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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-664

No. COA21-300

Filed 7 December 2021

Mecklenburg County, No. 20 CVD 12409

MARCEL ASLUND, Plaintiff,

v.

JULIE ROSE OSLUND, Defendant.

Appeal by Defendant from order entered 30 November 2020 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 22 September 2021.

No brief filed for Plaintiff-Appellee.

Passenant & Shearin Law, by Brione B. Pattison for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant-Mother ("Mother") appeals an order for expedited enforcement of a foreign order and attorney fees. On appeal, Mother contends the trial court lacked subject matter jurisdiction to enter its order under the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"); erroneously enforced a foreign custody order; and erroneously awarded attorney fees to Plaintiff-Father ("Father"). After careful review of the record and applicable law, we vacate the order of the trial court.

I. Factual and Procedural Background

¶ 2 Mother and Father were married on May 5, 2009, and subsequently divorced in October 2015. Mother is a United States citizen, and Father is a German citizen. During their marriage, the parties had three children ("the children"), who were born in the United States and who are U.S. citizens. At some point during the marriage, the parties moved to Germany, where they divorced and litigated child custody. In November 2017, a German court granted Mother "the right to specify the residence of all the Minor children." The German Court of Appeals affirmed this order on September 11, 2018.

¶ 3 In August 2018, Mother and the children relocated from Germany to Belgium, as permitted by the German court order. Thereafter, Father retained the children in Germany and Mother initiated proceedings under the Hauge Convention in Germany to have the children returned to Belgium. While Mother's case was pending, Father instituted a custody action in Belgium. In November 2019, a Belgian court found Father's justification for retaining the children in Germany on the grounds of acts of violence by Mother lacked foundation. It further found Father "committed a kidnapping" by refusing to deliver the children to Mother. The Belgian court granted "principal custody" to Mother on November 14, 2019.

¶ 4 In June 2020, Mother and the children relocated to Mecklenburg County, North Carolina. Father sought relief in Belgium, but Mother alleges she was not

served with a copy of any pleading Father filed in the Belgian court. Mother received, however, a notice in French of a hearing scheduled for August 19, 2020. On August 19, 2020, the Belgian court entered its order (the "Belgian order"), in which it "rule[d] that [Father] is to exercise parental authority over the common children . . ." and the children "are to have their primary residence with their [F]ather." Mother was not present in Belgium when the court heard the custody matter.

¶ 5 On September 14, 2020, Father filed an "Ex Parte Motion for Injunction, Rule 65 Temporary Restraining Order and Attorney's Fees" (the "Ex Parte TRO motion") in the Mecklenburg County District Court. The Ex Parte TRO motion contains a certificate of service, indicating service on Mother via certified mail. On September 15, 2020, Father filed a petition for expedited enforcement of a foreign child custody order, seeking to enforce the August 19, 2020 Belgian order. Father's petition was verified on July 2, 2020 and does not contain a certificate of service.

¶ 6 On September 18, 2020, the district court entered its order, in which it scheduled a hearing on Father's petition for expedited enforcement of the Belgian order for September 21, 2020 and directed law enforcement to take immediate custody of the children. That same day, the children were removed from Mother's home and placed in Father's custody. Mother contends she was not present when law enforcement removed the children from her residence, nor was Mother served with Father's petitions when the children were removed from her home.

¶ 7 The district court held the enforcement hearing for the Belgian order on September 21, 2020. Father and the children were not physically present for the hearing. Father and the children returned to Germany on or about September 19, 2020.[1] Because Mother was not served with Father's petitions, she requested a continuance of the enforcement hearing. Mother's continuance was granted, and Mother received a copy of Father's petitions that day.

¶ 8 On October 7, 2020, the trial court held the enforcement hearing. Mother, Mother's counsel, and Father's U.S. counsel appeared in person, and Father appeared from Germany via WebEx. Father's counsel filed an affidavit of attorney fees prior to the court hearing arguments on the merits of Father's petitions. The matter of attorney fees was held open as Mother's counsel did not have the opportunity to review the affidavit. The remaining matters were taken under advisement.

¶ 9 Father's counsel filed additional affidavits for attorney fees on October 8, 2020. On October 19, 2020, Father's counsel emailed the trial court's clerk inquiring as to whether the judge made a ruling on attorney fees. The clerk responded with the trial judge's order for Father's counsel to "prepare an order with appropriate Findings of Fact & conclusions of law awarding $10,000 in fees." Mother's counsel also sent an email, stating the trial court had not yet ruled on the underlying petitions and

[1] At the September 21, 2020 hearing, Mother's attorney stated, "We know [the children] have flown through Amsterdam, we believe they are in Germany."

requesting to be heard on the matter of attorney fees. The trial court's clerk responded, informing Father's counsel to prepare an order and to leave the amount for attorney fees blank. A hearing on attorney fees was not scheduled.

¶ 10 On November 30, 2020, the trial court entered its order enforcing the Belgian order and awarding Father $5,000 in attorney fees. Mother timely filed her notice of appeal on December 29, 2020. In January 2021, the parties entered a consent order to stay the execution of the attorney fees award pending the outcome of this appeal.

II. Discussion

¶ 11 Mother raises several arguments on appeal. Each will be addressed in turn.

A. UCCJEA Jurisdiction

¶ 12 Mother first contends the trial court lacked subject matter jurisdiction to enforce the Belgian order under the UCCJEA. We agree.

¶ 13 "The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal." *In re T.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896-97 (2006). Whether a trial court was vested with jurisdiction is reviewed *de novo*. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (citation omitted). "It is axiomatic that a trial court must have subject matter jurisdiction over a case to act in that case." *In re J.H.*, 244 N.C. App. 255, 259, 780 S.E.2d 228, 233 (2015) (citation omitted). Generally, the district courts of the State have exclusive, original jurisdiction over abuse, neglect, or dependency proceedings.

N.C. Gen. Stat. § 7B-200(a) (2020). "However, the jurisdictional requirements of the [UCCJEA] . . . must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code." *In re E.J.*, 225 N.C. App. 333, 336, 738 S.E.2d 204, 206 (2013).

¶ 14 "The UCCJEA provides a uniform set of jurisdictional rules and guidelines for the national and international enforcement of child-custody orders." *Hamdan v. Freitekh*, 271 N.C. App. 383, 386, 844 S.E.2d 338, 341 (2020) (citing *Creighton v. Lazell-Frankel*, 178 N.C. App. 227, 230, 630 S.E.2d 738, 740 (2006); N.C. Gen. Stat. § 50A-105 (2019)).

> The provisions of the UCCJEA apply internationally, as well as between states. North Carolina courts 'treat a foreign country as if it were a state of the United States for the purpose of applying' general provisions and jurisdictional evaluations, unless 'the child-custody law of a foreign country violates fundamental principles of human rights.'

Id. at 388, 844 S.E.2d at 342 (quoting N.C. Gen. Stat. § 50A-105(a) & (c)). The UCCJEA provides an expedited method for enforcement of a child custody order. *See* N.C. Gen. Stat. § 50A-308 (2020). Where a parent or custodian seeks expediated enforcement, the petition to do so "must be verified" and "[c]ertified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition." N.C. Gen. Stat. § 50A-308(a); *see also Boyd v. Boyd*, 61 N.C. App. 334, 336, 300 S.E.2d 569, 570 (1983) ("a verification is required as an essential part of the

complaint. . . . The want of a proper verification is a fatal defect and is a cause for dismissal of the action." (citation omitted)).

¶ 15 Mother contends the trial court lacked subject matter jurisdiction to enforce the Belgian order because (1) Father's petitions for expedited enforcement were verified before the Belgian order existed; and (2) Father's petitions failed to include certified copies and the requisite English translations of the Belgian orders. We agree.

¶ 16 Here, Father dated and signed his petitions for expedited enforcement of the Belgian order on July 2, 2020. Within his petitions for expedited enforcement, Father cites to the factual findings of the Belgian order. However, the Belgian order was not entered until August 19, 2020. Accordingly, Father could not have verified that he "read the foregoing [petition] and [knew] the contents thereof and that the same is true." Without the Belgian order being in existence, it is a factual impossibility for Father to verify that the facts within the order were true. Accordingly, we hold the trial court lacked subject matter jurisdiction over Father's expedited enforcement petitions. *See Boyd*, 61 N.C. App. at 336, 300 S.E.2d at 570-71; *see also In re T.R.P.*, 360 N.C. 588, 590-92, 598, 636 S.E.2d 787, 790-91, 794-95 (2006) (holding that a juvenile petition must be properly verified to confer subject matter jurisdiction upon a district court); *In re Green*, 67 N.C. App. 501, 503, 313 S.E.2d 193, 194-95 (1984) ("On the other hand, where it is required by statute that the petition be signed and

verified, these essential requisites must be complied with before the petition can be used for legal purposes." (citation omitted)).

¶ 17 Mother further contends the trial court lacked subject matter jurisdiction because the foreign orders were not accompanied by complete English translations. Specifically, Mother contends the copies of Father's Belgian order are insufficient because "the certifications, apostilles, and certificates of translations . . . are in French or German and are not accompanied by English translations."

¶ 18 N.C. Gen. Stat. § 50A-308 requires "[c]ertified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition." N.C. Gen. Stat. § 50A-308(a). While "the UCCJEA does not define the term 'certified copy," this Court has held "a certified copy is . . . defined as a copy of a document or record, signed and certified as a *true copy* by the officer whose custody the original is entrusted." *Hamdan*, 271 N.C. App. at 389, 844 S.E.2d at 343 (cleaned up). In *Hamdan*, this Court addressed whether a certified copy of a foreign order must be accompanied by an English translation. *Id.* at 390, 844 S.E.2d at 343. The Court held that, because the father "failed to provide the requisite English translation of the final child-custody determination," and "there [was] no indication that the untranslated document . . . [was] certified to be an exact reproduction of the [foreign court's] original final child-custody determination," the father "did not properly invoke the subject-matter jurisdiction of the trial court." *Id.* at 390-92, 844 S.E.2d at

343-44.

¶ 19 In the present appeal, Father attached a copy of the Belgian order to his enforcement petition. The petition states that this is a certified copy. However, the certifications, apostilles,[2] and certificates of translations are in French or German and are not accompanied by English translations. Further, the verification pages of Father's petitions contain a stamp in German for which a translation is not provided. Nor is a translation provided for a letter in French that is attached as exhibit to Father's enforcement petition.

¶ 20 While we hold the trial court lacked subject matter jurisdiction for improper verification, *see Boyd*, 61 N.C. App. at 336, 300 S.E.2d at 570 ("The want of proper verification is a fatal defect." (citation omitted)), we, in our discretion, address additional issues presented by this appeal.

B. Enforcement of the Belgian Order

¶ 21 In an alternative argument, Mother contends that, if the trial court had

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[2] "Apostille is a French word that means certification. It is the title given to the authentication certificate issued under the Hague Convention Abolishing the Requirement of Legalization . . . for Foreign Public Documents." N.C. Dep't of the Sec'y of State, *Authentications Quick Reference Guide*, 2, https://www.sosnc.gov/documents/guides/authentications/Authentications_Quick_Reference_Guide.pdf.

"An 'apostille' is a form of authentication issued to documents for use in countries that participate in the 1961 Hague Convention." N.C. Dep't of the Sec'y of State, *Authentications Quick Reference Guide*, 1, https://www.sosnc.gov/documents/guides/authentications/Authentications_Quick_Reference_Guide.pdf.

jurisdiction, it erroneously enforced the default custody order.

¶ 22 First, Mother contends the trial court erroneously enforced the default order because she did not receive notice of the Belgian proceeding. Under N.C. Gen. Stat. § 50A-308(c), upon the filing of a petition for expedited enforcement of a foreign order, the trial court shall "order . . . the respondent to appear in person with or without the child[ren] at a hearing." N.C. Gen. Stat. § 50A-308(c). Subsection (d) of Section 50A-308 provides that the trial court must "advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child[ren]," unless an exception applies. N.C. Gen. Stat. § 50A-308(d). One such exception is that "[t]he respondent was entitled to notice, but notice was not given in accordance with the standards of [N.C. Gen. Stat. §] 50A-108 in the proceedings before the court that issued the order for which enforcement is sought." N.C. Gen. Stat. § 50A-308 (d)(1)(c). Section 50A-108 provides, "[n]otice required for the exercise of jurisdiction when a person is outside of this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made." N.C. Gen. Stat. § 50A-108(a) (2020).

¶ 23 Here, Mother contends she never received service or notice of the Belgian proceeding. Mother only received a one-page document in French that remains untranslated. "At the hearing, the court will order the child to be delivered to the petitioner unless the respondent is prepared to assert . . . that notice was not given

in accordance with [N.C. Gen. Stat. § 50A-]108." N.C. Gen. Stat. § 50A-308 cmt. Accordingly, because Mother asserts she was not given notice in compliance with the statute, the trial court erroneously permitted Father to take custody of the children. N.C. Gen. Stat. § 50A-308(d).

¶ 24 Mother further contends the trial court erroneously enforced the foreign order as she was not served with Father's petitions when law enforcement went to Mother's residence and retrieved the children. N.C. Gen. Stat. § 50A-311 sets forth the statutory framework district courts of this State must follow before issuing a warrant to take physical custody of a minor child. N.C. Gen. Stat. § 50A-311 (2020). Subsection (b) of Section 50A-311 permits district courts of this State to "issue a warrant to take physical custody of the child[ren]," "[i]f the court, upon the testimony of the petitioner or other witness, finds that the child[ren] [are] imminently likely to suffer serious physical harm or be removed from this State." N.C. Gen. Stat. § 50A-311(b).[3] In the trial court's order, it must "[r]ecite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based." N.C.

[3] The official comment to Section 50A-311 provides that "[t]he [trial] court must hear the testimony of the petitioner or another witness prior to issuing the warrant." N.C. Gen. Stat. § 50A-311 cmt. Here, the trial court's order states it found, upon the testimony of Father, that the children faced imminent removal from the State of North Carolina. This testimony was not submitted to this Court to aid in our review. This Court's review is "limited to the record on appeal, verbatim transcripts . . ., and any other items filed with the record in accordance with Rule 9(c) and Rule 9(d)." *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922, *cert. denied*, 362 N.C. 682, 670 S.E.2d 564-65 (2008).

Gen. Stat. § 50A-311(c)(1). "The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody." N.C. Gen. Stat. § 50A-311(d). Here, the record on appeal does not contain any testimony from Father or any other witness regarding "imminent[] . . . serious physical harm" or the children's risk of being removed from this State. Accordingly, we hold the trial court failed to comply with the plain language of N.C. Gen. Stat. § 50A-311.

C. Attorney Fees

¶ 25 Next, Mother contends the trial court erred by awarding Father attorney fees. We agree.

¶ 26 Under N.C. Gen. Stat. § 50A-312, the prevailing party may be awarded attorney fees. N.C. Gen. Stat. § 50A-312 (2020). However, Mother "was entitled to have the determination made in the usual way judicial determinations are made—in court, before both parties, with each having the opportunity to present information and their views with respect to it." *Allen v. Allen*, 65 N.C. App. 86, 89, 308 S.E.2d 656, 658 (1983), *disc. rev. denied*, 310 N.C. 475, 312 S.E.2d 881 (1984). Here, Mother's counsel asked to be heard on the matter of attorney fees, but a hearing was never scheduled. Accordingly, we vacate the order of the trial court for a want of subject matter jurisdiction and hold the trial court erred in awarding Father $5,000 in attorney fees.

III. Conclusion

¶ 27 After careful review of the record and applicable law, we vacate the order of the trial court for a want of subject matter jurisdiction.

VACATED.

Judges DILLON and COLLINS concur.

Report per Rule 30(e).