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SUPREME COURT
STATE OF WASHINGTON
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No. 89196-6

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

WENDY A. MCDERMOTT
Appellant

and

JUSTIN J. MCDERMOTT
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

REPLY TO ANSWER TO PETITION FOR REVIEW

PATRICIA NOVOTNY
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 ORIGINAL

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A. IDENTITY OF PETITIONER

Wendy McDermott, appellant below and mother of the child at issue in this case, replies to the respondent's answer to her petition for review because it appears respondent has raised a new issue.

B. ISSUES PRESENTED BY RESPONDENT

1. Did the Court of Appeals reject the argument made here by respondent regarding the effect of the Kansas proceedings?

2. Can a party by agreement confer jurisdiction on a state court under the UCCJEA?

3. In any case, did the mother maintain a continuing objection to Kansas exercising jurisdiction, while agreeing in Kansas to orders governing parenting arrangements between now and May 2014, when the case is set for review and further orders in Kansas, including further consideration of her objection to jurisdiction?

C. STATEMENT OF THE CASE

On the eve of oral argument in the Court of Appeals, Justin sought by emergency motion to dismiss Wendy's appeal claiming she had agreed to Kansas being the child's home state and to it exercising jurisdiction over the parenting matters. He claimed this rendered her appeal moot. Justin to the contrary position with respect to his initial agreement to the exercise of jurisdiction in Washington, arguing in his appellate brief that

the parties cannot confer subject matter jurisdiction by their consent. Br. Respondent, at 22-25.¹ He cannot have it both ways.

In any case, the Court of Appeals denied his motion to dismiss and decided the case on its merits.² Nevertheless, Justin raises that exact same issue here, though without directly asking for review of the Court of Appeals' decision. Wendy refers the court to Justin's motion in the Court of Appeals, her response, and the court's decision.

Wendy further notes that Justin has mischaracterized the status of the litigation in Kansas and the effect of the orders. The parties did agree to entry of a decree of dissolution in Kansas, just as the parties initially agreed to accomplish that task here. CP 75-76, 190-191 (Justin agreeing to dissolve marriage in Washington and asking for that affirmative relief). There are a great many reasons the parties should dissolve their marriage expeditiously, even while they continue to litigate the parenting issues, and, for the moment, the Washington court is unavailable for that purpose.

¹ At the trial court, Justin agreed in his response to Wendy's petition for dissolution that the child had no home state. CP 74 & 85 (¶ 1.14). He asked the Washington court to dissolve the marriage and enter final orders, including a parenting plan. CP 190-191. Subsequently, he reversed positions and argued Kansas should have jurisdiction on the basis of significant connections and convenient forum. CP 59-61.

² The Court denied the motion to dismiss by Letter Ruling dated May 17, 2013. The order is noted at Slip Op. at 23 n. 15.

However, the decree of dissolution does not alter the issue presented by Wendy's petition to this Court, which relates solely to the exercise of jurisdiction over the parenting issues. On that point, Wendy has consistently maintained her objection to the exercise of jurisdiction by Kansas, as the Kansas pleadings and orders make clear. See, e.g., Agreed Order of 06/12/13 (¶ 21: "Respondent reserves her objection to Kansas being the home state of the minor child and future Orders will be subject to review of that issue."); Journal Entry, at ¶ 6 & p. 3.³

Of necessity, Wendy has also litigated in Kansas, her only presently available forum, to establish some order – for the time being – to the relationship of the parties and their child. However, the Kansas orders are not final, as Justin claims. Indeed, by their own terms, the residential arrangements last only until May 2014. At that time, the case is set for a review hearing, for which the court has set aside two days, obviously contemplating any number of possibilities – fact-finding, agreement, or transfer of the cause to Washington. See Agreed Order of 06/12/13 at ¶¶21 & 22. In other words, not only are the Kansas proceedings ongoing,

³ These orders are included in Appendix A to Justin's Answer to Petition for Review.

the Kansas court expressly recognizes the jurisdictional issue remains open (i.e., “subject to review”).⁴

The Kansas orders are absolutely clear in these pertinent respects. Consequently, the “interpretation” provided in the declaration of Justin’s Kansas counsel is irrelevant, as well as misleading. Moreover, it is not clear the rules permit this additional evidence without compliance with RAP 9.11. Nevertheless, Wendy provides a declaration from her Kansas counsel in support of this reply.

Finally, Wendy’s continuing objection to the exercise of jurisdiction by Kansas is no mere technical issue. The question of original jurisdiction is of considerable importance to the future of this family and the child. Wendy is the primary caregiver and resides in Washington. Agreed Order of 06/12/13 (¶ 2: “Respondent shall have the primary residency of the minor child”). Given the contentious nature of these proceedings so far, the prospect of continuing long-distance litigation imposes a heavy burden on the primary custodial parent. There are other consequences, known and unknown, that make this decision of great consequence to this family, as well as to UCCJEA and Washington jurisprudence. *See, e.g., In re Marriage of Schneider*, 173 Wn.2d 353,

⁴ What the Kansas court did seems similar to the contingent orders entered in *In re Marriage of Possinger*, 105 Wn. App. 326, 19 P.3d 110 (Wash. Ct. App. 2001).

370, 268 P.3d 215 (2011) (child support governed by state law of original child support order). For these practical reasons, Wendy contests jurisdiction in Kansas.

D. ARGUMENT WHY REVIEW OF THE ISSUE JUSTIN RAISES SHOULD BE DENIED.

The issue on appeal concerns subject matter jurisdiction, which cannot be conferred by agreement of the parties, as declared by the authorities Justin cites in his appellate brief. Br. Respondent, at 22-24. *See, also, In re Custody of A.C.*, 165 Wn.2d 568 n.3, 153 P.3d 203 (2007).⁵ Obviously, Wendy did not and does not agree to the exercise of jurisdiction by the Kansas court, or she would not continue to pursue her claim to jurisdiction in Washington. Moreover, as discussed above, her objection to the exercise of jurisdiction by Kansas is noted throughout the Kansas pleadings and orders. In any case, if agreement settled the matter then it would make dispositive Justin's concession two years ago that the child had no home state. That is, if UCCJEA jurisdiction could be waived and if anyone waived it, it was Justin. Certainly, Wendy has not waived her objection to the exercise of jurisdiction over the parenting issue by the Kansas court.

⁵ The effect of a party's consent would seem the same whether the UCCJEA confers "subject matter jurisdiction," as most of the case law across the country declares, or declares an "exclusive" basis for the exercise of the court's jurisdiction.

E. CONCLUSION

Justin's apparent effort to seek review of an issue he lost in the appellate court should be squarely confronted and review should be denied, since Wendy's participation in judicial proceedings in Kansas has been necessary and does not affect the question of UCCJEA jurisdiction. If her conduct could affect the UCCJEA issue, than so could Justin's, and his earlier admission that there was no home state should bar his subsequent efforts to forum shop this case to Kansas.

Dated this 26th day of September 2013.

RESPECTFULLY SUBMITTED,

/s/ Patricia Novotny

PATRICIA NOVOTNY
WSBA #13604
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of:

WENDY A. MCDERMOTT
Appellant

and

JUSTIN J. MCDERMOTT
Respondent

No. 89196-6

DECLARATION OF SHEILA
FLOODMAN MCALISTER

Sheila Floodman McAlister makes the following statements in the belief that they are true and accurate.

1. I am over twenty-one (21) years of age and competent, willing, and able to testify to the following, which is based upon my personal knowledge.

2. I am an attorney licensed to practice in the State of Kansas. I represent Wendy McDermott in the dissolution and child custody proceedings in Kansas.

3. Wendy has consistently maintained an objection to the exercise of jurisdiction by Kansas over child custody matters.

4. A review hearing for this case is set for May 2014, the date by which the current parenting orders terminate. The court reserved two days. At that time, it is my understanding the court will consider Wendy's objection to

jurisdiction, which she will renew at that time, and could order transfer or could decline jurisdiction, depending on whether Washington will exercise jurisdiction.

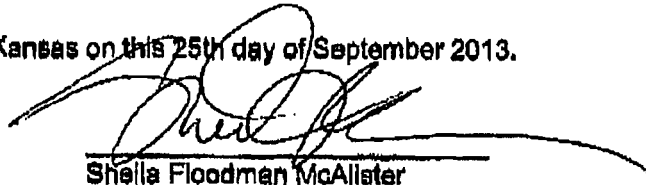
5. The court could also take testimony, including the testimony of the limited case manager and otherwise review the facts. The court could enter orders that were not limited to a specific time period (i.e., one year), as are the present orders.

6. Kansas counsel for Mr. McDermott, Ms. Passiglia, notes the parties litigated international travel issues this summer. The parties did so because Justin objected to Wendy taking H.J.M. to British Columbia for an extended weekend for a family reunion. There was no evidence whatsoever that Wendy was going to abduct the child, which I mention to dispel any suggestion to the contrary conveyed by Ms. Passiglia's declaration.

7. As of this date, Justin has not paid Wendy monthly nor past due child support as ordered by the Court on June 28, 2013 and which included retroactive support to December, 2012.

8 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF KANSAS THAT THE FOREGOING STATEMENT IS TRUE AND CORRECT.

Signed at Wichita, Kansas on this 25th day of September 2013.



Sheila Floodman McAllister

DECLARATION OF SHEILA FLOODMAN MCALISTER
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OFFICE RECEPTIONIST, CLERK

To: Pat Novotny
Cc: Shelby Lemmel; Ken Masters; Sharon Friedrich
Subject: RE: Marriage of McDermott, No. 89196-6

Rec'd 9-26-13

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Cc: Shelby Lemmel; Ken Masters; Sharon Friedrich
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Attached for filing in pdf format is the Petitioner's Reply to Answer to Petition for Review and Declaration of Service in Marriage of McDermott, No. 89196-6. The person submitting these pleadings is Patricia Novotny, WSBA No. 13604, whose email address is novotnylaw@comcast.net.

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Thank you!