IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1288

Filed: 5 September 2017

Harnett County, No. 16 CVD 1232

SHAWN BOWDEN, Petitioner,

v.

COLEEN WASHBURN, Respondent.

Appeal by respondent from order entered 12 July 2016 by Judge R. Dale Stubbs in Harnett County District Court. Heard in the Court of Appeals 6 June 2017.

No brief filed on behalf of petitioner-appellee.

Turrentine Law Firm, PLLC, by Karlene S. Turrentine, for respondent-appellant.

BRYANT, Judge.

Where the evidence was sufficient to support the trial court's finding of fact that respondent committed acts of domestic violence upon the minor children, the trial court did not err in issuing a domestic violence protective order.

Petitioner-father, Shawn Bowden of Harnett County, North Carolina, and respondent-mother, Coleen Washburn of Honolulu County, Hawaii, share custody of

their two minor children, Penelope and Tyler,[1] pursuant to an order previously entered in Harnett County. Respondent moved to Hawaii with the children sometime in 2015.

On 6 June 2016, eight-year-old Penelope and six-year-old Tyler arrived in North Carolina to spend the summer with petitioner. Petitioner alleges they immediately complained of abuse, saying respondent spanked them, forced them to ingest soap when they would not finish their dinner, forced them to hold a pushup stance, and do "walls sits." Additionally, Penelope was threatened that if she said anything regarding these punishments, her mother would "not fight to get her back."

Petitioner filed a complaint in Harnett County District Court, requested emergency relief, and was granted an ex parte domestic violence protection order ("DVPO") until 20 June 2016 (later extended to 12 July 2016). A day before the hearing scheduled for 12 July 2016, respondent's attorney sent notice that her firm represented respondent, but respondent's attorney would be handling a separate abuse, neglect, or dependency matter in juvenile court in another county on the morning of 12 July 2016. Respondent's attorney requested that the DVPO matter be held open until 11:00 a.m. She also requested that respondent be able to testify via telephone. Shortly after twelve noon, respondent's counsel had not arrived and the trial court moved forward with the hearing. Petitioner was the only party or witness

[1] Pseudonyms are used in order to protect the identities of the minor children. N.C. R. App. P. 3.1(b) (2017).

present. Petitioner testified to the veracity of the allegations he set forth in the complaint. Petitioner testified that he also reported the allegations to the Department of Social Services ("DSS") and a social worker substantiated "some type of abuse." Following the hearing, the trial court entered a DVPO against respondent effective for one year, giving petitioner full custody of the children. On 26 July 2016 (amended 28 July 2016), counsel for respondent made a motion to set aside the DVPO. On 9 August 2016, the trial court entered an order continuing the motion and setting the matter for hearing in regular domestic court on 15 August 2016. On 9 August 2016, respondent appealed the DVPO entered 12 July 2016.

On appeal, respondent contends the trial court erred (I) by finding and concluding that it had subject matter jurisdiction; (II) by finding and concluding that it had personal jurisdiction over respondent and her minor children; (III) in removing the children from respondent's care; (IV) by basing its DVPO on hearsay evidence; and (V) by moving forward with hearing the matter where the trial court knew respondent's counsel was handling a matter in juvenile court.[2]

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[2] The DVPO from which respondent appeals was effective for one year following 12 July 2016 and was thus set to expire on 12 July 2017, after this Court heard the matter on 6 June 2017. "Nevertheless, 'even when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.' " *Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001) (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)). This Court has previously acknowledged that a DVPO presents collateral legal and non-legal consequences sufficient to warrant a conclusion that a properly appealed but currently expired DVPO may not be

I

Respondent first argues the trial court erred by finding and concluding that it had subject matter jurisdiction to address allegations of domestic violence which occurred, if at all, in the state of Hawaii. We disagree.

We review whether the trial court had subject matter jurisdiction de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

In order to act, a trial court must have subject matter jurisdiction. *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2015). A challenge to the court's subject matter jurisdiction cannot be waived. *In re J.T.*, 363 N.C. 1, 3, 672 S.E.2d 17, 18 (2009) (citing N.C.G.S. § 1A-1, Rule 12(h)(3)). A party may raise the issue of subject matter jurisdiction at any time, including on appeal. *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961).

In this State, "[s]ubject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C.

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subject to dismissal for mootness. *See Mannise v. Harrell*, ___ N.C. App. ___, ___, 791 S.E.2d 653, 660 (2016) (acknowledging that acts of domestic violence are considered in child custody proceedings); *Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 (acknowledging that entry of a DVPO may be considered when a person applies for a job, a professional license, a government position, or admission to an academic institution). Thus, respondent's appeal from the 12 July 2016 DVPO set to expire on 12 July 2017 is not moot.

App. 666, 667, 353 S.E.2d 673, 675 (1987). Pursuant to section 50B-2(a) of our General Statutes,

> [a]ny person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person . . . . The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. Any action for a domestic violence protective order requires that a summons be issued and served.

N.C. Gen. Stat. § 50B-2(a) (2013). "Chapter 50B contains no provision that requires the underlying act or acts of domestic violence to have occurred in this State." *Mannise v. Harrell*, ___ N.C. App. ___, ___, 791 S.E.2d 653, 658 (2016).

Here, petitioner, a resident of North Carolina with joint legal custody of his children, sought relief for acts of domestic violence pursuant to Chapter 50B. Thus, the basic requirements for subject matter jurisdiction pursuant to section 50B-2(a) were satisfied, and the trial court properly assumed subject matter jurisdiction. Accordingly, we overrule respondent's argument.

II

Next, respondent contends the trial court erred by finding and concluding it had personal jurisdiction over respondent and her minor children, all of whom were residents of the State of Hawaii. We disagree.

"[T]he defense of lack of personal jurisdiction can be waived. . . . Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction." *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 336, 714 S.E.2d 770, 774 (2011); *see also* N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2015) ("A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."); *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) ("Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent." (citation omitted)).

In *Lynch v. Lynch*, our Supreme Court held that despite a defect in the service of the summons upon the defendant, the defendant waived her right to challenge personal jurisdiction where the defendant made a general appearance in the action (requesting the trial court enforce a foreign judgment) before she contested the trial court's exercise of personal jurisdiction over her. 303 N.C. 367, 369, 373–74, 279 S.E.2d 840, 842, 844–45 (1981).

"[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." *In re Blalock,* 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951). In practice, North Carolina courts have liberally interpreted what qualifies as a general appearance. "[A] court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction." *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009) (citation omitted). "[I]f [a] defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, [s]he has made a general appearance and has submitted h[er]self to the jurisdiction of the court whether [s]he intended to or not." *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978) (citing *Williams v. Cooper*, 222 N.C. 589, 24 S.E.2d 484 (1943)).

Respondent in the instant case raises the issue of personal jurisdiction for the first time on appeal. We note respondent submitted to the power and jurisdiction of the trial court and never challenged personal jurisdiction. Respondent's counsel notified the trial court that she represented respondent, requested that respondent be allowed to testify by telephone and that the matter be held open on 12 July 2016, until respondent's counsel could be present for the hearing. While the request to hold

the matter open mirrors a request for an extension of time and would not, standing alone, qualify as a "general appearance," for purposes of personal jurisdiction, respondent's counsel's request that respondent be allowed to testify via telephone during the 12 July 2016 hearing not only indicated a willingness to participate in the hearing and address the allegations, but also functioned as respondent's submission to the trial court's authority. Moreover, respondent later filed a motion and amended motion to set aside the trial court's 12 July 2016 DVPO. Thus, respondent made a general appearance before the trial court prior to objecting to the trial court's exercise of personal jurisdiction. Therefore, respondent waived her objection to the trial court's exercise of personal jurisdiction. *See Lynch,* 303 N.C. at 373–74, 279 S.E.2d at 844–45; *Blalock,* 233 N.C. at 504, 64 S.E.2d at 856; *Swenson*, 39 N.C. App. at 89, 250 S.E.2d at 288. Accordingly, respondent's argument is overruled.

III

Respondent next argues the trial court erred by entering a DVPO removing the children from respondent's care for a year where there was insufficient evidence to establish that the minor children were exposed to a risk of future harm. We disagree.

"When the trial court sits without a jury [regarding a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts."

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (alteration in original) (citation omitted). If the evidence exists to support the trial court's findings of fact, the trial court's findings are conclusive on appeal. *Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987). This Court may review a trial court's conclusions of law *de novo*. *Wright v. Auto Sales, Inc.,* 72 N.C. App. 449, 325 S.E.2d 493 (1985).

North Carolina General Statutes allow a person residing in this State to file a civil action in an attempt to seek relief for acts of violence against children in their custody. N.C.G.S. § 50B-2(a). Pursuant to General Statutes, section 50B-3, "[i]f the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." *Id.* § 50B-3(a).

> Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury . . . .

Id. § 50B-1(a). The trial court's decision in considering the DVPO must assess whether there is a substantial risk of future harm. *Hensey*, 201 N.C. App. at 65, 685 S.E.2d at 548 (citing *In re A.S.,* 190 N.C. App. 679, 690, 661 S.E.2d 313, 320 (2008)).

Here, petitioner testified the custody arrangement between himself and respondent was that respondent had primary custody of their two minor children, who came to visit petitioner in North Carolina. Petitioner further testified to the veracity of the allegations in the complaint, as related to him by his children immediately upon their arrival in North Carolina. In his complaint, petitioner alleged that

> [w]hen the kids don't finish there [sic] dinner there [sic] mother holds there [sic] head backwards and pours dawn dish soap down [her daughter's] throat and then makes my 6 year old son . . . rub [dawn dish soap] all in his mouth . . . [and] when [the daughter] comes to [her father's] house . . . not [to] say anything [because] if anyone comes to there [sic] house then she will not fight to get [the daughter] back[—]only [her] son.

The evidence presented to the trial court was sufficient to establish specific facts and circumstances from which the trial court could find that the acts committed by respondent upon her children were acts capable of causing bodily injury and that there existed a substantial risk of future harm. As a result, the conclusion of the trial court that respondent committed acts of domestic violence against the children is supported by the facts as found by the trial court. Thus, the trial court acted properly in removing the children from plaintiff's custody.

IV

Respondent contends the trial court erred by basing its DVPO entirely on hearsay evidence and with no known date, place, or time alleged as to the acts of

domestic violence. Specifically, respondent argues the statements that petitioner asserts the children made were inadmissible hearsay. We dismiss this argument.

"The right to except (*i.e.* object) is a privilege, which the party may waive; and if the ground of exception is known and not seasonably taken, by implication of law it is waived." *Lambros v. Zrakas*, 234 N.C. 287, 289, 66 S.E.2d 895, 896 (1951) (citation omitted); *see also id.* (holding that "though it is hearsay and also embraces the declaration of the alleged agent," where the defendant failed to object to the admission of the evidence "it went to the jury for its full evidentiary value"). While "an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action . . . may be made the basis of an issue presented on appeal," pursuant to the plain error rule, *see* N.C. R. App. P. 10(a)(4) (2017)), the plain error rule is not applicable in civil actions. *See Wachovia Bank v. Guthrie*, 67 N.C. App. 622, 626, 313 S.E.2d 603, 606 (1984) ("[O]ur Supreme Court intended the 'plain error' rule to apply only in criminal cases."). Moreover, arguments raised for the first time on appeal challenging the admissibility of hearsay evidence in a civil action have been dismissed. *See Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 22, 293 S.E.2d 240, 245 (1982) ("Although petitioners now object, on grounds of hearsay, to [the witness's] verification of his testimony by reference to exhibits he did not personally prepare, since no objection was made at

trial, these arguments may not be raised for the first time on appeal." (citation omitted)).

Here, on appeal, respondent raises the challenge to petitioner's testimony regarding statements by the minor children for the first time. Respondent does not provide any authority which preserves this argument for review on appeal. Accordingly, we dismiss this argument.

V

Lastly, respondent contends the trial court erred by moving forward with the hearing on the DVPO where the trial court was aware that defense counsel was handling a juvenile matter at the same time. We disagree.

"The ultimate authority over managing the trial calendar is retained in the court. . . ." *Simeon v. Hardin*, 339 N.C. 358, 376, 451 S.E.2d 858, 870 (1994). When addressing an issue with the presiding judge's management of the calendar, this Court should review the trial court's decision to move forward with the case for abuse of discretion.

In the event an attorney has conflicting engagements in different courts, the proceeding of a termination of parental rights or the adjudication of abuse, neglect, or dependency of a juvenile takes precedence over other district court matters. N.C. General Rules of Practice, Rule 3.1(a)(2). Once aware of a conflict, an attorney shall promptly give written notice and provide a resolution of the conflict under these rules

to the clerk of court and the appropriate judge. N.C. General Rules of Practice, Rule 3.1(b).

In this case, respondent's counsel appropriately prioritized the matter in juvenile court and provided reasonable notice of and a solution to the conflict time. However, the trial judge waited over an hour past the proposed continuance time of 11:00 a.m.: "[l]et the record show that . . . [t]he Court has held the case open and it's no longer going to hold it open . . . and the Court's calling the case for – for hearing." The trial court accommodated respondent's counsel according to the proposed solution by waiting beyond the requested continuance. Ultimately, the responsibility fell on counsel to guarantee the court had been effectively informed of a delay in the juvenile matter. Given the attempts to accommodate respondent's counsel's schedule, the trial court acted within its discretion to move forward on the case.

The order of the trial court issuing the DVPO against respondent and granting petitioner temporary custody is

AFFIRMED.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).