neger v. Neger*, 93 N.J. 15, 31, 459 A.2d 628, 636 (1983).

Additionally Karna filed the petition after her son had been in her custody for six months under the provisions of the New York decree. She continued to hold the child in Iowa beyond the time he should have been returned to Maurice under the provisions of the New York decree. *See* Iowa Code § 598A.8 (1997) (providing jurisdiction should not be exercised or declined if the petitioner has violated any provision of a custody decree of another state).

Furthermore, we look to the Federal Parental Kidnapping Prevention Act of 1980, 28 U.S.C. section 1738A (1983), which indicates a congressional intent

that the act be applied in all interstate custody disputes. The federal statute uses language more specific than the UCCJA in limiting modification jurisdiction and says:

> The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section [that the court has jurisdiction under its own law] continues to be met and such State remains the residence of the child *or of any contestant.*

28 U.S.C. § 1738A(d) (emphasis added).

State courts considering the question have held the federal legislation preempts state law in determining when jurisdiction may be exercised in interstate custody matters. *See Ex parte Lee*, 445 So.2d 287, 290 (Ala. Civ. App.1983)); *In re Marriage of Pedowitz*, 179 Cal. App. 3d 992, 999, 225 Cal. Rptr. 186, 189 (1986); *Tufares v. Wright*, 98 N.M. 8, 10, 644 P.2d 522, 524 (1982); *Voninski v. Voninski*, 661 S.W.2d 872, 876 (Tenn. Ct. App. 1982); *Arbogast v. Arbogast*, 327 S.E.2d 675, 679 (W. Va. 1984).

Two requirements under section 598A.14 must be met before the Iowa district court can modify the New York custody decree. First, New York cannot now have jurisdiction under jurisdictional prerequisites substantially in accordance with chapter 598A or New York having rendered the decree must have declined to assume jurisdiction to modify the decree. Second, the district court of Iowa must have jurisdiction. *Pierce*, 287 N.W.2d at 882.

Maurice continues to reside in New York. The child has spent a large portion of his time since the dissolution in the custodial care of Maurice in New York State. New York has not declined jurisdiction of a petition to modify the decree.

The district court failed to consider the jurisdictional issues under the Uniform Child Custody Jurisdiction Act as codified in Iowa Code chapter 598A. *See S.R., by M.J.R.*, 401 N.W.2d at 223-26. These jurisdictional requirements are mandatory, not discretionary. If the court lacks subject matter jurisdiction, it is without authority to hear the case and must dismiss the petition. *See Pierce*, 287 N.W.2d at 881-82. Maurice remains a resident of New York, thus maintaining preference for New York's jurisdiction over modification of custody. *See Leyda*, 398 N.W.2d at 819.

Maurice contends the Iowa court should not have ordered him to pay child support. Maurice and Karna stipulated to the New York Supreme Court decree providing that:

> The Husband and Wife shall be responsible for full support of the child while the child is residing with each of them and such terms shall continue until the earlier of the following events: (a) the attainment of the age of 21 years (22 years, if the Child enters and continues to attend college) by the Child; (b) the marriage of the Child; or (c) the death of such child.

The Iowa district court modified this decree and ordered Maurice pay child support in the amount of $345.39 per month. We agree with Maurice that the Iowa court should not have modified the New York decree. In *In re Marriage of Carrier*, 576 N.W.2d 97 (Iowa 1998) the court addressed the attempt of a mother to modify a Colorado decree to increase the father's child support obligation. The father at the time the action was filed continued to live in Colorado though the mother and child had moved to Iowa. The Iowa court found under the supremacy clause, article VI of the United States Constitution, the FFCCSOA, which provides that states must comply with child support orders made in other

states, is binding on all state and supersedes any inconsistent provision of state law.

The act provides that a child support order is made consistently with the full faith and credit act if:

> (1) a court that makes the order, pursuant to the laws of the state in which the court is located and subsections (e), (f), and (g)--
>
> (A) has subject matter jurisdiction to hear the matter and enter such an order; and
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> (B) has personal jurisdiction over the contestants; and
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> (2) reasonable notice and an opportunity to be heard is given to the contestants.

28 U.S.C. § 1738B(c).

We have found that the New York decree is a valid decree. The question is whether Iowa has authority to modify the New York order is addressed by section 1738B(a) which provides:

> (a) General rule --The appropriate authorities of each state--
>
> (1) shall enforce according to its terms a child support order made consistently with this section by a court of another state; and
>
> (2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

28 U.S.C. § 1738B(a). The foregoing language allows a state court to modify a child support order, such as the New York decree here only if permitted by sections 1738B(e), (f), and (i).

The first requirement set forth in section 1738B(e) allows modification of a child support order by a sister state if the rendering state loses continued,

exclusive jurisdiction over the child support order.[5] Subsection (e) provides:

> (e) Authority to modify orders.--A court of a state may modify a child support order issued by a court of another state if--
>
> (1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and
>
> (2)(A) the court of the other state no longer has continuing, exclusive jurisdiction of the child support order because that state no longer is the child's state or the residence of any individual contestant; or
>
> (B) each individual contestant has filed written consent with the state of continuing, exclusive jurisdiction for a court of another state to modify the order and assume continuing, exclusive jurisdiction over the order.

Thus, in order for a court of any state other than the original issuing state to modify a child support order, that court must have jurisdiction, and either: (1) the issuing state must no longer be the child's state or the residence of any individual contestant; or (2) the parties must file written consent to another state assuming jurisdiction. 28 U.S.C. § 1738B(e)(2).

This modification proceeding does not meet the express statutory requirements of section 1738B(e)(2). New York remains the residence of Maurice, an individual contestant, and he has not given written consent to Iowa jurisdiction. Therefore under section 1738B(e)(2)(A), New York has exclusive continuing jurisdiction. As a result the Iowa district court did not have power to modify the New York decree. Any modification of the child support order must occur in New York.

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[5] The FFCCSOA defines "continuing, exclusive jurisdiction" in 28 U.S.C. § 1738B(d) as follows:

> Continuing jurisdiction -- A court of a state that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the state is the child's state or the residence of any individual contestant unless the court of another state, acting in accordance with subsections (e) and (f), has made a modification of the order.

We reverse and dismiss.

REVERSED AND DISMISSED.

VAITHESWARAN, J. (dissenting)

I respectfully dissent. The majority first addresses Jorgensen's contention that New York did not have subject matter jurisdiction to determine the custody of Isaiah. The majority concludes New York had jurisdiction to enter the custody portion of the decree because both parents were parties to the divorce proceeding, appeared and were represented by counsel, and agreed that the New York Supreme Court should decide the issue of custody. I would not reach the issue of whether New York had jurisdiction to determine custody in the dissolution proceeding because I do not believe we have authority to consider a collateral attack on New York's decree. *See Sherrer v. Sherrer,* 334 U.S. 343, 355, 68 S. Ct.1087, 1093, 92 L. Ed. 1429, 1442 (1948); *In re Marriage of Winegard,* 278 N.W.2d 505, 508 (Iowa 1979); *see also In re T.H.,* 589 N.W.2d 67, 69 (Iowa 1999); *In re Estate of Mack*, 373 N.W.2d 97, 99 (Iowa 1985); *cf. In re Marriage of Leyda*, 398 N.W.2d 815, 820 (Iowa 1987) (noting without considering the issue that limitations which the UCCJA and PKPA place on court's jurisdiction to modify a foreign child custody decree do not touch upon court's jurisdiction to permit collateral attack upon a foreign decree). Additionally, if I were to reach the issue of New York's jurisdiction, I would not base a finding that New York had jurisdiction on the parties' agreement to submit to that court's jurisdiction, as subject matter jurisdiction cannot be conferred by consent. *State v. Mandicino*, 509 N.W.2d 482, 483 (Iowa 1993).

Assuming the New York decree was valid, the next question is whether the Iowa district court had jurisdiction to modify it. The majority concludes it did not. I disagree. Iowa Code section 598A.14 provides that an Iowa court may not

modify a decree unless the state issuing the decree does not now have jurisdiction or "has declined to assume jurisdiction to modify the decree, and the court of this state has jurisdiction." I would conclude the New York court expressly declined to assume jurisdiction.

Following entry of the New York decree, New York's family court, which had concurrent jurisdiction over custody disputes, dismissed a custody application filed by Vargas, concluding "New York was not the child's home state at the time of the commencement of this proceeding and that Iowa was the child's home state for purposes of exercising jurisdiction *in any custody proceeding*." (emphasis added). The court ordered Jorgensen to file a petition in Iowa within thirty days of the order. Both parties participated in this proceeding and neither party appealed the ruling or otherwise challenged the authority of the family court to issue the order. Therefore, that order was the final pronouncement of the New York courts on ongoing jurisdiction to determine the custody of Isaiah.[6] Although Jorgensen did not file her Iowa modification petition within thirty days of the family court order, I would nevertheless conclude that the order declining jurisdiction continued to apply in the absence of a subsequent New York order reaching a contrary conclusion. As New York declined jurisdiction, the Iowa district court had jurisdiction to consider Jorgensen's modification application. *Cf. In re Marriage of Arulpragasam and Eisele*, 709 N.E.2d 725 (Ill. App. Ct. 1999) (noting Massachusetts declined jurisdiction over

[6] The majority accords this ruling "no credence" because the jurisdictional finding was as of September 1993, eight months before the New York Supreme Court decree was entered. While this fact might be relevant in a direct challenge to the custody determination contained in the divorce decree, I am not convinced the date of the jurisdictional finding makes a difference for purposes of deciding whether New York declined jurisdiction. Under both the UCCJA and the PKPA, the only relevant jurisdictional date is the date a petition for custody determination is filed *See* 28 U.S.C. § 1728A(c), (f), (g), (h).

modification petition, and was not likely to conclude two years later in a new modification proceeding that it would exercise jurisdiction). Like the district court, I would therefore proceed to review the merits of Jorgensen's modification application.