

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: DONOVAN KILBURN :
 :
 : C.A. Case No. 20993
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 : T.C. Case No. JC-2003-11645
 :
 : (Civil Appeal from Juvenile
 : Court)
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AMENDED O P I N I O N

Rendered on the 3rd day of March, 2006.

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FAIN, J.

{¶ 1} This appeal arises from a judgment of the Montgomery County Common Pleas Court, Juvenile Division, which registered and enforced a Kentucky judgment for child support entered against defendant-appellant Robert Kilburn. Kilburn contends that Kentucky lacked personal jurisdiction over him, and the Ohio trial court erred by denying his motion to dismiss on that ground. He further contends, for the first time, that the Kentucky judgment cannot be enforced because that court lacked subject matter

jurisdiction.

{¶ 2} We conclude that the record does not support a finding that Kentucky lacked personal jurisdiction when it rendered the child support order. Therefore, we cannot say that the trial court erred when it denied Kilburn's motion to dismiss. We also conclude that the record does not support Kilburn's claim that the Kentucky court lacked subject matter jurisdiction. Additionally, the issue of subject matter jurisdiction is barred by the doctrine of res judicata. Accordingly, the judgment of the trial court is affirmed.

I

{¶ 3} The following facts are gleaned from the pleadings filed by the parties.

{¶ 4} Kelly Francis Lawrence and Robert Lee Kilburn are the parents of a minor child. In May of 2001, Lawrence filed an action for custody and child support in Clark County, Kentucky. Kilburn, who was residing in Texas at that time, was served via certified mail. The record indicates that he signed the certified mail receipt.

{¶ 5} Kilburn subsequently filed a notarized document entitled "Affidavit in Opposition of Motion for Temporary Custody." Thereafter, the Kentucky Court entered a judgment awarding custody of the child to Lawrence. The judgment also ordered Kilburn to pay child support to Lawrence.

{¶ 6} At some point thereafter, Kilburn moved to Ohio. In October of 2003, pursuant to a petition from the Commonwealth of Kentucky, the Montgomery County Child Support Enforcement Agency commenced a Uniform Interstate Family Support Act ("UIFSA") action against Kilburn in Montgomery County. The petition sought the registration and enforcement of the Kentucky judgment. Following service, counsel

was appointed to represent Kilburn. Kilburn then filed a motion to dismiss the action, contending that the Kentucky judgment was void because the Kentucky court never acquired personal jurisdiction over him.

{¶ 7} The magistrate filed a decision overruling the motion to dismiss and ordering enforcement of the Kentucky judgment. Kilburn filed objections to the magistrate's decision. In his objections, he argued that the magistrate erred in enforcing the Kentucky judgment, because of the lack of personal jurisdiction. The trial court overruled the objections, noting that the issue of jurisdiction should have been raised in the Kentucky action. The trial court then adopted the magistrate's decision as the judgment of the trial court. Kilburn appealed.

{¶ 8} This court has previously rendered an opinion in this case. See, *In re: Donovan Kilburn*, Montgomery App. No. 20993, 2006-Ohio-991. However, in that opinion, we omitted discussion of Kilburn's third Assignment of Error. Subsequently, Donovan filed an application to reconsider pursuant to App.R. 26(A) on the basis that this court neglected to address his third Assignment of Error. Therefore, this court granted the application to reconsider, and has corrected its prior omission herein.

II

{¶ 9} Kilburn's First and Second assignments of error are as follows:

{¶ 10} "THE TRIAL COURT ERRED BY FAILING TO RECOGNIZE AN OBLIGOR'S RIGHT TO ATTACK AND SEEK DISMISSAL OF A UIFSA PETITION IF THE INITIATING STATE LACKED PERSONAL JURISDICTION WHEN IT ISSUED

THE CHILD SUPPORT ORDER.

{¶ 11} “THE LOWER COURT WAS REQUIRED TO DISMISS THE UIFSA PETITION SINCE KENTUCKY DID NOT HAVE PERSONAL JURISDICTION OVER ROBERT KILBURN WHEN IT ENTERED THE CHILD SUPPORT ORDER AGAINST HIM.”

{¶ 12} In his assignments of error, Kilburn contends that the trial court erred by refusing to recognize his right to collaterally attack the Kentucky judgment. He further contends that he was entitled to have the UIFSA petition dismissed, and that the trial court erred by failing to do so. In support, he argues that the Kentucky court lacked personal jurisdiction over him when it rendered judgment against him.

{¶ 13} The UIFSA, codified in Ohio at R.C. Chapter 3115.01 et seq., permits states that “issue child support orders [to] request other states to enforce the order against a resident of the responding state when both states have adopted the UIFSA.” *Beam v. Beam*, Darke App. No. 02-CA-1573, 2002-Ohio-2910. Both Ohio and Kentucky have adopted versions of the Act. *Id.*

{¶ 14} In order to be entitled to registration and enforcement, the foreign judgment must have been rendered by a court having jurisdiction over the parties. *Emig v. Massau* (2000), 140 Ohio App. 3d 119, 123. R.C. 3115.44(A)(1) permits the contest of the registration or enforcement of a foreign support order based upon a claim of lack of personal jurisdiction. “R.C. 3115.44 therefore contemplates that the Ohio court can under some circumstances address personal jurisdiction issues affecting the validity of the order sought to be registered in Ohio.” *Id.* at 124.

{¶ 15} “As a general rule, however, after full and actual litigation of the question

in which full opportunity to be heard has been granted to the party contesting personal jurisdiction, a finding by a foreign state court that it had personal jurisdiction over the matter is not subject to collateral attack, particularly in instances where the party contesting jurisdiction has failed to undertake an appeal from the finding of jurisdiction.”

Id. “Due process does not require that a party be afforded a ‘second opportunity’ to litigate jurisdictional facts.” Id.

{¶ 16} Thus, we recognize that Kilburn is entitled to raise the issue of personal jurisdiction in the Ohio court action. However, we cannot say that the trial court, as Kilburn claims, precluded him from attacking the validity of the Kentucky judgment. Instead, it appears that the trial court found no basis for Kilburn’s attack. We agree.

{¶ 17} Under the UIFSA, an individual has the burden of proving that the rendering State, in this case Kentucky, lacked personal jurisdiction. R.C. 3115.44(A)(1); K.R.S. §407.5607. As noted, Kilburn filed a responsive pleading, styled as an affidavit, with the Kentucky court. Kilburn contends that, while the affidavit did “address the substantive claim of [custody],” it also contested the question of whether Kentucky had personal jurisdiction over him. Specifically, he refers to paragraphs three through five of his affidavit in support of his claim regarding personal jurisdiction. We have reviewed the entire affidavit, and disagree with Kilburn’s characterization of its contents. We note that the affidavit does contest Lawrence’s fitness to parent and that it contests whether Kentucky could serve as the “home state” of the child for purposes of determining custody and support. However, there is no mention of personal jurisdiction, or the lack thereof, over Kilburn.

{¶ 18} Furthermore, there is nothing in the record to indicate that Kilburn was

denied the opportunity to fully litigate the issue of personal jurisdiction in the Kentucky action. Likewise, the record is devoid of evidence indicating that Kilburn appealed the issue of personal jurisdiction to the Kentucky appellate courts. Thus, we conclude that Kilburn's claim that he contested personal jurisdiction in Kentucky is without merit.

{¶ 19} Even if Kilburn had contested personal jurisdiction in Kentucky, we would not be inclined to find error in the trial court's decision to deny his motion for dismissal of the Ohio action.

{¶ 20} Pursuant to the terms of the UIFSA, a state court may exercise personal jurisdiction over a non-resident if "the individual submits to the jurisdiction of [the] state by consent, by entering a general appearance, or by filing a responsive pleading or other document having the effect of waiving any contest to personal jurisdiction." R.C. 3115.03; K.R.S. §407.5201. A person makes a general appearance when he voluntarily takes some step in the action other than to contest jurisdiction. *Smith v. Hensel*, Ashland App. No. 04-COA-077 and 04-COA-078, 2005-Ohio-3465, ¶12.

{¶ 21} In this case, Kilburn filed a responsive pleading. The pleading did not raise the issue of personal jurisdiction, and Kilburn did not otherwise raise the issue with the Kentucky court. The pleading did, however, evidence an intent to contest Lawrence's claim to custody. Thus, the pleading appears to have been an attempt to assert a substantive defense against the custody action. This pleading constituted Kilburn's appearance in the action; it appears to have been voluntarily tendered; and it does not purport to contest personal jurisdiction.

{¶ 22} The Kentucky court properly exercised personal jurisdiction over Kilburn pursuant to the UIFSA. We conclude that Kilburn's failure to raise the issue in the

rendering tribunal or to contest the decision in the Kentucky appellate courts waived his right to contest the issue. Furthermore, we conclude that Kilburn cannot now assert it in a collateral attack in Ohio. Finally, we conclude that the provisions of the UIFSA were complied with, and that the trial court did not err by registering or enforcing the Kentucky judgment.

{¶ 23} Accordingly, both assignments of error are overruled.

III

{¶ 24} Kilburn's Third assignment of error states as follows:

{¶ 25} "IN THE EVENT THAT THIS COURT FINDS THAT LACK OF PERSONAL JURISDICTION WAS NOT RAISED IN THE AFFIDAVIT FILED BY APPELLANT IN THE KENTUCKY COURT, THEN THE KENTUCKY JUDGMENT IS STILL SUBJECT TO COLLATERAL ATTACK BECAUSE THE COURT LACKED SUBJECT MATTER JURISDICTION."

{¶ 26} Kilburn contends that the trial court should have dismissed the request for enforcement. In support, he contends that the Kentucky court lacked subject matter jurisdiction to determine the issue of child custody and support. He further contends that he is entitled to attack that judgment because the Kentucky court failed to address the issue of subject matter jurisdiction. He also argues that the issue of subject matter jurisdiction cannot be waived, and may be raised at any level of litigation.

{¶ 27} We begin by noting that in his Affidavit in Opposition of Motion for Temporary Custody filed with the Kentucky court, Kilburn raised an allegation that the Kentucky court lacked subject matter jurisdiction because neither Lawrence nor the

child resided in that state. He claimed that the parties were actually living in Texas at the time the Kentucky petition was filed. He further claimed that the child had been removed from the parties' home in Texas without his permission.

{¶ 28} Kilburn did not appear at the final hearing before the Kentucky court. Subsequently, that court, as noted above, entered judgment awarding custody to Lawrence and requiring Kilburn to pay support. In its judgment, the court specifically stated, "this court has jurisdiction of the cause and the minor child, who at all times pertinent was a resident of Clark County, Kentucky." Kilburn did not appeal that judgment in the Kentucky appellate system.

{¶ 29} We further note that Kilburn did not raise the issue of subject matter jurisdiction with the Ohio trial court. Instead, he objected to the enforcement action based upon the issue of lack of personal jurisdiction as noted in Part II above. Indeed, Kilburn raised the issue of subject matter jurisdiction for the first time on appeal to this court.

{¶ 30} We agree with Kilburn insofar as he states that subject matter jurisdiction cannot be waived. However, we note that we are not dealing with the issue of waiver. Instead, we are faced with the question of whether the issue of subject matter jurisdiction was fully litigated and thus whether the doctrine of res judicata bars a collateral attack on that issue.

{¶ 31} The doctrine of res judicata prevents parties from relitigating claims and issues when there is mutuality of the parties and when a valid, final decision has been rendered on the merits. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379. Res judicata applies to bar relitigation of the issue of subject matter jurisdiction. *Citicasters*

Co. v. Stop 26-Riverbend, Inc., 147 Ohio App.3d 531, 2002-Ohio-2286; *Goeller v. Moore*, Franklin App. No. 04AP-394, 2005-Ohio-292, ¶ 5. "Once a jurisdictional issue has been fully litigated and determined by a court that has authority to pass upon the issue, such determination is res judicata in a collateral action and can only be attacked directly by appeal." *Squires v. Squires* (1983), 12 Ohio App.3d 138; *Citicasters*, supra.

{¶ 32} Given that the issue of subject matter jurisdiction was raised in the Kentucky court, that the Kentucky court determined that it had jurisdiction of the "cause" as well as of the child, and that Kilburn neglected to appeal that decision with the appellate courts in Kentucky, we conclude that he is not now entitled to collaterally attack that court's decision with regard thereto.

{¶ 33} Furthermore, we cannot say, based upon the record before us, that the Kentucky court clearly lacked subject matter jurisdiction. As noted by Kilburn, at the time of the Kentucky action, jurisdiction over the matter was governed by K.R.S. 403.420 which provides in pertinent as follows:

{¶ 34} "(1) A court of this state *** has jurisdiction to make a child custody determination *** if:

{¶ 35} "(a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six (6) months before commencement of the proceeding ***; or

{¶ 36} "(b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection,

training, and personal relationships; or

{¶ 37} ****

{¶ 38} “(d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), or (c), *** and it is in the best interest of the child that this court assume jurisdiction.”

{¶ 39} A plain reading of this statute indicates that Kentucky need not, as Kilburn argues, be the home state of the child prior to the institution of a custody or support action, as a prerequisite for subject-matter jurisdiction. In other words, the statute permits jurisdiction without the necessity of a specific length of residency. The statute permits the Kentucky court to assume jurisdiction when no other state would have jurisdiction. KRS 403.420(1)(d). Upon this record, it is clear that no state other than Kentucky had issued an order relating to the custody or support of the parties’ minor child, and that there were no other proceedings pending in any other state. Additionally, Kilburn does not aver that any other state would be a better forum for this litigation. In his affidavit filed in the Ohio trial court, he noted that the parties had lived in Texas for approximately two months before Lawrence and the child moved to Kentucky. Thus, there is no showing that any other state besides Kentucky, at the time the Kentucky court asserted jurisdiction, had superior or superseding jurisdiction of the matter, or that any other state then had significant connection to the child.

{¶ 40} The statute also permits the Kentucky court to assume jurisdiction when it is in the child’s best interest so long as the child and one parent have a significant connection with the state. K.R.S. 403.420(1)(b). It is clear from the record that the Kentucky court found that Lawrence and the child were actually residing in Kentucky.

Furthermore, there is no indication from the record before us, except for Kilburn ' s own averments, that the child did not reside in Kentucky and that significant connection was lacking.

{¶ 41} In any event, the trial court found that it had subject matter jurisdiction over the case. Kilburn has the duty of proving a defense to the enforcement of the Kentucky order. R.C. 3115.44. He has not met that burden.

{¶ 42} The Third Assignment of Error is overruled.

IV

{¶ 43} All of Kilburn ' s Assignments of Error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, and VALEN, JJ., concur.

(Hon. Anthony Valen, Retired from the Twelfth Appellate District, Sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:
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