COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1318

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE MARRIAGE OF:

MALACHI WATKINS,

PETITIONER-RESPONDENT,

V.

MICHELLE WATKINS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM A. JENNARO, Reserve Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Michelle Swanson (formerly known as Michelle Watkins), appeals the order dismissing her post-judgment motion seeking to

modify the custody and placement provisions contained in her Texas divorce judgment. She argues that the trial court erred in finding that Wisconsin did not have personal jurisdiction over her former husband, Malachi Watkins, and in finding that the parties were required to return to Texas in order to modify their divorce judgment's custody and placement provisions.

¶2 Because the record clearly establishes that the trial court had personal jurisdiction over Watkins, we reverse. Further, because the trial court failed to address the tests for subject-matter jurisdiction, found in the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), we reverse and remand this matter to the trial court for such a determination.

I. BACKGROUND.

¶3 Swanson and Watkins were married in Appleton, Wisconsin, on March 31, 1995. Both were Wisconsin residents when they married. Their son, Nathan, was born on October 1, 1995. Following their marriage, they lived together in Eau Claire, Wisconsin, until June 1996. In June 1996, they moved to Texas because Watkins, who had been in the army reserves, went on active duty and was stationed in Texas. While in Texas, Watkins commenced a divorce action that was granted on December 18, 1998, by a Texas court.

¶4 The divorce judgment provided for joint custody of Nathan and alternating periods of placement between the parties until September 1, 2000, when Watkins was to have primary physical placement of Nathan.[1]

[1] In Texas, joint custodians are known as "joint managing conservators."

¶5 Shortly before the divorce was granted, Swanson moved back to Wisconsin. In May 1999, Watkins moved to Virginia, but he elected to retain his legal residence in Texas, as is permitted for those serving in the armed forces. Despite their moves, the parties continued to alternate Nathan's placement between their residences.

¶6 The divorce judgment gave Swanson placement of Nathan from May 15, 1999, to March 27, 2000. During this period, in November 1999, Swanson filed an order to show cause asking the Wisconsin court to change the custody primary placement provisions. Watkins was personally served with a copy of the motion in Virginia. In response to Swanson's motion, Watkins made a special appearance challenging the jurisdiction of the Wisconsin courts.[2] The trial court ordered the parties to file briefs and directed that Nathan remain in Wisconsin while the matter was pending. Ultimately, the trial court ruled that it did not have personal jurisdiction over Watkins and that subject-matter jurisdiction for any custody and placement issues lies with Texas. Consequently, the trial court dismissed Swanson's motion. A motion for reconsideration was also denied.

II. ANALYSIS.

¶7 Swanson argues that the trial court erred in two regards. First, she submits that the trial court erred in finding that it had no personal jurisdiction over Watkins. Second, Swanson asserts that the trial court, in making its determination that the parties needed to return to Texas to modify the judgment, failed to

[2] The matter was first calendared in front of the family court commissioner, who appointed a guardian ad litem and ordered the matter certified to the circuit court.

consider the UCCJA and PKPA provisions concerning the exercise of subject-matter jurisdiction. We agree with Swanson on both issues.

A. *Personal Jurisdiction*

¶8 A determination as to whether due process requirements have been met so "'as to make it fair to require defense of the action'" in this state is a question of law which this court determines *de novo*. ***McCarthy v. McCarthy***, 146 Wis. 2d 510, 513-14, 431 N.W.2d 706 (Ct. App. 1988) (citation omitted). Moreover, case law instructs that the jurisdictional statutes should be liberally construed in favor of exercising jurisdiction. *See* ***Lincoln v. Seawright***, 104 Wis. 2d 4, 9, 310 N.W.2d 596 (1981).

¶9 Several statutes, all found in Chapter 801, address the means by which Wisconsin courts can obtain personal jurisdiction over a litigant. Satisfying any one of these statutes establishes personal jurisdiction. ***McAleavy v. McAleavy***, 150 Wis. 2d 26, 33, 440 N.W.2d 566 (1989). Swanson points to WIS. STAT. § 801.05(11)[3] as support for her belief that personal jurisdiction was obtained over Watkins. This statute specifically addresses personal jurisdiction in marital actions. Swanson believes she met the statute's requirements in order for the court to exercise personal jurisdiction over Watkins. Section 801.05(11) reads:

> **(11)** CERTAIN MARITAL ACTIONS. In addition to personal jurisdiction under sub. (1) and s. 801.06, in any action affecting the family, except for actions under ch. 769, in which a personal claim is asserted against the respondent commenced in the county in which the petitioner resides at the commencement of the action when the respondent resided in this state in marital relationship

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> with the petitioner for not less than 6 consecutive months within the 6 years next preceding the commencement of the action and the respondent is served personally under s. 801.11. The effect of any determination of a child's custody shall not be binding personally against any parent or guardian unless the parent or guardian has been made personally subject to the jurisdiction of the court in the action as provided under this chapter or has been notified under s. 822.05 as provided in s. 822.12.

Swanson submits that the undisputed evidence before the court easily satisfied the requirements set forth in the statute because Watkins was a Wisconsin resident when he married Swanson; they lived in Wisconsin for over a six-month period within the six years prior to her filing a motion seeking a custody modification; and Watkins was personally served with her motion.[4]

¶10 Watkins does not squarely address Swanson's argument that WIS. STAT. § 801.05(11) confers the trial court with personal jurisdiction over him. Instead, Watkins argues that a requirement of the UCCJA prohibits the trial court from exercising personal jurisdiction over him unless this state has had "maximum contact" with him. Watkins cites ***Davanis v. Davanis***, 132 Wis. 2d 318, 329, 392 N.W.2d 108 (Ct. App. 1986), and ***Vorpahl v. Lee***, 99 Wis. 2d 7, 11, 298 N.W.2d 222 (Ct. App. 1980), for support. Watkins is incorrect.

¶11 First, contrary to Watkins's assertion, there is no requirement that Wisconsin have "maximum contacts" with Watkins in order to exercise personal jurisdiction. In fact, as noted, the jurisdiction requirements are to be liberally construed. ***Vorpahl*** is of no help to Watkins's position either because it does not address personal jurisdiction issues at all. Rather, the case discusses Wisconsin's

[4] The marriage was transacted on March 31, 1995; the parties lived in Wisconsin until June 1996. The motion was filed in November 1999. Service occurred on December 8, 1999.

subject-matter jurisdiction over children abducted in another state and brought to this state. ***Id.*** at 8-10. ***Davanis*** is also of little assistance to Watkins. Mr. Davanis, while on active duty in the army, married in Wisconsin but lived in this state for less than six months. ***Davanis***, 132 Wis. 2d at 322. Watkins, on the other hand, has, over the course of the last six years, been schooled (paying in-state tuition), lived, worked and been married in this state. Under WIS. STAT. § 801.05(11), the courts of Wisconsin did not have personal jurisdiction over Mr. Davanis because he did not meet the residency requirement. *See* ***id.*** at 333-34. However, here the trial court had personal jurisdiction over Watkins because the requirements of § 801.05(11) were met.

¶12 Moreover, the notice requirements to exercise jurisdiction over a person set forth in the UCCJA and embodied in WIS. STAT. § 822.05, were also met. Section 822.05, in pertinent part, directs:

> **(1)** Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be:
>
> (a) By personal delivery outside this state in the manner prescribed for service of process within this state;
>
> (b) In the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;
>
> ….
>
> **(2)** Notice under this section shall be served, mailed, delivered or last published at least 10 days before any hearing in this state.
>
> **(3)** Proof of service outside this state may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

Evidence was submitted that Watkins was personally served outside this state in the manner prescribed for service of process within this state. This occurred more than ten days before the hearing, and the process server's affidavit of proof was submitted, all in accordance with Wisconsin law.[5] Consequently, the trial court erred in its finding that there were no minimum contacts with Watkins, prohibiting the court to exercise personal jurisdiction over him.

B. *Subject-Matter Jurisdiction*

¶13 Swanson also argues that the trial court erred in ignoring the provisions of the UCCJA and PKPA in determining that Wisconsin was not the appropriate jurisdiction for her custody modification motion to be heard. We agree that the trial court's failure to consider or mention the relevant provisions in the UCCJA and PKPA concerning subject-matter jurisdiction was error and we remand, directing the court to make findings based on the two acts.

¶14 The application of statutory jurisdictional concepts to the facts presented is a question of law. ***P.C. and J.H. v. C.C.***, 161 Wis. 2d 277, 299, 468 N.W.2d 190 (1991). The UCCJA's principal purposes are found in WIS. STAT. § 822.01(1). It provides:

> **(1)** The general purposes of this chapter are to:
>
> (a) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

[5] Although the affidavit of service is not in the record, no argument has been raised regarding its authenticity, that the affidavit did not comport with WIS. STAT. § 801.11, or that the affidavit of service was served less than ten days before the hearing.

> (b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
>
> (c) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and family have the closest connection and where significant evidence concerning the child's care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and family have a closer connection with another state;
>
> (d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
>
> (e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;
>
> (f) Avoid relitigation of custody decisions of other states in this state insofar as feasible;
>
> (g) Facilitate the enforcement of custody decrees of other states;
>
> (h) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
>
> (i) Make uniform the law of those states which enact it.

Thus, inasmuch as subsection (1)(c)'s purpose is one argued by Swanson, one of the trial court's chief objectives in analyzing the prerequisites under the UCCJA will be to see whether this state has the closest connection to Nathan's family and to see if significant evidence is present in this state concerning Nathan's care and protection.

¶15 A UCCJA rule, found in WIS. STAT. § 822.03, states that before a court of this state may decide a child custody matter, it must have subject-matter jurisdiction which can be bestowed in several different manners. The statutory provisions relevant to our facts include:

> **[WIS. STAT. §] 822.03 Jurisdiction.**
>
> **(1)** A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (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 6 months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one 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
>
> ….
>
> (d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with par. (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

¶16 In the first hearing, with regards to subject-matter jurisdiction, the trial court said only that "And if it's going to be modified, it needs to be modified by the court in Texas." The trial court provided no analysis or reasons for this decision. At the motion for reconsideration, the trial court embellished on its earlier remarks, stating that Texas was chosen by the parties, that the court was concerned about reversing that decision, and that Texas should be allowed to decline jurisdiction before Wisconsin accepts it.

> THE COURT: ….
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> ….
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> The other part of it is the parties themselves accepted Texas as jurisdiction. As residence, and the court in Texas accepted Texas as the appropriate jurisdictional place. I think it would be reversing all of that by saying that jurisdiction is properly in Wisconsin now as opposed to back in Texas. I don't think it's in Virginia. I don't think it's in Virginia, but I think Texas remains the appropriate jurisdictional site as opposed to Wisconsin or Virginia.
>
> So for those reasons, that is part of the consideration. If I didn't articulate all those things at the last hearing, I would apologize. But those are the considerations that go to make up what was concluded was the appropriate jurisdictional conclusion at that time.
>
> ….
>
> I don't think Texas has been given an opportunity to decline jurisdiction.

Again, the trial court failed to address any of WIS. STAT. § 822.03's alternative scenarios which permit Wisconsin to exercise subject-matter jurisdiction. Moreover, its concern that the Texas court had not had the opportunity to decline jurisdiction could have been easily rectified. Had the trial court determined that the Wisconsin courts had concurrent jurisdiction with Texas, the trial court could have followed the suggested procedure found in WIS. STAT. § 822.07 and communicated with the Texas court who granted the divorce, and together they could have decided which court was the more appropriate one to exercise jurisdiction. Section 822.07(4) provides:

> **(4)** Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

¶17 Because the record before us contains no findings required under the UCCJA, we are obligated to remand this matter. On remand, the trial court is instructed to apply the UCCJA tests to determine whether Wisconsin has subject-matter jurisdiction.

¶18 The record is also devoid of any consideration by the trial court of the PKPA's mandates. The PKPA was enacted by Congress in 1980 and "'is … conclusive on the issues to which it is applicable.'" ***Michalik v. Michalik***, 172 Wis. 2d 640, 649, 494 N.W.2d 391 (1993) (citation omitted). Although the PKPA requires that a court give full faith and credit to a foreign custody decree, it also permits modification of a foreign decree under certain circumstances. PKPA at § 1738A(g) and 1738A(t). On remand, the trial court is directed to consider the tests contained in the PKPA to ascertain whether the PKPA permits Wisconsin to handle the modification motion.[6]

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[6] Swanson urges us to analyze the facts under the UCCJA and PKPA and determine whether the trial court in Wisconsin should hear this matter. Since this determination may require fact-finding and we are not a fact-finding court, we decline the offer. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980).