Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00261-CV

IN THE INTEREST OF J.K.B., J.M.B., J.F.B., C.J.B., and C.B.B., Children

From the 81st Judicial District Court, Wilson County, Texas
Trial Court No. CVW1800643
Honorable Russell Wilson, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 14, 2021

AFFIRMED

Father appeals the trial court's order terminating his parental rights to his children J.K.B., J.M.B., J.F.B., C.J.B., and C.B.B.[1] In a single issue, Father asserts the Texas court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") to modify a California court's custody order. We conclude the Texas court had jurisdiction under the UCCJEA and affirm the trial court's final termination order.

BACKGROUND

Father resided with Mother and their five children, J.K.B., J.M.B., J.F.B., C.J.B., and C.B.B, in California. On June 18, 2018, the Superior Court of California, Kern County, issued a

[1] To protect the identity of the minor children, we refer to the parties by fictitious names, initials, or aliases. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

"Restraining Order After Hearing (Order of Protection) (Domestic Violence Prevention)" and a "Child Custody and Visitation Order" (collectively, the "California Custody Order"). The California Custody Order protected Mother and the children by ordering Father, for a period of five years, not to: "[h]arass, attack, strike, threaten, assault (*sexually or otherwise*), hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, impersonate (*on the Internet, electronically or otherwise*), or block movements;" "[c]ontact, either directly or indirectly, by any means . . .;" and "[t]ake any action, directly or through others, to obtain the addresses or locations of any protected persons." Father was also prohibited from owning or possessing a firearm and ordered to stay at least 100 yards away from Mother and the children, as well as their home, vehicle, school, and childcare, except for peaceful contact required for any court-ordered visitation of the children. Finally, the Custody Order stated that Mother had legal and physical custody of the children, and Father had no visitation.

Shortly after the California Custody Order was issued, Mother took the children to Texas. Mother was subsequently arrested and charged with aggravated assault with a deadly weapon for shooting her boyfriend. On August 21, 2018, the Texas Department of Family and Protective Services (the "Department") filed an Original Petition for Protection of a Child, for Conservatorship, and for Termination in a Suit Affecting the Parent-Child Relationship based on an affidavit alleging there was no parent, family member, or other appropriate caregiver for the children and they were in immediate danger. A copy of the California Custody Order was attached to the Department's petition, in which it acknowledged continuing jurisdiction over the children was established in another court, but asserted the Texas court in which its petition was filed "has emergency and/or home state jurisdiction under the [UCCJEA]." The Department was appointed emergency temporary managing conservator of the children the same day, and became the

temporary managing conservator of the children after the full adversary hearing on August 28, 2018.

On July 24, 2019, the date the parental termination case was set for final hearing, Father filed a "Motion for UCCJEA Conference" requesting that the Texas court confer with the California court concerning the existence or exercise of custody jurisdiction. As an exhibit to his motion, Father attached a copy of a default custody order heard by the California court in Kern County on September 10, 2018 and signed on November 29, 2018; the order amended the California Custody Order by removing the children as protected parties from the restraining order and awarding full legal and physical custody of the children to Father, with no visitation for Mother. Father also attached a copy of a "Notice of Case Transfer" dated March 18, 2019, stating the case had been transferred from the California Superior Court in Kern County to the California Superior Court in Los Angeles County. Father filed a "Special Appearance, Plea to the Jurisdiction and Motion to Dismiss, Request for Court to Decline Jurisdiction, and Original Answer" in the Texas court on August 7, 2019.

On August 9, 2019, the Texas court and the California court in Los Angeles County conducted a telephonic UCCJEA conference; a record was made. At the conclusion of the conference, the California court ruled it was declining to exercise its continuing jurisdiction in favor of Texas as the more convenient forum based on the following findings:

> (1) not only has domestic violence occurred but Texas at this point is clearly in the best position to protect the parties and … children in the future because they already have the children in a protected circumstance and have access to the people who have been caring for these children;
>
> (2) the children have resided in Texas for almost one year;
>
> (3) the distance between the two states is not dispositive;

(4) with respect to financial hardship, while it is more expensive for Father to be in Texas, it is impossible for Mother to appear in California due to her custodial situation, and both parents have appointed counsel to represent them in Texas;

(5) there is no agreement between the parties as to jurisdiction;

(6) the witnesses and other evidence relevant to the children's best interests in the pending litigation are located exclusively in Texas;

(7) the Texas court would be able to decide the pending issues most expeditiously, and already has to some extent, and there is no pending litigation in California; and

(8) the Texas court has the highest degree of familiarity with the facts and issues in the pending litigation, and the California court in Los Angeles County has had no contact with the parties.

See CAL. FAM. CODE ANN. § 3427(b)(1)-(8) (listing the UCCJEA factors to be considered in making an inconvenient forum determination). That same day, the California court signed a written order finding that California is the home state of the minor children under the UCCJEA, but also finding that California is an inconvenient forum under the circumstances and declining to exercise its continuing jurisdiction.

Beginning in January 2020 and continuing in March 2020, an associate judge conducted a bench trial on the Department's petition to terminate Mother's and Father's rights to the children. After a de novo hearing before the district court on April 13, 2020, the district court adopted the associate judge's recommendation and found that Father has a history of domestic violence and that the following predicate grounds support termination of Father's parental rights: endangerment under subsection (D); endangerment under subsection (E); and failure to complete his family service plan under subsection (O). TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O). The court further found that termination of Father's parental rights is in the children's best interest and appointed the Department as sole managing conservator of the children. *Id.* § 161.001(b)(2). Mother's parental rights were terminated on similar grounds. The final termination order was

signed on April 17, 2020. The termination order recites that the Texas court has jurisdiction pursuant to the UCCJEA, as codified in Texas Family Code Chapter 152, and no other court has continuing, exclusive jurisdiction of the case. Only Father appeals.[2]

ANALYSIS

Whether a trial court has subject matter jurisdiction is a question of law which we review de novo. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). Subject matter jurisdiction is essential to the authority of a court to decide a case and is never presumed and cannot be waived. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Jurisdiction over interstate child custody matters is governed by the UCCJEA. *Powell v. Stover*, 165 S.W.3d 322, 324 (Tex. 2005); *Interest of C.R.-A.A.*, 521 S.W.3d 893, 898 (Tex. App.—San Antonio 2017, no pet.). "The UCCJEA was designed . . . to clarify and to unify the standards for courts' continuing and modification jurisdiction in interstate child-custody matters." *In re Forlenza*, 140 S.W.3d 373, 374 (Tex. 2004) (orig. proceeding). Both Texas and California have adopted the UCCJEA without substantial variation. TEX. FAM. CODE ANN. §§ 152.001-152.317; CAL. FAM. CODE §§ 3400-3465.

Under the UCCJEA, the state court that has made a child custody determination generally retains exclusive, continuing jurisdiction over any ongoing custody disputes. *Saavedra v. Schmidt*, 96 S.W.3d 533, 541 (Tex. App.—Austin 2002, no pet.); *see* TEX. FAM. CODE ANN. § 152.202; *see also* CAL. FAM CODE ANN. § 3422. A "child custody determination" is defined as "a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child" and includes "permanent, temporary, initial, and modification orders." TEX.

[2] Because Father does not challenge the sufficiency of the evidence to support the grounds for termination of his parental rights, we need not address the evidentiary basis for the trial court's findings under sections 161.001(b)(1) and (2). TEX. FAM. CODE ANN. §§ 161.001(b)(1), (2).

FAM. CODE ANN. § 152.102(3); *see* CAL. FAM. CODE ANN. § 3402(c). An "initial child custody determination" is the first custody determination concerning a particular child. TEX. FAM. CODE ANN. § 152.102(8); CAL. FAM. CODE ANN. § 3402(h). Jurisdiction to modify another state's child custody determination requires that (i) a court of the modifying state "has jurisdiction to make an initial determination" and (ii) the court of the original state determines that "it no longer has exclusive continuing jurisdiction" or a court of the modifying state "would be a more convenient forum," or a court of either state determines that the child, the parents, and any person acting as a parent do not presently reside in the original state. TEX. FAM. CODE ANN. § 152.203; CAL. FAM. CODE ANN. § 3423. An exception exists for temporary emergency jurisdiction when the child is present in the modifying state and 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." TEX. FAM. CODE ANN. § 152.204; CAL FAM. CODE ANN. § 3424. However, such emergency jurisdiction confers only temporary jurisdiction to prevent irreparable and immediate harm to children and does not confer authority to make a permanent custody disposition unless other jurisdictional prerequisites under the UCCJEA are satisfied. *Abderholden v. Morizot*, 856 S.W.2d 829, 833-34 (Tex. App.—Austin 1993, no writ).

The parties acknowledge that California was the parties' home state, the California Custody Order was a child custody determination, and therefore California retained exclusive, continuing jurisdiction over subsequent custody matters. The parties further acknowledge that the Texas court properly exercised temporary emergency jurisdiction over the children, who were present in the state, when it removed them and appointed the Department as temporary managing conservator. Father continues to reside in California. Father's sole argument on appeal is that the Texas court did not have jurisdiction under Texas Family Code section 152.203 to make a permanent modification to the California custody determination by terminating his parental rights to the

children – because the California court improperly declined to exercise its continuing jurisdiction when it found it was an inconvenient forum and Texas was a more convenient forum.

The inconvenient forum provision of the UCCJEA "allows the home state to defer jurisdiction if the court is an inconvenient forum under the circumstances and a court in another state would provide a more appropriate forum." *Powell*, 165 S.W.3d at 327. The statute provides that, "a court . . . that has jurisdiction . . . 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." CAL. FAM. CODE ANN. § 3427(a); *see also* TEX. FAM. CODE ANN. § 152.207(a). The issue of inconvenient forum may be raised by a party's motion, the court's own motion, or the request of another court. CAL. FAM. CODE ANN. § 3427(a); *see also* TEX. FAM. CODE ANN. § 152.207(a). "Before determining whether it is an inconvenient forum, a court . . . shall consider whether it is appropriate for a court of another state to exercise jurisdiction" and shall consider all relevant factors, including:

> (1) [w]hether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) [t]he length of time the child has resided outside [the state with jurisdiction];
>
> (3) [t]he distance between the court in [the state with jurisdiction] and the court in the state that would assume jurisdiction;
>
> (4) [t]he degree of financial hardship to the parties in litigating in one forum over the other;
>
> (5) [a]ny agreement of the parties as to which state should assume jurisdiction;
>
> (6) [t]he nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (7) [t]he ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) [t]he familiarity of the court of each state with the facts and issues in the pending litigation.

CAL. FAM. CODE ANN. § 3427(b); *see also* TEX. FAM. CODE ANN. § 152.207(b). Finally, before making its determination, the court must allow the parties to submit information on the matter. CAL. FAM. CODE ANN. § 3427(b); *see also* TEX. FAM. CODE ANN. § 152.207(b).

Father's argument on appeal challenges the California court's determination that it was an inconvenient forum and Texas was a more appropriate forum under the circumstances. Father specifically argues the California court erred by considering evidence and information related to the eight factors as of the date of the UCCJEA conference, rather than one year earlier when the Department filed its petition in Texas. In other words, Father asserts the California court's determination of whether it was an inconvenient forum, and Texas was a more convenient forum, was limited to reviewing the facts in existence on August 21, 2018, the date the Department's petition was filed, two months after the California Custody Order was signed.

In its responsive brief, the Department asserts that Father's appellate issue challenging the California court's order declining to exercise its continuing jurisdiction is not cognizable in this court and should have been brought in the California appellate court. We agree. As we noted in a recent opinion, under the plain meaning of the statute, the determination of an inconvenient forum under the UCCJEA can only be made by the court with jurisdiction, i.e., here, the California court. *In re A.R.C.*, No. 04-19-00198-CV, 2020 WL 1037892, at *4 (Tex. App.—San Antonio Mar. 4, 2020, no pet.) (mem. op.). We stated, "[t]he 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." *Id.* (citing Unif. Child Custody Jur. & Enf. Act § 152.202 cmt. 1); *see also Saavedra*, 96 S.W.3d at 54 (holding that as long as one parent continues to live in the original decree state, that state alone can determine whether its jurisdiction continues). Under the plain language of section 152.203, a Texas court has no jurisdiction to modify an existing child custody determination by another state

unless the Texas court has jurisdiction to make an initial custody determination and *the court of the other state* determines either: that it no longer has exclusive continuing jurisdiction or the Texas court would be a more convenient forum under section 152.207. TEX. FAM. CODE ANN. § 152.203(1); *In re A.R.C.*, 2020 WL 1037892, at *4. Thus, as the court with exclusive continuing jurisdiction, the California court had to make, and did make, the determination that Texas was a more appropriate forum. *In re A.R.C.*, 2020 WL 1037892, at *4; *see Saavedra*, 96 S.W.3d at 542; *see also In re W.T.H.*, No. 04-16-00055-CV, 2017 WL 603649, at * 4 (Tex. App.—San Antonio Feb. 15, 2017, no pet.) (mem. op.).

By challenging the factual findings relied on by the California court in determining it was an inconvenient forum, Father seeks appellate review in Texas of a ruling made by the California court. As the appellant did in *In re A.R.C.*, Father "asks this court to review the evidence [in existence on the date the Department's petition was filed under his argument] and declare [California] the more convenient forum." *In re A.R.C.*, 2020 WL 1037892, at *4. As we did in *In re A.R.C.,* we "decline to review the evidence regarding the convenience of the forum because as previously stated, that determination was for the [California] court to make." *Id.*; *see Saavedra*, 96 S.W.3d at 542. Father never raised his complaint about the California's court's ruling on inconvenient forum in the Texas trial court; there is no Texas court ruling on the issue to be reviewed. *C.f.*, *In re L.M.D.*, No. 04-19-00728-CV, 2020 WL 4607013, at *4 (Tex. App.—San Antonio Aug. 12, 2020, no pet.) (mem. op.) (reviewing Texas court's ruling that New York was more convenient forum for an abuse of discretion). We conclude, as we did in *In re A.R.C.*, that any appellate review of the California court's determination that it was an inconvenient forum under the circumstances, and Texas was a more appropriate forum, must be pursued in the

California appellate system.[3] *In re A.R.C.*, 2020 WL 1037892, at *4; *see*, *e.g.*, *Brossoit v. Brossoit*, 36 Cal.Rptr.2d 919, 925-26 (C.D. Cal. 1995) (reviewing California court's decision declining to exercise its jurisdiction and finding Tennessee a more convenient forum for an abuse of discretion).

We conclude the jurisdictional prerequisites of section 152.203 were met and the Texas court acquired jurisdiction to permanently modify the child custody determination made in California.[4] TEX. FAM. CODE ANN. § 152.203.

CONCLUSION

Based on the foregoing reasons, we hold the trial court had subject matter jurisdiction under the UCCJEA and we affirm the trial court's order terminating Father's parental rights.

Liza A. Rodriguez, Justice

[3] Father also complains that the California court stated during the UCCJEA conference that it would not consider Father's brief because it was not properly filed in the California court; he argues the statute requires the court to "allow the parties to submit information." Again, Father asks us to review a ruling by the California court, which we may not do. We note, however, that the California court's August 9, 2019 order recites that the Texas court "summarized for the court the arguments of all parties submitted in the Texas matter, and the court considered those arguments in making [its] findings."

[4] Father also asserts that, in exercising its temporary emergency jurisdiction, the Texas court issued a defective order that failed to specify a period of time adequate to allow a person to obtain an order from the state having jurisdiction. *See* TEX. FAM. CODE ANN. § 152.204(c). Father did not raise this purported error in the Texas trial court and has failed to preserve it for review. TEX. R. APP. P. 33.1(a).