

STATE OF MICHIGAN
COURT OF APPEALS

PRATAP G. LINGAM,

Plaintiff-Appellant,

v

NEELIMA LINGAM,

Defendant-Appellee.

UNPUBLISHED
September 11, 2012

No. 310012
Berrien Circuit Court
Family Division
LC No. 11-003030-DM

Before: WILDER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

In this divorce and child custody case, plaintiff appeals as of right the dismissal of his complaint for divorce on the basis of a lack of subject matter jurisdiction and denial of his motion to amend. We affirm.

Plaintiff and defendant, both Indian citizens, were married on March 27, 2004, in Hyderabad, India. The parties have one minor child, born in Florida and, therefore, a citizen of the United States. According to defendant, the child is considered "A Person of Indian Origins" in India. Plaintiff and defendant both applied for U.S. citizenship/permanent residency in 2007. Sometime in 2008, the family moved from Florida to Michigan. On October 21, 2009, defendant and the child flew to India to attend the wedding of plaintiff's brother. Plaintiff also went to India for the wedding and spent four weeks there before returning to Michigan. Defendant and the child did not return, and defendant filed for divorce in India.

On November 15, 2010, the family court in India granted the parties a divorce. In May 2011, plaintiff filed a verified complaint for divorce in Berrien County. In conjunction with the complaint, defendant sought a determination of custody of the child. Although plaintiff acknowledged and attached the "Indian Order dissolving the marriage," he alleged that the order should not be afforded comity because plaintiff was denied his due process rights. In conjunction with the complaint, the court entered an ex parte interim child custody order awarding plaintiff with sole custody.

On June 24, 2011, defendant's counsel entered a limited appearance, objecting to the trial court's jurisdiction over herself and "over the purported divorce involving her ex-husband." Defendant also filed objections to the custody order, alleging that divorce, custody, and support had already been determined by the court in India. Defendant indicated that she intended to seek dismissal due to, among others reasons, lack of both personal and subject matter jurisdiction. On

November 11, 2011, defendant moved to dismiss plaintiff's complaint, alleging, among other things, that the parties were already divorced, rendering the complaint moot and resulting in the trial court's lack of subject matter jurisdiction; that plaintiff received due process in India; and that custody and maintenance were already determined by the Indian courts, but the order could not be registered in the U.S. because plaintiff had filed for a stay.

At the hearing on defendant's motion to dismiss, the trial court stated, "clearly if these parties are already divorced I lack subject matter jurisdiction to divorce them again." Defendant argued that, based on the affidavit from plaintiff's Indian counsel, R.A.R. Krishna Sastry, it was clear that plaintiff had counsel that was involved in the Indian case, precluding any due process argument, and that the action in India was ongoing, precluding Michigan courts from making any determinations related to custody, support, or other issues. Plaintiff maintained that there was a due process violation and that, even if the divorce decree was valid, the doctrine of divisible divorce permitted the trial court to decide the custody issue. Defendant disputed plaintiff's assertion and argued that plaintiff was required to register the order from India before he could proceed. The trial court concluded that the parties were already divorced, rendering the divorce action moot and also divesting the trial court of subject matter jurisdiction. The trial court further concluded that plaintiff received due process in the India divorce proceedings. The trial court declined to issue a declaratory judgment declaring any Indian custody orders null and void. The ex parte custody order was vacated as void for lack of jurisdiction.

Plaintiff filed a motion seeking clarification of, relief from, and reconsideration of the trial court's rulings. The trial court held a hearing on the motion at which time it attempted to clarify its decision, but ultimately denied plaintiff's motion and upheld its previous rulings. Plaintiff then requested the ability to amend his complaint into a child custody petition, which the trial court denied, noting that leave to amend was not required when summary disposition had been granted under MCR 2.116(C)(4). Plaintiff now appeals.

Plaintiff first challenges the trial court's refusal to hold an evidentiary hearing on the issue of jurisdiction. In resolving this question, we must also address plaintiff's claims that the trial court erroneously granted summary disposition and the Indian divorce order comity, and erroneously decided the due process arguments.

The trial court dismissed plaintiff's complaint under MCR 2.116(C)(4). "Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are . . . reviewed de novo." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). "In considering a motion challenging jurisdiction under MCR 2.116(C)(4), a court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate that the court lacks subject matter jurisdiction." *CC Mid West, Inc v McDougal*, 470 Mich 878, 878; 683 NW2d 142 (2004). However, this Court cannot consider any documents not presented to the trial court at the time of its decision on the motion for summary disposition. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Plaintiff supports his contention that he was entitled to an evidentiary hearing on the question of the trial court's jurisdiction by citing *Smith v Smith*, 218 Mich App 727; 557 NW2d 271 (1996). However, *Smith* makes no pronouncement that parties are always entitled to an

evidentiary hearing on questions of jurisdiction. Rather, this Court remanded that case to the trial court for an evidentiary hearing to determine whether it had jurisdiction because it had failed to do so previously, even though its jurisdiction had been challenged. *Id.* at 729, 731-733.

Here, the parties fully briefed the trial court on their arguments regarding jurisdiction. Both parties provided affidavits in support of their position, as well as additional documentary evidence. Defendant's motion to dismiss on the basis of lack of subject matter jurisdiction was then noticed and set for hearing, which was held in February 2012. At that hearing, even plaintiff's counsel conceded that "this whole case depends on the status of that divorce order in Hyderabad, India." Thus, the parties were on notice that the purpose of the hearing was to determine the status of the Indian divorce order. Accordingly, plaintiff received a hearing on the issue of jurisdiction.

Plaintiff argues that he is entitled to an evidentiary hearing because there were outstanding issues of material fact regarding whether he received due process in India. In point of fact, to the extent that there were outstanding factual disputes that needed to be resolved before the trial court could determine jurisdiction, the trial court would have been required to order an immediate trial "to resolve any disputed issues of fact" because the motion was brought under MCR 2.116(C)(4). MCR 2.116(I)(3). However, ultimately, there were no genuine issues of material fact regarding whether plaintiff received due process in the Indian divorce proceedings because plaintiff's own affidavit evidence established that he received due process.

Procedural due process requires notice and an opportunity to be heard. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009).

Generally, due process in civil cases requires notice of the nature of the proceeding. In any proceeding involving notice, due process requires that the notice given be reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections. [*Vicencio v Ramirez*, 211 Mich App 501, 504; 536 NW2d 280 (1995) (citations omitted).]

Due process does not require actual notice. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 355-356; 745 NW2d 137 (2007), quoting *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 9; 732 NW2d 458 (2007). But, the "[f]undamental requirements of due process are satisfied if a party received actual notice." *Id.* at 356 n 4. Thus, so long as there was credible evidence that plaintiff had actual notice of the Indian divorce proceedings, "due process was not offended, regardless of whether the notice attempts were improper or insufficient." *Id.*

Plaintiff's own affidavit indicated that he received actual notice of the Indian divorce proceedings multiple times: by email from defendant on May 2, 2012; "official notice" on June 28, 2010; and an additional notice on September 14, 2010. Plaintiff's affidavit also established that he obtained counsel in India before the order was entered. Sastry's affidavit, provided by plaintiff, also established actual notice of the proceedings and further established that plaintiff had the opportunity to present his arguments to the court in India. Although Sastry was apparently unable to make those arguments because plaintiff made the decision not to make a personal appearance, plaintiff's election in no way diminishes the fact that plaintiff *could have*

appeared and presented his arguments. That he chose not to did not establish a lack of due process; it was waiver. *Walters v Nadell*, 481 Mich 377, 384 n 14; 751 NW2d 431 (2008) (“‘Waiver’ is an intentional and voluntary relinquishment of a known right . . .”). This is even more evident from Sastry’s attestation that plaintiff had the right to file a petition to set aside the Indian divorce order within 30 days, but he “was not interested to file a set aside petition.” Thus, plaintiff not only waived his right to appear before the Indian family court, but he waived his right to appeal the divorce order.

Taking the evidence in the light most favorable to plaintiff, there was no genuine issue of material fact that he received due process of law in the Indian divorce proceedings. Further, plaintiff’s evidence also established that the Indian divorce order was entitled to comity.

Comity is the recognition of a judicial or legislative act of another nation that permits foreign judgments to be recognized in this Country. . . . In *Grove* [*v Grove*, 2 Mich App 25, 33; 138 NW2d 527 (1965)], this Court indicated that the factors to be considered in determining whether a foreign judgment should be accorded comity were “whether or not the basic rudiments of due process were followed, whether the parties were present in court, [and] whether a hearing on the merits was held.” [*Dart v Dart*, 224 Mich App 146, 154-155; 568 NW2d 353 (1997).]

Having already established that the “basic rudiments of due process were followed,” the only issues remaining are whether the parties were present in court and whether a hearing on the merits was held.

Sastry’s affidavit established that defendant was present in court and Sastry was present on plaintiff’s behalf, although he could not make arguments because plaintiff was not present. Again, however, plaintiff had the opportunity to be present and expressly waived that right, as well as his right to appeal the divorce judgment. Notably, *Dart* does not require that both parties be present for the judgment to be entitled to comity. Rather, it requires that an appellate court consider “whether the parties were present in court.” *Id.* at 155. This distinction is important because if the law required the presence of both parties before a judgment was entitled to comity, parties could deliberately sabotage foreign proceedings simply by not appearing, thereby preventing the judgment from ever receiving comity here. However, considering whether the parties were present allows the court to look at the circumstances of why a party was not present. In this case, plaintiff’s express waiver of both his right to appear and his right to appeal the divorce judgment precludes any argument that his nonpresence prevents Michigan courts from granting the judgment comity.

Finally, Sastry’s affidavit established that a hearing on the merits was held. It noted multiple times that the judgment of divorce was rendered based on defendant’s presence and her affidavit evidence taken in open court. Although Sastry’s affidavit notes that the order itself does not address the merits of the case, comity does not require that the order address the merits; only that a hearing on the merits be held. Where the family court in India held a hearing at which both sides were given the opportunity to present evidence, at which defendant was present and presented evidence in open court, and the court made its ruling based upon the evidence presented by defendant, it is clear that a hearing on the merits occurred. Accordingly, plaintiff’s

affidavit evidence established that the Indian divorce order was entitled to comity. See *id.* at 154-155.

Finally, additional discovery on issues related to custody would have been irrelevant to the issue of whether the trial court had jurisdiction. Thus, any outstanding factual questions and necessary discovery on those matters did not prevent summary disposition on the basis of a lack of jurisdiction.

In sum, we hold that plaintiff received a hearing on the issue of jurisdiction. At that hearing, taking the evidence in the light most favorable to plaintiff, his own affidavit evidence established that he received due process in the Indian divorce proceedings and that the order was entitled to comity. Accordingly, the trial court was not required to hold an evidentiary hearing, and it did not err in granting summary disposition on the basis of lack of subject matter jurisdiction because the evidence conclusively established that the parties were already divorced.

Plaintiff next argues that the trial court erred in granting summary disposition without considering the statutory mandates of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101, *et seq.*, and in concluding that it lacked jurisdiction to consider the custody portion of the case. We review *de novo* whether a court has subject matter jurisdiction as a question of law. *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands*, 265 Mich App 285, 290; 698 NW2d 879 (2005).

Jurisdiction over divorce cases is strictly statutory, being conferred on the circuit courts by MCL 552.6. *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004). “In actions governed by statute, a party must have standing bestowed by statute.” *Id.* at 332. MCL 552.6 provides, in relevant part:

(1) A complaint for divorce may be filed in the circuit court upon the allegation that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. In the complaint the plaintiff shall make no other explanation of the grounds for divorce than by the use of the statutory language.

* * *

(3) The court shall enter a judgment dissolving the bonds of matrimony if evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

The circuit court only has subject matter jurisdiction over a divorce if there is a marriage to dissolve. *Ryan*, 260 Mich App at 332. Where the parties are already divorced, no judgment can be entered. Thus, the complaint for divorce here was moot, and “a court hearing a case in which mootness has become apparent would lack the power to hear the suit.” *City of Novi v Robert Adell Children’s Funded Trust*, 473 Mich 242, 255 n 12; 701 NW2d 144 (2005).

The mootness of the divorce action also divested the trial court of jurisdiction over the ancillary issue of child custody. The trial court had jurisdiction to decide custody in the context of the divorce matter pursuant to MCL 552.15(1), which provides in relevant part:

After the filing of a complaint in an action . . . for a divorce . . . on the motion of either party . . . the court may enter orders concerning the care, custody, and support of the minor children of the parties during the pendency of the action as prescribed in section 5 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605, and as the court considers proper and necessary. . . .

But, without jurisdiction over the divorce, the trial court was also divested of jurisdiction to decide the ancillary matter of child custody within the confines of the divorce case. Moreover, “[w]hen there is a lack of subject-matter jurisdiction, regardless of what formalities the trial court may have taken, its actions are void.” *Ryan*, 260 Mich App at 332. Thus, because the parties were already divorced, the trial court lacked subject matter jurisdiction over a divorce action and any other collateral matters which were statutorily granted to the trial court in the context of a divorce action, including custody.

Plaintiff contends that the trial court retained jurisdiction over custody and support issues based on the doctrine of divisible divorce. The United States Supreme Court established the doctrine of divisible divorce in *Estin v Estin*, 334 US 541; 68 S Ct 1213; 92 L Ed 1561 (1948). The premise behind the doctrine is that although foreign judgments must be given “full faith and credit as the continuance of the marriage relationship, it does not necessarily affect other incidentals of marriage such as proper settlement or support payments.” *Owen v Owen*, 389 Mich 117, 121; 205 NW2d 181 (1973). Under *Estin*, the law and policy of the home state decides “whether the foreign divorce judgment will affect those aspects of the marriage over which the home state retains control.” *Id.* Michigan determined that its policy was to protect the property rights of its citizens and concluded that ex parte divorce decisions would not be given full faith and credit with respect to those matters. *Id.* at 122, citing *Malcom v Malcom*, 345 Mich 720; 76 NW2d 831 (1956).

However, none of the cases cited by plaintiff hold that the doctrine grants jurisdiction over a divorce action where the parties are already divorced. Rather, the cases involve petitions seeking resolution of those issues not determined by the divorce already obtained. *Estin*, 334 US at 542-543 (action to collect alimony arrears); *Owen*, 389 Mich at 119 (petition to amend judgment for separate maintenance); *Malcom*, 345 Mich at 722-723 (petitions for modification of support and custody provisions of a separate maintenance decree); *Cantor v Cantor*, 87 Mich App 485, 487-488; 274 NW2d 825 (1978) (petition for enforcement of property settlement and alimony provisions); *Gray v Gray*, 32 Mich App 466, 469-470; 189 NW2d 145 (1971) (petition to amend separate maintenance and increase alimony); *Reinink v Reinink*, 24 Mich App 202, 203; 108 NW2d 57 (1970) (petition for separate maintenance). Thus, had plaintiff filed a separate action for custody and support, the trial court may¹ have had jurisdiction to consider

¹ We use the term “may” because there is an outstanding factual dispute concerning whether the family court in India had, in fact, already addressed issues of custody and support.

those issues. However, plaintiff has failed to establish that the doctrine of divisible divorce vested the trial court with jurisdiction over a divorce action where the parties were already divorced.

Plaintiff next contends that the trial court erred in taking judicial notice of certain Indian custody laws. Generally, we would review the trial court's decision to take judicial notice for an abuse of discretion. *Freed v Salas*, 286 Mich App 300, 341; 780 NW2d 844 (2009). However, it is unnecessary to do so in this case because the trial court did not make any rulings on the basis of Indian custody law. Moreover, even if we were to conclude that the trial court's actions amounted to an abuse of discretion, plaintiff has failed to explain how he was prejudiced by this error, rendering it harmless. MCR 2.613(A).

Finally, plaintiff argues that the trial court erred by denying his motion to amend his petition.² Appellate review of a trial court's denial of leave to amend pleadings is for an abuse of discretion. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). An abuse of discretion occurred if the denial fell outside the range of reasonable and principles outcomes. *Id.*

As an initial matter, plaintiff's assertion that the trial court must be deemed to have decided this issue under (C)(10) because it considered documents outside of the pleadings is meritless. MCR 2.116(G)(5) and (6) also require a trial court to consider all documents and evidence presented by the party when summary disposition is considered under (C)(4). Because summary disposition was not granted under (C)(10), MCR 2.116(I)(5) is inapplicable, and the trial court was only bound by MCR 2.118(A)(2), which provides that "[l]eave shall be freely given when justice so requires."

However, leave to amend should be denied when granting leave to amend would be futile or cause undue prejudice to the defendant. *Wormsbacher v Philip R Seavert Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009). Here, permitting plaintiff to amend a divorce petition when the parties are already divorced would be futile. The trial court simply has no jurisdiction over a divorce action or any ancillary issues at this point. Indeed, plaintiff's original complaint requested that relief be granted "[d]uring the pendency of this divorce action" and that, upon final hearing, the trial court grant a "Judgment of Divorce." With the parties already divorced, there is simply no amendment that would not be futile.

What plaintiff really sought was not to amend his petition, but rather to convert his divorce petition into an independent custody petition. Not only is this arguably prejudicial to defendant, but it is also problematic for the lower courts. As the trial court noted, the case numbering, docketing, and handling of divorce cases is different from child custody proceedings. Considering all of the relevant circumstances, we conclude that the trial court's decision not to

² Although plaintiff's issue statement also includes an argument that the trial court erred by denying his request for a declaratory judgment, plaintiff has abandoned it by failing to provide any reference, argument, or legal citation. *Peterson Novelties v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). In any event, we find no error because, without subject matter jurisdiction, the trial court lacked the authority to make a ruling on matters pertaining to custody.

permit the amendment fell within the range of reasonable and principled outcomes. *In re Kostin Estate*, 278 Mich App at 51.

Affirmed. Defendant may tax costs. MCR 7.219(A).

/s/ Kurtis T. Wilder

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly