STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1345

Daniel Don Wipf, petitioner,
Appellant,

vs.

Thelma Wipf,
Respondent.

Filed February 1, 2011
Affirmed
Peterson, Judge

Big Stone County District Court
File No. 06-FA-10-122

Gregory P. Grajczyk, Boos & Grajczyk, LLP, Milbank, South Dakota (for appellant)

Zenas Baer, Zenas Baer and Associates, Hawley, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Crippen, Judge.*

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

Appellant-father challenges a district court order that denies registration and enforcement of a South Dakota court's temporary custody order. We affirm.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

Appellant-father Daniel Don Wipf and respondent-mother Thelma Wipf are the parents of six children. After the parties separated, father moved to South Dakota. Mother and the children continued to reside in Minnesota.

In August 2009, father initiated a custody proceeding in South Dakota. Even though mother and the children remained in Minnesota and had never resided in South Dakota, both parties agreed to waive any jurisdictional issues and confer jurisdiction on the South Dakota court. In October 2009, a temporary custody plan was agreed to by the parties and adopted by the South Dakota court. The order was modified by the South Dakota court in November 2009 and March and April 2010. In May 2010, father moved for a contempt order after mother failed to comply with the custody order. At a hearing on father's motion, the South Dakota court sua sponte requested that the parties address the issue of jurisdiction over the custody matter before addressing the contempt motion. The parties announced on the record that they were waiving any jurisdictional challenge to the proceedings and were submitting themselves to the jurisdiction of the court. The South Dakota court issued an order finding that it had jurisdiction and instructing the parties to seek enforcement of the custody order in Minnesota.

Father filed a request to register and enforce the South Dakota court's order in Minnesota. Mother requested a hearing to contest the validity of the order, as authorized by section 518D.305(d) (2010). Mother argued that the South Dakota court's order was not entitled to registration and enforcement because, under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the South Dakota court lacked subject-

matter jurisdiction. The district court concluded that the South Dakota court lacked jurisdiction under the UCCJEA and issued an order denying father's request to register and enforce the South Dakota court's order. This appeal followed.

D E C I S I O N

Father argues that the district court erred in denying his registration request because the full-faith-and-credit clause of the United States Constitution requires Minnesota courts to recognize and enforce the South Dakota court's order determining child custody. The United States Constitution states "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. The general rule is "that a judgment is entitled to full faith and credit - even as to questions of jurisdiction - when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee v. Duke*, 375 U.S. 106, 111, 84 S. Ct. 242, 245 (1963). "[A] court need not accept the judgment of a foreign court if that court lacked the jurisdiction to render the judgment. However, if that same foreign court already fully and fairly addressed the contention that it lacked jurisdiction, then its decision on that point must be given effect." *United Bank of Skyline, Nat'l Ass'n v. Fales*, 405 N.W.2d 416, 417 (Minn. 1987). "Full faith and credit . . . generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it." *Durfee*, 375 U.S. at 109, 84 S. Ct. at 244.

Father argues that because the South Dakota court fully and fairly considered whether it lacked jurisdiction and decided that it did not, Minnesota courts should not again consider whether South Dakota lacked jurisdiction and, instead, should recognize and enforce the South Dakota court's temporary custody order. But the record does not support appellant's assertion that the South Dakota court fully and fairly considered the jurisdictional issue. The record indicates that, during a hearing on a contempt motion, the South Dakota court sua sponte requested that the parties address the issue of subject-matter jurisdiction. The South Dakota court's order states that both parties stated "on the record that they had no objections to the Court's jurisdiction and were specifically waiving any jurisdictional challenge to these proceedings." But the record does not include a transcript of the South Dakota proceedings and, therefore, does not reveal whether the subject-matter jurisdiction issue was fully and fairly litigated. *See In re Welfare of S.R.S.*, 756 N.W.2d 123, 128 (Minn. App. 2008) (recognizing that issue of subject-matter jurisdiction had not been fully and fairly litigated when "the question of jurisdiction was summarily addressed by the Colorado court in response to respondent's request for a status conference to clarify the issue of jurisdiction"), *review denied* (Minn. Dec. 16, 2008); *Lyon Fin. Servs., Inc. v. Waddill*, 625 N.W.2d 155, 159-160 (Minn. App. 2001) (concluding that, despite "substantive ruling," the issue of personal jurisdiction was not fully and fairly litigated when hearing transcript did not reveal any substantive discussion of the jurisdictional issue), *review denied* (Minn. June 19, 2001); *see also In re J.D.M.C.*, 739 N.W.2d 796, 808-09 (S.D. 2007) (stating that court could not review

whether personal and subject-matter jurisdiction questions were fully and fairly litigated when record did not include transcript of the proceedings).

Under South Dakota law, "[s]ubject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void." *Barnes v. Matzner*, 661 N.W.2d 372, 375 (S.D. 2003). "Subject matter jurisdiction is conferred solely by constitutional or statutory provisions" and "can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ." *In re Application of Koch Exploration Co.*, 387 N.W.2d 530, 536 (S.D. 1986); *see also Carlson v. Chermak*, 639 N.W.2d 886, 889 (Minn. App. 2002) (accord). "A judgment which is void is subject to collateral attack both in the State in which it is rendered and in other States." *Wells v. Wells*, 698 N.W.2d 504, 507 (S.D. 2005) (quotation omitted). In both Minnesota and South Dakota, questions of subject-matter jurisdiction may be raised at any time by the parties or sua sponte by the court. *Marzitelli v. City of Little Canada*, 582 N.W.2d 904, 907 & n.20 (Minn. 1998); *Barnes*, 661 N.W.2d at 375.

The UCCJEA and 28 U.S.C. § 1738A (2006) govern subject-matter jurisdiction over child-custody matters. Minnesota and South Dakota have adopted virtually identical versions of the UCCJEA. Minn. Stat. §§ 518D.101-.317 (2010); S.D. Codified Laws §§ 26-5B-101-405 (Supp. 2010). Applying the UCCJEA involves questions of subject-matter jurisdiction, which this court reviews de novo. *Schroeder v. Schroeder*, 658 N.W.2d 909, 911 (Minn. App. 2003).

Under the UCCJEA, unless an emergency situation is involved, a state court has jurisdiction to make an initial child-custody determination only if (1) the state is the home

state of the child within six months before commencement of the proceeding; (2) another state does not have jurisdiction as the home state, the child and the child's parents have a significant connection with the state, and there is substantial evidence available in the state concerning the child's care, protection, training, and personal relationships; (3) all courts having home-state jurisdiction have declined to exercise jurisdiction; or (4) no court of any state can claim jurisdiction under the previous three clauses. Minn. Stat. § 518D.201(a); S.D. Codified Laws § 26-5B-201(a). The term "home state" is defined as "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." Minn. Stat. § 518D.102(h); S.D. Codified Laws § 26-5B-102(7). The four jurisdictional bases listed above are the exclusive bases for a South Dakota court's jurisdiction to determine child custody. Minn. Stat. § 518D.201(b); S.D. Codified Laws § 26-5B-201(b).

The record establishes that South Dakota was never the children's home state and that Minnesota was and is the children's home state. The record does not indicate that a Minnesota court has ever declined to exercise jurisdiction. And although the parties consented to the South Dakota court's jurisdiction to determine the child-custody matter, subject-matter jurisdiction cannot be conferred by consent of the parties. *Hemmesch v. Molitor*, 328 N.W.2d 445, 447 (Minn. 1983); *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 769 N.W.2d 817, 825 (S.D. 2009); *see also* UCCJEA § 201 cmt., 9 U.L.A. 673 (1999) (noting that "since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that

would not otherwise have jurisdiction under this Act is ineffective"). Thus, because South Dakota lacked subject-matter jurisdiction under the UCCJEA to make the initial child-custody determination, the South Dakota court's order is not entitled to full faith and credit by the courts of this state. *See* 28 U.S.C. § 1738A(c) (requiring that full faith and credit be given to state courts' child-custody determinations provided that the courts have jurisdiction under state law and satisfy one of five additional jurisdictional bases); *see also Rosen v. Rosen*, 664 S.E.2d 743, 748-49 (W. Va. 2008) (stating that pursuant to 28 U.S.C. § 1738A, courts are not required to recognize and enforce custody determinations of sister states that lack jurisdiction under UCCJEA).

Appellant also argues that any challenge to the South Dakota's court jurisdiction should have been brought during the South Dakota proceedings. But appellant's argument fails to recognize that, under South Dakota law, a judgment rendered by a court that lacked jurisdiction is void and "subject to collateral attack both in the State in which it is rendered and in other States." *Wells*, 698 N.W.2d at 507 (quotation omitted). Therefore, even though respondent could have challenged the South Dakota court's subject-matter jurisdiction during the proceedings in South Dakota, res judicata does not bar respondent from making that challenge now. *See Mack v. Trautner*, 763 N.W.2d 121, 124 (S.D. 2009) (stating that for res judicata to bar a subsequent claim, the court in which the matter was litigated "must have had jurisdiction and its decision must be final and unreversed") (quotation omitted).

The party seeking reversal has the burden of showing error. *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *review denied* (Minn. June

28, 1993). Because the record does not show that the South Dakota court fully and fairly considered whether it had jurisdiction over the child-custody matter and appellant has failed to cite any authority that suggests that the issue was fully and fairly considered, appellant has not demonstrated that the district court erred by considering the South Dakota court's jurisdiction. Accordingly, we affirm the district court's order denying registration and enforcement of the South Dakota court's temporary custody order.

Affirmed.