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NO. COA06-183

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

IN RE:
R.A.H., Jr.,
T.S.H.,
Minor Children,

Carteret County
No. 04 J 41-42

Appeal by respondent from orders entered 8 July 2005 by Judge Jerry F. Waddell in Carteret County District Court. Heard in the Court of Appeals 14 September 2006.

Andrew A. Lassiter for petitioner-appellee.

Annick Lenoir-Peek for respondent-appellant.

LEVINSON, Judge.

Respondent, the mother of the minor children R.A.H., Jr., and T.S.H., appeals from orders terminating her parental rights in the children. We vacate the orders.

Respondent and the petitioner, who is the father of the minor children, were married in 1989 and divorced in 1995. The minor children, R.A.H., Jr., and T.S.H., were born during their marriage. The parents lived in Iowa during their separation and divorce, and in April 1995 the district court of Warren County, Iowa, entered a Decree of Dissolution of Marriage. The Court awarded the parents joint custody, with primary physical custody given to respondent and visitation rights to petitioner. On 15 July 1995 respondent

shot petitioner, and shot and killed petitioner's girlfriend. Respondent was convicted of willful injury and first degree murder, and was sentenced to life imprisonment without possibility of parole.

In 1996 petitioner filed a pleading in the Iowa court, seeking to terminate respondent's parental rights. He later took a voluntary dismissal, and on 8 April 1997 the district court of Warren County, Iowa, entered a consent order modifying the terms of the original custody order. Recognizing respondent's incarceration as a substantial change of circumstances, petitioner was awarded sole legal and physical custody of both children. Respondent was given visitation rights at the prison, and retained the right to educational and medical information about the children. Respondent's parents, who live in Iowa, were also given visitation rights.

Petitioner remarried in 1999, and in May 2000 he stopped the children's visitation. Respondent and her mother filed motions to have petitioner held in contempt for failure to comply with the 1997 order, and petitioner filed another motion to terminate respondent's visitation rights. Following a hearing on all motions, the Warren County court on 1 February 2002 entered an order that (1) dismissed petitioner's motion to terminate or suspend respondent's visitation rights; (2) granted petitioner's motion to terminate respondent's mother's visitation rights; and (3) held petitioner in contempt of court for failure to comply with the visitation provisions of the 1997 custody order.

In 2003 petitioner moved to Carteret County, North Carolina with his wife and the minor children. In June 2003 petitioner filed another motion in Iowa, again seeking modification of the parties' custody rights. The matter was heard in October 2003, and on 3 December 2003 the Warren County, Iowa, district court entered an order changing the schedule of respondent's visitation rights to visits during the children's summer vacation from school, and telephone visitation. Petitioner was also ordered to keep respondent informed of changes in the children's medical or educational situation.

Five months after the entry of this order, the petitioner on 20 April 2004 filed petitions for termination of parental rights in Carteret County, North Carolina. Petitioner alleged neglect, abandonment, and inability to care for the children as grounds for termination. In August 2004 counsel was appointed for respondent on the termination of parental rights petitions. Before the appointment of counsel, respondent either mailed petitioner or filed several *pro se* motions seeking dismissal of the petitions, enforcement of the Iowa court order, or change of venue. Her motions set out the history of the district court rulings in Iowa, and attached the relevant orders.

The hearing on the termination of parental rights petitions commenced on 22 April 2005, and was completed on 25 May 2005. On 8 July 2005 the trial court entered orders terminating respondent's parental rights in the minor children. From this order respondent timely appeals.

Respondent argues on appeal that the trial court lacked subject matter jurisdiction over the proceedings for termination of parental rights. We agree.

Subject matter jurisdiction "refers to the power of the court to deal with the kind of action in question," and "is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). "'Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial.'" *Stark v. Ratashara*, __ N.C. App. __, __, 628 S.E.2d 471, 473 *disc. review denied*, 360 N.C. 536, 633 S.E.2d 826 (2006) (citation omitted). "The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal. 'This Court recognizes its duty to insure subject matter jurisdiction exists prior to considering an appeal.'" *In re T.B.*, __ N.C. App. __, __, 629 S.E.2d 895, 896-97 (2006) (quoting *In the Matter of E.T.S.*, __ N.C. App. __, __, 623 S.E.2d 300, 302 (2005)) (internal citation omitted).

N.C. Gen. Stat. § 7B-1101 (2005), governs subject matter jurisdiction over termination of parental rights proceedings, and provides generally that the court "shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in . . . the district at the time of filing of the petition or motion."

In the instant case, it is undisputed that the children were living in Carteret County when the petitions were filed. "Thus, the general requirement that the children reside in or be found in the district where the petition is filed is fulfilled. However, the inquiry does not end at this stage. Rather, as N.C. Gen. Stat. § 7B-1101 indicates, jurisdictional provisions under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) (N.C. Gen. Stat. § 50A-101 *et seq.*) [(2005)]) must be satisfied." *In re N.R.M., T.F.M.*, 165 N.C. App. 294, 298, 598 S.E.2d 147, 149 (2004). In this regard, N.C. Gen. Stat. § 7B-1101 states that "before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204." In the instant case, the trial court failed to make any findings addressing jurisdiction under the above statutes. In addition, our review of the statutory bases for subject matter jurisdiction reveals that none are applicable to the facts of this case.

N.C. Gen. Stat. § 50A-201 (2005), addresses subject matter jurisdiction over "an initial child-custody determination," defined by statute as "the first child-custody determination concerning a particular child." N.C. Gen. Stat. § 50A-102(8) (2005). In the case *sub judice*, the initial custody determination was made by the court in Warren County, Iowa, making § 50A-201 inapplicable. N.C. Gen. Stat. § 50A-204 (2005), "Temporary emergency jurisdiction," is likewise inapplicable to the facts of this case.

The remaining possible basis for jurisdiction is N.C. Gen. Stat. § 50A-203 (2005), which provides in relevant part that:

Except as otherwise provided in G.S. 50A-204, a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a) (1) or G.S. 50A-201(a) (2) and:

- (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.

(emphasis added).

In the instant case, the record establishes that all previous orders addressing child custody were entered by the district court in Iowa. Nothing in the record indicates that Iowa relinquished jurisdiction, or was even asked to do so. Accordingly, we conclude that the North Carolina court lacked subject matter jurisdiction over the termination of parental rights proceeding, and that these orders for termination of parental rights must be vacated.

Vacated.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).