

DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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RICHARD LEE BENDER,

Appellant,

v.

ALISHA HORNBACK, f/k/a  
ALISHA HORNBACK BENDER,

Appellee.

No. 2D20-3614

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June 11, 2021

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Polk County; Catherine L. Combee, Judge.

Michael Panella of Panella Law Firm, Orlando, for Appellant.

Alisha Hornback, f/k/a Alisha Hornback Bender, pro se.

MORRIS, Judge.

Richard Lee Bender, the former husband, appeals an order denying his motion to vacate and set aside an order on an ex parte emergency petition to domesticate a foreign judgment filed by Alisha

Hornback, the former wife. Because the circuit court did not comply with section 61.528, Florida Statutes (2020), before it domesticated the foreign judgment, the circuit court erred in denying the former husband's motion to vacate.

The parties were married in 2011. They have a daughter, born on March 29, 2013. A final judgment of dissolution of marriage was entered in Florida on August 8, 2016, and it domesticated a 2014 order entered in North Carolina awarding full legal custody of the child to the former husband with the former wife having visitation.

On July 7, 2020, the former wife filed in Florida an ex parte emergency petition to domesticate a North Carolina custody order entered in January 2020. Even though the petition was ex parte and titled an emergency, it did not allege an emergency situation. That same day, the circuit court entered an order on the ex parte emergency petition, granting the former wife's petition and domesticating the January 2020 North Carolina custody order. The order did not cite an emergency situation and was not served on the former husband. On September 14, 2020, the former husband filed a motion to vacate and set aside the July 7, 2020, ex parte order.

After a nonevidentiary hearing, the circuit court denied the former husband's motion to vacate on November 16, 2020.

On appeal, the former husband argues that the circuit court abused its discretion in finding that the former husband received proper notice of the former wife's ex parte petition to domesticate the North Carolina order. Section 61.528 sets forth the requirements for registering a child custody determination issued by a court of another state. It requires the person requesting registration to provide "the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered." § 61.528(1)(c). It then requires the court to "[s]erve notice upon the persons named . . . and provide them with an opportunity to contest the registration in accordance with this section." § 61.528(2)(b). The statute contains requirements for the notice:

(3) The notice required by paragraph (2)(b) must state that:

(a) A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(b) A hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and

(c) Failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

§ 61.528(3). The statute then addresses when a person seeks to contest the validity of the registered order:

(4) A person seeking to contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(a) The issuing court did not have jurisdiction under ss. 61.514-61.523;

(b) The child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under ss. 61.514-61.523; or

(c) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of s. 61.509 in the proceedings before the court that issued the order for which registration is sought.

§ 61.528(4).

In its order denying the former husband's motion to vacate, the circuit court found that the former husband received notice in February 2020 of the January 2020 North Carolina order. The circuit court also found that he was "represented by counsel at the

evidentiary hearing" in North Carolina. The circuit court rejected the former husband's argument that the circuit court did not comply with section 61.528, but the circuit court did not explain its reasoning or how it complied with section 61.528.

It is clear that the circuit court did not comply with the requirements of section 61.528. The circuit court did not file the foreign judgment or the accompanying documents as required by section 61.528(2)(a), as the ex parte petition was not filed with the clerk of the circuit court. In addition, the circuit court did not provide the former husband with notice of the ex parte petition to domesticate the January 2020 North Carolina order in accordance with section 61.528(2)(b) and (3). Therefore, the former husband did not have an opportunity to contest the validity of the North Carolina order in accordance with section 61.528(4). Even if the former husband was aware of the North Carolina order or participated in the proceedings there, section 61.528 makes no exception for such a situation. In addition, neither the former wife's ex parte petition nor the circuit court's ex parte order domesticating the North Carolina order cite any applicable exception that would

have permitted the circuit court to avoid the requirements of section 61.528.

Because the circuit court did not comply with section 61.528 by giving the former husband notice, the ex parte order domesticating the North Carolina order is void. *See Renovaship, Inc. v. Quatremain*, 208 So. 3d 280, 285 (Fla. 3d DCA 2016) ("The general principle of law is well-settled: a final judgment entered without adequate notice of the hearing and an opportunity to be heard is void." (footnote omitted)). Accordingly, the circuit court should have granted the former husband's motion to vacate the ex parte order. *See* Fla. R. Civ. P. 1.540(b)(4) (providing that a court may relieve a party from a final order that is void). We reverse the order denying the former husband's motion to vacate and remand with directions for the circuit court to vacate the ex parte order and comply with the procedure required by section 61.528. On remand, the former husband will have an opportunity to challenge the North Carolina court's jurisdiction under sections 61.514 through 61.523.<sup>1</sup>

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<sup>1</sup> The former husband also argues that the circuit court erred in finding that Florida did not have subject matter jurisdiction.

Reversed and remanded.

CASANUEVA and KELLY, JJ., Concur.

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Opinion subject to revision prior to official publication.

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This issue is premature because the circuit court did not follow the procedures in section 61.528 and it is not clear from the record which state has jurisdiction. In its order, the circuit court found that the "Former Husband did not establish that North Carolina Court did not have jurisdiction." But the circuit court did not set forth findings to support its determination, and it is clear from the order that the circuit court did not conduct an evidentiary hearing. The first North Carolina order entered in 2014 found that North Carolina had jurisdiction, even though the court found in the same order that the child had lived in Florida since she was born. See N.C. Gen. Stat. § 50A-201 (2014) (generally providing, subject to an exception for temporary emergency jurisdiction, that "a court of this state has jurisdiction to make an initial child custody determination only if . . . [t]his state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state"); § 61.514(1)(a) (same). Then, the January 2020 order entered in North Carolina found that North Carolina had jurisdiction because the child had resided in North Carolina and it was the home state of the child. This is inconsistent with the earlier North Carolina order and the father's allegations that the child had lived in Florida with him her whole life.