DA 18-0536

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 17

IN RE THE MARRIAGE OF:

RAYMOND KREE KIRKMAN,

Petitioner and Appellant,

and

NADIYA KIRKMAN,

Respondent and Appellee.

APPEAL FROM: District Court of the Twentieth Judicial District,
In and For the County of Sanders, Cause No. DR-18-27
Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Quentin M. Rhoades, Robert Erickson, Kristin Bannigan, Rhoades Siefert & Erickson, PLLC, Missoula, Montana

For Appellee:

Emily Lucas, Brandi R. Ries, Ries Law Group, Missoula, Montana

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Submitted on Briefs: May 8, 2019

Decided: January 28, 2020

Filed:

Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 Raymond Kree Kirkman (Father) appeals the 2018 protective order regarding his minor children (M.K. and K.K.) issued by the Montana Twentieth Judicial District Court, Sanders County, on the petition of Nadiya Kirkman (Mother). We restate the issue as:

> *Whether the District Court erroneously modified the parties' prior Florida parenting plan in violation of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)?*

¶2 We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Father (age 45) and Mother (age 21) first met in 2000 through an international internet dating service while he was living in the United States and she was living in Ukraine. After he made several trips to see her in Ukraine, they engaged to marry, and she moved to the United States on a fiancé visa. After executing a prenuptial agreement prepared by Father and signed by Mother without legal advice, the parties married in 2001. They thereafter resided in a home in a remote location near Heron, Sanders County, Montana. At the time, Mother did not speak English and did not know anyone else in Montana. Mother later testified that Father prohibited her from taking English lessons or obtaining a Montana driver's license. In 2006, twins (M.K. and K.K.) were born as issue of the couple's marriage. The family moved to Florida in 2009. Father thereafter consented to Mother obtaining a Florida driver's license so she could transport the children to and from school.

¶4 In 2015, Mother decided to leave the marriage to get away from what she viewed as Father's threatening and abusive behavior. Following a subsequent incident resulting in his arrest for allegedly holding her by the throat and threatening her, the parties reached a marital settlement agreement and stipulated parenting plan. In October 2015, the Florida Twentieth Judicial Circuit Court (Florida court) accordingly dissolved the parties' marriage. Father received their most recent family home in Florida and Mother received the former family home in Montana. Under the court-adopted stipulated parenting plan (2015 Florida parenting plan), Mother received primary residential custody of the children, with authority to move them back to Montana, subject to Father's right to custodial visitation in Florida during the summer and other specified school breaks.[1] Mother accordingly moved with the children back to Montana and resumed living in the former family home in Sanders County. She remarried in 2016 to a man who had a minor daughter (G.S.).

¶5 Imprecision in the 2015 Florida parenting plan immediately led to frequent and ongoing disputes between Mother and Father. The District Court later found that Father's verbally abusive and threatening behavior toward Mother often exacerbated those disputes. In January 2018, Father petitioned the Florida court to modify the 2015 Florida parenting plan to either place the children in his primary residential custody or grant him additional parenting time. Mother filed a responsive motion to dismiss the Florida petition in March

[1] The Florida parenting plan included a visitation transfer protocol providing for Father to pick up the children from Mother in Montana and to then return them to her at the airport in either Missoula, Montana, or Spokane, Washington.

2018 under Florida's variant of the UCCJEA. Her response asserted that Montana is now the children's home state and the most convenient forum for resolving the dispute.[2]

¶6 On June 6, 2018, with the Florida proceeding apparently still pending without resolution of the threshold UCCJEA issue, Mother petitioned the Sanders County Justice Court pursuant to Title 40, ch. 15, MCA, for a protective order enjoining Father from contact with her, her husband, M.K., K.K., and G.S. The Justice Court subsequently issued a temporary protective order pending hearing.

¶7 On June 29, 2018, prior to the scheduled justice court hearing, Father filed a district court petition for Montana registration of the 2015 Florida parenting plan, a stay of the Montana protective order proceeding,[3] and abstention or deferral of Montana child custody jurisdiction over M.K. and K.K. to the Florida court pursuant to the UCCJEA. The petition asserted, *inter alia*, that Father had a "superior right" to the children under the 2015 Florida parenting plan and that Mother was thus "wrongfully detain[ing]" them under the Montana protective order.

¶8 On July 9, 2018, Mother filed a response asserting pursuant to § 40-7-203, MCA, that Florida "should" now "decline to exercise" its continuing child custody jurisdiction stemming from the 2015 parenting plan based on the children's long-established residence

[2] Uncertified copies of the parties' Florida filings are attached as exhibits to the *Affidavit of Nadiya Kirkman*, filed August 3, 2018.

[3] Father simultaneously moved the Justice Court to transfer jurisdiction over the protective order proceeding to the District Court pursuant to §§ 40-15-301(3) and -302(2), MCA (removal of protective order proceeding to district court upon filing of related parenting plan proceeding).

in Montana and "the history of domestic violence" that Father "perpetrated . . . towards [her] and the . . . children" in Montana. She alternatively asserted that the Montana court, in any event, had emergency jurisdiction under § 40-7-204, MCA, to temporarily protect the children pending determination of the proper state of child custody jurisdiction under the UCCJEA. The District Court subsequently set a hearing on the disputed issues for July 24, 2018.

¶9 Under preliminary questioning from the District Court at the hearing, Mother clarified that she was seeking two distinct forms of relief regarding M.K. and K.K. She first sought continuation of the previously issued temporary protective order pursuant to § 40-7-204 and Title 40, ch. 15, MCA. In reference to her asserted "Counter-Petition for Montana to Assume Jurisdiction," she requested that the court schedule a consultation with the Florida court in furtherance of an ultimate UCCJEA determination that Montana is now the proper state of child custody jurisdiction under § 40-7-203, MCA. Based on his previously filed 2018 Florida modification petition, and the fact that Mother had yet to file a competing Montana petition, Father asserted that the only UCCJEA issue properly before the court was the exercise of its temporary emergency jurisdiction under § 40-7-204, MCA. He further asserted that § 40-7-204, MCA, required the court to communicate with the Florida court following the hearing to consult on how to "resolve the emergency and protect . . . the children and determine a period of time for the duration" of the temporary

protective order.[4] Acknowledging the need for a subsequent UCCJEA consultation, the District Court proceeded with the hearing on the merits of the protective order petition. The hearing recessed at the end of the day and resumed on August 14, 2018.

¶10 In the interim, on July 27, 2018, the District Court set a briefing deadline for further consideration of the interstate jurisdiction issue in advance of its intended UCCJEA consultation with the Florida court. The court subsequently scheduled and noticed a telephone consultation for August 16, 2018—two days after the date set for continuation of the protective order hearing.

¶11 At the close of the August 14 hearing, Mother again requested pursuant to Title 40, ch. 15, MCA, that the court issue a permanent protective order enjoining Father from contact with her, her husband, and his daughter (G.S.). She requested that the court similarly enjoin Father from contact with M.K. and K.K. "for a limited amount of time" in accordance with § 40-7-204, MCA. As to her counter-petition for assumption of child custody jurisdiction under § 40-7-203, MCA, she requested that the court proceed with the scheduled UCCJEA consultation and ask the Florida court to decline to exercise its continuing jurisdiction. After further colloquy with counsel, the District Court stated its intent to enter a permanent protective order against Father regarding Mother, her husband,

[4] See § 40-7-204(4), MCA ("A court of this state . . . asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under 40-7-201 through 40-7-203, shall immediately communicate with the other court. . . . The purpose of the communication is to resolve the emergency, to protect the safety of the parties and the child, and to determine a period for the duration of the temporary order.").

and his daughter and to issue a similar "temporary" protective order regarding M.K. and K.K. "consistent with 40-7-204," MCA.[5]

¶12 On August 21, 2018, the District Court issued detailed findings of fact, conclusions of law, and a resulting "Permanent Order of Protection" (2018 Montana order) on the July 24 and August 14 hearing evidence. In pertinent part, the order:

(1) permanently enjoined Father from contact with Mother, her husband, or his daughter (G.S.);

(2) found and concluded that: (a) Father had exposed M.K. and K.K. to domestic violence; (b) they thus "fear[ed]" and did "not feel safe" with him; and (c) were accordingly "in reasonable apprehension of bodily injury" and "subjected to or threatened with mistreatment or abuse" as referenced in §§ 40-7-204 and 40-15-102, MCA;

(3) noted that the 2018 Florida child custody proceeding remained pending in the Florida court and that Mother "is apparently also seeking to modify the Florida parenting plan in the Montana court" to "clarify or restrict" Father's visitation rights;

(4) restricted Father's previously adjudicated visitation rights under the Florida parenting plan to supervised visitation in Montana upon 60 days advance notice;

(5) stated as a conclusion of law that the court "anticipated the Florida [c]ourt will determine . . . the more convenient forum for determining the competing requests . . . and that [resulting] interim and permanent modification orders" regarding M.K. and K.K. "will supersede this Montana order"; and

(6) similarly stated in the operative language that the court "anticipated" the 2018 Montana order "will be modified or affected by the custody and

[5] While not at issue on appeal, the record is silent as to whether and what end the scheduled UCCJEA consultation between the Montana and Florida courts in fact occurred. On August 14, 2018, the District Court issued an order, with an attached notice filed in the Florida court, advising the parties that the UCCJEA conference scheduled for August 16, 2018, would take place in chambers at the Lake County Courthouse at 3:30 p.m., EST. On August 15, 2018, Mother's counsel filed a notice regarding the telephone number and conference call PIN for the scheduled conference call. The record is devoid of any other indication.

visitation modification" to be issued by the appropriate court, upon resolution of threshold jurisdictional issue, "before [Father's] summer 2019 visitation" but, if not, Father "may return to this [c]ourt regarding that."[6]

¶13 Father timely appealed.

STANDARD OF REVIEW

¶14 Whether a district court had or properly exercised child custody jurisdiction in accordance with the UCCJEA is a question of law reviewed de novo. *Koeplin v. Crandall*, 2010 MT 70, ¶¶ 7-12, 355 Mont. 510, 230 P.3d 797. We review lower court conclusions of law de novo for correctness. *In re Marriage of Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894.

DISCUSSION

¶15 *Whether the District Court erroneously modified the parties' prior Florida parenting plan in violation of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)?*

¶16 Father asserts that the 2018 Montana order granted permanent protective relief in excess of the District Court's limited temporary emergency jurisdiction under § 40-7-204(1), MCA. Even if construed as a temporary order under § 40-7-204(1), MCA, Father asserts that the 2018 Montana order is still invalid due to non-compliance with the specific duration requirement of § 40-7-204(3), MCA. Mother asserts that the court properly acted within its emergency jurisdiction under § 40-7-204(1), MCA, and that the order substantially complied with § 40-7-204(3), MCA, in relation to M.K. and K.K.

[6] The record is silent as to the status or disposition of the previously filed Florida child custody proceeding after the filing of Mother's March 2018 motion to dismiss.

¶17 Like other states, Montana enacted the UCCJEA[7] in 1999 to avoid and streamline otherwise thorny interstate jurisdictional issues regarding child custody proceedings. Section 40-7-101, MCA, Comm'rs Note (1999). *See also In re Marriage of Vanlaarhoven*, 2002 MT 222, ¶ 14, 311 Mont. 368, 55 P.3d 942. In conjunction with § 40-4-211, MCA, the UCCJEA governs the jurisdiction of Montana courts over initial, modified, and temporary child custody determinations with interstate jurisdictional implications. *See* §§ 40-7-103(3)(a) and -201 through -204, MCA. This case involves the jurisdiction of Montana courts to temporarily protect children present in Montana on an emergency basis despite the parallel pendency of a previously filed petition in the court of another state to modify that court's initial child custody determination.

¶18 The UCCJEA broadly defines a "child custody proceeding" as any "proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." Section 40-7-103(4)(a), MCA. As pertinent here, the term includes "a proceeding for . . . protection from domestic violence, in which the issue may appear." Section 40-7-103(4)(a), MCA. Under the UCCJEA, the initial child custody determination is "the first child custody determination concerning a particular child" in any state. Section 40-7-103(8), MCA. In turn, a child custody modification is "a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination." Section 40-7-103(11), MCA. Here, the 2015 Florida parenting plan was

[7] The UCCJEA is codified at Title 40, ch. 7, MCA.

the initial child custody determination involving the subject children. The 2018 Florida modification proceeding initiated by Father and the 2018 Montana protective order proceeding subsequently initiated by Mother were both "child custody proceedings" as defined by § 40-7-103(4)(a), MCA. As a proceeding for relief enjoining or restricting Father's previously decreed visitation rights regarding M.K. and K.K. under the initial 2015 Florida parenting plan, the 2018 Montana protective order proceeding was a proceeding for a child custody "modification" as defined by § 40-7-103(11), MCA, and as generally governed by § 40-7-203, MCA (jurisdiction for child custody modifications).

¶19 "Except as otherwise provided" by § 40-7-204, MCA, and § 61.517, Fla. Stat.[8] the Montana and Florida variants of the UCCJEA provide that the court of another state that made the initial "child custody determination" for a child retains "exclusive, continuing [child custody] jurisdiction over" the child until that court "determines," as pertinent here, either that:

> (1) 'neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with [that state] and that substantial evidence is no longer available in [that state] concerning the child's care, protection, training, and personal relationships'; or
>
> (2) that state 'is an inconvenient forum.'

Section 40-7-202(1)(a), (2), MCA; §§ 61.515(1)(a) and 61.520(1), Fla. Stat. *See also* §§ 40-7-103(8)-(10) and -108, MCA. In the face of the original court's exclusive and continuing child custody jurisdiction, and "[e]xcept as otherwise provided" by § 40-7-204,

[8] In 2003, Florida amended § 61.517 (2002), Fla. Stat., without pertinent substantive change. See 2003 Fla. Laws ch. 2003-1, § 7.

MCA, a Montana court "may not modify a child custody determination made by a court of another state unless" the Montana court would otherwise have "jurisdiction to make an initial [child custody] determination" regarding the child and, as pertinent here, "the court of the other state determines [either that] it no longer has exclusive, continuing jurisdiction under" the standards of § 40-7-202, MCA, or that the Montana court "would be a more convenient forum" under the standards of § 40-7-108, MCA. Section 40-7-203(1), MCA. *Accord* § 61.516(1), Fla. Stat. For purposes of § 40-7-203(1), MCA, a Montana district court would otherwise have jurisdiction to make an initial child custody determination if, as pertinent here, Montana "is the home state of the child on the date of the commencement of the [Montana] proceeding" for modification. Sections 40-7-201(1)(a) and -203(1), MCA. *Accord* §§ 61.514(1)(a) and 61.516(1), Fla. Stat.[9]

¶20 However, as a narrow exception to the exclusive and continuing child custody jurisdiction of a court of another state, and the resulting UCCJEA limitation on the jurisdiction of Montana courts to modify that court's prior child custody determination, a Montana court of otherwise competent jurisdiction[10] "has temporary emergency jurisdiction" to "protect" a child "present in" Montana as "necessary in an emergency" where "the child, or a sibling or parent of the child, is subjected to or threatened with

[9] For purposes of § 40-7-201(1)(a), MCA, and § 61.514(1)(a), Fla. Stat., a child's "home state" is "the state in which [the] child lived with a parent or a person acting as parent for at least 6 consecutive months immediately before the commencement of [the] child custody proceeding" at issue. Section 40-7-103(7), MCA; § 61.503(7), Fla. Stat.

[10] See, *e.g.*, Title 40, ch. 15, MCA (protective orders in re domestic relations and stalking), and §§ 40-4-219 and -220(2)(a)(ii), (2)(b), MCA (emergency interim parenting plan incident to petition for parenting plan amendment).

mistreatment or abuse." Sections 40-7-202(1)(a), -203(1), and 204(1), MCA. *See also* §§ 61.515(1)(a), 61.516(1), and 61.517(1), Fla. Stat. In the absence of statutory definition, the express terms of § 40-7-204(1), MCA, have their plain meaning in ordinary usage. Section 1-4-107, MCA. In plain and ordinary usage, the term "emergency" means "[a] sudden and serious event" or "unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm"—"an urgent need for relief or help." *Emergency*, *Black's Law Dictionary* (11th ed. 2019).

¶21 It is beyond genuine material dispute in this case that Montana was the home state of M.K. and K.K. when Mother commenced the 2018 Montana protective order proceeding. However, it is similarly beyond genuine material dispute that the 2015 Florida parenting plan was the governing initial child custody determination as defined and referenced in §§ 40-7-103(8)-(10), -202(1), and -203(1), MCA, and §§ 61.503(8)-(10), 61.515(1), and 61.516(1), Fla. Stat. Consequently, except as provided by § 40-7-204(1), MCA, the Florida court retained, or retains, continuing exclusive child custody jurisdiction over M.K. and K.K. until such time as that court determined, or yet determines, as pertinent here, either that:

> (1) 'neither [they], [they] and one parent, nor [they] and a person acting as a parent [still] have a significant connection with [Florida] and that substantial evidence is no longer available in [Florida] concerning [their] care, protection, training, and personal relationships'; or
>
> (2) Florida 'is an inconvenient forum.'

See § 40-7-202(1)(a), (2), MCA; § 61.515(1)(a), Fla. Stat. In the interim, the District Court had no jurisdiction to temporarily or indefinitely modify the 2015 Florida parenting plan except as provided by § 40-7-204(1), MCA. *See* § 40-7-203(1), MCA.

¶22 Father does not dispute that M.K. and K.K. were present in Montana when Mother initiated the 2018 Montana protective order proceeding pursuant to Title 40, ch. 15, MCA. Mother's protective order petition alleged *inter alia* that he subjected or threatened her, and at least one of the children, with specified mistreatment or abuse, thus warranting immediate protection. The District Court ultimately found and concluded on the hearing record that: (1) Father had exposed M.K. and K.K. to apprehension of domestic violence; (2) they thus "fear[ed]" and did "not feel safe" with him; and (3) they were accordingly "in reasonable apprehension of bodily injury" and "subjected to or threatened with mistreatment or abuse" as referenced in §§ 40-7-204 and 40-15-102, MCA. Father does not contest the evidentiary sufficiency of those findings and conclusions on appeal. Thus, regardless of the continuing and exclusive child custody jurisdiction of the Florida court, the District Court had limited "temporary emergency jurisdiction" under § 40-7-204(1) and Title 40, ch. 15, MCA, to protect K.K. and M.K. under the circumstances of this case.

¶23 Father nonetheless asserts that the 2018 Montana order exceeded the court's limited jurisdiction by imposing permanent relief. The emergency jurisdiction provided by § 40-7-204(1), MCA, is expressly limited to protective orders that are "temporary" in duration and effect. *See* § 40-7-204(1), MCA. *See also* § 40-7-204(3), MCA. Accordingly, when cause exists for a Montana court to exercise temporary emergency

jurisdiction under § 40-7-204(1), the child is subject to a "previous child custody determination" of another state, and a "child custody proceeding" regarding the child is then pending in a court of another state with jurisdiction over the child under the standards of §§ 40-7-201 through -203, MCA, the resulting Montana temporary protective order "must specify . . . [the] period of time that the court considers adequate to allow the person seeking an order to obtain an order from the state" with ultimate "jurisdiction under" §§ 40-7-201 through -203, MCA. Section 40-7-204(3), MCA. The temporary emergency order then "remains in effect [only] until an order is obtained from the . . . state [with ultimate jurisdiction] within the period specified or until the period expires." Section 40-7-204(3), MCA.

¶24 Here, Father points out that the 2018 Montana order was generally captioned as a permanent order of protection and, in relation to M.K. and K.K., expressly stated that "[t]his Order is permanent." He further points out that the order does not affirmatively specify a precise period of duration or expiration date. We agree. Rather than simply adapting the pertinent language from § 40-7-204(3), MCA, for an appropriate finding as to the "period of time that the court consider[ed] adequate to allow the person seeking an order to obtain an order from the state" of ultimate jurisdiction and then specifying in statutory terms that the order "remains in effect until an order is obtained from [that] state within the period specified or until the period expires," the 2018 Montana order more cumbersomely stated as follows regarding M.K. and K.K.:

CONCLUSIONS OF LAW

. . .

> It is anticipated the Florida [c]ourt will determine whether Montana or Florida is the more convenient forum for determining the competing requests for modifying the child custody and visitation provisions of the original decree, and that interim and permanent modification orders will supersede this Montana order with regard to the children. . . .

ORDER OF PROTECTION

. . .

> It is anticipated this Order will be modified or affected by the custody and visitation modification proceedings, once jurisdiction therefore is determined, before [Father's] summer, 2019 visitation. If not, he may return to this [c]ourt regarding that. . . .
>
> This Order is *permanent*, unless or until modified or superseded by an order in the custody case, by a [c]ourt of competent jurisdiction.

(Emphasis added.)

¶25 However, despite the unqualified nature of the caption generally indicating a permanent order and relief, the operative language of the order clearly and more discriminately cited and exercised the court's limited jurisdiction regarding M.K. and K.K. under § 40-7-204, MCA, separate and apart from its broader jurisdiction and authority under Title 40, ch. 15, MCA, to provide permanent protective relief to Mother, her husband, and his daughter unrestricted by § 40-7-204, MCA. The specific statement in the operative language regarding M.K. and K.K. that the order was "permanent" is similarly qualified by the language "unless or until modified or superseded by an order in the custody case, by a [c]ourt of competent jurisdiction." In context, that limiting language was further

elaborated or informed by the unequivocal conclusion of law that "[t]he [c]ourt ha[d] jurisdiction over this matter pursuant to MCA 40-15-301 and 40-7-204" and related language describing the court's anticipation of the operation and effect of §§ 40-7-203 and -204, MCA, under the referenced facts and circumstances of this case.

¶26 While arguably ambiguous and certainly not the model of clarity, liberally construed as a whole to effect their manifest intent in accordance with § 40-7-204(1) and (3), MCA, the provisions of the 2018 Montana order regarding M.K. and K.K. nonetheless clearly indicate that the period the District Court considered adequate to allow Father and/or Mother to obtain appropriate relief from the court of ultimate child custody jurisdiction (as would be subsequently determined by the Florida court pursuant to § 40-7-203(1), MCA, and § 61.515(1), Fla. Stat.) was the period between the date of the order and the start of Father's 2019 summer visitation, as specified by the otherwise governing 2015 Florida parenting plan. In that regard, the 2015 parenting plan specified that Father's summer visitation started each year "one week after school lets out" for the summer break. Liberally construed as a whole to effect its manifest intent in accordance with § 40-7-204(1) and (3), MCA, the specified duration of the 2018 Montana order was from the date of filing until "one week after school lets out" for the 2019 summer break, or as sooner superseded by subsequent order of the court of ultimate child custody jurisdiction. The Montana order is thus minimally sufficient to comply with § 40-7-204, MCA.

CONCLUSION

¶27 We hold that the District Court did not erroneously modify the parties' 2015 Florida parenting plan in violation of the UCCJEA. In relation to M.K. and K.K. and liberally construed as a whole to effect its manifest intent, the order was a valid and effective temporary emergency order in accordance with § 40-7-204(1) and (3), MCA. By its terms, the order expired in relation to M.K, and K.K. "one week after" their school(s) "let[] out" for the 2019 summer break except as it may have been sooner superseded by order of the court of ultimate UCCJEA child custody jurisdiction.

¶28 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE