IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

FATEAMA M., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, J.W., *Appellees*.

No. 1 CA-JV 17-0079
FILED 10-26-2017

Appeal from the Superior Court in Apache County
No. S0100JD201600024
The Honorable C. Allan Perkins, Judge *Pro Tempore*

REMANDED WITH INSTRUCTIONS

COUNSEL

Hamblin Law Office, Eager
By Bryce M. Hamblin
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Dawn R. Williams
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Peter B. Swann and Judge Thomas C. Kleinschmidt[1] joined.

M c M U R D I E, Judge:

¶1 Fateama M. ("Mother") appeals the superior court's order adjudicating her child, J.W., dependent based on neglect due to Mother's mental illness.[2] Because the superior court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), we remand for further proceedings consistent with this decision.[3]

FACTS AND PROCEDURAL BACKGROUND

¶2 On June 25, 2015, the Department of Public Safety ("DPS") found Mother and J.W. stranded on Interstate 40 near the Petrified Forest National Monument. Mother's car broke down while she was driving from Texas to California where she resides. They were stranded for at least two days with limited food and water.

¶3 While assisting Mother, DPS officers observed Mother acting erratically. She was uncooperative with DPS and would not allow them to give her or J.W. food or water. Mother further refused to drink or allow J.W. to drink the water offered by a park ranger because she believed the water was poisoned. Mother also denied a DPS officer's request that she let J.W. out of the car so he could cool down.

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1 The Honorable Thomas C. Kleinschmidt, retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3, of the Arizona Constitution.

2 J.W.'s father is deceased.

3 The UCCJEA has been adopted in Arizona. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 25-1001 to -1067.

¶4 Because of Mothers irregular behavior, she was admitted to PineView Hospital for an involuntary mental health evaluation. The hospital released Mother three days later.[4] J.W. was taken into Department of Child Safety ("DCS") custody and DCS filed a dependency petition alleging Mother was neglecting J.W. due to mental illness.[5] A dependency hearing was held in September and October 2015 and the superior court found J.W. dependent as to Mother. Mother appealed the superior court order.

¶5 While Mother's appeal was pending in this court, Mother sought an order under Rule 59 that J.W. be returned to her custody. The superior court granted Mother's motion but denied her request to dismiss the dependency action. DCS petitioned for special action review in this court seeking to stay the return of J.W. to Mother until they could comply with the Interstate Compact on the Placement of Children ("ICPC"), or A.R.S. §§ 8-548 to -548.06. *DCS v. Hon. Perkins/Fateama M./J.W.*, 1 CA-SA 16-0029 (order accepting jurisdiction filed Mar. 2, 2016). We accepted jurisdiction and granted relief by "modifying the superior court's order to require J.W.'s return 'forthwith upon California's approval of the proposed placement pursuant to ICPC Article III(d),'" and "further directed [DCS] to continue to make every reasonable effort to facilitate and expedite ICPC approval."

¶6 In April 2016, DCS began an ICPC application and the Los Angeles County Department of Children and Family Services ("LADCFS") conducted a home study of Mother's residence. Mother's home was approved by LADCFS in May with "strongly suggested" services to be provided before J.W.'s placement with Mother. However, DCS did not return J.W. to California, and in August 2016 Mother filed a petition for

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[4] The psychiatrist who discharged Mother stated the following:

> As of today, [Mother] is discharged from PineView Hospital, with the intention of driving herself home to Long Beach, California, and of course, her 11 year old son should be back home with her.

[5] The dependency petition was filed in Apache County under case number JD2015-010. This Court issued a decision under that number in *Fateama M. v. DCS,* 1 CA-JV 16-0024, 2016 WL 5939730 (Ariz. App. Oct. 13, 2016) (mem. decision). This court takes judicial notice of the previous appellate records. *See MacRae v. MacRae*, 57 Ariz. 157, 158 (1941) (court may take judicial notice of its own records).

special action review in this court seeking to enforce our original order from the previous special action. *Fateama M. v. Hon. Perkins/DCS*, 1 CA-SA 16-0173 (order declining jurisdiction filed Aug. 10, 2016). This court declined to accept jurisdiction of the petition in a summary order.

¶7 This court then issued a memorandum decision regarding Mother's appeal, in which we vacated the superior court order finding J.W. dependent and remanded the case for dismissal of the petition. *Fateama M. v. DCS*, 2016 WL 5939730. This court found the superior court's dependency conclusion unsupported by substantial evidence because DCS failed to provide evidence that Mother's impaired mental condition continued to exist at the time of the dependency hearing. *See Fateama M.*, 2016 WL 5939730 at *3, ¶¶ 11–13.

¶8 After the decision was issued, but before the mandate from this court was filed, DCS issued a notice of temporary custody and filed an amended dependency petition on October 28, 2016.[6] DCS again alleged neglect due to mental illness in the amended petition and another hearing was held in January and February 2017. In March 2017, the superior court again found J.W. dependent. Mother timely appealed and we have jurisdiction pursuant to A.R.S. §§ 8-235(A), 12-120.21(A)(1), -2101(A)(1), and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

A. Reasonable Evidence Supports the Juvenile Court's Finding of Dependency.

¶9 A child is dependent when he "has no parent or guardian . . . willing to exercise or capable of exercising" proper and effective parental care. A.R.S. § 8-201(15)(a)(i). Mother argues the evidence

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[6] This court issued its decision finding insufficient evidence of a dependency on October 13, 2016. *Fateama M.*, 2016 WL 5939730. The mandate from this court did not issue, however, until November 17, 2016. At a review hearing on October 25, 2016, the superior court mistakenly informed the parties that this court's mandate had issued, and dismissed the original dependency case. At that hearing, DCS told the court that they had a temporary custody notice prepared and would immediately serve Mother to avoid returning the child to Mother's care. DCS subsequently filed an amended petition on October 28, 2016. The superior court treated this amended petition as a new case and assigned it a new cause number.

presented at the dependency hearing was insufficient to prove by a preponderance of the evidence that J.W. is dependent. We review the superior court's findings for an abuse of discretion and accept its findings of fact "unless no reasonable evidence supports" them. *Jesus M. v. ADES*, 203 Ariz. 278, 280, ¶ 4 (App. 2002). This court must determine whether the superior court's finding was based on "substantial evidence." *Denise R. v. ADES*, 221 Ariz. 92, 93–94, ¶ 4 (App. 2009).

¶10 After reviewing the evidence presented at the hearing, we conclude the superior court had substantial evidence to support its dependency finding. In the amended petition submitted by DCS, it again alleged J.W. was dependent due to neglect based on Mother's erratic behavior at the time of the removal in June 2015.[7] In addition, the second petition adds allegations that J.W. disclosed to both DCS and his counselors that his Mother had "presented as delusional" prior to the events of June 2015, and further alleged "family friends and relatives have confirmed those behaviors."[8] These additional allegations provided continuing circumstances of neglect at the time of the hearing, thereby alleviating this court's concerns from the previous appeal. *See Shella H. v. DCS*, 239 Ariz. 47, 50, ¶ 12 (App. 2016).

¶11 Unlike the previous record on appeal, several witnesses testified about Mother's mental condition outside of the June 2015 incident. Dr. Shane Hunt and Dr. Brian Merrill both testified regarding statements made by J.W. about his Mother's behavior, which included times where J.W. had to live in a car with Mother because she smelled strange things in the house, and times where J.W. went hungry because Mother believed

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[7] Rather than submit new reports to the court regarding progress in this case, DCS submitted the same reports from the previous hearing by crossing out the old case number and writing the new case number above it.

[8] Mother also argues DCS's amended petition should be barred under a theory of collateral estoppel. However, the application of *res judicata* to dependency adjudications is limited. *Bennigno R. v. ADES*, 233 Ariz. 345, 349, ¶ 16 (App. 2013). During a dependency proceeding, the issue being litigated is whether the child is dependent *at the time of the hearing*. *See Shella H. v. DCS*, 239 Ariz. 47, 50, ¶ 12 (App. 2016). This is because the circumstances surrounding such proceedings are "rarely, if ever, static." *Bennigno R.*, 233 Ariz. at 349, ¶ 16. Accordingly, the amended petition required a new hearing given the additional allegations.

certain food was poisoned. Both Hunt and Merrill also testified regarding the negative effects that behavior was having on J.W. Additionally, Susan Yarnell, a case aide who supervised visitations between Mother and J.W., testified that she believed J.W.'s conduct during visitations to be indicative of verbal and emotional neglect. This testimony was echoed by the supervising case worker, Christie Orona, who stated she believed the neglect was a recurring issue and not isolated to the events of June 2015. Accordingly, reasonable evidence supports the superior court's finding that J.W. was dependent regarding Mother on the ground of neglect at the time of the adjudication hearing. *See Jesus M.*, 203 Ariz. at 280, ¶ 4.

B. California, Not Arizona, is the Child's Home State Under A.R.S. § 25-1031.

¶12 Mother asserts that California, not Arizona, is J.W.'s home state under A.R.S. § 25-1031. Therefore, Mother argues the superior court lacked subject matter jurisdiction under the UCCJEA, and the dependency order must be reversed and dismissed. A claim for lack of subject matter jurisdiction can be raised at any time. *Kelly v. Kelly*, 24 Ariz. App. 582, 583 (App. 1975). Because the UCCJEA is a statutory scheme which establishes subject matter jurisdiction, we review the record *de novo*. *Gutierrez v. Fox*, 242 Ariz. 259, 264, ¶ 17 (App. 2017).

¶13 The UCCJEA is a uniform statutory scheme which has been adopted in all 50 states and the District of Columbia. *Angel B. v. Vanessa J.*, 234 Ariz. 69, 71–72, ¶ 7 (App. 2014). It is designed to "create consistency in interstate child custody jurisdiction enforcement proceedings." *Melgar v. Campo*, 215 Ariz. 605, 606, ¶ 7 (App. 2007).

¶14 Under A.R.S. § 25-1031, the "exclusive jurisdictional basis" for making an initial child custody determination is the child's "home state . . . on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding." A.R.S. § 25-1031(A), (B). "The drafters [of the UCCJEA] made it clear that the new act was to give priority to a finding of home state jurisdiction over any other jurisdictional provisions." *Welch-Doden v. Roberts*, 202 Ariz. 201, 208, ¶ 30 (App. 2002). Under § 25-1031(A), the superior court has home state jurisdiction to determine dependency in two ways.

¶15 First, under § 25-1031(A)(1), the superior court had home state jurisdiction if Arizona was "the home state of the child on the date of the *commencement of the proceeding*, or was the home state of the child within

six months before the *commencement of the proceeding*." A.R.S. § 25-1031(A)(1) (emphasis added). Section 25-1002(4)(a) defines a "child custody proceeding" as "a proceeding, including a proceeding for . . . dependency . . . in which legal custody, physical custody or visitation with respect to a child is an issue." Mother argues, and we agree, that under § 25-1031(A)(1) Arizona had to have been the home state at the time the original dependency petition was filed in June 2015. Arizona, however, was not the home state at that time.

¶16 DCS does not dispute that California was likely the home state of Mother and J.W. in June 2015. Instead, DCS claims Arizona was the home state at the time the current dependency was filed in October 2016 because J.W. had been living in Arizona since DCS took temporary custody of him in June 2015. However, this interpretation cannot be correct. If we were to read § 25-1031(A)(1) as applying to a consecutive, amended dependency petition, DCS could effectively create home state jurisdiction by taking temporary custody of a child, filing a dependency petition, dismissing the petition six months later, and then refiling an amended dependency petition. *See K.H. v. Dep't of Children & Family Servs.*, 846 So. 2d 544, 547 (Fla. Dist. Ct. App. 2003) ("[T]he manner in which the children were seized appears to have been calculated to create jurisdiction . . . and is problematic, to say the least."). This is especially true under the circumstances of this case, where the child has never left the custody of DCS between the reversal of the first dependency petition on appeal and the filing of the amended dependency petition.[9]

¶17 Second, under § 25-1031(A)(2), a court can establish home state jurisdiction if "[a] court of another state does not have jurisdiction under [§ 25-1031(A)(1)] or a court of the home state of the child has declined to exercise jurisdiction . . . ." DCS contends it was unclear at the time of the first dependency what the home state of Mother and J.W. was, and therefore, no other court had home state jurisdiction under § 25-1031(A)(1). We disagree. Mother's testimony during the first dependency hearing revealed she lived in California with J.W. and left for Texas and Oklahoma in mid-May 2015, before their car broke down in Arizona while returning

[9] DCS's second petition in this case is in fact an amended petition under Arizona Rule of Procedure for the Juvenile Court 48(E), considering the timing, parties, and similarity in allegations.

to California.[10] Furthermore, while DCS's answering brief in this appeal asserts "there is certainly no evidence that California—or any other state—was [J.W.]'s home state," DCS's answering brief filed in the first appeal included a statement of fact that Mother and J.W. had been traveling "to their home in California" when their car broke down. Because there is no evidence showing California has declined to exercise jurisdiction in this case at any point, jurisdiction under § 25-1031(A)(2) cannot be established either. Accordingly, Arizona does not have home state jurisdiction over this matter, and must rely on another basis to establish subject matter jurisdiction.

C. There is No Longer Emergency Jurisdiction Under A.R.S. § 25-1034.

¶18 It is apparent from the record that DCS and the superior court originally exercised jurisdiction based on the emergency provisions of § 25-1034. Mother challenges the superior court's continued use of temporary emergency jurisdiction under § 25-1034. We agree that there is no longer an adequate emergency that requires jurisdiction under § 25-1034.

¶19 Mother does not dispute the circumstances that took place in June 2015 were sufficient to establish an emergency under § 25-1034(A). However, it is clear to this court that the circumstances surrounding the *temporary* emergency have since passed. It has been over two years since the original emergency circumstances took place in this case. *See In re NC*, 294 P.3d 866, 877 (Wyo. 2013) ("To the extent that the district court's orders went beyond addressing the immediate emergency before the court, we conclude that the court acted outside its jurisdiction."); *Beauregard v. White*, 972 A.2d 619, 626 (R.I. 2009) ("By its very nature, temporary emergency jurisdiction exists only for a limited period."); *In re State ex rel. M.C.*, 94 P.3d 1220, 1225 (Colo. App. 2004) ("[E]xercise of temporary emergency jurisdiction may not last until the trial court can enter an adjudicatory order finding a child dependent and neglected."); *In re Brode*, 566 S.E.2d 858, 860 (N.C. Ct. App. 2002) ("When a court invokes emergency jurisdiction, any orders entered shall be temporary protective orders only."); *Saavedra v. Schmidt*, 96 S.W.3d 533, 549 (Tex. App. 2002) ("A court's exercise of

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[10] Mother also testified during the second dependency hearing that she is currently living in California. The social worker at PineView Hospital, where Mother was examined in June 2015, also testified during the dependency hearing in this case that Mother told her she lived in California.

temporary emergency jurisdiction is temporary in nature and may not be used as a vehicle to attain modification jurisdiction for an ongoing, indefinite period of time."); *cf. In re Jaheim B.*, 87 Cal. Rptr. 3d 504, 508 (Cal. Dist. Ct. App. 2008) ("Although emergency jurisdiction is generally intended to be short term and limited, the juvenile court may continue to exercise its authority as long as the reasons underlying the dependency exist."). While it is true that sufficient evidence exists to support a dependency finding, there is no longer an *emergency* that requires the proceedings to take place in this state.

¶20 A.R.S. § 25-1034(B) provides: "If a child custody proceeding has not been . . . commenced in a court of a state having jurisdiction under § 25-1031, 25-1032 or 25-1033, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child." There is nothing in the record before us that would indicate there exists a "child custody proceeding" in a court in California, the home state. However, because the ICPC determination was pending in California, and California authorities had not declined to exercise jurisdiction over the child in the ICPC, Arizona did not become the home state of J.W. under this subsection. *See* A.R.S. § 25-1002(4)(a) (defining a child custody proceedings as "a proceeding . . . in which legal custody, *physical custody or visitation* with respect to a child is an issue or in which that issue may appear") (emphasis added). Until California authorities decline to exercise jurisdiction over J.W., and Arizona provides in a final determination it is asserting home state jurisdiction over the child because of California's declination to act, Arizona cannot become the home state of J.W. *See* A.R.S. § 25-1034(B). To hold otherwise, would be an affront to the purpose of the ICPC, which is to allow the placement of children in a suitable environment based on their circumstances. *See* A.R.S. § 8-548 art. I. Furthermore, even if we were to find Arizona had emergency jurisdiction under § 25-1034(B), Arizona is an inconvenient forum for this parental relationship under § 25-1037(B).

¶21 Our holding is consistent with our March 2016 order following DCS's petition for special action review. In that order, this court granted DCS relief but ordered it "to continue to make every reasonable effort to facilitate and expedite ICPC approval." This court did not order DCS to return the child to Mother in accordance with her Rule 59 motion because the pending dependency at that time kept J.W. as "a ward of the court and subject to DCS's legal authority." However, after the memorandum decision from this court was issued in October 2016, and the mandate was issued in November 2016, the dependency should have been dismissed and the superior court's original order granting the Rule 59

motion should have controlled. *See* Ariz. R.P. Juv. Ct. 59(E) ("The court shall: 1. Return the child to the parent . . . if the court finds, by a preponderance of the evidence, that return of the child would not create a substantial risk of harm to the child's physical, mental or emotional health or safety . . . ."). Instead, DCS seemingly failed to make sufficient efforts to comply with this court's order following the special action and facilitate ICPC approval and transfer J.W.'s placement to California. DCS has not moved to set aside that order and the court has not made substantive findings reversing that order.

¶22 Therefore, this court orders DCS to comply with both the superior court's order granting Mother's Rule 59 motion and this court's order dated March 2, 2016, in 1 CA-SA 16-0029, and expedite ICPC approval of J.W.'s placement in California. *See* A.R.S. § 8-548. If California declines to accept placement of J.W. under the ICPC, Arizona can then, and only then, become the home state of the child.

CONCLUSION

¶23 The superior court failed to appropriately establish subject matter jurisdiction under the UCCJEA. We remand for further proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
FILED: AA