STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1659

In re the Custody of T. G. M. D.

Filed April 12, 2011
Affirmed
Larkin, Judge

Dakota County District Court
File No. 19HA-FA-10-80

Theresa M. Gerlach, Law Offices of Theresa Gerlach, PLLC, Hastings, Minnesota (for respondent-Danny Gail Dimm)

Lori Michael, Apple Valley, Minnesota (for appellant-Wendi Lee Bartell Dimm)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

In this child-custody dispute, appellant challenges the district court's denial of her request for relief under the Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* October 25, 1980, T.I.A.S. No. 11670 (Hague Convention) and Minn. Stat. §§ 518D.101-.317 (2010), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Because the district court correctly determined that appellant was not entitled to relief, we affirm.

FACTS

Appellant-mother Wendy Dimm and respondent-father Danny Dimm are married. The parties have one child, T.G.M.D., who was born on June 19, 2006. Mother is a citizen of the United States; father is a citizen of Canada. The child was born in Kamloops, British Columbia, Canada and has dual citizenship. The parties separated shortly after the child's birth, and mother and child moved to Minnesota in 2008. Father currently lives in Lillooet, British Columbia.

The child is the subject of two custody orders issued by the Provincial Court of British Columbia. The first order was issued in February 2008. It granted mother sole custody and guardianship of T.G.M.D. and authorized her to move T.G.M.D. to the United States. The order granted father telephone access to T.G.M.D. and visits as circumstances permitted.

The Provincial Court of British Columbia issued the second custody order in June 2010. This order awarded mother and father joint custody and guardianship of T.G.M.D. The order states that T.G.M.D.'s primary residence is to be with mother. The order grants father "unsupervised continuous access to [T.G.M.D.] for a period of three months each year, to be exercised [at father's residence]."

In July 2010, father filed a notice of registration of the Canadian custody order with the district court in Minnesota. Mother opposed father's filing and requested relief on several grounds. Mother filed a motion under the Hague Convention and a Hague petition requesting that the district court deny father's request to register and enforce the order. Mother also filed a motion for ex parte custody, requesting temporary sole legal

and physical custody and denial of parenting time for father. The district court denied mother's requests for relief, and this appeal follows.

D E C I S I O N

Because the district court's decision is based on the application of statutes to undisputed fact, our review is de novo. *See City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 5 (Minn. 2008) ("The application of statutes . . . to undisputed facts is a legal conclusion and is reviewed de novo."). We address each of mother's requests for relief in turn.

Request for Relief Under the Hague Convention

Mother sought to prevent the child's removal to Canada for court-ordered visitation with his father. But this is not the purpose of the Hague Convention. Proceedings under the Hague Convention "do not allow a court applying the Convention to adjudicate the merits of any underlying custody claims." *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995) (stating that the court may only litigate the question of wrongful removal). Instead, the objectives of the Hague Convention are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention art. 1. Neither the Hague Convention, nor its federal legislative counterpart, 42 U.S.C. § 11601-11611 (2006), proscribes the prospective removal of a child. Moreover, the removal of a child is considered wrongful only where "it is in breach of rights of custody attributed to a person." Hague Convention art. 3. The prospective "removal" that mother sought to

prevent—the child's removal to Canada for court-ordered visitation with his father—was not in breach of mother's custody rights and would not have been "wrongful." In sum, because T.G.M.D. had not been "wrongfully" removed, there was no basis for relief under the Hague Convention.

Request that the Custody Order Not Be Enforced

Enforcement of a foreign jurisdiction's custody order is governed by the UCCJEA. "The uniform custody laws were established to resolve jurisdictional issues involving interstate child-custody disputes . . . ." *Stone v. Stone*, 636 N.W.2d 594, 597 (Minn. App. 2001). Minnesota has adopted the UCCJEA for all custody issues raised after January 1, 2000. 1999 Minn. Laws ch. 74, § 20, at 216. The UCCJEA applies to the child-custody determinations made by the Canadian court. *See* Minn. Stat. § 518D.105 (a) (stating that a "court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying sections 518D.101 to 518D.210"), (b) (stating that "a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under sections 518D.301 to 518D.317").

Registration of another state's child-custody determination is governed by the UCCJEA. *See* Minn. Stat. § 518D.305 (explaining the procedure for registering a custody order issued by another state in this state and explaining the limited situations in which this court will decline to register a custody order issued by another state). The relevant section provides that a person who contests the validity of a registered order must request a hearing within 20 days of service of notice of registration. Minn. Stat.

§ 518D.305 (d). The UCCJEA further provides that the district court shall confirm the registered order unless the person contesting registration establishes one of three grounds for non-enforcement: the court that issued the custody order lacked jurisdiction; the custody order has been vacated, stayed, or modified by a court having jurisdiction to do so; or the person contesting registration was entitled to, but was not provided with, notice of the proceedings in the court that issued the order. *Id.* Because there is no showing that any of these circumstances existed, the district court was required to recognize and enforce the registered order. *See id.*; Minn. Stat. § 518D.306 (b) ("A court of this state shall recognize and enforce, but may not modify, except in accordance with sections 518D.201 to 518D.210, a registered child custody determination of a court of another state.").

Minnesota need not apply the UCCJEA if "the child custody law of a foreign country violates fundamental principles of human rights." Minn. Stat. § 518D.105 (c). Mother argues the Canadian order should not be enforced because the underlying proceedings violated her fundamental human rights. Mother asserts that her human rights were violated because she was not allowed to participate in the final custody hearing via telephone. But mother does not cite legal authority or analysis in support of her assertion that this constitutes a violation of "fundamental principles of human rights." Nor does she argue that Canada's "child custody law" violates "fundamental principles of human rights." In sum, mother's argument is not persuasive. The district court properly recognized and enforced the Canadian court's custody order.

Request for Modification of the Custody Order

Mother's request for relief in the district court required modification of the Canadian custody order. "The UCCJEA provides that the state issuing a custody decree will generally retain exclusive, continuing jurisdiction over the decree as long as that state remains the residence of the children or a parent." *Schroeder v. Schroeder*, 658 N.W.2d 909, 911 (Minn. App. 2003); *see also* Minn. Stat. § 518D.202 (a)(2). The district court may not modify a child-custody determination made by a court of another state unless it has jurisdiction to make an initial custody determination and either "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 the district court or a court of the other state determines that "the child, the child's parents, and any person acting as a parent do not presently reside in the other state." Minn. Stat. § 518D.203; *see also* Minn. Stat. § 518D.201 (explaining when a court has jurisdiction to make an initial custody determination). Because none of the requirements of section 518D.203 is met here, the district court does not have jurisdiction to modify the Canadian custody order.

Moreover, because the district court lacks jurisdiction, mother's argument that the district court erred in "failing to establish [itself] as the more appropriate forum under Minn. Stat. § 518D.207" is unavailing. We first note that mother did not request relief under section 518D.207 in the district court. Although this court will generally not consider matters not argued to and considered by the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), we have considered mother's argument and find it unavailing.

Section 518D.207 allows a court that has jurisdiction to decline to exercise jurisdiction if another forum would be more convenient. The statute states, in relevant part:

> A court of this state *which has jurisdiction under this chapter* to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum *may* be raised upon motion of a party, the court's own motion, or request of another court.

Minn. Stat. § 518D.207 (a) (emphasis added).

The only court with the authority to divest the Canadian court of jurisdiction under section 518D.207 is the Canadian court. And although the statute provides that the issue of inconvenient forum may be raised upon the request of another court, such a request is discretionary, not mandatory. *See* Minn. Stat. § 645.44, subds. 15, 16 (2010) (providing that "may" is permissive, and "shall" is mandatory, respectively). Yet mother suggests that the district court had an obligation, rather than an option, to contact the Canadian court and persuade it to relinquish jurisdiction. Mother cites no authority to support this suggestion. And because, as discussed below, the district court properly concluded that the circumstances did not warrant an exercise of temporary emergency jurisdiction, we discern no error in the district court's failure to ask the Canadian court, sua sponte, to relinquish jurisdiction.

Request for Emergency Custody

Mother argues that the district court erred in declining to exercise temporary emergency jurisdiction under Minn. Stat. § 518D.204, which states, in part:

> A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

Minn. Stat. § 518D.204 (a).

In support of her request for temporary emergency jurisdiction, mother argued that T.G.M.D. might suffer harm if he was required to travel to Canada for an extended visit with his father. Mother presented evidence that T.G.M.D. is autistic and that he receives special services and requires structure and routine. But mother's counsel argued, "we are not saying that he's going to be abused up there but the mistreatment would fall under the fact that you are taking this child, who is severely autistic, who has only been with his mother and his special ed teachers, you are removing him out of his element." The district court determined that these circumstances did not warrant application of section 518D.204 (a), finding that "there has been no evidence presented that [T.G.M.D.] has been subjected to or threatened with mistreatment or abuse."[1] This finding is not clearly erroneous. *See Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (stating that appellate courts review a district court's findings for clear error and that "[f]indings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made" (quotation omitted)). The record indicates that although father lives in a small town, father had arranged for special education services for T.G.M.D. in Canada and father's sister, a registered nurse, had moved in with father

[1] The district court recognized that "the best interests of the child may dictate a different result, [but] this is not the standard set forth in the statute."

to assist him with T.G.M.D.'s care during T.G.M.D.'s visit. And even if mother had established a basis for the district court to exercise temporary emergency jurisdiction and the court had issued an order, the court would have been required to specify "a period that the court consider[ed] adequate to allow [mother] to obtain an order from the state having jurisdiction." Minn. Stat. § 518D.204 (c). Thus, mother ultimately would have had to pursue relief in the Canadian court.

We last address mother's assertion that the district court was required to contact the Canadian court based on her request for temporary emergency jurisdiction. Section 518D.204 states, in part: "A court of this state which has been asked to make a child custody determination under this section, upon being informed that . . . a child custody determination has been made by, a court of a state having jurisdiction . . . shall immediately communicate with the other court." Minn. Stat. § 518D.204 (d). Although the district court was asked to exercise temporary emergency jurisdiction, the court determined that the emergency-jurisdiction statute was not applicable because T.G.M.D. had not been subjected to or threatened with mistreatment or abuse. Because the district court properly determined that an exercise of emergency jurisdiction was not permitted under the UCCJEA and therefore declined to issue any order inconsistent with the Canadian order, we discern no error in the district court's failure to communicate with the Canadian court.

In conclusion, because (1) relief was not available under the Hague Convention, (2) the district court was required to recognize and enforce the Canadian custody order, (3) the district court was without jurisdiction to modify the order, and (4) an exercise of

temporary emergency jurisdiction was not proper, the district court did not err in denying mother's requests for relief.

Affirmed.

Dated:

Judge Michelle A. Larkin