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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-467

Filed: 6 December 2016

Sampson County, No. 14 JA 007

IN THE MATTER OF:

K.D.I.

Appeal by respondent from adjudication and disposition orders entered 16 February 2016 by Judge James L. Moore, Jr. in Sampson County District Court. Heard in the Court of Appeals 20 October 2016.

*Warrick, Bradshaw and Lockamy, P.A., by Frank L. Bradshaw, for Sampson County Department of Social Services.*

*Parker, Poe, Adams & Bernstein L.L.P, by Fern A. Paterson, for Guardian ad Litem.*

*Appellate Defender Glen Gerding, by Assistant Appellate Defender J. Lee Gilliam for respondent-appellant father.*

McCULLOUGH, Judge.

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Respondent, the biological father of Kevin<sup>1</sup>, appeals from an order adjudicating Kevin a neglected and dependent juvenile and a disposition order which continued custody of Kevin with the Sampson County Department of Social Services (“DSS”). On appeal, respondent argues that the trial court lacked subject matter jurisdiction to enter both orders. For the reasons stated herein, we conclude that the trial court lacked subject matter jurisdiction and vacate the adjudication and disposition orders and remand for further proceedings.

I. Background

Kevin was born to respondent and his biological mother<sup>2</sup> in June 2000. In 2008, Kevin’s parents divorced and respondent was granted sole legal and physical custody of Kevin by the Supreme Court of Ulster County, New York (“New York court”). In 2013, respondent and Kevin moved to North Carolina.

On 7 February 2014, DSS filed a juvenile petition alleging that Kevin was a neglected and dependent juvenile. Kevin was placed in nonsecure custody with DSS by order entered 7 February 2014. Following a hearing held on 24 April 2014, the trial court adjudicated Kevin neglected and dependent. The disposition hearing was held on 8 May 2014 and the trial court determined that it was in the best interest of Kevin to remain in the custody of DSS and that the permanent plan was for

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<sup>1</sup> A pseudonym is used to protect the identity of the juvenile and for ease of reading.

<sup>2</sup> Kevin’s mother is not a party to this appeal.

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reunification. The case came on for a 90-day review hearing on 28 August 2014. The trial court concluded, in an order entered 13 November 2014, that it was in the best interest of Kevin that his custody remain with DSS and that the permanent plan for Kevin continue to be reunification. A six-month review order and permanency planning review order was entered 29 December 2014, concluding that Kevin's custody will remain with DSS and that the permanent plan for Kevin would continue to be reunification.

On 15 January 2015, respondent filed a motion to review the case and to begin a trial home placement. Following a six-month review and permanency planning review hearing, the trial court entered an order on 3 June 2015 concluding that legal custody would remain with DSS but that Kevin would be placed with respondent for a trial home placement, with the permanent plan to be reunification. On 29 July 2015, the trial court entered an order returning custody of Kevin to respondent, concluding that "there is no continued need for State intervention on behalf of the Juvenile[.]" and releasing juvenile court jurisdiction.

On 21 September 2015, DSS filed a juvenile petition alleging that Kevin was an abused, neglected, and dependent juvenile. The petition alleged that on 18 September 2015, DSS had received a report of potential abuse and neglect of Kevin. It further alleged as follows: Kevin was terrified of respondent; Kevin was thinking about suicide due to the circumstances in the home with respondent;

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respondent recently beat him with a wooden stick; respondent threatened to shoot Kevin with a gun three weeks ago; Kevin suffered daily emotional abuse; respondent berates and curses at Kevin; respondent takes Kevin's earned money; both respondent and Kevin have a history of mental and emotional issues and are currently in therapy; Kevin was placed in respondent's home for a trial home placement in April 2015 and custody was returned to respondent in August 2015; Kevin's mother resides in New York and is not involved in Kevin's care; and that Kevin is currently placed in kinship care with his maternal aunt. On 21 September 2015, the trial court granted DSS nonsecure custody of Kevin.

On 16 February 2016, the trial court entered an order finding as follows, in pertinent part: Kevin was previously adjudicated neglected and dependent on 24 April 2011 based on the tumultuous relationship between Kevin and respondent; Kevin was eventually placed back into respondent's care; Kevin's mother has not been a part of Kevin's life in years; since resuming living with respondent, Kevin and respondent have continued their harmful relationship; respondent refers to Kevin as "a\*\*hole" and other inappropriate names; respondent has threatened to harm and kill Kevin; respondent struck Kevin with a wooden pole; Kevin located a marijuana pipe and grinder in respondent's bedroom; Kevin does not feel safe in the home because of his relationship with respondent; a licensed clinical social worker who provided counseling for respondent and Kevin testified that there was continued

conflict and communication issues between them and that both have mood disorders; and that Kevin has threatened to commit suicide, harm others, and blow up a school. The trial court further found that Kevin's particular needs have not been addressed by respondent in an appropriate manner, that there continues to be anger and defiance issues between the two, and that respondent has been unable to structure an appropriate form of discipline for Kevin. Based upon these findings of fact, the court adjudicated Kevin to be a neglected and dependent juvenile as defined by N.C. Gen. Stat. §§ 7B-101(15) and (9).

On 16 February 2016, the trial court also entered a dispositional order. The trial court determined that Kevin's custody should remain with DSS, with placement in DSS's discretion "to provide or arrange for foster care or other placement, and with the authority to authorize necessary medical, dental, psychological, and psychiatric services for the Juvenile." The trial court concluded that the permanent plan for Kevin would be a concurrent plan of reunification and custody with a relative or other court-appointed caretaker. Visitation with respondent included structured and supervised visitations as directed by Kevin's therapist or family therapist.

Respondent entered notice of appeal from the trial court's adjudication and dispositional orders.

## II. Discussion

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On appeal, respondent argues that the trial court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) to enter the 18 February 2016 adjudication and disposition orders. We agree.

Our Court reviews the issue of subject matter jurisdiction as follows:

Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings.

*In re M.C.*, \_\_ N.C. App. \_\_, \_\_, 781 S.E.2d 70, 73 (2015) (citation omitted).

“Although the North Carolina Juvenile Code grants the district courts of North Carolina exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent[,] the jurisdictional requirements of the UCCJEA . . . must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code.” *In re J.W.S.*, 194 N.C. App. 439, 446, 669 S.E.2d 850, 854 (2008) (internal citations and quotation marks omitted). The UCCJEA is codified in Chapter 50A of our General Statutes and “is designed to provide[] a uniform set of jurisdictional rules and guidelines for the national

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enforcement of child custody orders[.]” *Id.* (internal quotation marks and citation omitted).

Here, it is undisputed that the New York court granted sole physical and legal custody of Kevin to respondent on 2 July 2008. Thus, at the time the North Carolina juvenile petitions were filed, there was an existing order from another state pertaining to Kevin. Accordingly, any change to the New York court order qualified as a modification under the UCCJEA. *See In re N.R.M.*, 165 N.C. App. 294, 299, 598 S.E.2d 147, 150 (2004). A “modification” is defined as “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.” N.C. Gen. Stat. § 50A-102(11) (2015).

Under the applicable modification provision of the UCCJEA, N.C. Gen. Stat. § 50A-203, a North Carolina court

cannot modify a child-custody determination made by another state unless two requirements are met. First, the North Carolina court must have jurisdiction to make an initial determination. N.C. Gen. Stat. § 50A-201(a)(1) provides for jurisdiction if North Carolina is the home state of the child on the date of the commencement of the proceeding[.]

*J.W.S.*, 194 N.C. App. at 446, 669 S.E.2d at 855 (internal citations and quotation marks omitted). “Home state” is defined as “the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately

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before the commencement of a child-custody proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period.” N.C. Gen. Stat. § 50A-102(7) (2015). Here, Kevin had been living in North Carolina with respondent since 2013 and the relevant juvenile petition was filed 21 September 2015. Thus, the home state requirement was satisfied.

However, a second requirement must also be met.

Even where North Carolina is the home state of the child, however, in order for a North Carolina court to modify a custody determination of another state, one of the following requirements must also be met:

- (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
- (2) A court of this State 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.

*J.W.S.*, 194 N.C. App. at 447, 669 S.E.2d at 855 (citing N.C. Gen. Stat. § 50A-203).

“Under subsection (1), there are two means whereby North Carolina would obtain jurisdiction.” *N.R.M.*, 165 N.C. App. at 300, 598 S.E.2d at 150. The first manner is if the New York court determined it no longer had jurisdiction under N.C. Gen. Stat. § 50A-202, which provides that a court which has made a child-custody determination consistent with the UCCJEA has exclusive, continuing jurisdiction until:

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- (1) [that court] determines that . . . the child, the child's parents, and any person acting as a parent [no longer] have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
- (2) [that court] or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

N.C. Gen. Stat. § 50A-202(a) (2015). “The official comment to this statute clarifies that ‘the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.’” *N.R.M.*, 165 N.C. App. at 300, 598 S.E.2d at 151 (citation omitted). In the present case, there is no order from the New York court in the record stating that New York no longer has jurisdiction. Therefore, New York did not lose jurisdiction pursuant to N.C. Gen. Stat. § 50A-202(a)(1).

A second means under N.C. Gen. Stat. § 50A-203(1) whereby New York would relinquish jurisdiction to North Carolina is if the New York court determined that a North Carolina court would be a more convenient forum under N.C. Gen. Stat. § 50A-207. Yet, nothing in the record demonstrates that the New York court made such a determination. Accordingly, neither method of obtaining jurisdiction under N.C. Gen. Stat. § 50A-203(1) is satisfied.

The final option for North Carolina to obtain

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jurisdiction is contained in N.C. Gen. Stat. § 50A-203(2). This section allows jurisdiction if either the issuing state or the state attempting to modify the order determines that the child, the child's parents, and any person acting as a parent have left the issuing state.

*Id.* at 301, 598 S.E.2d at 151. Here, while respondent and Kevin no longer lived in New York, the trial court found that Kevin's biological mother resided in Syracuse, New York. The 21 September 2015 petition also indicated a New York address for Kevin's biological mother. Because Kevin's biological mother continued to live in New York, N.C. Gen. Stat. § 50A-203(2) was not satisfied. Accordingly, the trial court lacked subject matter jurisdiction to modify the prior New York custody order and the 16 February 2016 adjudication and disposition orders are vacated.

Nonetheless, this conclusion does not end our inquiry since N.C. Gen. Stat. § 50A-203 begins with the phrase: "Except as otherwise provided in G.S. 50A-204[.]" *In re J.H.*, \_\_ N.C. App. \_\_, \_\_, 780 S.E.2d 228, 236 (2015). Pursuant to N.C. Gen. Stat. § 50A-204(a), "[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 . . . is subjected to or threatened with mistreatment or abuse." In the 21 September 2015 juvenile petition, DSS alleged, *inter alia*, that respondent recently beat Kevin with a wooden stick, threatened to shoot Kevin with a gun, and berates and curses at Kevin. In the 21 September 2015 order for nonsecure custody, the trial court checked a box on the

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pre-printed AOC form to find that “the juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, custodian, or caretaker has created conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection[.]” This Court has held that a trial court had temporary emergency jurisdiction to grant nonsecure custody to DSS under similar factual circumstances in *In re J.H. J.H.*, \_\_ N.C. App. at \_\_, 780 S.E.2d at 237. Accordingly, we hold that the trial court had temporary emergency jurisdiction to enter the 21 September 2015 order for nonsecure custody.

However, as to temporary emergency jurisdiction under the UCCJEA:

If there is a previous child-custody determination that is entitled to be enforced under this Article, or a child-custody proceeding has been commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, any order issued by a court of this State under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under G.S. 50A-201 through G.S. 50A-203. The order issued in this State remains in effect until an order is obtained from the other state within the period specified or the period expires.

N.C. Gen. Stat. § 50A-204(c) (2015). N.C. Gen. Stat. § 50A-204(d) further provides that:

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 proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203 shall immediately communicate with the other court . . . to resolve the

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emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

In the present case, the trial court's 16 February 2016 adjudication and disposition orders do not specify "a period that the court considers adequate to allow [DSS] to obtain an order" from the New York court. Nor is there any indication that the trial court "immediately communicated" with the New York court in an effort to resolve the emergency and determine "a period of duration for the temporary order" in accordance with N.C. Gen. Stat. § 50A-204(d). The trial court did not purport to exercise temporary emergency jurisdiction; rather, it merely stated that it had jurisdiction over the parties and the subject matter of the action.

We note that the "Affidavit as to Status of Minor Child" filed on 7 February 2014 does not indicate that DSS had any knowledge of the prior New York proceedings, although the petition does allege upon information and belief that "there has been significant history involving Respondent Father and [Kevin] with the Ulster County Department of Social Services in New York, where they are originally from[.]" The petition also noted that because of the New York DSS involvement, "[Kevin] had received substantial mental health treatment, including hospitalizations[]" and that "DSS initially became aware of the family because New York requested a courtesy home visit be completed[]" in North Carolina. We also note that the "Affidavit as to Status of Minor Child" filed with the 21 September 2015 petition likewise does not

identify any other custody proceedings involving Kevin. The lack of information regarding the New York proceedings in the 2015 affidavit seems particularly odd since the court proceedings and reports following the 2014 petition included much information regarding Kevin's prior involvement with DSS in New York. We are concerned that no one seemed to identify the need to contact the New York court to make an inquiry regarding jurisdiction, even though Sampson County DSS was clearly aware that New York's DSS had prior "significant" involvement with Kevin. But whatever the reasons for this omission, the trial court properly exercised emergency jurisdiction based on the allegations of the 2015 petition.

Therefore, we hold that while the trial court properly exercised temporary emergency jurisdiction to enter the 21 September 2015 order for nonsecure custody, it did not have temporary emergency jurisdiction to enter the 16 February 2016 adjudication and disposition orders. The 16 February 2016 adjudication and disposition orders are vacated and remanded to the trial court for a proper determination of jurisdiction under the UCCJEA, with directions for the court to communicate with the New York court under N.C. Gen. Stat. § 50A-110 and request that the New York court determine (1) whether it will no longer exercise exclusive, continuing jurisdiction; or (2) whether a North Carolina court would be a more convenient forum. N.C. Gen. Stat. § 50A-203(1) (2015); *see J.H.*, \_\_ N.C. App. at \_\_, 780 S.E.2d at 238 (remanding "the case for a proper determination of the [North

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Carolina] trial court’s jurisdiction under the UCCJEA” and affirming that this would be the correct analysis “[i]f the Texas court [had previously] exercised exclusive, continuing jurisdiction” under the UCCJEA).

As a result of this decision, we need not reach respondent’s remaining arguments on appeal.

VACATED AND REMANDED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).