

NO. COA14-910

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

IN THE MATTER OF:

Surry County

No. 13 JT 95

B.L.H.

a minor child

Appeal by respondent from order entered 29 April 2014 by Judge Angela B. Puckett in Surry County District Court. Heard in the Court of Appeals 22 December 2014.

H. Lee Merritt, Jr. for petitioner-appellee.

Peter Wood for respondent-appellant.

DAVIS, Judge.

R.H.L. ("Respondent") appeals from the trial court's 29 April 2014 order terminating his parental rights to his daughter, B.L.H. ("Barbara").¹ On appeal, Respondent argues that (1) the trial court lacked subject matter jurisdiction to terminate his parental rights; and (2) he received ineffective assistance of counsel at the termination of parental rights

¹ The pseudonym "Barbara" is used throughout this opinion to protect the identity of the minor child and for ease of reading. N.C.R. App. P. 3.1(b).

proceeding. After careful review, we affirm in part, vacate in part, and remand for further proceedings.

Factual Background

M.M.W.N. ("Petitioner") and Respondent are the natural parents of Barbara, who was born in 2001. The parties married in February 2003 and lived together with Barbara in Patrick County, Virginia until Respondent and Petitioner separated in December 2003. Following the parties' separation, Petitioner and Barbara moved to Surry County, North Carolina, and Respondent remained in Patrick County, Virginia. The parties subsequently divorced.

On 1 July 2004, a custody order was entered in Patrick County, Virginia granting the parties joint legal custody of Barbara and primary physical custody to Petitioner. The order contained provisions for visitation by Respondent, which he exercised on a regular basis until July 2006. In late July 2006, Respondent was charged with federal drug-related offenses. On 5 October 2006, the Virginia court entered an order modifying the terms of Respondent's visitation to permit supervised visitation only. Respondent was convicted of the drug offenses and sentenced to active imprisonment in May 2007. Respondent is currently serving his sentence at a federal prison in Texas, and his projected date of release is 10 July 2017.

Petitioner remarried in September 2006 and since that time has continuously lived with Barbara and her present husband in Surry County, North Carolina. Petitioner's husband filed a petition to adopt Barbara in October 2013. On 16 December 2013, Petitioner filed a motion in Surry County District Court to terminate Respondent's parental rights, alleging that Respondent had neglected and abandoned Barbara. The summons issued to Respondent in connection with that proceeding contained a notice that an attorney had been temporarily assigned as Respondent's counsel. The notice also contained contact information for the attorney and encouraged Respondent to contact him immediately. The return of service indicated that service was effectuated upon Respondent on 17 January 2014.

Respondent filed a *pro se* response on 7 February 2014, opposing the termination of his parental rights and the proposed adoption of Barbara by Petitioner's husband. In his response, he asserted that he had written letters to Barbara but that Petitioner had refused to give the letters to her. He also alleged that despite his incarceration, he had made child support payments from 2007 to May 2013, at which time his funds were depleted. The response was addressed to the "Surry County Court" in care of the temporarily-assigned attorney.

On 24 February 2014, the trial court officially appointed the same attorney to represent Respondent in the termination of parental rights proceeding. At a hearing held on 27 February 2014, the trial court concluded that it possessed subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") and scheduled an adjudication hearing on the motion to terminate Respondent's parental rights for 26 March 2014. Respondent's attorney asked the trial court for sufficient time to communicate with Respondent and expressed concerns about his ability to contact Respondent in prison. However, the attorney ultimately agreed to the 26 March 2014 hearing date and stated that if he encountered a problem, he would discuss it with Petitioner's counsel.

At the beginning of the 26 March 2014 proceeding, Respondent's trial counsel requested that the following information be noted in the record: (1) Respondent was incarcerated in federal prison in Texas; (2) the attorney had not yet spoken to Respondent but had spoken to "Kristin," Respondent's adult daughter who was in "some type" of contact with Respondent; (3) the attorney had not spoken to anyone else about the case after his conversation with Kristin; and (4) even though he had not communicated with Respondent, the attorney believed that he had enough information to cross-examine

Petitioner and that "if [Respondent] were present and if he had communicated [with the attorney,]" Respondent would have wanted the attorney to proceed in representing Respondent at the hearing.

After counsel's statements were read into the record, the following colloquy occurred between him and the trial court:

THE COURT: All right. And what efforts have you made to contact [Respondent]?

[COUNSEL]: Your Honor, there was a -- I did not write [Respondent], Your Honor. I sent a request to the prison to find out about the email down there because it is my understanding just through my research that inmates do have, for a fee, an email service that they can use. I heard no response from [Respondent], Judge. I did not write him. Honestly, I did not have a way to phone him and speak to him as well. As I indicated, I spoke to his daughter. She essentially raised some of the same issues as her father had raised in response.

THE COURT: Has she -- had she spoke to him about this trial?

[COUNSEL]: I think she had spoken to him. That's my understanding, Your Honor.

THE COURT: Okay, and has he made any effort to contact you or write you at your address?

[COUNSEL]: No, Your Honor, he has not.

THE COURT: And it looks like he was given your name and address through the summons. All right. Then, are you ready to proceed today, then, [Counsel]?

[COUNSEL]: Yes.

THE COURT: Okay. All right.

The trial court then proceeded to conduct the adjudication hearing. Petitioner was the only witness to testify at the hearing, and Respondent's counsel conducted the following cross-examination of her:

Q. Ma'am, you indicated that [Barbara] -- I mean, excuse me, your stepdaughter is [Kristin]; is that correct?

A. It is. . . .

Q. Okay. I understand. And you and [Kristin] stay in kind of regular contact?

A. Yes.

Q. Have you ever told [Kristin] that you did not want [Barbara] to see, observe, look at any letters that her father may have sent to [Kristin]?

A. Whenever -- he hadn't spoken to her -- Do you mind if I explain?

When he was first sent away and hadn't talked to her, it had been years, three years that he was away and one conversation the first time that she was allowed to stay the night at her sister's house three years later, he called his oldest daughter and wanted to speak with [Barbara] and [Barbara] got very upset. And at that point there was nothing else.

Q. So getting back to my question. So is it your testimony that you did not want [Barbara] to have any type of correspondence or any letters that her father may've sent?

A. No, my -- I never once stopped her from

ever speaking to him.

Q. Has [Kristin] tried to ever give you any letters that --

A. Nope.

Q. -- your -- her father has sent to her to give to [Barbara]?

A. No.

[COUNSEL]: That's the only questions, Your Honor.

The trial court asked Respondent's attorney whether he had any evidence to offer. Counsel replied, "No evidence, Judge, on adjudication." The guardian *ad litem* also declined to present evidence. The trial court then invited arguments from the parties' attorneys. After arguments were made by Petitioner's counsel, Respondent's attorney stated the following:

[COUNSEL]: Thank you, Your Honor.

Your Honor, obviously counsel (inaudible) [Respondent] -- and that (inaudible). I'm not an expert, Judge, on the workings of the Federal Prison System. I do know that -- I don't know what actions [Respondent] could have taken to've [sic] availed himself to be present at this hearing. I don't know how easy it is for [Respondent] to be moved from Texas to North Carolina. That -- Judge, whether the county or whether the Federal Prison System would allow a writ to be issued for him to be present in court, my guess is probably no. The only evidence I can offer up -- and we've all heard cases. Mr. Merritt and I have had cases involving this issue, Your Honor. In the case law -- I think we all agree the case law is pretty

clear, that just because one is incarcerated it's kind of a double-edged sword, that does not automatically equate to grounds to terminate one[']s parental rights. But on the other edge of the sword, it doesn't mean that your rights or your duties as a parent doesn't [sic] end. In our (inaudible) estimate, the testimony I can offer, Judge, would be that . . . I mean [Petitioner] testified that a few years after he had been incarcerated that the daughter [Barbara] spent the night with her half sister [Kristin] in -- I believe up in Virginia, and that at that point in time the respondent called his -- [Kristin], the other daughter and wanted to speak to [Barbara] but [Barbara] was somehow upset by this. And I don't know what happened after then but -- the only thing I can argue, Judge, is that perhaps the reaction that he got, Judge, and probably, again, estimation that -- thinking that this is probably not going to happen again, Judge, letting him not to have any contact with the -- with his daughter. Again, without him being here, I can't -- I don't have any way to contradict what the testimony would be with him, Judge. So we would simply argue that due to his circumstances, Judge, he has made all efforts that he can, (coughing/inaudible) preponderance of the evidence, the facts as alleged in the petition and the facts -- the issue that they contend that should lead this Court to terminate his parental rights.

The trial court concluded that grounds existed to terminate Respondent's parental rights and proceeded to the disposition hearing. During the disposition phase of the proceeding, Petitioner was once again the only witness to testify. Respondent's counsel did not cross-examine her and did not present any evidence on Respondent's behalf. When offered the

opportunity to be heard, Respondent's counsel stated, "Judge, for those reasons I've stated, I'd contend it's not in the best interest . . . (inaudible)." No other argument by Respondent's counsel appears in the record.

The trial court entered an order on 29 April 2014 terminating Respondent's parental rights based on its determination that (1) the two alleged grounds for termination – abandonment and neglect – were proven by clear, cogent, and convincing evidence; and (2) termination of Respondent's parental rights was in Barbara's best interests. Respondent filed a timely notice of appeal to this Court.

Analysis

I. Subject Matter Jurisdiction

Respondent first contends that the trial court lacked subject matter jurisdiction to terminate his parental rights because (1) the Virginia court that entered the initial custody order did not relinquish jurisdiction; and (2) Respondent remained domiciled in Virginia.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be

raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). The question of whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

"In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). For termination of parental rights proceedings, the statute establishing jurisdiction is N.C. Gen. Stat. § 7B-1101, which provides in pertinent part:

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, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, 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. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding

the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.

N.C. Gen. Stat. § 7B-1101 (2013).

The above-referenced statutes listed within N.C. Gen. Stat. § 7B-1101 are all provisions of the UCCJEA, which defines a "child-custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." N.C. Gen. Stat. § 50A-102(3) (2013). The jurisdictional requirements of the UCCJEA apply to termination of parental rights proceedings. *In re N.T.U.*, ___ N.C. App. ___, ___, 760 S.E.2d 49, 53, *disc. review denied*, ___ N.C. ___, 763 S.E.2d 517 (2014). As such, N.C. Gen. Stat. § 7B-1101 requires that the trial court "have jurisdiction to make a child-custody determination under the provisions of N.C. Gen. Stat. § 50A-201 or N.C. Gen. Stat. § 50A-203 in order to terminate the parental rights of a nonresident parent." *Id.*

As Respondent does not reside in North Carolina and is therefore a nonresident parent, we must determine whether the trial court possessed subject matter jurisdiction under either N.C. Gen. Stat. § 50A-201 or N.C. Gen. Stat. § 50A-203. Because

N.C. Gen. Stat. § 50A-201 pertains only to *initial* custody determinations and the initial custody order in the present case was made by a Virginia court, § 50A-201 is inapplicable. See *In re J.D.*, ___ N.C. App. ___, ___, 759 S.E.2d 375, 378 (2014) (concluding that § 50A-201 could not confer jurisdiction upon North Carolina court because initial custody determination had been made by Indiana court). As such, N.C. Gen. Stat. § 50A-203 is the only possible basis for the trial court's exercise of jurisdiction over this matter.

N.C. Gen. Stat. § 50A-203 states that a court of this State may not modify a child-custody determination 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.

N.C. Gen. Stat. § 50A-203 (2013).

N.C. Gen. Stat. § 50A-201(a)(1) requires either that (1) North Carolina is the home state² of the child on the date of the commencement of the proceeding; or (2) North Carolina was the home state of the child within six months before the commencement of the proceeding and, although the child is presently absent from this State, a parent continues to reside here. N.C. Gen. Stat. § 50A-201(a)(1) (2013).

In this case, Barbara has been living in North Carolina with Petitioner since December 2003. Accordingly, North Carolina is Barbara's home state, and the first prong of N.C. Gen. Stat. § 50A-203 is therefore satisfied. However, because nothing in the record indicates that the Virginia court determined either that it no longer had exclusive, continuing jurisdiction or that a North Carolina court would be a more convenient forum, N.C. Gen. Stat. § 50A-203(2) must be satisfied in order for a North Carolina court to possess jurisdiction to modify the initial custody determination regarding Barbara.

Respondent contends that N.C. Gen. Stat. § 50A-203(2) is not satisfied because although Petitioner and Barbara no longer live in Virginia, Respondent remains domiciled there despite being physically incarcerated in Texas. We disagree.

² The UCCJEA defines "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7).

N.C. Gen. Stat. § 50A-203 does not require that the parties no longer be *domiciled* in the state which initially exercised jurisdiction over the child in order for another state to modify the existing custody determination. Rather, the relevant statutory provisions permit modification of another state's custody determination if neither the child nor the parents "presently reside" in the state which entered the initial custody order. N.C. Gen. Stat. § 50A-203; see N.C. Gen. Stat. § 50A-202(a)(2) (2013) (explaining that if child and parents "do not presently reside" in state that made initial custody determination, that state no longer possesses exclusive, continuing jurisdiction). Indeed, the official comment to N.C. Gen. Stat. § 50A-202 clarifies that the phrase "do not presently reside" was intended to mean

that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.

The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.

If the child, the parents, and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.

N.C. Gen. Stat. § 50A-202 cmt.

"Residence simply indicates a person's actual place of abode, whether permanent or temporary." *Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972). It is undisputed that neither Respondent, nor Petitioner, nor Barbara *actually resided* in Virginia at the time of the filing of the motion to terminate Respondent's parental rights. Consequently, Virginia no longer possessed exclusive, continuing subject matter jurisdiction, and a North Carolina court was legally authorized to assume jurisdiction. Respondent's argument on this issue is therefore overruled.

II. Ineffective Assistance of Counsel

Respondent next contends that he received ineffective assistance of counsel because his trial counsel made no effort to communicate with him prior to the 26 March 2014 hearing.³ We agree.

³ Respondent also asserts that his trial counsel's failure to present evidence regarding his state of domicile constituted ineffective assistance of counsel. As explained in the

An indigent parent has a statutory right to counsel in a termination of parental rights proceeding. N.C. Gen. Stat. § 7B-1101.1(a) (2013).

A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation.

In re Bishop, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989) (internal citation omitted).

The right to counsel provided by statute "includes the right to effective assistance of counsel." *Id.* at 665, 375 S.E.2d at 678. "A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996).

preceding section, however, a party's physical residence, rather than his domicile, is the relevant issue when determining subject matter jurisdiction under the UCCJEA. As such, Respondent was not prejudiced by trial counsel's failure to offer evidence regarding Respondent's domicile. See *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (explaining that parent must show that he was prejudiced in order to establish ineffective assistance of counsel in termination of parental rights proceeding), *appeal dismissed*, 363 N.C. 564, 686 S.E.2d 676 (2009).

Here, the record reveals that Respondent's counsel did not have any actual contact whatsoever with Respondent. Counsel did not write any letters or send any emails to Respondent. Nor did he engage in any conversation with Respondent by telephone. The record indicates that the only affirmative act undertaken by counsel even arguably constituting an attempt to communicate with Respondent was to contact the federal prison to learn about the prison's email system.

Our Supreme Court has explained that "a lawyer cannot properly represent a client with whom he has no contact." *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). Indeed, counsel's argument at the termination hearing revealed how this lack of contact hindered his ability to effectively represent Respondent. Counsel did not present any evidence on Respondent's behalf at either phase of the hearing, failed to present a cogent argument at the adjudication phase, and declined to make any substantive argument during the disposition phase of the hearing.

"It is well established that attorneys have a responsibility to advocate on the behalf of their clients." *In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010). A parent facing the termination of his parental rights is "entitled to procedures which provide him with fundamental

fairness in this type of action." *Id.* at 561, 698 S.E.2d at 79. "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L.Ed.2d 599, 606 (1982).

This is not a case in which a parent failed to cooperate with his attorney or declined to respond to inquiries from his attorney. To the contrary, Respondent acted promptly upon receiving the summons and motion to terminate his parental rights by filing a response, which he directed to his appointed counsel. Respondent also acted in a timely fashion by returning the affidavit of indigency form that had been mailed to him by the clerk of court. Nothing in the record suggests that Respondent personally received notice of the 26 March 2014 hearing or that Respondent wanted his appointed attorney to proceed on his behalf at the hearing in the absence of any prior consultation with him.

Accordingly, we conclude that Respondent's counsel did not make sufficient efforts to communicate with Respondent in order to provide him with effective representation and that this failure deprived Respondent of a fair hearing. As a result,

Respondent is entitled to a new hearing on the termination of his parental rights.

Conclusion

For the reasons stated above, we conclude that the trial court possessed subject matter jurisdiction over this action. However, because Respondent was denied effective assistance of counsel, we vacate the order terminating his parental rights and remand for a new hearing.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge STEELMAN concur.