

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1434

Filed: 17 July 2018

Onslow County, No. 17 JT 75

IN THE MATTER OF: S.P.R.-G.

Appeal by respondent-father from order entered 28 September 2017 by Judge William B. Sutton in Onslow County District Court. Heard in the Court of Appeals 28 June 2018.

Lee E. Britt for petitioner-appellee mother.

Rebekah W. Davis for respondent-appellant father.

DAVIS, Judge.

E.G. (“Respondent”) appeals from an order terminating his parental rights to his minor child, S.P.R.-G. (“Sergio”).¹ After a thorough review of the record and applicable law, we hold that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding and vacate the court’s termination order.

Factual and Procedural Background

¹ A pseudonym is used to protect the juvenile’s identity and for ease of reading.

This appeal involves a private termination action between two parents. Respondent and Sergio's mother, L.B. ("Petitioner"), were married and living in Florida when Sergio was born in 2005. Respondent and Petitioner separated in 2006, and Respondent moved to North Carolina with Sergio. The parties divorced on 26 March 2009 in Guilford County, North Carolina. The divorce judgment did not determine custody.

Respondent and Sergio subsequently moved to Maryland. In early 2010, Petitioner filed a custody action in Baltimore County, Maryland. During the pendency of the custody action, Petitioner moved to Onslow County, North Carolina in August 2010. On 14 February 2011, the Maryland court entered a custody order awarding sole physical custody of Sergio to Respondent, joint legal custody to both parties, and visitation to Petitioner.

The parties appeared again in the Maryland court on 3 July 2013 for a hearing on Respondent's Petition to Modify Visitation and Petitioner's Amended Motion to Modify Custody and Visitation. In an order entered 9 August 2013, the Maryland court modified custody by awarding Petitioner sole physical custody of Sergio and granting liberal visitation rights to Respondent.

Petitioner and Sergio moved to Georgia in October 2013. They moved back to Onslow County on 11 July 2016 and continue to live there. On 10 March 2017, Petitioner filed a petition in Onslow County District Court to terminate the parental

rights of Respondent. The petition alleged three grounds in support of termination: (1) neglect; (2) willful abandonment; and (3) willful failure to pay a reasonable cost of care. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (4), (7) (2017). Respondent filed an answer on 25 May 2017 that included motions to dismiss for lack of personal and subject matter jurisdiction. However, the record contains no indication as to whether the trial court actually ruled upon these motions.

Following a hearing on 19 July 2017, the trial court entered an order on 28 September 2017 holding that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect) and (7) (willful abandonment). The court then determined that it was in the best interests of Sergio that the parental rights of Respondent be terminated. Respondent filed a timely notice of appeal.

Analysis

Respondent's sole argument on appeal is that the trial court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") to enter its termination order because (1) the Maryland court that entered the initial custody order did not relinquish jurisdiction; and (2) no finding was made that Respondent no longer lived in Maryland. We agree.

"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) (citation omitted). It is well established that “[s]ubject matter jurisdiction cannot be conferred by consent or waiver” by the parties. *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007) (citation omitted), *aff’d per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). Furthermore, “[w]hen a court decides a matter without the court’s having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. Thus the trial court’s subject-matter jurisdiction may be challenged at any stage of the proceedings, even for the first time on appeal.” *In re K.U.-S.G., D.L.L.G., & P.T.D.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (internal citations and quotation marks omitted). “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 B.L.H.*, 239 N.C. App. 52, 58, 767 S.E.2d 905, 909 (2015) (citation omitted).

The trial court’s subject matter jurisdiction in a termination of parental rights action is established by N.C. Gen. Stat. § 7B-1101, which provides, in pertinent part, as follows:

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[.]

N.C. Gen. Stat. § 7B-1101 (2017).

As Respondent does not live 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 Maryland court, that statute is inapplicable. *See In re J.D.*, 234 N.C. App. 342, 347, 759 S.E.2d 375, 378 (2014) (concluding that N.C. Gen. Stat. § 50A-201 could not confer jurisdiction upon North Carolina court because initial custody determination had been made by Indiana court).

As such, the only possible basis to support the trial court's exercise of jurisdiction over this matter is N.C. Gen. Stat. § 50A-203, which sets out the requirements for a North Carolina court to possess jurisdiction to modify an existing custody determination by a court of another state. *See* N.C. Gen. Stat. § 50A-203 (2017). Under N.C. Gen. Stat. § 50A-203, a North Carolina court cannot modify a child custody determination made by a court from another state unless two conditions are met.

First, the North Carolina court must have “jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2)[.]” N.C. Gen. Stat. § 50A-203. Subsection (a)(1) provides for jurisdiction if North Carolina is the “home state of the child on the date of the commencement of the proceeding[.]” N.C. Gen.

Stat. § 50A-201(a)(1). “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.” N.C. Gen. Stat. § 50A-102(7) (2017).

In the present case, it is undisputed that Sergio has been living with Petitioner in North Carolina since 11 July 2016. Thus, North Carolina was the home state of Sergio when the petition was filed. Therefore, the trial court had jurisdiction to make an initial custody determination under N.C. Gen. Stat. § 50A-201(a)(1).

However, in order for a North Carolina court to modify a custody determination of another state a second requirement must also be met. This requirement is that one of the following must exist:

- (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.

Under subsection (1), there are two potential grounds whereby North Carolina would obtain jurisdiction. The first ground would be satisfied if the Maryland court determined it no longer possessed jurisdiction under N.C. Gen. Stat. § 50A-202. That

statute provides that a court that has made a child custody determination consistent with the UCCJEA has exclusive, continuing jurisdiction until:

- (1) [that court] 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) [that court] 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.

N.C. Gen. Stat. § 50A-202(a) (2017).

The official comment to N.C. Gen. Stat. § 50A-202 clarifies that “the 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.” *In re N.R.M., T.F.M.*, 165 N.C. App. 294, 300, 598 S.E.2d 147, 151 (2004) (citation and quotation marks omitted). Here, there is nothing in the record indicating that a Maryland court entered an order stating that Maryland no longer possessed jurisdiction under N.C. Gen. Stat. § 50A-202.

A second means by which Maryland could relinquish jurisdiction to North Carolina pursuant to N.C. Gen. Stat. § 50A-203(1) would be if the Maryland court determined that a North Carolina court would be a more convenient forum under N.C. Gen. Stat. § 50A-207. Once again, however, no evidence exists in the record

demonstrating that the Maryland court made such a determination. Therefore, neither method of obtaining jurisdiction under N.C. Gen. Stat. § 50A-203(1) is satisfied.

Consequently, the final potential avenue for North Carolina to have obtained jurisdiction is contained in N.C. Gen. Stat. § 50A-203(2). This section “allows jurisdiction if either the issuing state or the state attempting to modify the order determines that the child, the child’s parents, and any person acting as a parent have left the issuing state.” *Id.* at 301, 598 S.E.2d at 151. In the present case, the trial court found in its 28 September 2017 order that Respondent was a “citizen and resident of Baltimore, Maryland.”

Petitioner argues that because Respondent was homeless for a period of time following the Maryland court’s initial custody determination, the evidence is unclear as to whether he continuously resided in Maryland. She requests *de novo* review of this issue, asserting that Maryland did not maintain “continued, exclusive jurisdiction” if Respondent did not continuously reside in the state. This argument lacks merit.

As N.C. Gen. Stat. § 50A-202(a)(2) makes clear, Maryland’s jurisdiction would not be automatically severed merely because Respondent did not continuously live there. Rather, a Maryland court or a North Carolina court would have to first make the determination that Respondent no longer resides in Maryland. Here, no such

determination has been made. To the contrary, as noted above, the trial court expressly found that Respondent is a resident of Baltimore, Maryland.

Thus, because neither a Maryland nor a North Carolina court has determined that Respondent no longer lives in Maryland, the requirement set out in N.C. Gen. Stat. § 50A-203(2) has not been met. Therefore, because neither prong of N.C. Gen. Stat. § 50A-203 is satisfied, the trial court lacked subject matter jurisdiction to consider a petition for termination of Respondent's parental rights. *See In re J.A.P.*, 218 N.C. App. 190, 193, 721 S.E.2d 253, 254 (2012) (holding that North Carolina court lacked subject matter jurisdiction over termination of parental rights proceeding where "[n]othing in the record indicates that a New Jersey court determined that New Jersey no longer has exclusive, continuing jurisdiction or that a [North Carolina court] would be a more convenient forum or that any court has determined that respondent-father no longer lives in New Jersey" (quotation marks omitted)). Accordingly, we vacate the trial court's order terminating Respondent's parental rights and remand for entry of an order dismissing Petitioner's action. *See N.R.M.*, 165 N.C. App. at 301, 598 S.E.2d at 151.

Conclusion

For the reasons stated above, we vacate the trial court's 28 September 2017 order terminating Respondent's parental rights and remand for further proceedings consistent with this opinion.

IN RE: S.P.R.-G.

Opinion of the Court

VACATED AND REMANDED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).