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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001010-ME

TROY W. FOSTER — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 09-CI-00025

TANYA FORTNER — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND WINE, JUDGES.

LAMBERT, JUDGE: Troy Foster appeals from the Johnson Circuit Court's April 30, 2010, judgment registering a foreign order from Georgia in the state of Kentucky and holding a prior judgment entered in Kentucky Case No. 03-C-00240 to be void as a matter of law. After careful review, we reverse.

Tanya and Troy Foster were divorced in the state of Georgia on or about October 1, 2002. There was one child born of the marriage, K.F., and the

Georgia Superior Court set out in the divorce decree that Troy would pay Tanya (now Tanya Fortner) child support in the amount of $311.00 per month.

After the divorce, K.F. resided with Tanya until March 2003, at which time Tanya was incarcerated. K.F. then lived with Troy, who was at that time a resident of Kentucky, from March 2003 until August 28, 2003, when K.F. was removed from Troy's home and placed into foster care in Kentucky. However, prior to K.F.'s removal from Troy's home, Troy filed a complaint dated July 9, 2003, in Kentucky Case No. 03-C-00240 for standard child support and issued a summons via regular mail to Tanya in the state of Georgia. This summons was returned "no such number." Tanya was then physically served in the state of Kentucky when she arrived at a custody case involving K.F. on July 21, 2003.[1]

Thereafter, a default judgment was entered on September 19, 2003, requiring the payment of child support by Tanya to Troy in the amount of $180.00 per month. However, at the time the child support order was entered, Troy no longer had custody of K.F., as he had been removed by Child Protective Services and placed in foster care.

Upon her release from prison, Tanya regained custody of K.F., and on August 16, 2004, K.F. was returned to Tanya in Georgia, where he has resided since that time. On December 18, 2008, the Georgia Office of Child Support Services requested Kentucky to enforce child support arrears against Troy in the sum of $16,711.00. This request is entitled "Child Support Services Transmittal #1

[1] Tanya was in Kentucky to attend the separate July 21, 2003, custody hearing in an abuse, neglect, and dependency case regarding K.F.

—Initial Report," and no order appears in the record reflecting that such claimed arrearages were ever reduced to a judgment. On January 14, 2009, the state of Georgia, through the Cabinet for Families and Children, by and through the office of the Johnson County Contracting Official, filed a UIFSA[2] petition to register a foreign order in the Johnson Family Court. In its petition to enforce child support arrears, Georgia did not seek child support for the period in which K.F. resided with Troy or for the period during which K.F. was placed in Kentucky foster care.

On April 30, 2010, the Johnson Family Court issued its findings of fact, conclusions of law, and judgment. The court found that the Kentucky action filed as Case No. 03-C-00240 should have been filed as a UIFSA action for Georgia to establish and enforce, and therefore the judgment entered in that case modifying child support was void as a matter of law. Further, the trial court held that Kentucky was required to honor the child support order and UIFSA petition by the state of Georgia and indicated that if Troy wanted to modify child support or dispute the arrearages, he would have to do so in the state of Georgia. The court then registered the Georgia judgment in Kentucky for enforcement and collection on the arrears and ordered Troy to pay $311.00 per month and $100.00 extra per month until such time as the arrearage was paid. This appeal now follows.

As the arguments presented to us on appeal are purely matters of law, we will review the claims *de novo*. *See Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

[2] UIFSA refers to the Uniform Interstate Family Support Act, which is codified at Kentucky Revised Statutes (KRS) 407.5101, et seq.

Initially we note that this is a perplexing and strange case. The Johnson Family Court held that the order entered in Case No. 03-C-00240 was void because it was not filed as a UIFSA petition. Had the Georgia order been registered in the state of Kentucky at the time the Kentucky order was entered, we would agree. KRS 407.5603(3) provides that ". . . a tribunal of this state shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction." Thus, had the petition to register the Georgia divorce decree ordering Troy to pay child support been filed prior to the order entered in the Kentucky court in 2003, we would agree that Kentucky courts had no authority to modify child support. However, the Johnson Family Court entered its order in September 2003, and the petition to register the foreign judgment was filed on January 14, 2009, and that petition was not ultimately registered until April 30, 2010. Thus, at the time the Johnson Family Court entered the order requiring Tanya to pay child support, it was under no duty under the UIFSA to enforce or decline to modify the Georgia order.

This above concept is illustrated by the Kentucky Supreme Court's analysis of the UIFSA in *Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007):

> The problem with this is that UIFSA limits the power of a circuit court to act once a child support decree has been issued by another state. The available options are (1) registration and enforcement of a decree as it exists, KRS 407.5201-.5608, and (2) registration and modification of the decree, KRS 407.5609-.5614. In both situations, the petitioner must ask the court to do something with the decree by actively seeking registration and either enforcement or modification of it. There is no provision that allows a party-prior to seeking

> to register and then enforce or modify a decree-to ask the court to declare whether the requirements of either set of statutes has been met.

Because neither Tanya nor the state of Georgia had ever attempted to register the child support order/divorce decree in the state of Kentucky, it appears that Kentucky was free to modify the order, assuming it had jurisdiction otherwise to do so.

Accordingly, the Johnson Family Court's authority to enter the motion to modify child support depends upon whether it had jurisdiction to enter such an order. It appears that at the time Troy filed the motion to modify child support in Johnson Family Court, the court had jurisdiction to hear the case.

In *Nordike*, the Kentucky Supreme Court articulated the three types of jurisdiction necessary for a court to hear a case:

> First, there is personal jurisdiction, or "the court's authority to determine a claim affecting a specific person." Milby, 952 S.W.2d at 205. When the question is whether the court has the power to compel a person to appear before it and abide by its rulings, this is a question of personal jurisdiction. Given the mobile world we live in, personal jurisdiction often is difficult to obtain, which has led each state to the development of long-arm statutes that extend personal jurisdiction to nonresidents. KRS 407.5201 is such a statute.
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> Often, discussions of jurisdiction concern subject-matter jurisdiction, or the court's power to hear and rule on a particular type of controversy. *Id.* Subject matter jurisdiction is not for a court to "take," "assume," or "allow." " '[S]ubject-matter jurisdiction cannot be born of waiver, consent or estoppel,' " but it is absent " 'only where the court has not been given any power to do anything at all in such a case. . . .' " *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970) (quoting *In Re Estate of*

> *Rougeron*, 17 N.Y.2d 264, 271, 270 N.Y.S.2d 578, 217 N.E.2d 639, 643 (N.Y. 1966)). A court either has it or it doesn't, though admittedly there are times when more than one court may have subject matter jurisdiction or it is difficult to determine which court does.
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> "Finally there is jurisdiction over the *particular* case at issue, which refers to the authority and power of the court to decide a *specific* case, rather than the class of cases over which the court has subject-matter jurisdiction." *Milby*, 952 S.W.2d at 205. This kind of jurisdiction often turns solely on proof of certain compliance with statutory requirements and so-called jurisdictional facts, such as that an action was begun before a limitations period expired. "[A]lthough a court may have jurisdiction over a particular class of cases, it may not have jurisdiction over a particular case at issue, because of a failure by the party seeking relief to comply with a prerequisite established by statute or rule." *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999). Jurisdiction over a particular case can perhaps be the most difficult of the jurisdictional ideas, as it also includes, or at least relates to, concepts such as ripeness and failure to state a claim, which are usually discussed in terms of their jurisdictional effect, although without specific reference to particular-case jurisdiction. *E.g., Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 275-76 (Ky. App. 2005) ("Because the Appellants' claims were filed before they were ripe, the circuit court has no jurisdiction over the instant case.").

Id. at 737-38. KRS 23A.110 vests Kentucky Family Courts with jurisdiction over cases involving child support. Thus, Kentucky had subject matter jurisdiction over classes of cases involving child support and, theoretically, had subject matter jurisdiction to hear Troy's motion to modify child support. Furthermore, when Troy personally served Tanya while she was in the state of Kentucky, this was sufficient to establish personal jurisdiction. *See* KRS 407.5201(1). Thus, the issue turns on whether or not the family court had particular-case jurisdiction to hear

Troy's motion for child support. The trial court held that Troy's motion should have been brought as a UIFSA complaint rather than as a standard residential complaint. As stated above, had the original child support order been registered in the state of Kentucky prior to the filing of the motion to modify child support in Kentucky, we would agree.

Troy counters that Kentucky was his home state and that of the child as defined by KRS 407.5101(4), and, thus, a motion to modify child support was properly brought in Kentucky. That statute states that the *home state* is the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately preceding the time of filing of a petition. K.F. moved to Kentucky and began residing with Troy in March 2003, and thus at the time Troy filed his motion in July 2003, K.F. had been residing with Troy for five months, and not the requisite six months required for Kentucky to be considered the home state of the child. Accordingly, Troy's argument that Kentucky was the home state of the child fails. However, the definition of home state in KRS 407.5101(4) falls within the parameters of the UIFSA, and thus is not helpful in this instance because a motion to register the foreign judgment was not made until years later.

Troy next contends that even if the Johnson Family Court did not have particular case jurisdiction, Tanya waived that argument by not challenging the order or contesting particular case jurisdiction at the time the motion was filed. In *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422 (Ky. App.

2008), this court articulated the effect of a lack of subject matter or particular case jurisdiction:

> It is well-established that a judgment entered by a court without subject matter jurisdiction is void. In addition, since subject matter jurisdiction concerns the very nature and origins of a court's power to do anything at all, it cannot be born of waiver, consent or estoppel, and may be raised at any time.
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> On the other hand, lack of particular case jurisdiction merely renders a judgment *voidable*, rather than *void ab initio*. . . . Any error rendering a judgment voidable cannot be challenged in a collateral action and is subject to consent, waiver, or estoppel.

Id. at 430-31 (citations and quotations omitted). Based on this, we agree with Troy that Tanya waived any argument that the trial court did not have particular case jurisdiction when it entered the order in September 2003, and she cannot collaterally attack or raise the issue of particular case jurisdiction at this juncture.

In summation, the Johnson Family Court had jurisdiction to enter the order awarding Troy child support in 2003, and any argument Tanya had that particular case jurisdiction was improper was waived and cannot be attacked collaterally. Accordingly, the Johnson Family Court's holding in its order that the September 2003 order was void as a matter of law was in error.

We also take issue with the portion of the April 30, 2010, order registering a foreign judgment for child support arrearages that was never reduced to a judgment. In its order, the family court states "the [o]rder for child support entered in the State of Georgia against [Troy], is hereby registered in the State of Kentucky for enforcement and collection of the arrears." There is no Georgia order attached

to the Johnson Family Court's April 30, 2010, judgment. Further, the only document in the record referencing such arrears is an initial petition by Georgia to have Kentucky register its "order," and no reference is made to any official judgment signed by a Georgia judge. The original divorce decree is attached to the petition, which is the only order in the record which requires Troy to pay child support in the amount of $311.00 per month. However, we find it troublesome that the arrearage Georgia is asking Kentucky to enforce has not been reduced to any judgment found in the record. We agree with Troy's argument that he has not had the opportunity to challenge such an arrearage, should he wish to do so. The Johnson Family Court's judgment allowing Troy's employer to withhold child support in the amount of $311.00 and arrearages in the amount of $100.00 per month impermissibly deprives Troy of his property without due process of law.

Accordingly, we reverse the April 30, 2010, judgment of the Johnson Family Court holding that the September 2003 judgment was void as a matter of law. Further, we reverse the judgment ordering the withholding of child support and arrearages by Troy's employer because no formal judgment from the state of Georgia has been registered in Kentucky concerning the arrearage issue. This matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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