STATE OF MICHIGAN

COURT OF APPEALS

KAREN SUE HANSEN,

Plaintiff-Appellant,

v

MARTHA FLORENCE MCCLELLAN,

Defendant-Appellee.

UNPUBLISHED
December 7, 2006

No. 269618
Ingham Circuit Court
LC No. 06-00015-CZ

Before: Murphy, P.J., and Meter and Davis, JJ.

METER, J. (*dissenting*).

I respectfully dissent. I would hold that under the Adoption Code, MCL 710.21 *et seq*., the circuit courts of Michigan do not have subject-matter jurisdiction to grant a joint adoption petition filed by two unmarried persons and that such an adoption, if granted, is subject to collateral attack. I would reverse the trial court's order and remand this case for entry of judgment in favor of plaintiff.

In *Edwards v Meinberg*, 334 Mich 355, 359; 54 NW2d 684 (1952), quoting *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935), the Supreme Court noted:

> "There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal."

Therefore, the pertinent question is whether the Washtenaw Circuit Court, in granting the joint adoption petition, was acting without the power to adjudicate or was simply exercising its power to adjudicate.

For guidance, I turn, initially, to the case of *In re Adams*, 189 Mich App 540; 473 NW2d 712 (1991). In *Adams*, two individuals who were both married, but not to each other, desired to jointly adopt their biological daughter. *Id*. at 541. In support of their adoption petition, they cited MCL 710.24(1), the same provision at issue in the present case. See *Adams, supra* at 541. MCL 710.24(1) states, in pertinent part:

> If a person desires to adopt a child or an adult and to bestow upon the adoptee his family name, or to adopt a child or an adult without a change of name,

> with the intent to make the adoptee his heir, that person, together with his wife or her husband, if married, shall file a petition with the court of the county in which the petitioner resides or where the adoptee is found . . . .

The *Adams* Court noted that "[t]he entire subject of adoption is governed solely by statute." *Adams*, *supra* at 542. It also noted that "the provisions of the Adoption Code [MCL 710.21 *et seq*.] must be strictly construed" and that jurisdiction over adoption proceedings is governed solely by that code. *Adams*, *supra* at 542-543. The Court ultimately held that the petitioners could not jointly adopt their biological daughter, stating:

> [W]e conclude that the probate court correctly construed the requirement of § 24 that both spouses to a marriage join in the petition to adopt as precluding petitioners . . . , who are married, but not to each other, from adopting their natural daughter . . . . [*Id*. at 543.]

Adams is instructive here for two reasons. First, it makes clear that the Adoption Code must be strictly construed and that a court's jurisdiction is derived from that code. Second, in the course of its analysis, the Court touched upon the issue we face today, stating:

> In the absence of a statutory prohibition, an unmarried person may adopt another person. However, it has been held inconsistent with the general scope and purpose of the adoption statutes to allow two unmarried persons to make a joint adoption. . . . In *Adoption of Meaux*, 417 So 2d 522 (La App, 1982), the Louisiana Court of Appeals held that under a Louisiana adoption statute which allowed a single person or a married couple to adopt a child, the natural parents of a minor child, who were apparently living together but not married to each other, could not jointly adopt their natural child because they were neither "a single person" nor a married couple. [*Adams*, *supra* at 544.]

Here, two unmarried persons attempted to jointly adopt the children. However, the Adoption Code, which must be strictly construed, does not provide for a joint adoption by two unmarried persons.[1] MCL 710.24(1) states that a "person" may file an adoption petition, "together with his wife or her husband, if married . . . ." There is simply no provision in the Adoption Code for a joint adoption by two unmarried persons. Moreover, such an adoption would run contrary to the statement in *Adams*, *supra* at 544, that "it has been held inconsistent with the general scope and purpose of adoption statutes to allow two unmarried persons to make a joint adoption."

I conclude that, under the current state of the law in Michigan, the Washtenaw Circuit Court erred in granting the joint adoption petition at issue in this case. Moreover, I conclude that this was not merely an error in the *exercise* of jurisdiction; instead, the court was without the power to adjudicate at all. Again, jurisdiction in adoption cases is solely derived from the

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[1] I note that if 2005 HB 5399, a pending bill, is adopted, then MCL 710.24(1) would allow for a joint adoption by two unmarried persons.

Adoption Code, *Adams*, *supra* at 542-543, and the Adoption Code does not provide a court with jurisdiction to grant a joint adoption petition filed by two unmarried persons.

An analogous case is *Ryan v Ryan*, 260 Mich App 315; 677 NW2d 899 (2004). In *Ryan*, *supra* at 323-324, an individual filed for a divorce from her parents. On the question of subject-matter jurisdiction, the Court held:

> "Marriage is inherently a unique relationship between a man and a woman." MCL 551.1. It follows that a court only has jurisdiction over the dissolution of a marriage between a man and a woman. In other words, while the family division of the circuit court has subject-matter jurisdiction over married couples seeking a divorce, it is without jurisdiction over claims filed by children to divorce their parents. . . . When there is a lack of subject-matter jurisdiction, regardless of what formalities the trial court may have taken, its actions are void. [*Id*. at 332.]

Here, while the family division of the Washtenaw Circuit Court had subject-matter jurisdiction *in general* over adoption proceedings, it lacked subject-matter jurisdiction to grant a joint adoption to two unmarried persons. Therefore, its actions are void. *Id*.[2] As stated in *Edwards*, *supra* at 359, "[i]f there is a true jurisdictional defect, the court has acted without authority [and] its judgment is a nullity and is always subject to collateral attack."[3] Moreover, it is of no import that the parties consented to the jurisdiction of the Washtenaw Circuit Court. As noted in *Shane v Hackney*, 341 Mich 91, 98; 67 NW2d 256 (1954), "the parties by consent or conduct cannot give the court jurisdiction over the subject matter where it otherwise would have no jurisdiction[.] (Citations and quotation marks omitted.) Nor, contrary to defendant's argument, can the doctrine of res judicata be used to uphold the adoptions here. As noted in *Reid v*

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[2] In my opinion, the majority misconstrues the significance of the *Ryan* decision. The majority states that the Washtenaw Circuit Court had "jurisdiction to adjudicate adoptions" and that therefore it had subject-matter jurisdiction over the pertinent proceedings in this case. However, *Ryan* makes clear that even if a court has subject-matter jurisdiction *in general* over a subject like divorce, adoption, marriage, etc., that subject-matter jurisdiction is limited by pertinent statutory authority. See *Ryan*, *supra* at 332. Here, there simply was no statutory authority authorizing the court to grant a joint adoption petition to two unmarried persons. I also note that the case of *In re Adoption of Knox*, 381 Mich 582; 165 NW2d 165 NW2d 1 (1969), which the majority relies on, is distinguishable from the present case. In upholding the challenged adoption in *Knox*, the Supreme Court relied heavily on the fact that "[n]othing in the probate record shows [the adoptive mother] to be a married woman" and concluded that the plaintiff should not be able to "resort to extrinsic evidence to establish that fact." *Id*. at 589. Here, the operative fact that plaintiff and defendant were not married to each other is plainly evident from a cursory review of the adoption petition, given that they are both women and that marriage between two women is not and has not been, in the past, legally recognized in this state.

[3] "[A] collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal." *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995).

Gooden, 282 Mich 495, 498; 276 NW 530 (1937), a prior judgment cannot form the basis of a res judicata decision unless the judgment was rendered "by a court having jurisdiction."

Defendant cites *Hatcher v Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), in arguing that the adoptions here are not subject to collateral attack. In *Hatcher*, *supra* at 428, the Court concluded that a parent cannot challenge a probate court's assumption of subject-matter jurisdiction over a minor child after the parent's parental rights have been terminated. I do not agree with defendant that *Hatcher* requires us to affirm the Ingham Circuit Court's ruling in this case. First, *Hatcher* dealt with the specific and unique circumstances surrounding child protective proceedings. See, generally, *id*. at 433-436. Second, the *Hatcher* Court stated that "a court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *Id*. at 444. In the present case, the proceeding before the Washtenaw Circuit Court was *not* "of a class the court is authorized to adjudicate," because the court lacked jurisdiction to grant a joint adoption to two unmarried persons. Defendant's argument concerning *Hatcher* is unavailing.

In my opinion, the Washtenaw Circuit Court lacked subject-matter jurisdiction to grant the joint petition for adoption, and plaintiff's collateral attack in the Ingham Circuit Court was proper. Therefore, the Ingham Circuit Court erred in granting summary disposition to defendant and denying summary disposition to plaintiff. I would hold that the proceedings that occurred in the Washtenaw Circuit Court are void.[4]

I note, however, that my legal reasoning today is limited to *joint* petitions for adoptions. In *In re Munson*, 210 Mich App 500, 501; 534 NW2d 192 (1995), the petitioner, who was unmarried at the time, attempted to adopt a person, April Munson, who remained the legal child of her biological mother. The Court stated, in part:

> Finally, because petitioner is a single person and the Adoption Code permits single persons to adopt, the probate court erred in applying this Court's decision in *Adams, supra*, to the case at bar. *Adams* only addressed situations where more than one person joins in the adoption petition, i.e., where two single people or two married people who are not married to each other attempt to adopt jointly. [*Adams, supra*] at 543-544, 546-547. *Adams* did, however, affirm that the statutory language of § 24 unambiguously limits the "group of persons eligible

[4] Plaintiff makes the additional argument that the Washtenaw Circuit Court lacked subject-matter jurisdiction because the adoption proceedings should have taken place in a different county. MCL 710.24(1) states that an adoption petition shall be filed in the county "in which the petitioner resides or where the adoptee is found . . . ." Plaintiff argues that she, defendant, and the children had no connection with Washtenaw County at the time of the purported adoptions. However, venue and jurisdiction are distinct concepts. See, generally, *Morrison v Richerson*, 198 Mich App 202, 206-208; 497 NW2d 506 (1992); see also *Stamadianos v Stamadianos*, 425 Mich 1, 5-14; 385 NW2d 604 (1986). Under the analogous case of *Morrison*, *supra* at 206-208, it appears to me that the error complained of by plaintiff here was an error concerning venue, not jurisdiction, and therefore could not be the subject of a collateral attack.

> to adopt to *single persons* and married persons jointly with their spouses." *Id.* at 547 (emphasis added). Here, petitioner alone is asking the probate court to recognize him as April's legal father. Because *Adams* does not address the instant question whether a single man may adopt an adult adoptee after he divorces the adoptee's biological mother, we hold that the probate court erred in denying petitioner's adoption request on the basis of the holding in *Adams.* Instead, we find that as a single person, petitioner is entitled to petition for April's adoption under the Adoption Code, thereby becoming April's legal father and terminating the parental rights of respondent, her biological father.

Munson makes clear that there is a distinction between a joint petition for adoption and a petition involving only one potential adopter. Because alternative factual situations are not before us in this appeal, my legal reasoning today encompasses only those situations involving a joint petition for adoption.

I would reverse the trial court's order and remand this case for entry of judgment in favor of plaintiff.

/s/ Patrick M. Meter