

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY S. PECORARO,
Plaintiff-Appellee,

v

GINA ROSTAGNO-WALLAT,
Defendant,

and

JEFFREY C. WALLAT,
Defendant-Appellant.

FOR PUBLICATION
January 18, 2011
9:00 a.m.

No. 293355
Wayne Circuit Court
Family Division
LC No. 08-160479-DC

ANTHONY S. PECORARO,
Plaintiff-Appellee,

v

GINA ROSTAGNO-WALLAT,
Defendant-Appellant,

and

JEFFREY C. WALLAT,
Defendant.

No. 293445
Wayne Circuit Court
Family Division
LC No. 08-160479-DC

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

ZAHRA, J.

In this consolidated appeal by leave granted,¹ Jeffrey C. Wallat and his spouse, Gina Rostagno-Wallat, (collectively referred to as “the Wallats”) appeal an order issued by the Wayne Circuit Court which, among other things, enforces an order of filiation issued by a New York court. The order of filiation declared Anthony Pecoraro to be the father of a child conceived and born to Rostagno-Wallat during her marriage to Wallat. On appeal, we must decide whether Pecoraro has standing to bring suit to establish paternity in Michigan. We must also consider whether the Full Faith and Credit Clause of Article IV, section 1, of the United States Constitution requires us to give full force and effect to the order of filiation entered by the New York court.

In Michigan, a child conceived and born during a marriage is legally presumed the legitimate child of that marriage and the mother’s husband is the child’s father as a matter of law. A third party may not rebut this legal presumption unless there first exists a judicial determination arising from a proceeding between the husband and the wife that declares the child is not the product of the marriage. Because there was no paternity determination made in legal proceedings involving Wallat and Rostagno-Wallat that established Wallat was not the father of the child, we hold that Pecoraro lacks standing to seek paternity under Michigan’s Paternity Act. Further, because the New York court concluded that it lacked personal jurisdiction over Wallat, a necessary party to the paternity proceedings, we hold that the Full Faith and Credit Clause of the United States Constitution does not require us to give effect to the New York order of filiation. We reverse the judgment of the lower court and remand for entry of judgment consistent with this opinion.

I. BASIC FACTS AND PROCEDURE

The Wallats have been married to each other since June 4, 1994. At all times pertinent to this action, they have resided in Michigan. Two children were conceived and born during their marriage, one was born in 1999 and the other in 2002. The birth certificates of both children identify Jeffrey Wallat as the father.

Rostagno-Wallat and Pecoraro attended law school together in Lansing, Michigan. In June of 1997, their relationship expanded beyond the study of law. An intimate relationship between them continued on an “on and off” basis after Pecoraro graduated from law school in 1998 and returned to his home in Buffalo, New York. Rostagno-Wallat informed Pecoraro that he was the biological father of the child born in 2002 (throughout the remainder of this opinion, the child born in 2002 is referred to as “the child”). Deoxyribonucleic acid (DNA) testing performed in 2002 confirmed that Pecoraro was the biological father of the child. In April 2005, Rostagno-Wallat and Pecoraro permanently ceased their relationship and litigation commenced shortly thereafter.

A. PECORARO’S PATERNITY ACTION IN NEW YORK

¹ *Anthony S Pecoraro v Gina Rostagno-Wallat*, unpublished order of the Court of Appeals, issued January 11, 2010 (Docket Nos. 293355, 293445).

In June 2005, Pecoraro filed a paternity petition against Rostagno-Wallat in New York, seeking an order of filiation establishing himself as the father of the child. Rostagno-Wallat moved to dismiss the paternity action for lack of personal jurisdiction, as neither she nor the child ever had resided in New York. Rostagno-Wallat also argued that dismissal was required because Pecoraro failed to name a necessary party—her husband, Jeffrey Wallat, who also was not subject to the jurisdiction of New York.² Finally, Rostagno-Wallat argued that paternity was already established by operation of Michigan law, which presumes that absent a prior judicial determination to the contrary, all children born of a marriage are the product of the marriage. *Girard v Wagenmaker*, 437 Mich 231, 242-244; 470 NW 2d 372 (1991); MCL 722.714; MCR 3.903(7).

The New York court denied Rostagno-Wallat's motion to dismiss the paternity petition. The New York court found that it had jurisdiction over Rostagno-Wallat under NY Fam Ct Act § 580-210(6), because she engaged in sexual intercourse in New York and the child may have been conceived by that act. Thereafter, Pecoraro apparently amended his petition to name Wallat as a defendant.

Wallat made a special appearance in the New York court to contest the court's jurisdiction over him. Wallat argued the paternity action had to be dismissed because he was a necessary party to the establishment of paternity and he could not be compelled to litigate in New York because New York did not have personal jurisdiction over him. Wallat, like Rostagno-Wallat, argued that the paternity of the child was established pursuant to Michigan law.

The New York court conceded that Wallat was a necessary party to the paternity action and that it did not have any basis to exercise personal jurisdiction over Wallat. The New York court also acknowledged that under Michigan law, paternity was established in Wallat, since he was the spouse of Rostagno-Wallat at the time of conception. Nonetheless, the New York court found that under New York's Civil Practice Law and Rules, CPLR 1001(b), dismissal of the paternity action was not required. This rule provides, in pertinent part, that "[i]f jurisdiction over [a necessary party] can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party."³ The New York court

² New York's Civil Practice Law and Rules, CPLR 1001(a), defines necessary parties as: "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made Plaintiffs or Defendants. . . ."

³ CPLR 1001(b) provides in full:

When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action

held that justice required that Pecoraro be permitted to proceed with the matter even though the court could not obtain jurisdiction over Wallat. Wallat's motion to dismiss for lack of personal jurisdiction was denied.⁴

A trial was held on the issue of paternity. Rostagno-Wallat did not attend the trial and presented no proofs. In April 2007, the New York court issued a decision and order that held Rostagno-Wallat was estopped from denying that Pecoraro was the father of the child. The New York court granted Pecoraro's petition to establish paternity and issued an order of filiation declaring him the father of the child. Thereafter, the New York court dismissed Pecoraro's claim against Wallat for lack of personal jurisdiction. The Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, subsequently affirmed this order on June 6, 2008.

B. LEGAL PROCEEDINGS IN MICHIGAN

In January 2006, prior to the resolution of the paternity action in New York, Wallat filed a paternity action against Rostagno-Wallat in the Wayne Circuit Court. After conducting a hearing with testimony from Wallat and Rostagno-Wallat, the court entered an order dismissing

to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

⁴ New York's CPLR 1001(b) provides that, under limited circumstances, litigation may proceed without a necessary party over whom the court lacks jurisdiction. We question whether this court rule comports with the minimum requirements of due process. This aside, the rule does not in any way purport to establish a basis for personal jurisdiction over the necessary party where none exists. Thus, it is puzzling that the New York court did grant in part Wallat's motion and dismiss him from the litigation, while continuing litigation between Pecoraro and Rostagno-Wallat. In any event, Wallat was not an active participant to the paternity proceedings and never submitted himself to the jurisdiction of the New York court. After the New York court entered its order of filiation establishing paternity in Pecoraro, it dismissed Pecoraro's claims against Wallat for lack of personal jurisdiction.

the case because the child was conceived and born during the parties' marriage and thus was not born out of wedlock. The court concluded it lacked jurisdiction to enter an order of filiation "due to paternity already being established."

In February 2008, while the New York proceedings were on appeal, Pecoraro filed in the Wayne Circuit Court a "Complaint for Paternity" against Rostagno-Wallat in which he, among other things, sought enforcement of the New York order of filiation. This complaint alleged that the parties were never married and had one minor child born out of wedlock. In July 2008, Wallat filed a complaint for declaratory judgment against Rostagno-Wallat and Pecoraro. In this action, Wallat sought a determination that he is the legal father of the child. After additional procedural maneuvering by and between the litigants, all parties eventually filed motions for summary disposition. On July 16, 2009, the trial court issued an opinion and order finding in favor of Pecoraro. This appeal followed.

II. ANALYSIS

On appeal, the Wallats argue that the trial court erred by finding that Pecoraro had standing under the Michigan Paternity Act. They also argue the trial court erred in concluding that it was constitutionally required to give full faith and credit to the New York order of filiation issued by the New York court. We agree.

A. STANDARD OF REVIEW

Whether a party has standing to commence an action to establish paternity under the Paternity Act involves a question of law that this Court reviews de novo. *Barnes v Jeudevine*, 475 Mich 696, 702; 718 NW2d 311 (2006). We also review the interpretation of statutes, jurisdictional issues and constitutional questions de novo. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006); *Pontiac Food Ctr v Dep't of Cmty Health*, 282 Mich App 331, 335; 766 NW2d 42 (2008); *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 620; 692 NW2d 388 (2004).

B. PECORARO LACKS STANDING TO ESTABLISH PATERNITY IN MICHIGAN

Pecoraro argues that he can enforce the New York order of filiation under Section 4b of the Michigan Paternity Act, which provides that "[t]he establishment of paternity under the law of another state has the same effect and may be used for the same purposes as an acknowledgment of paternity or order of filiation under this act." We find no merit in this argument. Before Pecoraro may assert the provisions of the Michigan Paternity Act, he must establish that he has standing under that Act.

Standing to pursue relief under the Michigan Paternity Act is conferred on "(1) the mother of a child born out of wedlock, (2) the father of a child born out of wedlock, or (3) the Family Independence Agency on behalf of a child born out of wedlock who is being supported in whole or in part by public assistance." *McHone v Sosnowski*, 239 Mich App 674, 677; 609 NW2d 844 (2000), citing MCL 722.714(1) and (8). Under the statute, a "child born out of wedlock" is defined as "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child

born or conceived during a marriage but not the issue of that marriage.” MCL 722.711(a); *In re KH*, 469 Mich 621, 631-632; 677 NW2d 800 (2004).

It is undisputed that on the date of conception and at all times pertinent to these proceedings, Rostagno-Wallat has been married to Wallat. Thus, the first method for establishing that the child was born “out of wedlock” cannot be satisfied. The only remaining method of establishing that a child was born “out of wedlock” requires a court determination that the child is not the issue of the marriage. *Barnes*, 475 Mich at 703-704, citing *Girard v Wagenmaker*, 437 Mich at 243. In *Barnes*, the Michigan Supreme Court held “that a court determination under MCL 722.711(a) that a child is not ‘the issue of the marriage’ requires that there be an affirmative finding regarding the child’s paternity in a prior legal proceeding that settled the controversy between the mother and the legal father.” *Id.*, at 705.

Pecoraro maintains that the New York order of filiation constituted a prior court determination that the child was not the issue of defendants’ marriage. Although the New York court made this finding, the New York action was not a proceeding between Rostagno-Wallat, the mother, and Wallat, the legal father. Rather, the New York court expressly allowed the action to proceed without having personal jurisdiction over Wallat. Further, because Wallat could not be forced to participate in the proceedings, the New York proceedings clearly did not “settle the controversy between the mother and the legal father,” satisfying the Michigan Paternity Act. *Barnes*, 475 Mich at 705. Simply put, because Rostagno-Wallat and Wallat have not asked a court to declare that the child was born out of wedlock, Pecoraro lacks standing to claim paternity under Michigan’s Paternity Act.

Pecoraro also argues he has standing to assert his claim under the Child Custody Act, MCL 722.21 *et seq.*, which defines parent as “the natural or adoptive parent of a child.” MCL 722.22(h). This definition was added to the Child Custody Act in 2005, which did not previously define the term “parent.” Pecoraro maintains that because he is the child’s biological father, he is the natural father, as that term is used the Child Custody Act. Thus, he concludes, he may pursue his claim under the Child Custody Act, which confers on parents standing to seek custody of their children. *Aichele v Hodge*, 259 Mich App 146, 165; 673 NW2d 452 (2003).

Our Supreme Court in *Girard*, addressed the interaction between the Paternity Act and the Child Custody Act. 437 Mich at 251. As in the instant case, the Court in *Girard* held that “a putative father of a child born to a woman married to another man, did not have standing to contest paternity under the Paternity Act.” *Id.* *Girard* further posited that given this conclusion, the putative father “clearly could not obtain a determination that he was the natural or biological father of the child under the Child Custody Act.” *Id.* The *Girard* Court then concluded that, because the putative father “could not obtain a determination that he was a parent of . . . [the child], [the putative father] . . . must be considered a nonparent under the Child Custody Act and his child custody claim is barred.” *Id.*, citing *Ruppel v Lesner*, 421 Mich 559, 565; 364 NW2d 665 (1984).

The central premise in *Girard* was that, given the court’s conclusion that the putative father did not have standing to contest paternity, the putative father “clearly could not obtain a determination that he was the natural or biological father of the child.” *Id.*, at 251. The Legislature’s amendment to the Child Custody Act does not alter this central premise. The

purpose of the 2005 amendment was to provide statutory rights to adoptive parents. The phrase “natural parent” was used by the Legislature to distinguish between adoptive parents and non-adoptive parents. Nothing in the amendment supports the conclusion that it was intended to circumvent the Michigan Paternity Act. Pecoraro simply cannot use the Child Custody Act to obtain a determination that he is the father under the Michigan Paternity Act. Whether the putative father would be considered a natural or biological parent under the Child Custody Act is irrelevant unless he can first establish paternity under Michigan’s Paternity Act. Accordingly, we reject Pecoraro’s claim under the Child Custody Act.

C. THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION

Pecoraro also argues that Michigan is required to give effect and full force to the New York order of filiation. Specifically, Pecoraro argues that the New York judgment must be honored under the Full Faith and Credit clause to the United States Constitution, art IV, § 1, and the Uniform Enforcement of Foreign Judgment Acts, (UEFJA), MCL 691.1171 *et seq.* Because the UEFJA specifically references a “judgment,” “that is entitled to full faith and credit[.]” Pecoraro’s argument under the UEFJA rises or falls on his constitutional claim under the Full Faith and Credit Clause.

The Full Faith and Credit Clause provides, in relevant part, that “Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.” The purpose of the Full Faith and Credit Clause “is to prevent the litigation of issues in one state that have already been decided in another.” *Martino v Cottman Transmission Systems, Inc.*, 218 Mich App 54, 58; 554 NW2d 17 (1996). A foreign judgment is conclusive and must be recognized if jurisdiction has been obtained over the parties and the subject matter. *Baker by Thomas v General Motors Corp.*, 522 US 222, 223; 118 S Ct 657; 139 L Ed 2d 580 (1998); see *Nat’l Equip Rental, Ltd v Miller*, 73 Mich App 421, 424; 251 NW2d 611 (1977).

Before a court is bound by a judgment rendered in another state, however, it may inquire into its jurisdictional basis, and if either personal or subject matter jurisdiction is lacking, full faith and credit is not due. *Underwriters Nat’l Assurance Co v North Carolina Life & Accident & Health Ins Guaranty Assn.*, 455 US 691, 705; 71 L Ed 2d 558, 102 S Ct 1357 (1982). Thus, collateral attack of a foreign judgment is permitted in Michigan by showing that the judgment a party is seeking to enforce was void for want of jurisdiction in the court that issued it. *Nash v Salter*, 280 Mich App 104, 119-120; 760 NW2d 612 (2008). Accordingly, the courts of this state are not obliged under the federal Constitution to give a foreign judgment full faith and credit where the issuing court lacked jurisdiction over the subject matter or the parties. *Hare v Starr Commonwealth Corp.*, ___ Mich App ___, ___ NW2d ___ (Docket No. 291476, issued January 4, 2011), slip op at 6; *California v Max Larsen, Inc.*, 31 Mich App 594; 597-598, 187 NW2d 911 (1971). Further, “[t]he Due Process Clause of the Fourteenth Amendment limits the jurisdiction of state courts to enter judgments affecting the rights or interests of nonresident defendants. As a result, a valid judgment affecting a nonresident’s rights or interests may only be entered by a court having personal jurisdiction over that defendant.” *Jeffrey v Rapid American Corp.*, 448 Mich 178, 185; 529 NW2d 644 (1995) (citations omitted).

We hold that the New York order of filiation was not a valid and binding judgment over Wallat. We base this holding on three distinct but related findings. First, the New York court

lacked personal jurisdiction over Wallat. This point is not in contention. The New York court expressly found that it lacked personal jurisdiction over Wallat. Upon finding that the New York court lacked jurisdiction over him, Wallat was not required to submit to the jurisdiction of New York or put his parental rights in peril.

Second, the New York court also found that Wallat was a necessary party to the paternity proceedings in New York. The court recognized that as Rostagno-Wallat's spouse and the legal father under Michigan law, Wallat had exercised parental rights over the child and established himself as a stable and substantial presence in the life of the child. The New York court observed that it could not issue an order of filiation to Pecoraro without substantially impacting Wallat's parental rights under Michigan law.

Third, the New York court expressly recognized that the effect of its action would ultimately have to be determined by a Michigan court. We presume the New York court recognized this point because it lacked jurisdiction over a necessary party.

We are unpersuaded by Pecoraro's claim that the Wallat's remedy, if any, was through the New York appellate court, which affirmed the order of filiation. Again, the New York court found it lacked personal jurisdiction over Wallat and it found that Wallat was a necessary party to the proceedings. Upon entering the judgment, the court dismissed the claims asserted against Wallat by Pecoraro for lack of personal jurisdiction. In essence, Pecoraro is claiming that Wallat should have pursued appellate rights when Wallat had no adverse ruling or judgment imposed against him. In essence, Pecoraro is asserting that Wallat was obligated to submit to the jurisdiction of New York or forfeit his parental rights. Pecoraro offers no legal authority for his position. Moreover, we are aware of no case that requires a party to submit to the jurisdiction of a court or place his rights at risk.

Similarly, we are not persuaded by the argument that the New York court order should be honored because in arguing the merits of the underlying claim, Rostagno-Wallat protected the interests of Wallat. We conclude that the interests of Rostagno-Wallat, the mother, were not consistent with the interests and rights of Wallat, the legal father. Rostagno-Wallat's parental rights as mother were never at risk in this litigation. More significant, however, is the notion that a judgment issued in a matter that does not include a necessary party has no effect. As a result, the courts of the state of Michigan are not obliged to give the New York order of filiation full faith and credit.

III. CONCLUSION

Pecoraro lacks standing to assert his claim of paternity under the Michigan Paternity Act. Because New York admittedly lacked personal jurisdiction over Wallat, a necessary party to the proceedings in New York, the order of filiation issued by the New York court is not entitled to full faith and credit under Article IV, section 1, of the United States Constitution.

We reverse the judgment of the trial court and remand for entry of judgment consistent

with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Elizabeth L. Gleicher

/s/ Kirsten Frank Kelly