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ANALYSIS

Law of the Case Cannot Override Lack of Subject Matter Jurisdiction

"When a court makes a legal determination in a case, that determination, if not appealed from, becomes the law of the case and controls when the question which led to it is again presented in that same case," write Thomas R. Newman and Elliott Scheinberg.

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Civil Appeals

By Thomas R. Newman and Elliott Scheinberg | September 09, 2024 at 12:00 PM



We begin by defining "law of the case" and "subject matter jurisdiction."

The law of the case doctrine "is a rule of comity and convenience which states that ordinarily a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case." *Abe v. New York University*, 139 AD3d 416 [1st Dept. 2016]. When a court makes a legal determination in a case, that determination, if not appealed from, becomes the law of the case and controls when the question which led to it is again presented in that same case. *Pinapati v. Pagadala*, 244 AD2d 676, 678 [3d Dept 1997].

The doctrine is "designed to limit re-litigation of issues" and "addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment." *People v. Evans*, 94 NY2d 499, 502 [2000]. "The doctrine is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power." *Id.* at 502. "This doctrine presents itself in two scenarios: (1) when a second court of the same hierarchical jurisdiction becomes involved in the same matter and (2) when a court, on remand, is presented with a ruling from a reviewing court. The doctrine, however, only applies when the prior ruling directly passed upon a question of law that is essential to the determination of the matter." *Gulf Coast Bank & Trust v. Virgil Resort Funding Group*, 201 AD3d 1086 [3d Dept 2022] (citations omitted).

The foregoing notwithstanding, in *Buechel v. Bain*, 97 NY2d 295, 303-04 [2001], the Court of Appeals stated that law of the case "is a flexible doctrine ... In the end, the fundamental inquiry is whether re-litigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings."

In *Thrasher v. United States Liab. Ins.*, 19 NY2d 159, 166-167 [1967], the Court of Appeals, "in discussing subject matter jurisdiction, drew a clear distinction between a court's competence to entertain an action and its power to render a judgment on the merits ... Absence of competence to entertain an action deprives the court of 'subject matter jurisdiction'; absence of power to reach the merits does not." 41 NY2d at 75. "A judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived," (*Editorial Photocolor Archives v. Granger Collection*, 61 NY2d 517, 523 [1984]) because it goes to the "competence" of the court. *Henry v. New Jersey Transit Corp.*, 39 NY3d 361, 367 [2023]. Absence of competence to entertain an action occurs, for example, when a court

is a statutory court, such as the Family Court (N.Y. Constitution art. VI, Section 13) and lacks subject matter jurisdiction to, for instance, enforce marital agreements which survive the judgment of divorce as independent contracts. *Carpenter v. Reiter*, 231 AD2d 629 [2d Dep't 1996].

Unlike law of the case, subject matter jurisdiction is rigidly immutable throughout the life of the order or the judgment and may never be waived; it may always be raised sua sponte by an appellate court even for the first time on appeal. *Royal Zenith v. Continental Ins.*, 63 NY2d 975, 977 [1984].

'Matter of Child A.' (2d Dept 2024)

We turn now to a recent Second Department decision, *Matter of Child A.*, 228 AD3d 858, 860 [2d Dept. 2024]. This case has been reviewed three times on Monroe Place. *Matter of Child A.* raises the question of whether law of the case can defeat a claim of lack of subject matter jurisdiction. We think not.

In June 2014, petitioners, parents of two children adopted in Russia, commenced proceedings to deny recognition of the adoption order or vacate it on the grounds of fraud and newly discovered evidence based on the children's severe behavioral and psychiatric problems, eventually leading to their placement in a psychiatric residential treatment facility, where they continued to reside. Both adoption agencies separately moved to dismiss the proceedings insofar as asserted against each of them on various grounds, including lack of subject matter jurisdiction. The Surrogate's Court denied the motions. Both agencies appealed.

The Second Department reversed (*In re Child A*, 145 AD3d 874, 876 [2d Dept 2016]):

“The Surrogate's Court, as a court of limited jurisdiction, may exercise only the powers conferred upon it by statute and those powers incidental, inherent or necessary to do justice in a particular case to which its jurisdiction extends.” Moreover, “ '[a]doption in this state is solely the creature ... of statute, [and] the adoption statute must be strictly construed'” (cites omitted).

The Appellate Division further held that pursuant to the plain language of the statutory scheme, Domestic Relations Law Sections 111–c, 114(3), the Surrogate's Court lacked authority to grant the relief sought by the adoptive parents.

'Matter of Child A. (Parent M)' (2018)

The Surrogate's Court approved a guardian ad litem (GAL) for the children. In November 2015, the Surrogate's Court awarded the GAL interim fees of \$100,000. The parents appealed and the Second Department reduced the award to \$53,000. *Matter of Child A. [Parent M]*, 164 AD3d 781 [2d Dept. 2018].

'Matter of Child A.' (2020)

In November 2020, the GAL moved for another fee award and, by order dated March 17, 2021, the Surrogate's Court directed the parents to pay the GAL another \$53,000, which order the parents appealed arguing, inter alia, “that the Surrogate's Court lacked subject matter jurisdiction to render an attorney's fee award.” 228 AD3d at 860.

The Second Department affirmed, without addressing petitioners' lack of subject matter jurisdiction argument. Instead, the court embarked on a discussion of the law of the case doctrine, stating: “An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court ... The doctrine of the law of the case operates to foreclose re-examination of the issue absent a showing of subsequent evidence or change of law The law of the case doctrine generally precludes a party from raising an argument on a subsequent appeal that 'w[as] raised or could have been raised' on a prior appeal.” 228 AD3d at 860 (citations omitted).

The court concluded that “[h]ere, the petitioners’ [parents’] arguments regarding the award of [another] interim attorney’s fee to the GAL either were or could have been raised on the prior appeal from the order dated Nov. 30, 2015, relating to an earlier interim attorney’s fee. Further, the petitioners point to no new evidence or intervening change in the law which would warrant re-examination of the issue of the GAL fee award. Under these circumstances, the decision and order of this court on that prior appeal precludes re-examination of these issues.” 228 AD3d at 860 (citations omitted).

While the children undeniably required representation to protect them, not a word was said about the parents’ argument regarding lack of subject matter jurisdiction. We have no idea as to the merit, if any, of their jurisdictional argument but believe the Second Department should have addressed it, even if only in a succinct rejection.

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