DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	No. 1 CA-CV 10-0471
	)	
STUART A. GOLD,	)	DEPARTMENT C
	)	
Petitioner/Appellee/ Cross-Appellant,	)	**MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
	)	
v.	)	
	)	
DANIELLE L. GOLD,	)	
	)	
Respondent/Appellant/ Cross-Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2006-002228

The Honorable M. Scott McCoy, Judge

REVERSED IN PART, DISMISSED IN PART AND REMANDED

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K E S S L E R, Judge

¶1 Danielle L. Gold ("Mother") appeals and Stuart A. Gold ("Father") cross-appeals from the superior court's May 2010 order holding a 2007 custody provision in a dissolution decree unenforceable on the ground that the court lacked subject matter jurisdiction to enter the 2007 custody provision. In addition, Father cross-appeals from the May 2010 order to the extent that the court held it had jurisdiction to enter an emergency custody order in February 2010. For the following reasons, we reverse the May 2010 order of the superior court to the extent it ruled the 2007 custody decree was unenforceable. We dismiss the cross-appeal from the February 2010 order and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 In March 2006, Father filed a petition for dissolution of marriage. The petition alleged that Arizona was the "home state" of the parties' minor child, as defined in Arizona Revised Statutes ("A.R.S.") section 25-1002(7)(a) (2007).[1] The petition also alleged that the parents resided in Maricopa County. The response alleged that the child and Mother resided in Ghana at the time of the petition. In September 2007, the trial court held an evidentiary hearing and found that at least

[1] We cite and quote from the most current version of any statute unless it has been amended from the time of the underlying events. A.R.S. section 25-1002 is part of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), A.R.S. §§ 25-1001 through 25-1067.

one of the parties was domiciled in Arizona for 90 days prior to the filing of the petition although the parties and their child were currently residing in Ghana. In October 2007, the superior court entered a final decree of dissolution. The superior court found that it had jurisdiction to order child custody and ordered joint custody along with a parenting time plan.[2] The decree recited that the parties intended to work in Ghana for at least two years and ordered both parents not to remove the child from Ghana without the written consent of the other party. The order also stated that any disputes arising under the decree must be litigated in Maricopa County, Arizona.

¶3 In December 2009, Mother filed a petition in superior court to relocate the child. Mother also filed an emergency petition for temporary custody, alleging that contrary to the 2007 decree, Father had filed a competing action in Ghana requesting modification of the divorce decree to grant him sole custody of their child. Father filed his own petition in the

[2] A superior court minute entry indicates that by September 2007, both parties resided in Ghana, however it does not state when they moved there. A deposition attached to a superior court filing indicates that Father moved to Ghana in mid-May 2006, after he filed the petition for dissolution. According to Wife's deposition, she went to Ghana with the child in January 2006, about two months before Father filed the petition for dissolution. Prior to that move, Mother had regularly visited Ghana for 2 weeks to a month at a time.

superior court to enforce the provision of the original decree preventing removal of the child from Ghana.[3]

¶4 In February 2010, the trial court entered an interim custody order providing that the child could continue to reside in Pennsylvania with Mother until a hearing could be held on Mother's pending petition to relocate and Father's petition to enforce the 2007 decree.

¶5 The superior court, acting sua sponte, ordered briefing on whether it had exceeded its jurisdiction under the UCCJEA in the 2007 decree. Both parties responded, supporting the court's jurisdiction to enter the 2007 decree. In May 2010, the superior court entered a signed minute order finding, based on pleadings submitted to it by the parties, that both parents and the child had been living in Ghana for at least two months before Father filed the petition in March 2006. Based on that, the superior court determined that it lacked subject matter jurisdiction to determine child custody in the 2007 decree.

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[3] Although this case involves the removal of a child across international lines, federal law implementing the Hague convention, including the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601 et. seq., does not apply, because Ghana is not a signatory of the Hague convention. *Taveras v. Taveras,* 397 F.Supp.2d 908, 912 (S.D. Ohio 2005); *see also* Hague Conference on Private International Law, Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (listing Hague convention signatories) (last checked June 10, 2011).

Accordingly, while not expressly vacating the 2007 decree, the court declared the 2007 decree unenforceable as to custody and denied Mother's request to modify the decree and Father's request to enforce it. However, the superior court reaffirmed its February 2010 emergency temporary order granting custody to Mother, and ordering her to live with the child in Pennsylvania. In so doing, it found it had jurisdiction to enter the February order as an emergency custody order under A.R.S. section 25-1034(B). Mother filed a timely notice of appeal and Father filed a timely cross-appeal. This Court has jurisdiction of the appeal pursuant to Article 6, section 9 of the Arizona Constitution and A.R.S. § 12-2101(C) (2003).

ANALYSIS

¶6 On appeal, both parties urge reversal of the superior court's determination that the 2007 decree was entered without jurisdiction and was thus unenforceable. Additionally, Father argues that we should reverse the February 2010 temporary custody modification because the superior court lacked temporary emergency jurisdiction at the time of the post-decree petitions.

I. The Superior Court Erred in Reconsidering Its 2007 Order in 2010

¶7 Two competing principles must be resolved to determine if the superior court erred in holding the 2007 decree unenforceable as it relates to the child. On the one hand,

either as part of the same proceeding or in a different cause of action, "a superior court judge has no jurisdiction to review or change the judgment of another superior court judge when the judgment has become 'final.'" *Davis v. Davis,* 195 Ariz. 158, 161, ¶ 11, 985 P.2d 643, 646 (App. 1999) (dictum) (same proceeding). "When a final judgment is involved one superior court judge has no jurisdiction to review or change the judgment of another superior court judge." *Lemons v. Superior Court,* 141 Ariz. 502, 504, 687 P.2d 1257, 1259 (1984) (dictum) (same proceeding). *See also Fraternal Order of Police v. Superior Court,* 122 Ariz. 563, 565, 596 P.2d 701, 703 (1979) (in two separate actions, res judicata prevents a judge of the same court in the second action from issuing a ruling directly contrary to a final judgment in the first action); *Hodge v. Hodge,* 621 F.2d 590, 593 (3d Cir. 1980) (res judicata precludes the same court from later vacating a divorce decree after the time has expired to appeal).[4]

¶8 In this case, there is no question the 2007 decree was final by the time superior court entered its May 2010 order

[4] In comparison, the law of the case doctrine does not prevent a second judge in the same case from revisiting prior nonfinal decisions in that case. *State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994); *Bogard v. Cannon & Wendt Elec. Co., Inc.* 221 Ariz. 325, 332 n.11, ¶ 26, 212 P.3d 17, 24 n.11 (App. 2009); *Dunlap v. City of Phoenix,* 169 Ariz. 63, 66, 817 P.2d 8, 11 (App. 1990) (citation omitted) (stating that "the trial judge has jurisdiction to reconsider [a] motion *unless the first decision was a final judgment*") (emphasis added).

finding the custody portion of the decree unenforceable. If we applied the above rule, the superior court lacked jurisdiction to so hold because the 2007 order was final.

¶9 In contrast, we have long recognized that a judge has no discretion but to vacate a judgment under Ariz. R. Civ. P. 60(c)(4) as void if the court rendering the judgment lacked subject matter jurisdiction. *Martin v. Martin*, 182 Ariz. 11, 14-15, 893 P.2d 11, 14-15 (App. 1994) (if a Rule 60(c)(4) motion is made for lack of jurisdiction, a court has no discretion but to void the judgment if it finds lack of jurisdiction); *In re Milliman's Estate*, 101 Ariz. 54, 58, 415 P.2d 877, 881 (1966) ("Rule 60(c) does not afford the only grounds for setting aside a judgment. A court which makes a void order may at any time on its own motion or the motion of [a] party move to set aside such [a] void order.").

¶10 These two competing principles are based on time-honored but competing policies; the first being finality of judgments and the second being that even finality is premised on the sanctity of law, including subject matter jurisdiction. *See* Restatement (Second) On Judgments § 12 cmt. a (1982) ("Restatement").

¶11 These two principles and their underlying policies conflict when a court or party challenges a judgment as void after the time to appeal has expired and the earlier judgment is

entitled to finality. Rule 60 does not directly address this issue because it merely says that any such motion should be made in a reasonable time. However, both Restatement § 12 and the modern trend of cases suggest that finality must be given greater weight so that an earlier final judgment is not upset even on lack of jurisdiction grounds unless one of a number of limited factors is present. As explained by the Restatement § 12, the parties and a court should be precluded from litigating the subject matter jurisdiction in an earlier final ruling subject to three exceptions:

> When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:
>
> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
>
> (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

¶12 As the Restatement further explains, under the traditional doctrine, the policy of voiding an earlier judgment

when jurisdiction was questionable was usually seen as primary, but that emphasis had severe shortcomings. *Id.*, cmt. a and b. In contrast, the Restatement notes that the more modern trend of cases gives more weight to the finality of judgments. *Id.*, cmt. a and c. Thus, when jurisdiction is actually litigated in the first proceeding or even implicitly litigated and the case is then litigated on its merits, a court should not proceed with attacking that earlier judgment unless one of the three exceptions applies. *Id.*, cmt. c and d. While section 12 of the Restatement directly deals with separate later litigation attacking the earlier judgment, the Restatement notes that the same principle applies to later proceedings in the original case. *Id.*, § 69 (providing that the factors set forth in Restatement § 12 apply equally well to seeking relief under Rule 60).

¶13 The United States Supreme Court has recently given its imprimatur on this modern trend of cases in applying the federal equivalent to our Rule 60.[5] In *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), a bankruptcy debtor had obtained a judgment confirming his bankruptcy plan without an

[5] The present Ariz. R. Civ. P. 60(c) is in the form of its federal counterpart Rule 60(b) as originally adopted in 1937. We look for guidance to federal cases interpreting similarly worded federal counterparts to our rules. *Harper v. Canyon Land Dev. LLC,* 219 Ariz. 535, 537-38, ¶ 6, 200 P.3d 1032, 1034-35 (App. 2008).

adversarial hearing. *Id*. at 1373. The plan discharged the interest due on the student debt. *Id*. at 1374. The creditor did not take an appeal. *Id*. Years later, the creditor initiated collection proceedings to pay the discharged debt. *Id*. The debtor sought to have the creditor held in contempt for violating the judgment and the creditor sought to have the judgment vacated under Rule 60(b)(4), contending that without any adversarial hearing, the judgment was void. *Id*. at 1376.

¶14 In rejecting the creditor's arguments, the Court first noted that the bankruptcy order was a final judgment and because the creditor had not appealed, finality would normally preclude any challenge to the judgment's enforceability. *Id.* at 1376. While the Court explained that an exception to that rule for void judgments existed under Rule 60, it held that Rule 60(b)(4) was not a substitute for a timely appeal and was to be used only in the "rare instance" when a judgment is premised on a certain type of jurisdictional error (or on a due process violation that deprived a party of an opportunity to be heard), adopting the view that it was limited to the "exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id.* at 1377, (citing *Nemaizer v. Baker,* 793 F.2d 58, 65 (2nd Cir. 1986) and *United States v. Boch Oldsmobile, Inc.,* 909 F.2d 657, 661-62 (1st Cir. 1990)). The Court then ruled that the judgment in *Espinosa* did not rise to that level

of jurisdictional defect. *Id.* at 1378.[6]

¶15 Our supreme court embraced a similar principle in a slightly different procedural context in *Lofts v. Superior Court*. 140 Ariz. 407, 682 P.2d 412 (1984). In *Lofts*, the supreme court reversed a superior court's refusal to grant full faith and credit to a Washington state custody order. *Id*. at 410, 682 P.2d at 415. *Lofts* reasoned that, at least in a case where subject matter jurisdiction apparently had been fully and fairly litigated, res judicata barred relitigation of the issue because the principle of finality must take precedence over any lingering questions related to jurisdiction. *Id*. The court concluded that jurisdiction appeared to have been litigated even though it did not have the full record from the foreign court in part because it had some of the pleadings before that court and the findings of fact made by the Washington state court. *Id*. at 411, 682 P.2d at 416. The court also noted that the Washington court judgment itself was "*prima facie* evidence of that court's jurisdiction to render it and of the right which it purports to adjudicate." (citations omitted). *Id.*

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[6] We find similar factors in Arizona cases dealing with horizontal appeals from nonfinal judgments. A court should not reconsider the nonfinal ruling of another judge of the same court in the same action unless the first decision was manifestly erroneous or unjust, or there has been a substantial change of essential facts, issues, evidence or law. *Cypress on Sunland Homeowners Ass'n v. Orlandini,* __ Ariz. __, __, ¶ 25, __ P.3d __, __, 2011 WL 2158076 at *6 (Ariz. App. May 19, 2011).

¶16 Although this case involves a court refusing to enforce its own final order and does not implicate full faith and credit, we think the supreme court's demand that finality eventually should end litigation is well applied in a case where the court in 2006 appeared to resolve the issue of jurisdiction and the parties have literally relied for years and traveled to the opposite end of the earth in reliance on the validity of a final decree.

¶17 The factors in Restatement § 12 and the limitation of Rule 60 in *Espinosa* are persuasive as to cases such as this that do not involve a default judgment. Thus, we look to see whether the "subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the [original custody action] was a manifest abuse of authority" (Restatement § 12(1))[7] or this is an "exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction." *Espinosa*, 130 S. Ct. at 1377 (citation and internal quotation omitted). We find that it does not fall into either classification and thus the trial court erred in revisiting the enforceability of the custody provisions in the 2007 decree.

¶18 In 2006, the trial court held an evidentiary hearing and found that at least one of the parties had been domiciled in

[7] The other two factors cited in Restatement § 12 are not present here.

Arizona for 90 days before the petition was filed. It later held that it had jurisdiction under the UCCJEA and noted that the parties had moved to Ghana and intended to stay there temporarily for two years.

¶19 The motions and pleadings which the superior court considered in 2010 do not change the factual basis for jurisdiction in 2006 so as to make the 2007 decree erroneous, no less lacking an arguable basis for jurisdiction or being a manifest abuse of authority. Pursuant to A.R.S. section 25-1031(A)(1) (2007), the court has jurisdiction to issue initial custody orders if Arizona is the "home state of the child on the date of the commencement of the proceeding . . . ." Pursuant to section 25-1002(7)(a) (2007), "home state" means the "state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding, including any period during which that person is temporarily absent" from Arizona. The key date is the March 2006 petition for dissolution. It is undisputed that both parents were living in Arizona with the child for several years before March 2006. The fact that Mother and child left the State for Ghana two months before the petition was filed is not determinative, because there is no

evidence that such a move was anything other than temporary.[8] Thus, we include in the six consecutive months the period during which the person is temporarily absent.

¶20 In its May 2010 order, the trial court appears to base its decision on lack of jurisdiction in 2006 on the grounds that as of the filing of the March 2006 petition, neither Father nor Mother "continued to live in Arizona. Under A.R.S. § 25-1031(A)(1), Arizona therefore was not [the child's] home state." We disagree. As noted *supra*, ¶ 19, we determine the "home state" based on where one or both parents and child lived within six months before the petition, regardless of temporary absences. The fact that Father and Mother may have temporarily left the State with their child before or after the petition's filing, as found by the court in 2007, does not deprive Arizona of jurisdiction under 25-1031(A)(1).

¶21 This conclusion is consistent with *Welch-Doden v. Roberts*, 202 Ariz. 201, 42 P.3d 1166 (App. 2002). As we held in *Welch-Doden,* determination of home state under § 25-1031(a)(1) is broader than the six consecutive month requirement of § 25-1002(7)(a), so that a home state can be determined if the state

[8] Indeed, we do not have a transcript from the 2006 evidentiary hearing and thus assume that the record supports the court's 2007 decree that it had jurisdiction under the UCCJEA. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996) (noting "[w]e may only consider the matters in the record before us. [W]e presume that the record before the trial court supported its decision.").

was the home state "within six months" before the commencement of the custody proceedings. *Id*. at 208-09, ¶ 33, 42 P.3d at 1173-74. The fact that the child and Mother were absent for two of the six months is not significant. Moreover, as *Welch-Doden* notes, its analysis does not affect the exception for temporary absences under § 25-1002(7)(a). *Id.* at 205 n.7, ¶ 17, 42 P.3d at 1170 n.7. Determination of whether an absence is temporary must be made from the perspective at the time of the commencement of the custody proceedings (here, March 2006), rather than from hindsight and possibly changed intentions two or four years later.

¶22 Finally, as the trial court initially held in 2007, the two year absence from the State was intended to be temporary. In 2010, there is no basis to recharacterize that absence simply because the move to Ghana eventually turned out to be longer than the two years. Such a change in plans years after the petition was filed does not retroactively transform the intent of the parties and their residence for UCCJEA purposes at the time of the petition in March 2006.

¶23 Accordingly, the trial court erred in its May 2010 order by finding the 2007 decree unenforceable as to custody because of lack of jurisdiction. Since the superior court's refusal to consider and rule on Father's petition to enforce the decree and Mother's petition to modify the decree was based on

its erroneous conclusion that the initial decree was invalid, we reverse the May 2010 order to the extent it dismissed those petitions. On remand, the court must accept the 2007 decree as valid, but may conduct an evidentiary hearing to determine whether, pursuant to A.R.S. § 25-1032 (2007), continuing exclusive jurisdiction exists to rule on the pending motions to enforce and to modify the 2007 decree.[9] If it finds it has such continuing jurisdiction, it shall rule on the merits of those petitions.

II. The Superior Court's Temporary Custody Order

¶24 Father cross-appeals from the emergency temporary custody order entered in February 2010, arguing that the court lacked jurisdiction to enter that order under A.R.S. § 25-1034. We disagree.

¶25 First, temporary orders are not appealable. *Villares v. Pineda*, 217 Ariz. 623, 624-25, ¶ 10, 177 P.3d 1195, 1196-97 (App. 2008). Temporary orders are merely preparatory orders entered in anticipation of a trial. *Id*. at 625, ¶ 11, 177 P.3d at 1197. Therefore, we lack jurisdiction to consider whether the superior court exceeded its jurisdiction on direct appeal.

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[9] We do not decide whether exclusive continuing jurisdiction exists. This will require evidentiary hearings before the trial court on whether the child and any parent are "residing" in Arizona at the time of rendering a decision on the pending petitions (*see* A.R.S. § 25-1032(A)(2)) or whether it has jurisdiction at the time of the filing or resubmission of such petitions pursuant to section 25-1032(B).

¶26 Second, since this issue might arise on remand, we hold that if Father presses this attack on remand, the superior court will have to hold evidentiary hearings on whether it had jurisdiction to issue its February 2010 temporary order. The court concluded that it had such jurisdiction under A.R.S. section 25-1034(B) (2007) because the 2006 decree as to custody was unenforceable. However, since we disagree with that premise and hold the court had UCCJEA jurisdiction in 2006 and thus 2007, evaluation of whether the conditions of § 25-1034(A) are met will be necessary at the trial court. Specifically, on remand, the court will have to determine whether "it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." A.R.S. § 25-1034(A). While Mother contends that Father's alleged actions in seeking to have their child returned to Ghana through criminal process and to separate the child from Mother constitutes abuse or mistreatment, that is a matter which requires evidence, not merely argument. Since the trial court did not hold evidentiary hearings on whether it had jurisdiction pursuant to § 25-1034(A), we remand this matter to the trial court for such evidentiary hearings if Father again seeks to attack the February 2010 order.[10]

[10] Of course, if the court on remand finds that it has continuing jurisdiction under section 25-1032 and enters new

¶27 Finally, we note that the temporary order has been in place for over a year. We anticipate that the superior court will conduct an appropriate hearing upon remand and that the parties will make a greater effort to put aside their apparent animosity and attempt to find a common ground for their child's best interests.

CONCLUSION

¶28 For the foregoing reasons, we reverse the superior court's May 2010 order that the 2007 decree was entered without subject matter jurisdiction. On remand, the superior court will treat that decree as valid and enforceable. We also reject Husband's attack on the February 2010 temporary custody orders, but hold that a determination of whether the trial court had jurisdiction to issue that order must await further proceedings. On remand, the court should consider whether it has jurisdiction to consider the parties' petitions, and if so it should decide them on the merits. If it decides that it lacks such jurisdiction under § 25-1032 or denies such petitions, it should

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orders dealing with the custody of the child, the issue of jurisdiction for the February 2010 order will become moot.

decide whether it has jurisdiction to issue new emergency custody orders under § 25-1034.

/s/
_____
DONN KESSLER, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
MICHAEL J. BROWN, Judge