IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

SUSAN POWELL,

Plaintiff-Appellee,

Vs.

Henry Chancery No. 15687
C.A. No. 02A01-9501-CH-00006

WILLIAM D. POWELL,

Defendant-Appellant.

FROM THE HENRY COUNTY CHANCERY COURT

THE HONORABLE HANSEL McCADAMS, JUDGE
SITTING BY INTERCHANGE

Steven L. West of McKenzie
For Appellee

William D. Powell, Pro Se

VACATED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This appeal involves a dispute concerning modification of a child custody and support decree. The facts are as follows:

In 1978, plaintiff-appellee, Susan Powell, and defendant-appellant, William D. Powell,

were married in Columbia, Missouri. In 1983, Mr. and Mrs. Powell moved to Los Alamos, New Mexico, where they resided together with their three children until 1993. In May, 1993, the parties were divorced in the Los Alamos County First Judicial District Court. The final decree, entered on May 10, 1992, incorporated a Marital Settlement Agreement and Parenting Plan, entered into by the parties prior to the divorce. The Marital Settlement Agreement incorporated into the divorce decree provided that the parties would have joint custody of the children, and Ms. Powell would have primary physical custody of the children. The Marital Settlement Agreement also provided Mr. Powell liberal visitation and required him to pay child support in the amount of $1,200.00 per month to Ms. Powell. The Agreement specifically required the parties to submit any future disputes regarding child custody or child support to mediation prior to commencing any legal action. On October 15, 1993, the Los Alamos County First Judicial District Court entered a "Stipulated Order Modifying Parenting Plan." The order states that "[t]he parties agreed that the Parenting Plan should be modified due to a substantial change in circumstances resulting from Petitioner's intended move to Tennessee and other matters which require a change in the parenting arrangements and in the payment of support." The modification order altered Mr. Powell's visitation schedule with his children and lowered the amount of child support from $1,200.00 per month to $781.00 per month.

In November of 1993, Ms. Powell moved with the parties' three minor children from New Mexico to Henry County, Tennessee. In December, 1993, Mr. Powell moved to Calloway County, Kentucky in order to be near his children. On May 24, 1994, Ms. Powell filed a "Complaint to Enforce Judgment" against Mr. Powell in the Chancery Court of Henry County, Tennessee, seeking to enforce the provisions of the modified New Mexico divorce decree. The complaint also seeks child support in accordance with the guidelines adopted by the State of Tennessee. Mr. Powell's answer admits the allegations of the complaint and agrees to enforcement of the New Mexico decree.

On June 14, 1994, Ms. Powell filed a motion requesting that the provisions of the New Mexico divorce decree awarding the parties joint legal custody of the three minor children be modified to award Ms. Powell sole legal custody of the children. On September 13, 1994, the chancery court entered an order modifying the child support provisions of the modified New

Mexico divorce decree and awarded Ms. Powell the sum of $800.00 per month in child support. On October 19, 1994, the chancery court entered an order establishing the New Mexico decree as a foreign judgment, in full force and effect. On November 4, 1994, the chancery court entered an order modifying the New Mexico divorce decree by awarding Ms. Powell sole custody of the minor children and altering Mr. Powell's visitation privileges, such that he could only have visitation with one child at a time.[1] On November 4, 1994, the chancellor also found Mr. Powell in arrears in child support in the amount of $3,160.00, and he increased the child support payments to $900.00 per month. The court further found that Mr. Powell was not entitled to receive a credit for a lump sum social security payment made by the Social Security Administration to Ms. Powell on June 16, 1994, in the amount of $2,412.00.

Mr. Powell has appealed the November 4, 1994, order and presents three issues for our review. Those issues, as stated in his brief, are:

> 1. Whether the Tennessee Chancery Court lacked subject matter jurisdiction to modify the custody and visitation privileges of a prior New Mexico divorce decree.
>
> 2. Whether the Tennessee Chancery Court erred by modifying the child support provisions of the prior New Mexico divorce decree without plaintiff showing a substantial change of circumstances.
>
> 3. Whether the Tennessee Chancery Court erred in failing to allow defendant credit toward his child support obligation for payments made by the social security administration to plaintiff for the benefit of the parties' minor children on account of defendant's disability.

Appellant's first issue for review questions the subject matter jurisdiction of the chancery court to modify the New Mexico divorce decree.

Ms. Powell's original petition in the Henry County Chancery Court seeks to file and enforce the New Mexico judgment pursuant to T.C.A. § 26-6-101 *et seq.* In his answer, Mr. Powell admits the allegations of the complaint and states: "Defendant agrees to recognition and enforcement of foreign decree." Subsequently, Ms. Powell filed a motion to change the custody and visitation provisions of the New Mexico decree. Mr. Powell's first assertion of lack of

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[1]The chancellor apparently modified the visitation privileges due to a traumatic brain injury which Mr. Powell suffered in 1988.

jurisdiction of the Henry County Chancery Court is that Ms. Powell's motion to modify the New Mexico decree did not comply with the provisions of T.C.A. § 36-6-210 (1991) which provides:

> **Information in first pleading or affidavit --Continuing duty to inform court**. -- (a) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five (5) years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit, every party shall further declare under oath whether:
>
> > (1) The party has participated (as a party, witness, or in any other capacity) in any other litigation concerning the custody of the same child in this or any other state;
> >
> > (2) The party has information of any custody proceeding concerning the child
> >
> > pending in a court of this or any other state;
> >
> > (3) The party knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.
>
> (b) If the declaration as to any of the above items is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.
>
> (c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

Although Ms. Powell's motion does not supply the information required by T.C.A. § 36-6-210, we do not deem the requirements of the statute as jurisdictional. Since the requirements of the statute are not jurisdictional, Mr. Powell is precluded from presenting this argument for the first time on appeal. ***Lawrence v. Stanford***, 655 S.W.2d 927, 929 (Tenn. 1983); ***Seay v. County of Shelby***, 672 S.W.2d 404, 409 (Tenn. App. 1984). Therefore, we will not address appellant's argument in this regard.

The appellant next argues that under T.C.A. § 36-6-215 (a)(1), the provisions of the New Mexico decree cannot be modified by the chancery court, because there was no finding by the chancery court that the New Mexico court did not have jurisdiction to modify the prior decree,

and because the New Mexico court did not decline to assume jurisdiction to modify the decree.

T.C.A. § 36-6-215 (1991) provides:

> **Modification of foreign decree. --** (a) If a court of another state has made a custody decree recognizable and enforceable under § 36-6-213, a court of this state shall not modify that decree unless:
>
> (1) It appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this part or has declined to assume jurisdiction to modify the decree; and
>
> (2) The court of this state has jurisdiction;
>
> (b) If a court of this state is authorized under subsection (a) and § 36-6-209 to modify a custody decree of another state, it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with § 36-6-223.

Ms. Powell and the minor children moved to Henry County in November of 1993, and the "motion" to modify the custody provisions of the New Mexico decree was filed on June 14, 1994. The Chancery Court of Henry County had jurisdiction in this case by virtue of being the home state of the minor children at issue. T.C.A. § 36-6-202 (5) (1991) provides:

> "Home state" means the state in which the child immediately preceding the time involved lived with such child's parents, a parent or a person acting as a parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six (6) months or other period . . . .

T.C.A. § 36-6-203 provides, as pertinent to the issue before us:

> **Jurisdiction to make custody determination**. - (a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) This state:
>
> (A) Is the home state of the child at the time of commencement of the proceeding; or
>
> (B) Had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person

acting as parent continues to live in this state . . . .

Mr. Powell moved from New Mexico to Kentucky in December, 1993. Since New Mexico is no longer the home state by definition, and neither the child nor either parent is living in New Mexico, the New Mexico court does not have jurisdiction under Tennessee's version of the UCCJA.[2]

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[2]Also, it would appear that under New Mexico's version of the UCCJA, NMSA § 40-10-8, the New Mexico court would decline to exercise jurisdiction. The statute provides in pertinent part:

> **Inconvenient Forum**
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> A. A district court which has jurisdiction under the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] to make an initial decree or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is more of an appropriate forum.
>
> B. A finding of inconvenient forum may be made upon a district court's own motion or upon motion of a party or of a guardian ad litem or other representative of the child.
>
> C. In order to determine whether it is an inconvenient forum, the court shall consider whether it is in the interest of the child that another state assume jurisdiction, and for this purpose may take into account the following factors, among others; whether:
>
> (1) another state is or recently was the child's home state;
>
> (2) another state has a closer connection with the child and his family or with the child and one or more of the contestants;
>
> (3) substantial evidence concerning the child's present or future care, protection, training and personal relationships is more readily available in another state;
>
> (4) the parties have agreed on another forum which is no less appropriate;
>
> (5) the parties have stipulated that New Mexico shall retain jurisdiction of custody matters;
>
> (6) the out of state contestant has complied with any previous custody and visitation orders of a New Mexico court;
>
> (7) the exercise of jurisdiction by a court of New

Mr. Powell next argues that the chancery court should have declined to exercise jurisdiction under T.C.A. § 36-6-209 (1991) which provides that if the petitioner seeking modification has violated the provision of a custody decree of another state, the Tennessee court may decline to exercise jurisdiction "if this is just and proper under the circumstances." Mr. Powell points out that the New Mexico divorce decree as modified provides:

> F. Future Disputes. In the event that future disputes arise under this Agreement concerning the parenting provisions under this Agreement, the parties will try to first resolve it between themselves. The parties further agree that if they cannot reach an agreement just between themselves, as a condition precedent to filing any court action, the mediation procedures stated below shall be followed:
>
> The parties will agree upon a mediator within fifteen (15) days of the first announcement by one of them that they cannot reach an agreement alone. The dispute will be promptly submitted to the jointly chosen mediator with the costs of mediation born equally between the parties. The parties each agree that all communications made with and information disclosed to the mediator are confidential and in the nature of settlement discussions that will be inadmissible in court. Each party also agrees not to call the mediator as a witness in any litigation related to the subject of mediation. Mediation will not last longer than thirty (30) days from the date the mediator is chosen. In the event an agreement is reached by mediation, a formal agreement will be drawn up by the parties or by an attorney who has not mediated the dispute, the parties will sign it and it shall be filed as a court order, if appropriate. In the event the parties cannot reach an agreement within the thirty (30) day period, then any party may take appropriate court action.

The above-quoted provision is a part of the decree of the New Mexico court and is entitled to full faith and credit in the courts of this state. U.S. Const. art. IV, § 1; T.C.A. § 26-6-103 (1980); T.C.A. § 26-6-104 (1980); T.C.A. § 36-6-214 (1991).[3]

> Mexico would contravene any of the purposes stated in Section 40-10-2 NMSA 1978.

[3]Article IV, Section I of the United States Constitution provides:

> **Full Faith and credit to records and judicial proceedings of states**. --Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

T.C.A. § 26-6-103, 104 (1980) provide:

While we do not agree with Mr. Powell that the Tennessee court should decline to exercise jurisdiction, we do recognize that the provisions of the New Mexico decree in this regard should be enforced.

Mr. Powell has also presented an issue concerning the modification of the New Mexico decree concerning the child support obligation. This, likewise, is subject to the mediation provision in the New Mexico decree.

Accordingly, the order of the trial court modifying the New Mexico decree as to child custody, visitation and child support is vacated. The case is remanded to the trial court for enforcement of the mediation provisions of the New Mexico decree concerning modification of the decree as it pertains to child custody, visitation, and support. Costs of this appeal are assessed against the appellee.

> **26-6-103. "Foreign judgment" defined.** - As used in this chapter, "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.
>
> **26-6-104. Effect and treatment of authenticated foreign judgment.** - (a) A copy of any foreign judgment authenticated in accordance with the acts of congress or the statutes of this state may be filed in the office of the clerk of any circuit or chancery court of this state.
>
> (b) The clerk shall treat the foreign judgment in the same manner as a judgment of a court of record of this state.
>
> (c) A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a court of record of this state and may be enforced or satisfied in like manner.

T.C.A. § 36-6-214 (1991) provides:

> **Recognition and enforcement of foreign decree.** -- The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this part or which was made under factual circumstances meeting the jurisdictional standards of the part, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this part.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE