IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-945

Filed: 7 July 2020

Wake County, No. 18 CVD 15091

JOANNE KATHLEEN MCDOWELL, Plaintiff-Appellant,

v.

STEVEN CLARK BUCHMAN, Defendant-Appellee.

Appeal by Appellant-Mother from order entered 17 April 2019 by Judge Anna Worley in Wake County District Court. Heard in the Court of Appeals 10 June 2020.

Katten Muchin Rosenman LLP, by Rebecca K. Lindahl and Michaela Connors Holcombe, for plaintiff-appellant.

Tharrington Smith, LLP, by Evan B. Horowitz and Jeffrey Robert Russell, for defendant-appellee.

PER CURIAM.

On April 17, 2019, the trial court denied registration of a foreign child custody order. Appellant-Mother appeals, arguing the trial court misapplied the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). We disagree.

The parties are parents of a minor child born on April 22, 2010. On March 15, 2011, the parties entered into a consent judgement relating to the custody of the

minor child. Subsequently, however, the parties were "totally unable to cooperate with one another regarding custody issues of the minor child."

On November 7, 2012, the trial court entered a child custody order which modified the consent judgement. The trial court found in Finding of Fact 4:

> Father had some visits with the minor child from April through July of 2011. Visitations ceased when mother obtained a [*sic*] emergency custody order in September 2011. Visitations resumed when the emergency order was dissolved in November 2011. Visitations ceased again in February 2012 when mother required that she supervise all visitation and father refused to accept mother's requirements for visitation. Limited visitations began again in October 2012. Otherwise, the parties have been unable to agree on any visitation.

The trial court concluded that

> 1. The Court has jurisdiction over each of the parties and North Carolina is the "Home State" of the minor child. North Carolina has continuing exclusive jurisdiction over the issue of the custody of the minor child. Further, the matter is properly before the court.
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> . . . .
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> 3. [Mother] and [father] are each fit and proper parents for the minor child and each is capable of providing suitable care and nurturing for the minor child. Each parent has an appropriate support network to assist with the care and nurturing of the minor child.
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> 4. Substantial changes of circumstances have occurred which are likely to, and have, effected [*sic*] the best interest of the minor child. These changes have occurred as a result of the mother moving to Orange County, North Carolina and, more significantly, as a result of the parties being totally unable or unwilling to have any meaningful

> discourse regarding visitation and other issues effecting [*sic*] the child's best interest. It is in the best interest of the minor child that he have a meaningful relationship with each of his parents and that appears to impossible [*sic*] under the [consent judgment]. Further, it appears to be unnecessary that the father's visitation with the child be supervised as apparently was contemplated, at least to some degree, by the [consent judgement]. Also, the lack of a set visitation schedule is contrary to the child's best interest as is the requirement that visitation occur in Henderson County or Buncombe County, NC.

The modification order established that beginning in January 2013, the father "shall have custody of the minor child the third week of each month." However, on December 17, 2012, Appellant-Mother absconded with the child to Canada.

On January 28, 2013, the father initiated an *ex parte* proceeding seeking to hold Appellant-Mother in criminal contempt for failing to comply with the modification order as well as an emergency custody order. The trial court determined that Appellant-Mother had removed the child "with the intent to evade the jurisdiction of this state" and issued an *ex parte* custody order in which the father was awarded immediate custody of the minor child "pending a hearing in this cause on the merits." In addition, Appellant-Mother was found to be in criminal contempt and an order was issued for her arrest.

On April 21, 2015, Appellant-Mother filed an application in Ontario, Canada seeking custody of the minor child and a restraining order against the father. Although the father received notice of the proceeding, he did not file an answer. On December 1, 2015, a Canadian trial court entered an order granting sole custody of

the minor child to Appellant-Mother, relying solely on affidavits presented by Appellant-Mother. The Canadian court "accept[ed] this [affidavit] evidence as fact," and purported to supersede the *ex parte* order "on a final basis."

In December 2018, Appellant-Mother sought to register the Canadian order in Wake County, North Carolina. The father contested, and a hearing was held on April 2, 2019. The trial court denied Appellant-Mother's request because "Canada did not have jurisdiction to enter the order sought to be registered, nor did Canada properly exercise emergency jurisdiction[.]" As such, "Canada did not act in substantial conformity" with the jurisdictional requirements of the UCCJEA, and the Canadian order was not registered.

Appellant-Mother appeals, arguing that the Canadian order should have been registered in Wake County. We disagree.

Both parties agree the threshold question is whether a child custody proceeding was pending in North Carolina. Specifically, Appellant-Mother argues that the *ex parte* order "was a final order subject to modification by a court of competent jurisdiction," and as such, "there was no 'pending' or 'simultaneous' child custody proceeding when Appellant-Mother filed her petition in Toronto in December 2015[.]" We disagree.

Under the UCCJEA, foreign countries are treated as if they are states within the United States. N.C. Gen. Stat. § 50A-105(a) (2019). Therefore, Canada and North Carolina are states for purposes of UCCJEA analysis.

Section 206 ("Simultaneous Proceedings") provides that

> a court of this State may not exercise its jurisdiction under this Part if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this Article, *unless the proceeding has been terminated or is stayed by the court of the other state* because a court of this State is a more convenient forum under G.S. 50A-207.

N.C. Gen. Stat. § 50A-206(a) (2019) (emphasis added). Thus, if the *ex parte* order was a temporary order, the North Carolina proceedings would be considered pending, and another state could exercise jurisdiction only if North Carolina terminated or stayed the proceeding. *See id.*

Under North Carolina law, an order becomes final when it "addresses the [issues] presented . . . [and] disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Cty. of Durham by & through Durham DSS v. Hodges*, 257 N.C. App. 288, 293, 809 S.E.2d 317, 322 (2018) (citations and quotation marks omitted). An order is temporary if it does not determine all the issues. *Peters v. Pennington*, 210 N.C. App. 1, 13-14, 707 S.E.2d 724, 734 (2011). "[T]he trial court's designation of an order as temporary or permanent is not binding on an appellate court. Instead, whether an order is

temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) (citations and quotation marks omitted).

> A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered *ex parte* and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the *child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.*

N.C. Gen. Stat. § 50-13.5(d) (2019) (emphasis added).

"[T]emporary custody orders establish a party's right to custody of a child pending the resolution of a claim for permanent custody—that is, pending the issuance of a permanent custody order." *Regan v. Smith*, 131 N.C. App. 851, 852-53, 509 S.E.2d 452, 454 (1998) (citations omitted). "[A] temporary custody order that does not set an ongoing visitation schedule cannot become permanent by operation of time." *Woodring v. Woodring*, 227 N.C. App. 638, 645, 745 S.E.2d 13, 19 (2013) (footnote omitted).

Here, the *ex parte* order was issued in response to Appellant-Mother absconding to Canada with the minor child in 2013. The language of the *ex parte* order provided, "[t]hat immediate custody of the minor child . . . is hereby awarded to the [father], *pending a hearing in this cause on the merits*." (Emphasis added).

Unless sufficiently specific, an *ex parte* custody order should be considered temporary as it inherently contemplates a return hearing to resolve the emergency which justified issuing the order. Here, the *ex parte* order did not set an ongoing visitation schedule. Thus, a return hearing was contemplated. In addition, the terms of the order contemplated an additional hearing "on the merits." Accordingly, the *ex parte* order was not a permanent order by the plain language of the order, or by operation of time. Therefore, Canada lacked jurisdiction unless North Carolina terminated or stayed the proceedings. There is no evidence in the record that a court in this State terminated or stayed child custody proceedings.

The custody proceeding in Henderson County was, and still is, pending, and the proceeding in this State has not been terminated or stayed. As such, Canada lacked jurisdiction to enter the Canadian order. The trial court's denial of registration of the Canadian order is affirmed.

AFFIRMED.

Report per Rule 30(e).

Panel consisting of: Judges ZACHARY, BERGER, and BROOK