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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-228

No. COA21-413

Filed 5 April 2022

Mecklenburg County, Nos. 18JA251, 18JA252

IN THE MATTER OF:

K.A.B.

L.M.A.

Appeal by respondent-mother from orders entered 22 April 2021 by Judge Aretha V. Blake in Mecklenburg County District Court. Heard in the Court of Appeals 2 November 2021.

Richard Croutharmel for respondent-appellant-mother.

Kathleen Arundell Jackson for petitioner-appellee Mecklenburg County Department of Social Services.

Winston & Strawn LLP, by Stacie C. Knight, for appellee-guardian ad litem.

GORE, Judge.

¶ 1 Respondent-mother appeals from two orders (a permanency planning order and a guardianship order) entered on 22 April 2021. The orders ceased reunification efforts between the parents and the juveniles K.A.B. ("Kobe") and L.M.A. ("Lonnie"),[1]

[1] Pursuant to N.C.R. App. P. 42(b), pseudonyms are used to protect the identity of the juveniles and for ease of reading.

placed the juveniles in the guardianship of a maternal aunt living in South Carolina, waived further review hearings, and released the guardian ad litem ("GAL") and the court-appointed parent attorneys from the case.

¶ 2 Respondent-mother raises two issues on appeal. First, she argues the trial court never acquired subject matter jurisdiction over Lonnie, and its modification of Lonnie's custody order violated the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") (N.C. Gen. Stat. § 50A-201 et. seq.). Second, she contends the trial court abused its discretion by failing to enter timely visitation orders as to both juveniles as required by § 7B-905.1.

¶ 3 Petitioner Mecklenburg County Department of Youth and Family Services ("YFS") filed its brief concurrently with a motion to expedite calendaring of this matter. YFS concedes all issues raised. The GAL filed a Notice of Joinder with YFS's concession brief.

¶ 4 We vacate and remand for further proceedings.

I. Factual and Procedural Background

¶ 5 Respondent-mother has a prior child protective services ("CPS") history with YFS. CPS was involved in at least seven investigations, one Family In-Home Services case, and one Permanency Planning case. Several of the prior investigations involved domestic violence between respondent-mother and Lonnie's father in the presence of one or more of the juveniles. Some of the domestic violence incidents resulted in

injuries to respondent-mother. One incident in 2010 involved respondent-mother's daughter V.A., and V.A.'s father (also Lonnie's father). In 2011, V.A. entered YFS custody following repeated domestic violence incidents between her parents. While V.A. was in YFS custody, respondent-mother made minimal progress on her case plan. Respondent-mother claimed this was because of a complicated pregnancy with twins. V.A.'s father moved to New York. Following an adjudication and dispositional hearing in 2011, the trial court awarded custody of V.A. to the maternal great-grandmother residing in South Carolina.

¶ 6 Lonnie and his twin brother were born in December 2011 in Charlotte, North Carolina. Sometime thereafter, the family moved to New York. In December 2014, respondent-mother called 911 and reported finding her 2-year-old son, Lonnie's twin brother, face down and unresponsive in the bathtub. Lonnie was also in the bathtub at that time. Respondent-mother admitted leaving the children unsupervised while bathing for approximately three minutes. Lonnie's father was not home at the time of the incident. Respondent-mother attempted to resuscitate the child. The child was hospitalized and pronounced dead four days later.

¶ 7 The local department of social services in New York ("NY DSS") substantiated a case against respondent-mother for inadequate guardianship (both children), internal injuries (Lonnie's twin brother), and lack of supervision (both children). Lonnie's twin brother was confirmed abused, and Lonnie was confirmed maltreated.

NY DSS took Lonnie into custody and placed him in foster care. In January 2016, respondent-mother regained custody of Lonnie and the NY DSS case was closed. In February 2016, respondent-mother returned to North Carolina with Lonnie while Lonnie's father remained in New York.

¶ 8 In 2016, CPS twice investigated respondent-mother for allegations of improper discipline of Lonnie but did not file a petition. The juvenile Kobe was born in June 2017. In May 2018, Lonnie came to school crying, and stated his "mom took a switch and hit me across the face because I forgot my umbrella at school." Lonnie further reported that he lost a tooth from the incident, and that respondent-mother bit and twisted his pinky finger. School personnel examined the area of the missing tooth and observed "a bit of blood as if the tooth had just fallen out[,]" and Lonnie's "finger had punctures, a little bit of blood and appeared swollen."

¶ 9 Twenty days later, Lonnie came to school complaining of head pain and stated respondent-mother "hit him on the head with a [TV] remote" after "he let [Kobe] go into the hallway when he was not supposed to." School personnel observed "a 'dent' on [Lonnie's] forehead near his hairline but the skin was not broken."

¶ 10 On 31 May 2018, YFS filed a juvenile petition alleging Lonnie and Kobe were neglected and dependent. The juveniles were then placed in foster care. At an initial non-secure custody hearing on 6 June 2018, the trial court ordered YFS to conduct a home study of maternal relatives in South Carolina for possible placement of the

juveniles. YFS concluded that a maternal great aunt, Aunt Greta, was the best possible placement for Lonnie and Kobe.

¶ 11 At a hearing on 16 July 2018, the trial court adjudicated the juveniles neglected and dependent pursuant to a mediated agreement of the parties. The trial court ordered respondent-mother to complete services to effect reunification. Respondent-mother's family services plan included refraining from physical or inappropriate discipline of the juveniles, obtaining mental health treatment, obtaining treatment regarding her domestic violence history, communicating with others in a non-hostile and respectful manner, and establishing financial stability. At a review hearing on 9 October 2018, the trial court found that respondent-mother was participating in mental health counseling, which included a parenting component, but ordered her to complete an evidence-based parenting program outside of therapy treatment.

¶ 12 In late November 2018, an Interstate Compact on the Placement of Children approved a home study on Aunt Greta's home in South Carolina. On 19 January 2019, YFS placed Lonnie and Kobe in Aunt Greta's care.

¶ 13 After a review hearing on 14 February 2020, the trial court concluded that respondent-mother was not making adequate progress within a reasonable period of time under her case plan and acting in a manner inconsistent with the health and safety of the juveniles. The trial court changed the juveniles' primary permanent

plan to guardianship with a concurrent secondary plan for reunification with a parent.

¶ 14 After further review hearings held in late August and early September 2020, the trial court maintained the status quo of the case, with the juveniles remaining in YFS custody, but additionally ordered YFS to discuss with respondent-mother's therapist the possibility of combined unsupervised and supervised visits.

¶ 15 After a permanency planning hearing conducted on 9 December 2020, 18 December 2020, 29 January 2021, and 2 February 2021, the trial court found that respondent-mother was involved in a few domestic violence incidents, arrested for violating a domestic violence protection order held by her ex-boyfriend, was receiving inadequate mental health treatment, and continuing to deny her mental health diagnoses. It further found that Aunt Greta "understands the legal significance and responsibilities of being a guardian under N.C. Gen. Stat. § 7B-600. She has the financial ability to meet the children's needs. She has cared for them for two years. She has been active in ensuring all of the children's medical and educational needs have been met."

¶ 16 On 22 April 2021, the trial court entered an order placing the juveniles in Aunt Greta's guardianship. The trial court further ordered that

> YFS shall send the Visitation Agreements to the Court in a Word document so that the Court can make changes. The Court will send out the modified Visitation Agreements to

> the parties. Visitation shall be in accordance with the Visitation Agreements as modified by the Court.

The trial court waived further review and released the court-appointed attorneys and parties. The trial court also entered a separate guardianship order. On 17 May 2021, respondent-mother filed notice of appeal.

II. Subject Matter Jurisdiction

¶ 17 Respondent-mother contends the trial court lacked subject matter jurisdiction over Lonnie and violated the UCCJEA by modifying Lonnie's custody order. We agree.

A. Standard of Review

¶ 18 "We review issues relating to subject matter jurisdiction de novo." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

B. Discussion

¶ 19 "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question and is conferred upon the courts by either the North Carolina Constitution or by statute." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007) (*purgandum*). Subject matter jurisdiction "cannot be conferred by consent, waiver, or estoppel." *In re Davis*, 114 N.C. App. 253, 256, 441

S.E.2d 696, 698 (1994) (citation omitted). A question of subject matter jurisdiction may be raised for the first time on appeal. *Forsyth Cnty. Bd. of Soc. Servs. v. Div. of Soc. Servs.*, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986). "When the record shows a lack of subject matter jurisdiction in the lower court, the appropriate action on the part of the appellate court is to vacate any order entered without authority." *In re N.P.*, 376 N.C. 729, 2021-NCSC-11, ¶ 6 (*purgandum*).

1. Initial Child-Custody Jurisdiction

¶ 20 "The UCCJEA is a jurisdictional statute, and the jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child custody disputes." *Foley v. Foley*, 156 N.C. App. 409, 411, 576 S.E.2d 383, 385 (2003) (citations omitted). "The first provision of the UCCJEA, [§ 50A-201 (2018)], addresses the jurisdictional requirements for initial child-custody determinations." *In re J.W.S.*, 194 N.C. App. 439, 446, 669 S.E.2d 850, 854 (2008). "'Initial determination' means the first child-custody determination concerning a particular child." § 50A-102(8) (2018).

¶ 21 In this case, the juvenile petition filed by YFS contains the following allegation:

> it was discovered that [respondent-mother] had recently moved back to Charlotte from New York, where [Lonnie] had been *taken into foster care* following the death of his twin brother in 2015. [Lonnie] was returned to his mother's custody shortly before she returned to Charlotte.

These facts are sufficient to place the trial court on notice that the State of New York

likely made an initial determination and entered a court order concerning Lonnie's custody prior to the current action. However, the record does not indicate that the trial court broached the issue of subject matter jurisdiction or contacted the State of New York to determine whether it could exercise jurisdiction over Lonnie's custody in 2018.

2. Jurisdiction to Modify Determination

¶ 22 "The third provision of the UCCJEA, [§ 50A-203 (2018)], addresses the jurisdictional requirements for the modification of child-custody determinations." *In re J.W.S.*, 194 N.C. App. at 446, 669 S.E.2d at 855. Section 50A-102(11) defines a "modification" as "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination." § 50A-102(11) (2018).

¶ 23 "A North Carolina court cannot modify a child-custody determination made by another state unless two requirements are met. First, the North Carolina court must have jurisdiction to make an initial determination." *In re J.W.S.*, 194 N.C. App. at 446, 669 S.E.2d at 855 (citing § 50A-203). Under § 50A-201(a)(1), "a court of this State has jurisdiction to make an initial child-custody determination only if . . . [t]his State is the home state of the child on the date of the commencement of the proceeding . . . ." § 50A-201(a)(1).

> "Home state" means 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. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

§ 50A-102(7) (2018).

¶ 24 Here, an Affidavit as to Status of Minor Child Lonnie reveals that at the time YFS filed its initial petition in May 2018, North Carolina qualified as Lonnie's "home state."

¶ 25 Second, "[e]ven where North Carolina is the home state of the child, . . . one of the following requirements must also be met." *In re J.W.S.*, 194 N.C. App. at 447, 669 S.E.2d at 855.

> (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.

§ 50A-203.

¶ 26 As previously discussed, there is no indication in the record that a New York court entered an order stating that it no longer has jurisdiction or that North Carolina is a more convenient forum. Additionally, there is evidence in the record that

Lonnie's father continued to reside in New York at the time the petition was filed.

3. Temporary Emergency Jurisdiction

¶ 27 If the trial court cannot meet the above listed requirements, it may still exercise "temporary emergency jurisdiction." § 50A-204 (2018). Under § 50A-204(a),

> [a] court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

§ 50A-204(a) (2018). A temporary emergency order "remains in effect until an order is obtained from the other state within the period specified or the period expires." § 50A-204(c) (2018). Furthermore,

> [a] court of this State which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203 . . . *shall immediately communicate* with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

§ 50A-204(d) (emphasis added).

¶ 28 While the juvenile petition does not allege abuse, the facts in this case are sufficient to allege to mistreatment. Under similar factual circumstances, this Court has held that a trial court had temporary emergency jurisdiction to enter a nonsecure

custody order when "[t]he juvenile is exposed to a substantial risk of physical injury . . . because the parent . . . has created conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection." *In re J.H.*, 244 N.C. App. 255, 266, 780 S.E.2d 228, 237 (2015) (quotation marks and citation omitted). Allegations in the petition demonstrating conditions likely to cause injury or abuse include:

> b. [YFS] became involved with the family most recently on [9 May 2018] when a CPS report was received alleging that six-year old [Lonnie] had sustained injuries following discipline he received from his mother that occurred on the same date.
>
> c. The investigation revealed that [Lonnie] was disciplined by his mother on the morning of [9 May 2018] with a charging cord used to plug in a cell phone. [Lonnie] sustained multiple linear welt marks to his lower back as a result of the discipline. During the incident [respondent-mother] also bit [Lonnie's] left pinky finger, breaking the skin and causing redness, pain, and swelling.
>
> . . .
>
> f. On [29 May 2018], [respondent-mother] struck [Lonnie] in the forehead with the remote control because he was supposed to be watching his one-year old brother and he became distracted, allowing the one-year old to leave the room where the children were supposed to remain. [Lonnie] sustained a small cut and swelling to his forehead from being struck.

¶ 29 Thus, we conclude that the trial court had temporary emergency jurisdiction to enter a nonsecure custody order placing Lonnie in YFS custody and continuing

nonsecure custody pending resolution of this matter. However, the trial court did not purport to exercise temporary emergency jurisdiction in either its nonsecure custody order or adjudication and disposition order. It did not communicate with the New York court, as mandated by § 50A-204(d), to determine whether the New York court expressly relinquished jurisdiction. Instead, it found that North Carolina was Lonnie's home state and purported to have jurisdiction over the parties. Accordingly, we vacate all orders concerning Lonnie entered after the 18 June 2018 nonsecure custody order, and this matter is remanded for further proceedings.

III. Visitation

¶ 30 Respondent-mother argues the trial court abused its discretion by ordering permanent out-of-home placement of the juveniles with Aunt Greta in South Carolina but then failing to grant the mother visitation rights as required by § 7B-905.1. We agree.

A. Standard of Review

¶ 31 Our "review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re J.V. & M.V.*, 198 N.C. App. 108, 112, 679 S.E.2d 843, 845 (2009). "We review a trial court's determination as to the best interest of the child for abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007).

B. Discussion

¶ 32 "An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." § 7B-905.1(a) (2021). "If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised." § 7B-905.1(c) (2021).

¶ 33 In this case, the trial court made no finding that respondent-mother had forfeited her right to visitation. At a hearing on 1 February 2016, the trial court stated:

> I'll adopt numbers 1 though 5 with respect to the visitation agreement. I'm going to ask that the parties—well, I guess that would be YFS. Whoever has a Word version of the visitation agreement, send it to me, so I can revise it. What I want to do is to—I think both parents need to have some time at every Christmas. Both parents need to have some time on the Mother's/Father's Days, things like that, and Thanksgiving too. And then I want to put in something for spring break for [Kobe]. So I want to make some revisions to that, and then I will send out when I'm going to adopt those visitation plans, so it could be attached to the order when it's submitted.

¶ 34 However, the trial court made no order regarding respondent-mother's visitation. Instead, the order simply reiterates its colloquy from the bench:

> YFS shall send the Visitation Agreements to the Court in a Word document so that the Court can make changes. The Court will send out the modified Visitation Agreements to the parties. Visitation shall be in accordance with the Visitation Agreements as modified by the Court.

¶ 35 YFS argues the trial court's omission of the visitation agreements from its final permanency planning order constitutes a clerical error. A "clerical error" is defined as "an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *Clerical Error*, Black's Law Dictionary (8th ed. 2004). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quotation marks and citations omitted).

¶ 36 Here, the trial court indicated it would adopt aspects of the parties' visitation agreement, make unspecified changes, and attach a modified version to the order. It inadvertently failed to do so. The appropriate remedy is to remand the permanency planning order with respect to Kobe for entry of a visitation order.

IV. Conclusion

¶ 37 As to Lonnie, we vacate and remand all orders entered after the nonsecure custody order for additional proceedings not inconsistent with this opinion. Regarding Kobe, we remand this matter for entry of a visitation order.

VACATED AND REMANDED.

Judges DILLON and WOOD concur.

Report per Rule 30(e).