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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-423

Filed: 3 March 2020

Wake County, No. 14JA304

IN THE MATTER OF: S.T.

Appeal by Respondent-Mother from order entered 22 January 2019 by Judge V.A. Davidian, III in Wake County District Court. Heard in the Court of Appeals 19 February 2020.

Wake County Attorney Scott W. Warren, by Senior Assistant County Attorney Mary Boyce Wells, for petitioner-appellee Wake County Human Services.

Respondent-Father, pro se, respondent-appellee.

Leslie Rawls for respondent-appellant mother.

Parker Poe Adams & Bernstein LLP, by Kiah T. Ford, IV, for guardian ad litem.

BERGER, Judge.

Respondent-Mother appeals from an order placing S.T. (“Scott”) in the sole legal and physical custody of Respondent-Father.¹ On appeal, Respondent-Mother

¹ A pseudonym is used to protect the identity of the juvenile.

argues that the trial court erred when it denied Respondent-Mother's motion to dismiss for lack of subject-matter jurisdiction. We disagree.

Factual and Procedural Background

Respondent-Mother and Respondent-Father (collectively, "Respondent-Parents") were married on November 9, 2001. Scott was born to Respondent-Parents in June 2002 and the couple separated two months later. In April 2004, a superior court in Georgia entered an order granting sole physical custody of Scott to Respondent-Mother. At that time, Respondent-Parents continued to share joint legal custody.

In mid-2014, Respondent-Mother and Scott, who were now living in North Carolina, became homeless and moved in with a family in Wendell. On September 9, 2014, Respondent-Mother abandoned Scott with the family without providing her contact information or any financial resources for Scott's care. The Wake County Department of Social Services ("DSS") was subsequently contacted on September 19, 2014. On September 26, 2014, DSS filed a petition alleging that twelve-year-old Scott was neglected. Attached to that petition was an affidavit detailing where Scott had resided since March 13, 2014.

A nonsecure custody order was entered, and Scott was adjudicated neglected on May 20, 2015. The trial court held numerous review and permanency planning hearings, including a hearing in July 2018. Respondent-Mother appeared *pro se* and

challenged the trial court's subject-matter jurisdiction during the July 2018 permanency planning hearing. Respondent-Mother argued that Georgia maintained jurisdiction because no North Carolina court had addressed the 2004 custody order issued by a Georgia court.

Before ruling on the motion to dismiss, the trial court heard from several witnesses. Respondent-Father testified that both he and Respondent-Mother moved to North Carolina when Scott was two years old, and that Scott had resided in North Carolina for approximately ninety percent of his life. Respondent-Mother testified that she and Scott moved from Georgia to North Carolina in 2010. A witness for Respondent-Mother testified that Respondent-Mother had been living in Godwin, North Carolina for two years.

Based on the forgoing evidence, the trial court found that North Carolina was Scott's home state and that the court had jurisdiction to enter a juvenile order in the case. Accordingly, the trial court denied Respondent-Mother's motion to dismiss for lack of subject-matter jurisdiction. The trial court also granted Respondent-Father sole legal and physical custody of Scott. Respondent-Mother's sole argument on appeal is that the trial court erred when it denied her motion to dismiss for lack of subject-matter jurisdiction. We disagree.

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). When a court decides a matter without jurisdiction, “then the whole proceeding is null and void, *i.e.*, as if it had never happened.” *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970). Accordingly, “the trial court’s subject-matter jurisdiction may be challenged at any stage of the proceedings.” *McKoy*, 202 N.C. App. at 511, 69 S.E.2d at 592.

Analysis

As an initial matter, the trial court erred when it determined Respondent-Mother waived her jurisdictional argument by failing to bring it prior to trial. It is well-settled in our State that a party may raise a jurisdictional challenge at any stage of a proceeding, including for the first time on appeal. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). However, because the trial court also reviewed Respondent-Mother’s jurisdictional argument and determined, on the merits, that the court had jurisdiction in the case, we conclude this error was harmless.

Generally, only the state that enters an initial child-custody order “can determine that it no longer has exclusive, continuing jurisdiction or that another state would be a more convenient forum.” 3 SUZANNE REYNOLDS, LEE’S NORTH CAROLINA FAMILY LAW § 13.137, at 13-237 (5th ed. 2002). However, this general rule

is subject to one exception. Under Section 50A-203 of the North Carolina General Statutes, a court of this State may modify a child-custody order made by a foreign court, without that foreign court first “releasing” its exclusive, continuing jurisdiction, where a two-prong jurisdictional test is satisfied. *In re T.J.D.W.*, 182 N.C. App. 394, 396-97, 642 S.E.2d 471, 743 (2007); N.C. Gen. Stat. § 50A-203, cmt. (2019) (Generally, “[t]he modification State is not authorized to determine that the original decree State has lost its jurisdiction. *The only exception is when the child, the child’s parents, and any other person acting as a parent do not presently reside in the other State.*” (Emphasis added)).

Under the first prong of this jurisdictional test for modification, the court seeking to modify the child-custody order must meet the jurisdictional requirements to make an initial custody determination under Section 50A-201(a)(1) or (a)(2). Pursuant to Section 50A-201(a)(1) and (a)(2), a court of this State has jurisdiction to make an initial child-custody determination when:

(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; [or]

(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[.]

N.C. Gen. Stat. § 50A-201(a)(1), (a)(2) (2019). A child's "home state" is that "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) (2019). Under the second prong, in addition to satisfying the jurisdictional requirements of either Section 50A-201(a)(1) or (a)(2), the court seeking to modify the child-custody order must determine 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(2).

In the case at hand, evidence in the record clearly satisfies the first prong of the jurisdictional test set forth in Section 50A-203. DSS initially filed its petition to the trial court on September 26, 2014. Attached to that petition, DSS included an affidavit detailing where Scott had resided since March 13, 2014—more than six months prior to the commencement of the proceeding. As evidenced by the affidavit, Scott only resided in North Carolina during the six months prior to DSS filing its petition. Moreover, undisputed testimony from the record establishes that Scott has

resided in North Carolina since at least 2010. Accordingly, North Carolina was Scott's home state on September 26, 2014, when the proceeding commenced in Wake County District Court. Thus, the first prong of the jurisdictional test for modification is satisfied.

Although Respondent-Mother argues on appeal that the trial court was not at liberty to consider the affidavit submitted by DSS with its petition, this argument is without merit. Respondent-Mother is correct that a pleading is not evidence. However, "an affidavit is not a pleading." *First Citizens Bank & Tr. Co. v. McLamb*, 112 N.C. App. 645, 651, 439 S.E.2d 166, 169 (1993). The trial court may consider affidavits in determining whether it meets the jurisdictional requirements of Section 50A-203. *Hammond v. Hammond*, 209 N.C. App. 616, 632, 708 S.E.2d 74, 85 (2011).

The second prong of the jurisdictional test under Section 50A-203 is satisfied where "[a] court of this 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(2). In this case, Respondent-Mother does not contest the trial court's finding that Respondent-Parents and Scott did not reside in Georgia at the time the petition was filed by DSS on September 26, 2014. Additionally, the affidavit filed by DSS and testimony from the hearings clearly establishes that Respondent-Parents and Scott have not resided in Georgia since at least 2010. Therefore, the second prong of the jurisdictional test for modification is also satisfied in this case.

Accordingly, the trial court did not err when it denied Respondent-Mother's motion to dismiss for lack of subject-matter jurisdiction because the record demonstrates that the jurisdictional requirements for modification of a child-custody determination under Section 50A-203 were established.

Conclusion

For the reasons stated herein, the trial court did not err by denying Respondent-Mother's motion to dismiss for lack of subject-matter jurisdiction.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).