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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-719

Filed: 6 March 2018

Durham County, Nos. 16 JT 77-78

IN THE MATTER OF: A.G.D. & L.K.D.

Appeal by respondent-father from order entered 4 April 2017 by Judge Fred Battaglia in Durham County District Court. Heard in the Court of Appeals 15 February 2018.

Ellis Family Law, P.L.L.C., by Autumn D. Osbourne, Esq., for petitioner-appellee mother.

David A. Perez, for respondent-appellant father.

CALABRIA, Judge.

Respondent, the father of A.G.D. (“Anthony”) and L.K.D. (“Larry”),¹ appeals from an order terminating his parental rights. Because the trial court lacked jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”), N.C. Gen. Stat. § 50A-101 *et seq.* (2015), to enter the order, we vacate the order.

¹ The parties have stipulated to these pseudonyms for their minor children pursuant to N.C.R. App. P. 3.1(b).

I. Factual and Procedural Background

This is a private termination action between two parents. Respondent and petitioner, the mother of the children, were married on 28 January 2003, separated on 15 January 2008, and divorced on 23 December 2009. During their marriage, they had two children, Anthony and Larry. In November 2009, the parties executed a “Separation Agreement and Property Settlement,” under which petitioner was given “custody of the minor children of the parties, subject to secondary custody and visitation by [respondent]”.

After the parties separated, petitioner moved to Michigan with the children, where she remained until 2011. On 21 May 2010, petitioner remarried. In July 2011, petitioner and her new husband went to live in Japan, where he was stationed under military orders. In 2012, respondent filed a child custody action in Durham County District Court. On 12 October 2012, the trial court entered an order concluding that it had subject matter jurisdiction to make an initial custody determination pursuant to N.C. Gen. Stat. § 50A-201(a)(2). A temporary custody order was entered on 29 November 2012.

On 28 March 2014, the parties consented to a permanent child custody order. They agreed to share joint legal custody of the children. Petitioner was given primary physical custody, subject to respondent’s agreed-upon visitation. The order also required respondent to pay petitioner \$900 per month in child support. At the time

the order was entered, respondent was living in Kentucky pursuant to military orders.

In August 2014, petitioner, her husband, and the children moved to Germany, again due to petitioner's husband's military orders. On 7 August 2014, respondent filed a petition to establish UCCJEA jurisdiction in Kentucky and a motion for temporary custody of the children in Christian County, Kentucky, Family Court. On 15 August 2014, petitioner filed an *ex parte* motion in the cause in Durham County requesting that the trial court enter an order "maintaining the status quo of custody . . . and that North Carolina maintain continuous jurisdiction over the parties', [sic] subject matter and minor children." The trial court entered an order consistent with this request the same day.²

On 18 November 2014, petitioner filed a motion for contempt, alleging that respondent had failed to comply with the child support requirements of the 28 March 2014 order. On 24 November 2014, respondent filed a motion to modify child support. The motions were heard on 9 February 2015. On 12 March 2015, the trial court entered an order denying respondent's motion to modify and concluding that respondent was in civil contempt for failing to pay \$5,400 in child support. Respondent was sentenced to 90 days in jail unless he paid his arrears over four monthly installments ending 1 June 2015.

² The Kentucky court declined to exercise jurisdiction.

On 2 June 2015, petitioner filed a second motion for contempt, alleging that respondent had not complied with the 12 March 2015 contempt order. After respondent failed to appear, the trial court issued an order for arrest and a show cause order.³

On 16 May 2016, petitioner filed a petition to terminate respondent's parental rights on the grounds of failure to pay child support and abandonment. See N.C. Gen. Stat. § 7B-1111(a)(4), (7) (2015). The petition alleged that petitioner was "temporarily residing out of North Carolina with her current spouse who is on military assignment in Germany." On 22 August 2016, respondent moved to dismiss the petition for lack of jurisdiction under the UCCJEA. On 6 September 2016, the trial court entered a memorandum order denying the motion.

The matter was heard beginning 20 December 2016. On 4 April 2017, the trial court entered an order terminating respondent's parental rights on the ground of failure to pay child support. Respondent filed timely notice of appeal.

II. UCCJEA Jurisdiction

Respondent's sole argument is that the trial court erred by denying his motion to dismiss for lack of subject matter jurisdiction under the UCCJEA. We agree.

A. Standard of Review

³ This order was rescinded on 6 September 2016 so respondent could participate in the termination of parental rights hearing.

“Subject matter jurisdiction, a threshold requirement for a court to hear and adjudicate a controversy brought before it, is conferred upon the courts by either the North Carolina Constitution or by statute.” *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006) (citation and quotation marks omitted). “When the trial court never obtains subject matter jurisdiction over the case, all of its orders are void *ab initio*.” *In re A.G.M.*, 241 N.C. App. 426, 432, 773 S.E.2d 123, 129 (2015) (citation, quotation marks and brackets omitted). Whether the trial court has jurisdiction under the UCCJEA is a question of law and is reviewed *de novo*. See *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

B. Analysis

By its own terms, the UCCJEA applies in termination proceedings. See N.C. Gen. Stat. § 50A-102(4) (2015) (defining “Child-custody proceeding” to include a proceeding for termination of parental rights). “Once a court of this State has made an initial child-custody determination, the UCCJEA provides for ‘*exclusive, continuing jurisdiction*’ pursuant to N.C. Gen. Stat. § 50A-202[.]” *In re H.L.A.D.*, 184 N.C. App. 381, 386, 646 S.E.2d 425, 430 (2007), *aff’d per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). In this case, the trial court determined it had jurisdiction to enter an initial custody determination and entered an order in 2012. Accordingly, the court maintained exclusive, continuing jurisdiction so long as it met the requirements of N.C. Gen. Stat. § 50A-202 (2015). That statute states:

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(a) Except as otherwise provided in G.S. 50A-204, a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:

(1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or

(2) A court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

(b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201.

N.C. Gen. Stat. § 50A-202. In this case, the trial court's termination order made the following findings regarding the places of residence of the parties:

2. The Petitioner . . . is a citizen and resident of the United States, who is currently temporarily living in Germany as her current husband is on a military assignment in Germany. Petitioner was in North Carolina prior to 2008 and then in Michigan from 2008 until 2011. Petitioner was in Japan from July 2011 until August 2014 and Germany from 2014 until present. At all times Petitioner was with her current husband under military orders.

3. The Petitioner is the biological mother of the minor children, who is exercising custody of the juveniles pursuant to a Child Custody Consent Order

4. The Respondent . . . is the biological father of the juveniles. Respondent is a resident of Kentucky.

Respondent argues that these findings demonstrate that neither of the parties nor their children presently reside in North Carolina, such that the trial court no longer had exclusive, continuing jurisdiction under N.C. Gen. Stat. § 50A-202(a).

This Court has previously explained that, in the context of N.C. Gen. Stat. § 50A-202(a)(2), “[r]esidence simply indicates a person’s actual place of abode, whether permanent or temporary.” *In re B.L.H.*, 239 N.C. App. 52, 61, 767 S.E.2d 905, 911 (2015) (internal quotation marks and citation omitted).

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

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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.

Id. at 60-61, 767 S.E.2d at 911 (quoting N.C. Gen. Stat. § 50A-202 cmt.). Based on this interpretation, it is clear that the trial court's findings with respect to residence conclusively establish that the parties and their children "do not presently reside" in North Carolina as of the date of the filing of the termination petition. N.C. Gen. Stat. § 50A-202. Accordingly, under subsection (a)(2), the trial court no longer had exclusive, continuing jurisdiction at the time the termination petition was filed.

Nonetheless, petitioner argues that the court maintained exclusive, continuing jurisdiction based on this Court's opinion in *In re C.S.E.*, 227 N.C. App. 224, 741 S.E.2d 927 (2013) (unpublished). Initially, we note that this case is unpublished and thus "does not constitute controlling legal authority." N.C.R. App. P. 30(e)(3).⁴ Moreover, it is distinguishable from the present case. In *C.S.E.*, the Court's holding was based on its determination that "[t]here [wa]s nothing in the record to suggest the juvenile court had been subsequently divested of its jurisdiction pursuant to either of the two provisions of Section 50A-202(a)." *C.S.E.*, 227 N.C. App. 224, 741 S.E.2d 927.

⁴ Petitioner did not identify this opinion as unpublished in her brief; nor did she comply with the procedural requirements for citing an unpublished opinion in N.C.R. App. P. 30(e)(3).

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By contrast, the trial court in this case made specific findings regarding the parties' residences that conclusively show that the parties and the children "do not presently reside" in North Carolina, thereby extinguishing the trial court's exclusive, continuing jurisdiction. N.C. Gen. Stat. § 50A-202(a)(2).

However, under N.C. Gen. Stat. § 50A-202(b), the trial court still had jurisdiction under the UCCJEA "if it ha[d] jurisdiction to make an initial determination under G.S. 50A-201." Under that statute, a court has jurisdiction in four circumstances:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

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(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201(a). Petitioner argues that “North Carolina would have jurisdiction under N.C. Gen. Stat. § 50A-201(a)(4) because no other court would have jurisdiction under said statute.”

Petitioner acknowledges that “it could be argued that Germany was the home state of the minor children and would therefore have jurisdiction under [the] UCCJEA[.]” Pursuant to N.C. Gen. Stat. § 50A-102(7) (2015) the “Home state” is defined 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” Since the trial court found that petitioner and the children were living in Germany beginning in 2014, Germany was necessarily the children’s home state under the UCCJEA when the termination petition was filed in May 2016.

Nevertheless, petitioner still contends that Germany, as the children’s home state, would not have UCCJEA jurisdiction because German courts would be compelled to decline to exercise jurisdiction. In support of this contention, petitioner

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cites a law review article which provides an overview of German family law as well as a relevant German regulation regarding the jurisdiction of German courts.

Petitioner's argument must be rejected because the language of N.C. Gen. Stat. § 50A-201(a)(3) is not predictive; it only provides jurisdiction if a court of another state "ha[s] declined to exercise jurisdiction," not if it *would* decline to do so. *See Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 299-300, 767 S.E.2d 378, 393 (2014) (concluding that "North Carolina could not exercise jurisdiction under section 50A-201(a)(3)" when "[n]either Utah nor Florida has declined to exercise jurisdiction" and those states would otherwise have jurisdiction under subsection (a)(2)). Moreover, because Germany had home state or country jurisdiction and had not declined to exercise it when the termination petition was filed, the trial court could not have jurisdiction under N.C. Gen. Stat. § 50A-201(a)(4). *Id.* at 300, 767 S.E.2d at 393-94. Accordingly, the trial court had no basis to exercise jurisdiction pursuant to N.C. Gen. Stat. § 50A-201(a).

III. Conclusion

The trial court's undisputed findings of fact establish that petitioner and the parties' children were residing in Germany at the time the termination petition was filed. As a result, the trial court no longer had "exclusive, continuing jurisdiction" under N.C. Gen. Stat. § 50A-202. In addition, because petitioner and the children were living in Germany for more than six months prior to the filing of the petition,

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Germany was the home state or country of the children under the UCCJEA. Since Germany had not declined to exercise jurisdiction prior to the filing of the petition, the trial court did not have jurisdiction to make an initial custody determination under N.C. Gen. Stat. § 50A-201(a). Consequently, the trial court did not have jurisdiction to terminate respondent's parental rights, and the court's order is vacated.

VACATED.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).