STATE OF MICHIGAN

COURT OF APPEALS

JULIANNA ELLEN USITALO, Plaintiff-Appellee,	UNPUBLISHED December 11, 2012
V	No. 308240 Saginaw Circuit Court
MELISSA JO LANDON, Defendant-Appellant.	LC No. 10-007690-DC

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Defendant, Melissa Jo Landon, appeals as of right the trial court's order granting plaintiff, Julianna Ellen Usitalo, joint legal and physical custody of their adopted daughter as well as parenting time. Defendant is the biological mother of the minor child, who was born on November 28, 2003. The parties, who were in a long-term, same-sex relationship, adopted the minor child on February 28, 2005. On appeal, defendant does not challenge the propriety of the custody and parenting time award entered by the trial court. Instead, defendant argues that the Michigan adoption code, MCL 710.21 *et seq*., only permits adoptions by a single person or a married couple, and that because Michigan does not recognize same-sex marriages, plaintiff's adoption of the minor child is void ab initio. Defendant acknowledges that a collateral attack on the validity of an adoption is not typically permissible; however, she argues that because Michigan law does not permit same-sex adoptions, the probate court that granted the adoption lacked subject-matter jurisdiction. Accordingly, defendant maintains that a collateral attack on the validity of the adoption is permissible. Because we conclude that the probate court had subject-matter jurisdiction over the adoption, defendant may not collaterally attack the validity of the 2005 adoption order. Therefore, we affirm the trial court's order granting plaintiff custody and parenting time.

After the 2005 adoption, the parties lived together and jointly raised the minor child. In July 2007, plaintiff and defendant separated, but continued to jointly parent the minor child. In August 2008, the parties entered into a written agreement regarding custody and parenting time. However, the relationship between the parties further deteriorated, and in November 2009, the parties stopped cooperating in regard to the minor child's care and custody. On January 27, 2010, plaintiff filed a complaint in the Saginaw Circuit Court against defendant seeking sole legal and physical custody of the minor child. Plaintiff filed a motion for parenting time on the same day. In response, defendant filed an answer and a motion to dismiss. Defendant argued

that plaintiff's adoption of the minor child was void ab initio because Michigan does not permit same-sex adoptions. Thus, defendant argued that because the adoption was void, plaintiff is not a legal parent of the minor child, and dismissal of plaintiff's complaint for custody and motion for parenting time was accordingly required.

In response to the parties' filings, the Saginaw Circuit Court issued an order transferring the matter to the Shiawassee Circuit Court, which is the county where the adoption was granted. In its order, the Saginaw Circuit Court found that the legal status of the adoption was a central issue in the case, and stated, "This court sees no reason why it should hear a collateral attack upon an adoption granted in Shiawassee County and will accordingly transfer this matter to the Circuit Court for Shiawassee County for any further proceedings."

Once the case was transferred, defendant filed a motion to dismiss the custody proceedings and a motion for mandamus, asking the Shiawassee Circuit Court to vacate the 2005 order granting the adoption. Defendant argued that even though her appellate rights had expired, mandamus was available to compel the court to vacate the order and a collateral attack on the adoption was permitted because the probate court never had subject-matter jurisdiction over the adoption proceeding. Defendant again argued that the probate court lacked subject-matter jurisdiction because Michigan's adoption code only permits adoptions by a single person or a married couple and Michigan does not recognize same-sex marriages. Thus, defendant maintained the adoption was void and plaintiff is merely an unrelated, third party who lacks standing to bring a custody action.

Plaintiff countered that defendant wanted the adoption from the start, and the two of them petitioned for it together. Plaintiff asserted that the probate court had subject-matter jurisdiction over the adoption because subject-matter jurisdiction is a court's right to exercise its power over a certain class of cases, and not just the particular case before it. Thus, the adoption was valid and defendant is barred from bringing a collateral attack. Plaintiff maintained that defendant should have filed a direct appeal back in 2005 if she wanted to challenge the probate court's interpretation of the Michigan adoption code.

A hearing was held in the Shiawassee Circuit Court on defendant's motion to dismiss the custody proceedings and motion for writ of mandamus to void the adoption. The circuit court ordered that the case be reassigned to the probate judge who originally granted the adoption. The circuit court noted that he believed the adoption was invalid, but ordered that the probate judge who granted the adoption "may enter such order as he deems appropriate with regard to the validity of the adoption after examination of the motions, responses, briefs of the parties, and the transcript of the proceedings of June 11, 2010."

The probate court heard oral arguments regarding defendant's motion and issued an opinion from the bench. The probate court held that it had subject-matter jurisdiction over the 2005 adoption because Michigan's adoption code does not contain language that includes or excludes adoption by an unmarried couple. The probate court stated that if the parties disagreed with its interpretation of the adoption statute, they would have had to appeal within 21 days of its original ruling on the adoption in 2005. Thus, the probate court denied defendant's motion to dismiss the custody proceedings and motion for mandamus, and transferred the case back to the Saginaw Circuit Court for custody proceedings.

Defendant filed another motion to dismiss the custody proceedings in the Saginaw Circuit Court, which denied the motion based on res judicata because the Shiawassee court already ruled on that issue. After custody and parenting time hearings, the Saginaw Circuit Court entered an order granting plaintiff joint legal and physical custody of the minor child, as well as parenting time. Defendant now appeals as of right.

On appeal, defendant reiterates her argument that the probate court that granted the adoption lacked subject-matter jurisdiction; therefore, her collateral attack on the adoption is permissible. Thus, defendant maintains that this Court should review the validity of the 2005 adoption, and conclude that the adoption was void and plaintiff has no parental rights to the minor child. In support of her argument, defendant primarily relies on the reasoning and analysis set forth in the dissenting opinion in *Hansen v McClellan*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2006 (Docket No. 269618).[1] Plaintiff argues that the probate court had subject-matter jurisdiction, and that defendant accordingly cannot collaterally attack the validity of the 2005 adoption.

Whether a court has subject-matter jurisdiction is a question of law subject to de novo review. *Young v Punturo*, 270 Mich App 553, 560; 718 NW2d 366 (2006).

Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 375; 689 NW2d 145 (2004). "[S]ubject-matter jurisdiction describes the types of cases and claims that a court has authority to address." *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001). This Court explained:

> Jurisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during trial. [*Id.*, quoting *Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938) (additional citations omitted).]

A party may attack subject-matter jurisdiction at any time, and a proven lack of subject-matter jurisdiction renders a judgment void. *In re Hatcher*, 443 Mich 426, 438; 505 NW2d 834 (1993). The existence of subject-matter jurisdiction does not depend on the correctness of the trial court's ultimate legal conclusions. *Id.* The Michigan Supreme Court explained:

> Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in

[1] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010).

> the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. Error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made. [*Id.* at 438-439, quoting *Jackson City Bank & Trust v Fredrick*, 271 Mich 538, 545-546; 260 NW 908 (1935).]

Thus, while the lack of subject-matter jurisdiction may be collaterally attacked, a court's exercise of jurisdiction can only be challenged on direct appeal. *In re Hatcher*, 443 Mich at 439.

In this case, defendant does not dispute that the probate judge who presided over the 2005 adoption in the family division of the circuit court in Shiawassee County generally has subject-matter jurisdiction over adoption proceedings. MCL 600.1021(1)(b) specifically provides that "the family division of circuit court has sole and exclusive jurisdiction over . . . [c]ases of adoption as provided in chapter X of the probate code . . . ." See also *In re Adams*, 189 Mich App 540, 542-543; 473 NW2d 712 (1991) ("Jurisdiction over adoption proceedings is conferred upon the probate court in chapter X of the Probate Code, known as the Adoption Code . . . ."). There is also no dispute that the adoption in this case was granted pursuant to chapter X of the probate code. Rather, defendant argues that because the Michigan adoption code does not provide for same-sex adoption, the probate court lacked subject-matter jurisdiction in this case, despite the fact that it has subject-matter jurisdiction over adoption proceedings generally. Thus, defendant is essentially arguing that subject-matter jurisdiction is proper only for adoptions that comply with defendant's interpretation of the Michigan adoption code. We disagree with defendant's view of subject-matter jurisdiction jurisprudence.

Defendant's argument conflates subject-matter jurisdiction with a court's *exercise* of its jurisdiction. Whether the probate judge's interpretation of the Michigan adoption code was correct as a matter of law has no affect on whether the court had subject-matter jurisdiction over the adoption because subject-matter jurisdiction concerns the right of a court to exercise judicial power over a certain class of cases, not a particular case within a class. *In re Amb*, 248 Mich App at 166. Defendant's argument – that the court lacked subject-matter jurisdiction because same-sex adoptions are not permitted by Michigan's adoption code – makes subject-matter jurisdiction dependent on the facts of a particular case within the broader class of adoption cases. However, defendant's statement of subject-matter jurisdiction is incorrect because subject-matter jurisdiction concerns only a court's authority to exercise judicial power over broad classes of cases, and does not consider particular cases within the broad class. *Id.* Even assuming defendant's interpretation of the Michigan adoption code is correct and same-sex adoptions are

not permitted under Michigan law,[2] the fact that the court that granted the adoption in 2005 made an error of law is not sufficient to render the adoption void, and collateral attack is not permitted. When subject-matter jurisdiction is proper "mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void," and such a judgment is "valid and binding for all purposes and cannot be collaterally attacked." *In re Hatcher*, 443 Mich at 438-439 (quotation marks and citation omitted).

Therefore, we conclude that defendant may not collaterally attack the validity of the 2005 adoption because there was no defect in the court's subject-matter jurisdiction. Thus, because the validity of the adoption may not now be questioned, we reject defendant's claim that plaintiff lacked standing to seek custody and parenting time of the minor child, and affirm the trial court's custody and parenting time order.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

[2] We specifically decline to rule on the merits of defendant's argument regarding the proper interpretation of the Michigan adoption code, and offer no opinion regarding whether the Michigan adoption code permits same-sex adoptions.