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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-418

Filed: 7 November 2017

Swain County, No. 16 CVS 97

RON DAVID METCALF, Plaintiff,

v.

SUSAN HYATT CALL, et al., Defendants.

Appeal by plaintiff from order entered 13 October 2016 by Judge William H. Coward in Swain County Superior Court. Heard in the Court of Appeals 20 September 2017.

Ron David Metcalf, pro se, plaintiff-appellant.

Earwood, Moore, Carpenter & Guy, PLLC, by Kimberly N. Carpenter, for defendant-appellee.

ZACHARY, Judge.

Where plaintiff fails to establish that the trial judge abused his discretion in denying plaintiff's status to sue as an indigent, we affirm. Where the cases giving rise to plaintiff's Petition for Writ of Recordari were two district court cases, the superior court lacked subject-matter jurisdiction, as appellate power over district court cases lies in the Court of Appeals. Where plaintiff, during the hearing, did not allege any

grounds for the trial judge's disqualification, the issue of recusal was not properly preserved for appeal.

Background

This appeal arises from two district court custody cases heard in Swain County in which defendant-appellee Susan Call was awarded custody of her two minor grandchildren. Plaintiff-appellant Ron David Metcalf is the maternal grandfather of those two minor children. Ms. Call is the paternal grandmother. The biological parents—Mr. Metcalf's daughter and Ms. Call's son—were the defendants in the two district court cases in which Ms. Call was awarded custody. Neither parent appealed from those decisions. Mr. Metcalf was not a party to, and was not permitted to intervene in, either of the two district court custody cases.

On 19 April 2016, Mr. Metcalf filed a Petition for a Writ of Recordari in Swain County Superior Court, seeking *de novo* review of the two district court custody cases to which he was not a party. Mr. Metcalf also filed a Petition to Sue/Appeal/File Motions as an Indigent, which the trial court denied on 12 April 2016. Ms. Call filed a motion to dismiss Mr. Metcalf's Petition for Writ of Recordari on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, in that Mr. Metcalf lacked standing. Mr. Metcalf responded with a "Motion to Quash Motions to Dismiss," which, among other things, requested that "[a]ny

judge” “in any proceeding in which his impartiality might reasonably be questioned” be disqualified.

On 27 September 2016, the hearing on Ms. Call’s motion to dismiss and Mr. Metcalf’s “Motion to Quash” was held in Swain County Superior Court before the Honorable Judge William H. Coward. At the hearing, Judge Coward refused to recuse himself and determined that the court lacked subject-matter jurisdiction to hear Mr. Metcalf’s Petition for Writ of Recordari because the district court had exclusive jurisdiction over custody matters. Because the court lacked subject-matter jurisdiction, Judge Coward did not reach Ms. Call’s Rule 12(b)(6) motion regarding Mr. Metcalf’s lack of standing. Mr. Metcalf timely appealed.

On appeal, Mr. Metcalf argues that the trial court erred in (1) denying his Petition to Sue/Appeal/File Motions as an Indigent, (2) holding that it lacked subject-matter jurisdiction to rule on his Petition for Writ of Recordari, and (3) determining that there were no grounds for Judge Coward’s disqualification. As explained below, we conclude that Mr. Metcalf’s arguments lack merit, and affirm the order of the trial court in all respects.

Discussion

I. Petition to Sue as an Indigent

We first address Mr. Metcalf’s challenge to Judge Coward’s denial of his Petition to Sue/Appeal/File Motions as an Indigent.

A. Standard of Review

We review the denial of a motion to file as an indigent for abuse of discretion. See *Griffis v. Lazarovich*, 164 N.C. App. 329, 331, 595 S.E.2d 797, 799 (2004); *Atlantic Ins. & Realty Co. v. Davidson*, 82 N.C. App. 251, 252, 346 S.E.2d 218, 219 (1986). “To support an abuse of discretion, plaintiff must show that the trial court’s ruling was ‘manifestly unsupported by reason,’ or ‘so arbitrary that it could not have been the result of a reasoned decision.’ ” *Griffis*, 164 N.C. App. at 331, 595 S.E.2d at 799 (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)).

B. Analysis

A superior court judge, district court judge, or clerk “may authorize a person to sue as an indigent . . . when the person makes affidavit that he or she is unable to advance the required court costs.” N.C. Gen. Stat. § 1-110(a) (2016). The statute provides five different criteria whereby, if any one of them is met, the court “shall” authorize that person to sue as an indigent. N.C. Gen. Stat. § 1-110(a)(1)-(5). If none of those criteria are met, then the court “may,” in its discretion, authorize the person to sue as an indigent if it is shown that the person is unable to advance the required court costs. N.C. Gen. Stat. § 1-110(a).

In his affidavit and petition to sue as an indigent, Mr. Metcalf does not attest that he meets any of the five criteria entitling him to authorization from the court to sue as an indigent pursuant to N.C. Gen. Stat. § 1-110(a). Further, Mr. Metcalf has

failed to argue or to establish that Judge Coward abused his discretion in denying Mr. Metcalf authorization to sue as an indigent under the catchall provision of N.C. Gen. Stat. § 1-110(a). *See In re McCarroll*, 313 N.C. 315, 317, 327 S.E.2d 880, 881 (1985). Accordingly, we affirm that portion of the 13 October 2016 order.

II. Motion to Dismiss

Next, Mr. Metcalf argues that Judge Coward erred in granting Ms. Call's motion to dismiss his Petition for Writ of Recordari for lack of subject-matter jurisdiction. We disagree.

A. Standard of Review

“Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). Issues of statutory construction are also questions of law, reviewed *de novo* on appeal. *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008).

B. Analysis

Ms. Call argues that the district court division maintains exclusive jurisdiction over all child custody matters pursuant to N.C. Gen. Stat. § 7A-244, and that, as such, the superior court division lacked subject-matter jurisdiction to hear Mr. Metcalf's Petition for Writ of Recordari concerning a child custody matter.

Subject-matter jurisdiction “involves the authority of a court to adjudicate the type of controversy presented by the action before it.” *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001). A court may not decide a matter without having subject-matter jurisdiction. *McKoy*, 202 N.C. App. at 511, 689 S.E.2d at 592. “Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law.” *Id.*

N.C. Gen. Stat. § 7A-244 vests the district court division with subject-matter jurisdiction to hear child custody matters. However, the fact that the district court division may exercise original jurisdiction over custody cases does not necessarily resolve the issue before us.

While unfamiliar in modern practice, North Carolina authorizes the use of the writ of recordari. N.C. Gen. Stat. § 1-269 (2017). The writ exists as an alternative to appeal where an aggrieved party would otherwise have no legal right to review. *See Taylor v. Johnson*, 171 N.C. 84, 85, 87 S.E. 981, 983 (1916). Courts in this State maintaining a power of appellate review—including North Carolina’s superior courts—may issue the writ as to matters that arose in an inferior court over which the higher court may properly exercise an appellate power. *See id.*

Both under our Constitution and statutes the writ[] of . . . recordari . . . ha[s] full vigor[] in this State, and whenever a substantial wrong has been done in judicial proceedings, giving a litigant legal right to redress, and no appeal has

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been provided by law, . . . the Superior Courts of higher jurisdiction, by reason of the statute (and well sustained precedents), to all subordinate courts, over which they exercise appellate power, may issue one . . . of these important writs and under it see that the error is corrected and justice duly administered.

State v. Tripp, 168 N.C. 150, 154, 83 S.E. 630, 632 (1914) (citations omitted). Thus, for purposes of a writ of recordari, the question is whether the superior court maintains *appellate* power over the district court in custody matters.

While the cases addressing writs of recordari refer to the superior court division as being an appropriate forum for the writ, *See Taylor*, 171 N.C. at 85, 87 S.E. at 983, there is no question that appeal lies of right directly to this Court from any final judgment of a district court in a civil action. N.C. Gen. Stat. § 7A-27(b)(2) (2016). Hence, it is this Court, and not the superior court, that may properly exercise appellate authority over the district court in a custody matter by way of writ of recordari.

Accordingly, notwithstanding the challenge to his standing to do so, the appropriate avenue would have been for Mr. Metcalf to file his Petition for Writ of Recordari in this Court, not in the Swain County Superior Court. Therefore, we affirm the superior court's order granting Ms. Call's motion to dismiss on the ground that the superior court had no subject-matter jurisdiction over Mr. Metcalf's Petition for Writ of Recordari.

III. Disqualification of Judge Coward

Finally, Mr. Metcalf argues that Judge Coward improperly presided over the motion to dismiss his Petition for Writ of Recordari. However, his argument is not properly before this Court.

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, *stating the specific grounds* for the ruling the party desired the court to make[.]” N.C. R. App. P. Art. II, Rule 10(a)(1) (2017) (emphasis added). This Court does not have the authority to pass upon an issue for the first time on appeal where that issue was not before the trial court. *Revels v. Robeson Cnty. Bd. of Elections*, 167 N.C. App. 358, 361, 605 S.E.2d 219, 221 (2004).

In his 16 September 2016 “Motion to Quash” Ms. Call’s motion to dismiss, Mr. Metcalf seemed to suggest that Judge Coward should recuse himself from the case. Yet when Judge Coward addressed that suggestion at the hearing, Mr. Metcalf replied, “I have no problem with you making rulings and judgments on this,” and later reasserted, “I have no problem with you ruling on this.” As Mr. Metcalf stated no grounds at the hearing to support the recusal of Judge Coward, this issue was not properly preserved for appeal. We will not entertain Mr. Metcalf’s *post hoc* objections, and dismiss his appeal with regard to this issue.

Conclusion

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For the reasons discussed above, the order of the trial court is affirmed in all respects.

AFFIRMED.

Judges CALABRIA and INMAN concur.

Report per Rule 30(e).