UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2601

September Term, 2014

SUSAN CARRINGTON

v.

JOHN McNELIS

Woodward,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 11, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A court may modify a child custody order if it has jurisdiction over the case and there has been a material change in circumstances. Susan Carrington, appellant, believes the Circuit Court for Montgomery County has jurisdiction over her custody dispute with her ex-husband, John McNelis, appellee, and that the circuit court erred by not modifying custody. Carrington's allegations stem from a long-standing custody dispute with McNelis, during the course of which he moved to New York with the children. The circuit court dismissed Carrington's motion to modify custody because it re-affirmed that Maryland no longer has jurisdiction over the custody case. Finding no error, we affirm.

BACKGROUND

McNelis and Carrington are former spouses who have two children together. The parties obtained their divorce in Maryland and began their long custody battle in Montgomery County. In 2009, the circuit court granted McNelis permission to move to New York with the children. A year later, McNelis filed a motion in Montgomery County to transfer venue of the custody proceedings to New York. Following a hearing, Judge Steven G. Salant entered an order ("Salant Order") staying the Maryland proceedings and finding that New York is a more appropriate forum. The Salant Order stated:

> ORDERED, that the [S]tate of Maryland is an inconvenient forum under the circumstances; and it is further
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> ORDERED, that the [S]tate of New York is a more appropriate forum for this matter; and it is further
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> ORDERED, that the [S]tate of Maryland declines to exercise its jurisdiction in this matter; and it is further
>
> ORDERED, that all pending proceedings as to custody and visitation issues shall be stayed upon the condition that a child

> custody proceeding be promptly commenced in the [S]tate of New York... .

The Salant Order gave either party sixty days to commence child custody proceedings in New York. McNelis later entered a line stating that a motion to modify custody was already pending in New York. Carrington did not seek to revise or appeal the Salant Order.[1]

Almost four years after the Salant Order was entered, in July 2014, Carrington filed a petition to modify custody in Maryland. In that petition, she alleged that Maryland still had continuing and exclusive jurisdiction over the custody case. McNelis filed a motion to dismiss Carrington's petition arguing that Maryland no longer had jurisdiction over the custody case.

Following a hearing, Carrington's petition was dismissed by Judge Sharon V. Burrell ("Burrell Order") on the grounds that Maryland courts had surrendered jurisdiction over the custody case. Judge Burrell found that the Salant Order stayed Maryland proceedings on the condition that a child custody proceeding be promptly commenced in New York and found that New York proceedings had been commenced. As a result, Judge Burrell dismissed Carrington's petition. After an unsuccessful motion for reconsideration, Carrington noted this appeal.

[1] After the Salant Order was entered, which stayed proceedings in Maryland so that New York could assume jurisdiction, Carrington had 10 days to file a motion to alter or amend. Md. Rule 2-534. Carrington had 30 days to note an appeal. Md. Rule 8-202. Carrington did not do either and, as a result, has waived the opportunity to challenge the Salant Order.

DISCUSSION

Carrington presents two questions for our review. *First*, Carrington argues that the circuit court improperly converted McNelis's motion to dismiss into a motion for summary judgment. *Second*, Carrington argues that the circuit court had jurisdiction over the custody case and, therefore, erred by dismissing her petition. Carrington makes her argument in several ways, but each comes back to the underlying premise that Maryland has jurisdiction over the custody case and should act on that jurisdiction. We disagree with Carrington on both points. As a result, we hold that the circuit court properly granted McNelis's motion to dismiss.

1. Motion to Dismiss

Carrington argues that the circuit court impermissibly granted summary judgment by converting McNelis's motion to dismiss into a motion for summary judgment. Carrington argues that the circuit court considered matters outside of the pleadings and, therefore, pursuant to Maryland Rule 2-322(c), automatically converted McNelis's motion to dismiss into a motion for summary judgment. McNelis responds that Carrington misunderstands the process and that the circuit court did not grant summary judgment. We conclude that because McNelis's motion was a motion to dismiss for lack of jurisdiction over the subject matter, it did not convert into a motion for summary judgment.

The Maryland Rules provide for both mandatory and permissive defenses, all of which may be raised in a preliminary motion to dismiss and decided by the court in a hearing on the motion to dismiss. Md. Rule 2-322(a)-(b). All of the Rule 2-322(a) and (b) grounds, except (b)(2) raising the failure to state a claim upon which relief can be granted,

"raise questions of law for the court to decide… . If determinations of fact become necessary in deciding the motion, the court may consider affidavits or, in connection with any hearing, take testimony." Paul V. Niemeyer, Maryland Rules Commentary, Commentary to Rule 2-322 at 267 (LexisNexis, 4th Ed.) (explaining that, "[w]ith the exception of motions under subsection (b)(2) raising the failure to state a claim upon which relief can be granted, motions under subsections (a) and (b) raise matters that are collateral to the merits."). When considering a motion to dismiss for failure to state a claim, however, if the circuit court contemplates "matters outside the pleadings," the motion to dismiss is automatically converted into a motion for summary judgment. Md. Rule 2-322(c). This automatic conversion only occurs, however, when the circuit court is considering a motion to dismiss for failure to state a claim upon which relief can be granted, not with regard to any of the other mandatory or permissive defenses. *Beyond Systems Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 12 (2005) (contrasting the effects of the circuit court's consideration of affidavits and other evidence on a motion to dismiss for lack of personal jurisdiction with a motion to dismiss for failure to state a claim).

Here, in response to Carrington's petition to modify custody, McNelis filed a motion to dismiss. Although woefully short of citation, we interpret his motion as filed pursuant to Maryland Rule 2-322(b)(1), claiming a lack of jurisdiction over the subject matter. In such a circumstance, the circuit court could and, in fact, did properly consider affidavits, testimony, and other matters outside of the original pleadings without converting the motion to dismiss into a motion for summary judgment. Therefore, we reject Carrington's first claim of error.

2. Jurisdiction

More centrally, Carrington argues that Maryland has jurisdiction over the custody case because the New York proceedings, in her view, are not actually custody proceedings. Thus, Carrington argues, the conditions of the Salant Order were never satisfied and Maryland retained exclusive and continuing jurisdiction over the custody case. McNelis responds that the Salant Order properly transferred jurisdiction to New York and that the conditions of the Salant Order have been satisfied because there are ongoing custody proceedings in New York. Because jurisdiction was transferred to New York, McNelis concludes, Maryland cannot re-acquire jurisdiction until circumstances change. We conclude that Maryland does not have jurisdiction over this custody case because the conditions of the Salant Order were satisfied. The circuit court's grant of the motion to dismiss, therefore, was correct.

Before a circuit court may proceed with a custody case or modification of a custody case, it must have jurisdiction. When the custody dispute involves parents and children in different states, the determination of jurisdiction is essential. Two states cannot exercise jurisdiction over the same custody case at the same time. FL § 9.5-201(a)(2). Interstate family law disputes are governed by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") which has been adopted in all 50 states and the District of Columbia. *Britton v. Meier*, 148 Md. App. 419, 426 (2002).

Under the UCCJEA, as adopted here, Maryland has jurisdiction if it is the home state at the start of custody proceedings or if other states do not have or have declined to

exercise jurisdiction. FL § 9.5-201(a)(1)-(4). Once Maryland has acquired jurisdiction, Maryland continues to have jurisdiction over a custody case until either:

> (1) a court of this State determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
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> (2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

FL § 9.5-202(a). Thus, Maryland has continuing jurisdiction over a custody case that begins in Maryland, but, if the child and a parent move from away from Maryland, Maryland may cede that jurisdiction to another state. FL § 9.5-202.

Here, Maryland was the home state at the beginning of the custody case and exercised jurisdiction over the custody case until McNelis requested the case be transferred. Because McNelis and both children moved to New York, the Salant Order, in accordance with FL § 9.5-202, transferred jurisdiction from Maryland to New York on the condition that custody proceedings be initiated in New York.

The condition of the Salant Order was satisfied when Carrington filed a petition to modify custody in New York. McNelis also filed a petition to modify custody in New York. Both of those documents were included with McNelis's motion to dismiss along with other documents evidencing the ongoing custody case in New York. Those documents include:

- Carrington's Petition for Modification in the New York Family Court, Rockland County, which includes a copy of the Maryland Custody order. Filed 10/22/10;

- McNelis's Petition for Modification in the New York Family Court, Rockland County. Filed 11/4/10;
- Transcripts from the March 14, 2011 hearing in New York discussing both petitions and during which Carrington consents to entering a custody order giving McNelis full custody;
- New York Family Court order suspending Carrington's visitation. Entered 5/11/11.

These documents provide evidence that a custody case was initiated and is ongoing in New York. Not only did both parties file petitions to modify custody in New York, at the joint hearing on those petitions Carrington consented, on the record, to the New York court entering an order granting McNelis full custody and terminating Carrington's visitation rights. Thus, the circuit court had sufficient evidence to support its conclusion that the Salant Order was satisfied because a New York court is currently overseeing the custody dispute.[2] *See Britton*, 148 Md. App. at 425 (stating that "the proper standard for reviewing

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[2] Carrington argues that, although the circuit court held a hearing and heard argument on the motion to dismiss, the circuit court should have held an additional evidentiary hearing on her claim that New York has failed to follow the UCCJEA. Carrington argues that New York is violating the UCCJEA because it never registered the Maryland custody order. From that, Carrington argues that the circuit court's failure to provide her with an evidentiary hearing was a denial of her due process. We conclude that the circuit court has afforded Carrington the due process to which she is entitled.

"At the core of the procedural due process right is the guarantee of an opportunity to be heard." *Golden Sands Club Condo., Inc. v. Waller*, 313 Md. 484, 487 (1988). "Though the opportunity to be heard is commonly considered a procedural right, its denial *vel non* must be determined by the substance of things, and not by mere form." *Wagner v. Wagner*, 109 Md. App. 1, 26 (1996) (holding that even if the litigant was not afforded an oral hearing, "it does not necessarily mean that she was denied due process."). We must, therefore, determine whether Carrington was "afforded the due process warranted by the interests at issue." *Wagner*, 109 Md. App. at 26.

(continued…)

the grant of a motion to dismiss is whether the trial court was legally correct.”).[3] We conclude that the circuit court’s dismissal of Carrington’s petition was correct.

Carrington’s petition to modify custody was met with a motion to dismiss. The trial court had before it, as noted above, sufficient evidence on the motion to dismiss to determine that the conditions of the Salant Order had been satisfied. Carrington’s arguments that New York courts are not following the UCCJEA or are being unfair to her can only be raised in New York. Maryland does not have the authority to review the New York custody decisions. Because the circuit court, after holding a hearing and listening to arguments from both sides, correctly determined that it did not have jurisdiction, due process did not require an evidentiary hearing.

[3] Carrington’s arguments focus on whether jurisdiction was or was not validly transferred to New York, McNelis counters Carrington’s arguments by explaining why jurisdiction could not be re-acquired by Maryland. Although McNelis’s counter-argument misses the focus of Carrington’s arguments, we do agree with his contention that Maryland could not currently re-acquire jurisdiction over the custody case from New York. We will address his contentions, pursuant to Maryland Rule 8-131, because these issues may arise again. Md. Rule 8-131 (stating that this Court may decide an issue “to avoid the expense and delay of another appeal.”).

A Maryland court may only modify an out-of-state custody determination only if a Maryland court “has jurisdiction to make an initial custody determination,” and either:

> (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction … or that a court of this state would be a more convenient forum… or
>
> (2) a court of this State or a court of the other state determines that the child, the child’s parents, and any other person acting as a parent do not presently reside in the other state.

FL § 9.5-203. Thus, for a Maryland court to have jurisdiction to modify an out-of-state custody decision Maryland (A) has to have jurisdiction to make an initial custody determination and either, (B) the other state must determine that it no longer has jurisdiction or that Maryland would be a more convenient forum, or (C) the children and parents no longer reside in the other state. FL § 9.5-203; *see also Toland v. Futagi*, 425 Md. 365, 387 (2012) (stating that the UCCJEA does not “not authorize a Maryland circuit court to decline jurisdiction” on another State’s behalf). (continued…)

In conclusion, although a parent may file a motion for modification of custody at any time when there has been a material change of circumstances, the circuit court only has power to act on that motion if it has jurisdiction. Here, the circuit court properly concluded that it did not have jurisdiction because the conditions of the Salant Order had been satisfied and jurisdiction validly transferred to New York. The circuit court, as a result, properly dismissed Carrington's petition to modify custody.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Here, for Maryland to regain jurisdiction over the custody case, Carrington would have to demonstrate that Maryland meets the FL § 9.5-203 test. First, there is no dispute that Maryland had jurisdiction to make the initial custody determination and, in fact, did so before McNelis moved to New York and the Salant Order transferred jurisdiction to New York. There was no evidence presented, however, that a New York court has made a finding that it no longer has jurisdiction or that Maryland is a more convenient forum. FL § 9.5-203(1). Neither is Carrington able to show that the children or McNelis no longer reside in New York. FL § 9.5-203(2). Therefore, because the conditions for modification of out-of-state custody determination pursuant to FL § 9.5-203 are not met, the circuit court could not currently re-acquire jurisdiction. Of course, we make no prediction about future occurrences.