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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 28640-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

JAMIE LYN RUFF,

Respondent,

vs.

DENNIS ANTON KNICKERBOCKER,

APPELLANT.

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. Contrary to Ms Ruff's various assertions, the Superior Court lacked subject matter jurisdiction as a matter of law at the time of commencement of this case, insofar as such jurisdiction was then exclusively vested in the State of Montana and there was no compliance in any form with the applicable provisions of the Parent Kidnapping Prevention Act [PKPA] and Uniform Child Custody Jurisdiction Enforcement Act [UCCJEA]. [Issue no. 1].

Ms. Ruff at pages 9 through 12 of her brief, presumes to argue from a hyper-technical standpoint that, from the viewpoint of subject matter jurisdiction, the Superior Court had such jurisdiction or authority to act, notwithstanding the indisputable fact, at the time the Superior Court initially attempted to assume jurisdiction, such authority did in fact rest solely in the Montana District Court; the Montana Court having previously made a jurisdictional determination in the October 24, 2002, Order from Interim Parenting Plan. [CP 7-8].

Curiously, Ms. Ruff relies on In re Custody of A.C., 165 Wn. 2d 568, 573-74, 200 P. 3d 689 (2009), for the novel, yet inaccurate, proposition Washington had subject matter jurisdiction or authority to act on custody. More to the point, and as Ms. Ruff herself readily acknowledges on pages 11 and 12 of her brief, "subject matter jurisdiction" may be bound by limitations imposed by the legislature. In essence, it matters not what Ms. Ruff chooses to call

such “jurisdiction” or judicial authority. Id. And as previously argued by Mr. Knickerbocker in his motion for discretionary review, citation to obiter dicta in footnote 3 of In re: Custody of A.C., 165 Wn. 2d 568, 573 n.3 is of no moment. Indeed, A.C. 165 Wn. 2d 568, at 577 ftnt 8 refers to the UCCJEA provisions as “jurisdictional” and notes “agreement to confer jurisdiction under the UCCJEA statute is not effective.” And the fact A.C. at note 8 makes this quite clear has been so interpreted by our sister states. See Walsh v. Walsh, 307 S.W. 3d 127, 130 (2009) wherein, citing to In re: Custody of A.C., 165 Wn. 2d 568 (2009) the Kentucky court indicated the record did not contain an order or other document by which the sister state relinquished exclusive, continuing jurisdiction over the custody proceedings to Kentucky by declaring Kentucky a more convenient forum or finding that it no longer had jurisdiction. As Walsh indicated, citing to A.C., “this lack of jurisdiction cannot be waived. See . . . In re Custody of A.C., 165 Wash. 2d 568, 200 P. 3d 689, 693 n. 8 (2009).” See also Uniform Child Custody Jurisdiction and Enforcement Act sec 201 cmt, 9 Part 1A U.L.A. 673 (1999).

Consequently, and contrary to Ms. Ruff's misplaced reliance upon In re Marriage of Major, 71 Wn. App. 531, 533-35, 859 P. 2d 1262 (1993), whether the Superior Court lacked statutory versus subject matter jurisdiction is purely a distinction without a difference. In this vein, and as Mr. Knickerbocker previously

pointed out in his opening brief, at 15, a court has no greater power to assume or exercise jurisdiction in a custody matter than conveyed by statute and, in this instance, under the governing provisions of the UCCJEA. See, In re: Leland, 115 Wn. App. 517, 526, 61 P.3d 357 (2003), overruled on other grounds, In re PRP of Higgins, 152 Wn. 2d 155, 95 P. 3d 330 (2004); see also, In re Marriage of Hamilton, 120 Wn. App. 147, 150, 884 P.3d 259 (2004); In re. A.C., supra. at note 8. and PKPA.

Since the Washington court acted beyond its authority under the UCCJEA and PKPA in the first instance, those proceedings are deemed void from the outset. Id. Ms. Ruff's protestations to the contrary on page 12 of her brief are not well taken in light of the governing decision in In re Custody of A.C., at 574-76, as quoted in Mr. Knickerbocker's opening brief, at pages 13 through 14.

Once again in A.C., at 575, it was posited "there [was] no current Montana custody decree in effect so there is no initial determination to be modified." However, in both the present case and A.C., such argument failed and is supported by the facts "[s]ince the trial court's action . . . occurred after Montana's prior determination concerning custody . . . [thus constituted an attempted] . . . modification of Montana's initial determination." Custody of A.C., at 575. The Montana order is clear and controlling in this regard. [CP 7-8]. Hence, the bottom line remains

Washington lacked statutory or subject matter jurisdiction to intercede or act in this child custody matter. Custody of A.C., at 574-776.

2. Furthermore, as a matter of law, contrary to Ms. Ruff's various claims, the Superior Court, lacked jurisdiction over the subject matter as no emergency or exigent circumstance existed. [Issues Nos. 2 and 4].

Next, Ms. Ruff on pages 3, and 12 through 20 of her brief, claims the Superior Court properly exercised emergency jurisdiction based upon the content of Ms. Ruff's July 16, 2008 affidavit [CP 496-99] wherein she alleged Mr. Knickerbocker threatened to "abduct" the child. However, from an objective standpoint there is no indication any such abduction was immediate and, even assuming, arguendo, imminent abduction existed, the Montana court was fully equipped to address the claim since Mr. Knickerbocker's' supposed threat was to "return [the child] to Montana." After all, as Ms. Ruff readily concedes on page 9 of her brief, Washington was not the home state of the child. Rather, the home state was, in fact, Montana where subject jurisdiction resided at the commencement of the Washington proceeding. [Id.].

Clearly, the mere prospect of the child being returned to her "home state" does not constitute an emergency requiring a non-

home state to intercede. Curiously enough, short of baldly asserting the existence of an "emergency", Ms. Ruff has never once cited any legal authority nor otherwise proved or substantiated such a claim of a dire need for Washington to intervene. In fact, Ms. Ruff started the Montana proceedings!

Thus, by definition, under the UCCJEA, no "emergency" existed when on July 17, 2008, the Superior Court entered an ex-parte custody order and attempted to exercise "emergency jurisdiction" on the principal basis a need might somehow exist to exercise such jurisdiction so as to insure the child's residence would remain stable. [CP 513-15].

Moreover, even if the requisite "emergency" could be said to have existed, the mandatory procedure the Superior Court was required to follow was clearly ignored, as Mr. Knickerbocker previously argued in his opening brief, at pages 17 through 20, and as succinctly expressed and outlined in 32 P. Hoff, "The ABC's of the UCCJEA," Family Law Quarterly, No 2 (Summer 1998).

Also, contrary to Ms. Ruff's failed attempt, at pages 14 through 15 of her brief, to distinguish certain other legal principles directly pertaining to this case, it was well-settled by In re Marriage of Kastanas, 78 Wn. App. 193, 199, 896 P.726 (1995), the putative exercise of emergency jurisdiction in this circumstance was strictly unavailable to the Superior court under the PKPA insofar as "(g) a

court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of the other State is exercising jurisdiction consistently with the provisions of [28 U.S.C. 1738A] to make a custody determination." See also, In re Marriage of Ieronimakis, 66 Wn. App. 83, 831 P.2d 172, review denied, 120 Wn. 2d 1006 (1992).

By the same measure, and contrary to Ms. Ruff's novel arguments on page 17 through 20 a party cannot in any way consent to, waive, or otherwise be estopped, on the issue of subject matter jurisdiction or the lack thereof. See, Rust v. W. Washington State College, 11 Wn. App. 410, 419, 524 P.2d 204 (1974). See also, A.C. at fnnt 8 supra. The court either has jurisdiction or it does not. Stated differently, a party's putative consent to in personam jurisdiction is not a substitute for a lack of subject matter jurisdiction. Id. Even Ms. Ruff at page 19 of her brief, seems to realize subject matter jurisdiction is not subject to being conferred by consent.

In sum, since the Montana court was exercising jurisdiction since 2002, and issued an interim custody order [CP 7-8], the Washington court, as a matter of law, lacked co-extensive jurisdiction to rule on any matter of custody. Hence, Ms. Ruff's claims of consent, wavier, and estoppel are not well-taken and

entirely inapposite. See also, Walsh, supra. Uniform Child Custody Jurisdiction and Enforcement Act sec 201 cmt, 9 Part 1A U.L.A. 673 (1999).

By the same token, contrary to Ms. Ruff's final claim on page 20 of her brief, there is no issue of forum non conveniens under RCW 26.27.261 since no lawful basis existed from the onset for Washington to exercise jurisdiction co-extensively with the State of Montana. Clearly, jurisdiction cannot be conferred after the fact. Marriage of Ieronimakis, supra.; see also, In re Marriage of Hamilton, 120 Wn. App. 147, 884 P. 3d 259 (2004).

3. Contrary to Ms. Ruff's assertion on pages 21 through 23 of her brief, the supplementation of the record does not create any distinction between this case and the controlling opinion in Custody of A.C., 165 Wn.2d 568, 573-74, 200 P.3d 689 (2009). [Issue nos. 1, 2 and 4].

On pages 21 through 23 of Ms. Ruff's brief, she claims the supplemented record distinguishes this case insofar as the Montana court subsequently dismissed the Matter of the Parentage of Kayleigh Lynn Ruff [DR 02-15] on January 8, 2009, per the purported pro se stipulation, and in favor of the Spokane Court proceedings eventually consolidated under cause no. 08-3-01628-3. [CR 517-19, 521-22]. However, on its face, this argument incorrectly assumes Washington had jurisdiction co-extensive with

Montana, and Montana had authority to relinquish its lawful jurisdiction under the UCCJEA in favor of another state having no such lawful jurisdiction. In this regard, there was no determination by the Montana court Washington had lawfully exercised jurisdiction in the first instance. And, if any such jurisdiction was in fact co-extensive, the Montana court failed to further undertake to determine any arguable issue of forum non conveniens or make any such findings as necessary. See, Walsh, supra.

Since there was no lawful basis from the onset for Washington to exercise any jurisdiction co-extensively with Montana, the order of dismissal entered by the Montana court is of no legal consequence. Once again, clearly, jurisdiction cannot be conferred by consent nor after the fact. See, Rust v. W. Washington State College, 11 Wn. App. 410, 419, 524 P. 2d 204 (1974); see also, In re Marriage of Ieronimakis, 66 Wn. App. 83, 831 P.2d 172, review denied, 120 Wn. 2d 1006 (1992); In re Marriage of Hamilton, 120 Wn. App. 147, 884 P. 3d 259 (2004); A.C. at note 8. Uniform Child Custody Jurisdiction and Enforcement Act sec 201 cmt, 9 Part 1A U.L.A. 673 (1999).

4. As a matter of law, the Superior Court could not properly assert "home state jurisdiction" as it erroneously attempted to do in its findings. [Issues nos. 2 through 4].

As aptly noted in In re Marriage of Leronimakis, 66 Wn. App. 83, 831 P. 2d 172, review denied, 120 Wn. 2d 1006 (1992), jurisdiction cannot arise or be created after the fact. Although Leronimakis dealt with the UCCJEA's predecessor, In re Marriage of Hamilton, 120 Wn. App. 147, 884 P. 3d 259 (2004), makes clear the foregoing principle remains sound in all respects. In sum, at the time this matter was commenced in Washington, Montana was exercising exclusive jurisdiction, thus, the child's subsequent residency for the last six months was entirely irrelevant and did not thereafter empower Washington with any subject matter jurisdiction after the fact. The "Home State" is only determined at the initial commencement of the proceedings.

In addition, once again, there are similar procedural defects from Washington's standpoint. As specified in RCW 26.27.101(1), a court of this state may communicate with a court in another state concerning a proceeding arising under this chapter. Furthermore, as mandated by RCW 26.27.251(2), and except as otherwise provided in RCW 26.27.231 [i.e., pertaining to emergency jurisdiction], a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to RCW 26.27.281. If the court determines that a child custody proceeding has been commenced in a court of another state having jurisdiction

substantially in accordance with this chapter, the court of this state is legally obligated and required to stay its proceeding and immediately communicate with the other state having jurisdiction. After having done so, if the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, then the court of this state is legally bound to dismiss the proceeding before it. RCW 26.27.231(4). In fact, pursuant to RCW 26.27.421(1), "[a] court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter."

Here, there was no immediate communication as mandated under the foregoing provisions of RCW 26.27, despite the clear fact there was no impediment whatsoever for such communication. The facts are also clear, contrary to the foregoing statutory mandate, there was a stay never issued by the Superior Court nor was the Washington proceeding ever dismissed in recognition of Montana's jurisdiction. Contrary to the Superior Court's erroneous treatment of this case, there is nothing in the record to suggest the Montana court could not adequately address any issue related to custody and thus the Superior Court was entirely without jurisdiction to intercede in this matter under the governing provisions of the UCCJEA and PKPA.

5. Consequently, as a matter of law, the lack of subject matter jurisdiction rendered the Superior court proceedings including the appointment of a guardian ad litem, void and entirely without legal effect. [Issues nos. 1 through 4].

It is well settled a judgment or other decision rendered by a court lacking subject matter jurisdiction is void ab initio and not legally binding nor enforceable as a decision or judgment. Wesley v. Schneckloth, 55 Wn. 2d 90, 93-94, 346 P. 2d 658 (1959); State v. Brennan, 67 Wn. App. 347, 349 n.4, 884 P. 2d 1343 (1994); Rust v. Western Washington State College, 11 Wn. App. 410, 418-19, 524 P. 2d 204 (1974). Thus, the Washington proceedings, and all rulings and determinations by the Superior Court, are void from the onset and of no legal consequence or effect. Id.

While Ms. Ruff on pages 23 though 25 on her brief invites this Court to simply ignore the glaring procedural defects and allow the rulings of the Washington court to stand, Ms. Ruff cites no authority whatsoever for this broad departure from the accepted rule of law. Contrary to Ms. Ruff's view, it is clearly incumbent upon a party in a non-initiating state who wishes to file a new proceeding under the provisions of UCCJEA to first have the initiating state removed and dismissed from any further proceeding governing the minor's custody. The orderly system of administration of government as between the states, the policies

and provisions of the PKPA, as well as the policies and provisions of the UCCJEA itself, cannot be interpreted otherwise. In this vein, the provisions cited by Ms. Ruff on page 23 of her brief will not be rendered meaningless but will be consistently allowed to serve their intended purpose in any given child custody case or setting. Once the Superior Court chose to act without legal authority under the UCCJEA and PKPA, all acts and proceedings which followed thereafter were void ab initio.

It is a cardinal rule under In re Marriage of Ieronimakis, 66 Wn. App. 83, 831 P.2d 172, review denied, 120 Wn. 2d 1006 (1992), jurisdiction cannot arise or be created after the fact. This is true whether we are speaking of the UCCJEA or its predecessor. In re Marriage of Hamilton, 120 Wn. App. 147, 884 P. 3d 259 (2004). Simply put, Ms. Ruff has no license whatsoever to ask this Court to do other than follow the accepted federal and state law and practice governing the exercise of subject matter jurisdiction. Id.

In sum, and for these stated reasons, Mr. Knickerbocker once more maintains the challenged decisions of the superior court, as identified, discussed and outlined in his previous assignments of error, issues presented and argument, still remain in error and, accordingly, should now be reversed with prejudice. RAP 12.2. In this vein, Ms. Ruff, has failed to demonstrate in her

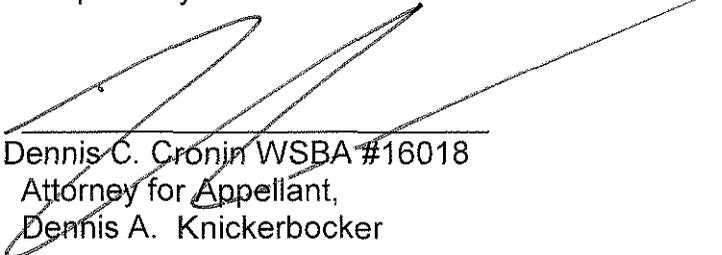
responsive brief any other relief is legally warranted under this particular set of facts and the governing law. Id.

B. CONCLUSION

Based upon the foregoing points and authorities, Mr. Knickerbocker, respectfully requests the challenged decisions and proceedings of the Superior Court which were erroneously entered in this case, and the subject of this appeal, be reversed and this matter be dismissed with prejudice as being void ab initio.

DATED this 2nd day of December, 2011.

Respectfully submitted:



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Declaration of Service

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, that on this date declarant personally delivered the original and two true and correct copies of the document entitled: REPLY BRIEF FOR APPELLANT for filing at:

Court of Appeals of the State of Washington, Division III
Clerk of the Court
500 N. Cedar Street
Spokane, WA 99201

AND

on this date declarant personally delivered one true and correct copy of: REPLY BRIEF FOR APPELLANT for service upon all other parties, namely JAMIE RUFF by and through her attorney PETER LINEBERGER at Mr. Lineberger's regular place of business:

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