IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

IN RE: N.D.	:	APPEAL NO. C-180441 TRIAL NO. F18-407X
	:	*O P I N I O N.*

Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 4, 2019

Sean Brinkman, for Appellants Luke Brunck and Amber Brunck.

BERGERON, JUDGE.

{¶1} After the Arkansas Court of Appeals invalidated the adoption at issue in this case, the adoptive parents turned to an Ohio juvenile court for relief. This case, like so many in the adoption and family law context, puts this court in the unpleasant position of determining the fate of a child caught, innocently, in a morass of competing custodial interests, a dizzying array of statutes, and jurisdictional turmoil. Here, however, federal law proves to be our guide, as it dictates that we accord full faith and credit to the custodial determinations of the Arkansas courts in this case. We accordingly affirm the decision of the juvenile court to decline to exercise its jurisdiction over the matter and dismiss the complaint for legal custody.

I.

{¶2} Petitioners-appellants Luke and Amber Brunck adopted N.D. in Arkansas in February 2017, receiving the blessing of an Arkansas trial court. The birth mother (respondent-appellee Kristal Thompson) moved to set aside the adoption just over a week later, claiming that a fraud perpetrated upon her by a third-party intermediary should vitiate the adoption. After losing before the trial court, she appealed, and in March 2018, the Court of Appeals of Arkansas agreed with her, setting aside the adoption. Its opinion chronicles the tragic conning of a vulnerable new mother by a third party (not the Bruncks), leading it to conclude that the "adoption * * * was carried out under fraudulent circumstances." *Thompson v. Brunck*, 2018 Akr.App. 198, 545 S.W.3d 830, 841 (2018). The opinion details the fraud perpetrated on Ms. Thompson—quoting extensive portions of text message exchanges between her and her defrauder, Amber Biggerstaff. In them, Ms. Biggerstaff preyed upon Ms. Thompson's fears of losing custody of N.D. to N.D.'s

father and offered to adopt N.D. herself to remove the father from the picture (this decoy scheme being suspect enough). Ms. Biggerstaff conjured up and perpetuated the delusion that such an adoption was merely a formality and could proceed with Ms. Thompson, for all practical intents and purposes, remaining N.D.'s mother. Over time, Ms. Thompson displayed growing anxiety and skepticism about the arrangement. But without any legal sophistication and relying on someone whom she believed to be a trusted and loving friend, she continued to rely on Ms. Biggerstaff's "legal advice," which the Arkansas appellate court noted that she "doled out * * * as if * * * a Pez dispenser * * *." *Id.* at 840. Unfortunately, Ms. Thompson realized the deception too late. Days after she learned the truth—that a third party would adopt N.D. and she would not maintain any custodial rights—the Bruncks filed their adoption petition. An attached list of expenses reflected a $3,000 reimbursement for a temporary caretaker: Ms. Biggerstaff.

{¶3} While Ms. Thompson's motion to set the adoption aside was pending, the Bruncks moved N.D. to Hamilton County, where they lived and cared for her for over a year while the appeal worked its way through the Arkansas courts. Immediately in the wake of the Arkansas appellate ruling, they filed a complaint for legal custody with the Hamilton County juvenile court. The motion is cursory in terms of grounds for the relief sought—citing the fact that they had cared for N.D. for over a year, professing that they did not know Ms. Thompson's whereabouts, and alleging that Ms. Thompson was unfit to parent N.D. Even if perfunctory, the import of the complaint is clear. Notwithstanding the setting aside of their adoption of N.D. by the Arkansas court, the Bruncks sought to have an Ohio court grant them the

functional equivalent—legal custody over N.D. In other words, this represented a collateral attack on the Arkansas judgment.

{¶4} After the commencement of the Ohio juvenile court proceeding, Arkansas courts continued to issue orders relative to N.D.'s case. In particular, the Supreme Court of Arkansas denied review of the case in May 2018 (review requested by the Bruncks), and the circuit court of Washington County, Arkansas, issued an order in June 2018 requiring the return of N.D. to the birth mother pursuant to the mandate of the court of appeals. This meant that the Arkansas courts continued to exercise jurisdiction over the case (a fact that proves important under the controlling statute, as we discuss below).

{¶5} Back in Ohio, Ms. Thompson responded to the juvenile court action by filing a request to register a foreign child custody determination and motion for enforcement with the juvenile court in June 2018, to which she attached the mandate, order for return, and underlying opinion granting her motion to set aside adoption issued by the Arkansas courts. Based on these facts, the magistrate determined that she did not have jurisdiction over the matter and dismissed the case. Over the Bruncks' objections, the juvenile court adopted the magistrate's decision by entry, which they now appeal. They assert one assignment of error: that the juvenile court erred in finding that it lacked jurisdiction and dismissing the complaint.

II.

{¶6} We write on a somewhat muddled slate when it comes to law of interstate custody disputes—particularly adoptions. The Supreme Court of Ohio has acknowledged as much: "[T]he law in this area has been hampered by the inconsistent and apparently result-driven outcomes reached by the various courts

that have addressed * * * jurisdictional conflicts." *In re Adoption of Asente*, 90 Ohio St.3d 91, 98, 734 N.E.2d 1224 (2000). Our review of the law in this area and the facts of this particular case, however, establish that the result turns on our application of the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. 1738A.

{¶7} Before turning to the application of the PKPA, we must cross a few other potentially-applicable statutes off the list that often arise in the context of child custody disputes that traverse state lines. Many cases concerning interstate custody disputes look to the Uniform Child Custody Jurisdiction Act ("UCCJA") or the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which replaced the UCCJA in many states. The UCCJEA, however, codified in Ohio at R.C. 3127.01 et seq., explicitly "do[es] not govern adoption proceedings * * *." R.C. 3127.02. Therefore, it does not inform our analysis. The Interstate Compact on the Placement of Children ("ICPC"), also referenced in the context of interstate custody disputes, is likewise inapplicable to the jurisdictional question implicated by this particular case. In *Asente*, the Supreme Court of Ohio found no fault with the lower court's decision to not analyze jurisdictional issues under the ICPC, noting that its own "search of the relevant case law ha[d] found no Ohio court that has either accepted or rejected jurisdiction of an adoption matter based on the ICPC." *Asente* at 99. Rather, the ICPC can assume relevance "only after a court has properly asserted jurisdiction," but it does not shed light on the predicate jurisdictional question. *Id.*

{¶8} We therefore begin by walking through the PKPA framework as applied to this case. We then discuss the jurisdiction of the Hamilton County juvenile court—particularly as it pertains to the asserted exception to PKPA's full-

faith-and-credit mandate under 28 U.S.C. 1738A(f) for certain modifications of custody determinations.

A.

{¶9} The PKPA " 'mandate[s] that states afford full faith and credit to valid child custody orders of another state.' " *State ex rel. Garrett v. Costine*, 153 Ohio St.3d 29, 2018-Ohio-1613, 100 N.E.3d 368, ¶ 10, quoting *Justis v. Justis*, 81 Ohio St.3d 312, 315, 691 N.E.2d 264 (1998). Specifically, the PKPA provides: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." 28 U.S.C. 1738A(a). Needless to say, the purpose of this is to avoid jurisdictional battles and collateral attacks on properly-issued judgments.

{¶10} Subsection (b)(3) defines "custody determination" as "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." *Id.* In *Asente*, our Supreme Court applied the PKPA to adoption proceedings, and courts in other jurisdictions have explicitly held that the term "custody determination" as used in the PKPA includes adoptions. *See, e.g., In re Adoption of Baby E.Z.*, 687 Utah Adv.Rep. 17, 2011 UT 38, 266 P.3d 702, ¶ 19 (2011) ("We therefore conclude that, under the plain language of the PKPA, the adoption proceeding below involves a 'custody determination' subject to the PKPA."); *Brown v. DeLapp*, 2013 OK 75, 312 P.3d 918, ¶ 10 (Okla.2013), fn. 12 ("The majority of courts across the country addressing this issue have concluded that * * * the PKPA * * * appl[ies] to adoption

proceedings."); *In re Baby Girl F.*, 402 Ill.App.3d 127, 136-137, 342 Ill.Dec. 301, 932 N.E.2d 428 (2008) (collecting cases that have held that the PKPA applies to adoptions and holding that the PKPA applies to adoptions even subsequent to Illinois's adoption of the UCCJEA); *In re Custody of K.R.*, 897 P.2d 896, 899-900 (Colo.App.1995) ("The majority of jurisdictions that have addressed the issue have concluded that adoption proceedings are 'custody proceedings' because they inherently determine custody issues. Therefore, the * * * [PKPA] [is] applicable.").

{¶11} The PKPA also sets forth exactly what it means when it refers to custody determinations made "consistent[ly] with provisions of this section," explaining that full faith and credit is warranted only if "(1) such court has jurisdiction under the law of such State" and one of the several conditions outlined in subsection (c)(2) is satisfied (discussed in the ensuing paragraph). 28 U.S.C. 1738A(c). Therefore, we look first to the basis for Arkansas's jurisdiction over the initial adoption proceedings. Like Ohio, Arkansas has adopted the UCCJEA, at Ark.Code Ann. 9-19-101 et seq., which—due to the adoption exclusion—means that we must look elsewhere in its statutes for the jurisdictional hook. Ark.Code Ann. 9-19-103. Arkansas's controlling adoption statute grants jurisdiction over the adoption of minors "if the person seeking to adopt the child, or the child, is a resident of this state." Ark.Code Ann. 9-9-205(a)(1). No one disputes that N.D. was a resident of Arkansas at the time of the adoption, and for that reason, the Bruncks do not question Arkansas's original jurisdiction over the adoption proceeding. Indeed, the Bruncks initiated the proceedings in Arkansas by filing the original adoption petition in the Arkansas circuit court and seeking review of the unfavorable intermediate appellate decision by the Supreme Court of Arkansas.

{¶12} Next, 28 U.S.C. 1738A(c)(2) lays out several conditions, one of which must be met for the custody determination to be "consistent with the provisions" of 28 U.S.C. 1738A. One such condition is that "the court has continuing jurisdiction pursuant to subsection (d) of this section." *Id.* at 1738A(c)(2)(E). In turn, under 28 U.S.C. 1738A(d): "The jurisdiction of a court of a State which has made a child custody * * * determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child *or of any contestant*." (Emphasis added.) Here, the Bruncks do not challenge the fact that Ms. Thompson is a resident of Arkansas; and her filings with the juvenile court reflect an Arkansas address.

{¶13} In *Costine*, 153 Ohio St.3d 29, 2018-Ohio-1613, 100 N.E.3d 368, the Supreme Court considered whether the courts of West Virginia retained exclusive, continuing jurisdiction over visitation matters notwithstanding the fact that an Ohio probate court had, subsequent to the initiation of the West Virginia visitation proceedings, issued an adoption decree concerning the subject child. The court analyzed the conflict under the PKPA, noting that 28 U.S.C. 1738A(d) "sets forth a federal standard for exclusive continuing jurisdiction over a prior custody or visitation order." *Id.* at ¶ 14. Because the original proceeding was not an adoption in *Costine*, the court applied West Virginia's UCCJEA to determine that West Virginia retained jurisdiction for purposes of the first requirement under 28 U.S.C. 1738A(d), and easily concluded that a contestant (the grandmother seeking visitation) was a resident of West Virginia for purposes of the second requirement. *Id.* at ¶ 15. Although the UCCJEA does not guide our inquiry in this case, the same result obtains. Arkansas had jurisdiction to make the original custody determination as to

N.D. and has continuing jurisdiction under both prongs of 28 U.S.C. 1738A(d). Therefore, its custody determination comports with the provisions of the PKPA.

B.

{¶14} Having concluded that full faith and credit is due to the Arkansas appellate court's adoption determination under the PKPA, we move to the heart of the Bruncks' argument: that their requested relief is neither prohibited by the PKPA nor inconsistent with the orders from the Arkansas courts. As the bedrock for both points, the Bruncks emphasize the fact that the Court of Appeals of Arkansas did not explicitly determine the best interest of N.D. As such, they posit, this evidences either (1) that the Arkansas courts declined jurisdiction over a custody determination based on N.D.'s best interest or, alternatively, (2) that a custody determination based on N.D.'s best interest was an independent matter of first impression before the juvenile court that did not run afoul of the Arkansas courts' judgments. On either basis, they insist that the juvenile court could have appropriately exercised jurisdiction. We are unconvinced.

{¶15} For their first argument, the Bruncks must demonstrate that a modification was warranted under 28 U.S.C. 1738A(f), which provides as follows:

> A court of a State may modify a determination of the custody of the same child made by a court of another State, if—
>
> (1) it has jurisdiction to make such a child custody determination; and
>
> (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

{¶16} As to the first prong, Ohio's juvenile courts have exclusive original jurisdiction "to determine the custody of any child not a ward of another court of this state[.]" R.C. 2151.23(A)(2). But here, the juvenile court declined to exercise jurisdiction, which begs the question: does the PKPA divest juvenile courts of subject matter jurisdiction? Because the term "jurisdiction" is often used in a general sense, subject matter jurisdiction is prone to conflation (not to mention confusion) with jurisdiction over the case. *See Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18. "Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases." (Citation omitted.) *Id.* at ¶ 19. Jurisdiction over the case, by contrast, concerns the court's exercise of jurisdiction conferred. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 12. Unlike subject matter jurisdiction, jurisdiction over the case "involves consideration of the rights of the parties." *Kuchta* at ¶ 19.

{¶17} The juvenile court here unquestionably had subject matter jurisdiction over the proceeding. Its decision instead related to whether it would exercise that jurisdiction—a decision that hinged on the rights of the individual parties as dictated by the prior orders of a sister state court and federal law. Therefore, the flavor of jurisdiction that we address today concerns the juvenile court's jurisdiction over the case, rather than its subject matter jurisdiction. Our conclusion on this point is bolstered by the reasoning of the Supreme Court of Utah in *Baby E.Z.*, 687 Utah Adv.Rep. 17, 2011 UT 38, 266 P.3d 702, which considered the interplay between subject matter jurisdiction and the PKPA, specifically:

> [T]he plain language of the PKPA indicates that even though a state court may have subject matter jurisdiction under state law to make a

> custody determination, it should refrain from exercising that jurisdiction if another state is in the process of making a custody determination with respect to the same child. In short, although the PKPA, when properly raised, may limit the circumstances under which a state court may exercise its jurisdiction, it does not divest a court of its underlying subject matter jurisdiction.

Id. at ¶ 35.

{¶18} Upon the filing of the complaint for custody, Ms. Thompson promptly notified the juvenile court of the fact that the Arkansas courts continued to exercise jurisdiction over the custody matter. The juvenile court appropriately tackled the jurisdictional question at that time, recognizing the conflict and the limitations imposed on its jurisdiction by the PKPA. As a result, and for the reasons discussed below, it properly declined to exercise its conferred jurisdiction once apprised of the individual rights of the parties in this case and applicable federal law.

{¶19} As to the second prong of 28 U.S.C. 1738A(f), we have already determined that the Arkansas courts retained jurisdiction over this matter as demonstrated by their multiple and relatively recent exercises thereof. *See Asente*, 90 Ohio St.3d at 104, 734 N.E.2d 1224, citing *Souza v. Superior Court*, 193 Cal.App.3d 1304, 238 Cal.Rptr. 892 (1987) ("The Kentucky court's decision to exercise home state jurisdiction, appearing regular on its face, is not subject to collateral attack in Ohio."). *See also id.* at 105, citing *Litsinger Sign Co. v. Am. Sign Co.*, 11 Ohio St.2d 1, 227 N.E.2d 609 (1967), paragraph one of the syllabus ("[A] foreign decree may not be collaterally attacked or disregarded unless it was rendered by a state without personal or subject-matter jurisdiction under the foreign state's

internal law[.]"). In *Asente*, the Ohio Supreme Court considered whether adoption proceedings in Kentucky prevented an Ohio court's exercise of jurisdiction over a subsequent adoption petition concerning the same child. After walking through an analysis of the PKPA and UCCJA (in effect in Ohio at that time) and concluding that the Kentucky court's custody determination was entitled to full faith and credit, the court considered whether a modification was appropriate by the Ohio court under the PKPA. It held, "In the absence of an Ohio court meeting [the two factors under 29 U.S.C. 1738A(f)], the child custody determinations of another state made in conformity with the UCCJA are entitled to full faith and credit in this state." *Id.* at 103-104.

{¶20} With this backdrop in mind, the Bruncks insist that the Arkansas courts declined jurisdiction for purposes of 28 U.S.C. 1738A(f)(2) by failing to make a best interest determination as to N.D. We find this argument, and the Bruncks' analogy to *People ex rel. A.J.C.*, 88 P.3d 599 (Colo.2004), unpersuasive. *A.J.C.* concerned a failed adoption in Missouri of a child born in Missouri. *Id.* at 600. The would-be adoptive parents resided in Colorado and had taken the child to Colorado. *Id.* When the natural mother withdrew consent, the Missouri court ordered return of the child. *Id.* The would-be adoptive parents then sought to establish some form of custody or visitation in Colorado. *Id.* at 602. After analyzing myriad sources of potential law, the court held that "because Missouri failed to conduct a best interest analysis in issuing its custody decree, it declined jurisdiction to modify that order under section 1738A(f)." *Id.* at 612. Even in the event that we were to endorse the reasoning in *A.J.C.*, its majority opinion relied on its interpretation of case law from the states on each side of the custody dispute that "authorize[d], if not require[d], an

inquiry into the best interests of the child even following a failed adoption." The Bruncks, by contrast, direct us to no Arkansas law or Ohio law that would dictate a best interest analysis under the facts presented by this case. Thus, the failure to conduct such an analysis cannot be construed as abandonment of jurisdiction by the courts in Arkansas.

{¶21} The Bruncks alternatively posit that their complaint for custody "did not seek to modify or contradict any order of the Arkansas courts." But this strains credulity. It is impossible to read their complaint as anything other than a collateral attack on the Arkansas judgments. The Bruncks point to the fact that the Arkansas appellate decision did not order that custody be returned to mother; in other words, their complaint for custody was the first and only request for a custody determination based on N.D.'s best interest. While it is true that the intermediate appellate decision did not explicitly make a custody determination, once the Arkansas Supreme Court declined review, its mandate issued and the trial court ordered, "The right of legal and physical custody of [N.D.] now belongs to her mother, Kristal Thompson, and the Bruncks shall cooperate and turn over said child to her mother immediately and without delay." And that order fairly implements the mandate of the Arkansas appellate court. By seeking legal custody of N.D. in the interim, the Bruncks sought to eviscerate the result obtained in the Arkansas court system.

III.

{¶22} We are mindful of the difficulty and heartbreak that assuredly has befallen the Bruncks (through no fault of their own) as a result of these decisions. But federal law provides us an authoritative roadmap for making exactly these kinds

of (often gut-wrenching) decisions. Consistent with that mandate, we hold that, while the juvenile court had subject matter jurisdiction over the complaint for custody, it properly declined to exercise that jurisdiction under the PKPA. We accordingly overrule the Bruncks' sole assignment of error and affirm the decision of the juvenile court.

Judgment affirmed.

MOCK, P.J., and **MYERS, J.,** concur.

Please note:

The court has recorded its own entry this date.