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IN THE COURT OF APPEALS OF NORTH CAROLINA

2023-NCCOA-11

No. COA22-21

Filed 17 January 2023

Cumberland County, Nos. 20 JA 252–53

IN THE MATTER OF: M.W. and M.W.

Appeal by respondent-mother from orders entered 27 April 2021 and 21 September 2021 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 21 November 2022.

Patrick A. Kuchyt for petitioner-appellee Cumberland County Department of Social Services.

Elon University Guardian ad Litem Appellate Advocacy Clinic, by Interim Dean Alan D. Woodlief, Jr., for guardian ad litem.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for respondent-appellant mother.

PER CURIAM.

¶ 1

Respondent, mother of M.W. (“Mila”)¹ and M.W. (“Myles”), appeals from orders adjudicating Myles as an abused juvenile, adjudicating both Mila and Myles as neglected juveniles, and continuing custody of the children with the Cumberland

¹ Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading.

County Department of Social Services (“DSS”). We affirm the trial court’s adjudication of the children; however, because North Carolina is not the children’s home state, we reverse the adjudication order in part, vacate the disposition order, and remand for further proceedings.

I. Background

¶ 2

Prior to the initiation of the juvenile action, Mila and Myles resided with respondent in Pennsylvania. In June 2020, respondent sent Mila and Myles to visit friends and family in North and South Carolina. On 12 August 2020, both children were staying in the home of Ms. M. and her live-in boyfriend, Mr. T., in Fayetteville, North Carolina, preparing to return home to Pennsylvania. That day, Mila observed Mr. T. walk Myles into a bedroom and close the door. Mila heard banging and crying coming from inside the room before she saw Mr. T. carry out Myles, who was unconscious. When Myles began suffering seizures, Mr. T. placed Myles in a bathtub. At some point, Mila called respondent, who instructed “the adults” to call 911. When paramedics arrived, they observed bruising on Myles’ head and chest. Due to the severity of his injuries, Myles was transferred from Cape Fear Valley Hospital to the UNC Hospital Pediatric Intensive Care Unit. Physicians diagnosed Myles as suffering from injuries consistent with non-accidental trauma, including a small bleed on his brain.

¶ 3 On 13 August 2020, DSS filed a juvenile petition alleging that Mila and Myles were abused and neglected juveniles and obtained nonsecure custody of the children. The trial court held nine subsequent hearings continuing nonsecure custody of the children based on the court’s temporary, emergency jurisdiction under N.C. Gen. Stat. § 50A-204.

¶ 4 Following a hearing on 30 March 2021, the trial court entered an adjudication and temporary disposition order on 27 April 2021. Based on respondent’s stipulation to the above facts, the court adjudicated Mila as neglected, and Myles as abused and neglected. The matter proceeded to disposition, and on 21 September 2021 the trial court entered a disposition order, in which it ordered that the children’s legal and physical custody remain with DSS. In both the adjudication and disposition orders, the court concluded that North Carolina was the children’s home state, as defined by N.C. Gen. Stat. § 50A-102(7), and that it had subject matter jurisdiction. Respondent timely appealed both orders.

II. Adjudication

¶ 5 Respondent first argues that the trial court lacked jurisdiction to adjudicate the children as neglected and abused because they were residents of Pennsylvania, over whom a North Carolina court could only exercise temporary emergency jurisdiction, which did not support the entry of an adjudication order. Alternatively, she argues that Ms. M. and Mr. T. did not meet the definition of “caretakers” under

N.C. Gen. Stat. § 7B-101(3), and thus the trial court could not adjudicate Mila and Myles as abused or neglected.

A. Subject Matter Jurisdiction

¶ 6 “Subject matter jurisdiction is the threshold requirement for a court to hear and adjudicate a controversy brought before it.” *In re J.W.S.*, 194 N.C. App. 439, 446, 669 S.E.2d 850, 854 (2008). “Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal.” *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff’d per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). We review the question of whether a court has jurisdiction de novo. *In re T.N.G.*, 244 N.C. App. 398, 402, 781 S.E.2d 93, 97 (2015). In making our determination, “we are not restricted to consideration of the jurisdictional basis cited by the trial court.” *Id.*

¶ 7 Under our Juvenile Code, a district court “has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2021). “However, the jurisdictional requirements of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) . . . must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code.” *In re J.H.*, 244 N.C. App. 255, 259–60, 780 S.E.2d 228, 233 (2015) (citation omitted).

¶ 8 Under the UCCJEA,

a court of this State has jurisdiction to make an initial child-custody determination only if:

(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;

(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).

¶ 9 The trial court found that the children were “resid[ing] in, or were found in” North Carolina at the time DSS filed its petition, and concluded that at the time of the adjudication hearing and the disposition hearings, North Carolina was the children’s home state. The court’s conclusion was erroneous.

¶ 10 A child’s “home state” is defined as “the state in which [the] 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[.]” including a proceeding on abuse and neglect allegations. N.C. Gen. Stat. § 50A-102(4), (7) (2021). Should a proceeding commence, it does so with “the filing of the first pleading” in the proceeding. *Id.* § 102(5); *see, e.g., T.N.G.*, 244 N.C. App. at 403, 781 S.E.2d at 97.

¶ 11 Here, the child custody proceeding commenced on 13 August 2020, when DSS filed a petition alleging that the children were abused and neglected. The trial court found that Myles had been in North Carolina “since June 2020[.]” a period of, at most, ten weeks. The court’s findings did not specify how long Mila had been in North Carolina, but indicated that she spent time in South Carolina while Myles was in North Carolina. The record provides no indication that either child was in North Carolina for six consecutive months preceding the filing of the juvenile petition. Therefore, North Carolina did not qualify as the home state at the commencement of the adjudication proceeding, and the trial court did not have jurisdiction to exercise

initial child-custody jurisdiction based on home state status pursuant to N.C. Gen. Stat. § 50A-201(a)(1).

¶ 12 Additionally, the trial court’s findings are insufficient to establish initial child-custody jurisdiction under the remaining three prongs of subsection (a). *See Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 283, 767 S.E.2d 378, 384 (2014) (considering whether “there was any ground for the exercise of subject matter jurisdiction under the UCCJEA” regardless of the trial court’s stated ground); *Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003) (reviewing the record for grounds to establish subject matter jurisdiction after the trial court’s stated basis was determined erroneous). It was uncontested that the children resided in Pennsylvania, and we note that Pennsylvania has adopted the UCCJEA. *See* 23 Pa. Cons. Stat. § 5401 (2021).

¶ 13 In accordance with its obligation under N.C. Gen. Stat. § 50A-209(a), DSS reported that the children had resided with respondent in Pennsylvania over the preceding five years or since birth, and that they both left Pennsylvania in June 2020 to visit family and friends. *See* N.C. Gen. Stat. § 50A-102(7) (allowing “[a] period of temporary absence” from a state to be counted toward the six-month period required to establish home state status). Therefore, though the trial court failed to make findings regarding the history of the children’s residency, the record supports a determination that a Pennsylvania court could exercise initial child-custody

jurisdiction in accordance with N.C. Gen. Stat. § 50A-201(a)(1). *See In re L.T.*, 374 N.C. 567, 569, 843 S.E.2d 199, 200–01 (2020) (“The trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites in the Act were satisfied when the court exercised jurisdiction.”).

¶ 14 Moreover, the record provides no indication that a Pennsylvania court declined to exercise jurisdiction in favor of North Carolina as the more appropriate forum. Thus, the trial court could not have exercised initial child-custody jurisdiction pursuant to N.C. Gen. Stat. § 50A-201(a)(2)–(4).

¶ 15 Nonetheless, a court of this State may exercise temporary emergency jurisdiction “if the child is present in this State and . . . 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.” N.C. Gen. Stat. § 50A-204(a) (2021). Here, both children were in North Carolina, and Myles had suffered abuse. Indeed, in every nonsecure custody order, the trial court relied upon § 50A-204 temporary emergency jurisdiction to maintain DSS custody of the children. *See, e.g., J.W.S.*, 194 N.C. App. at 450, 669 S.E.2d at 856 (upholding the trial court’s exercise of temporary emergency jurisdiction under N.C. Gen. Stat. § 50A-204(a) to issue temporary nonsecure custody orders).

¶ 16 Respondent argues that because the trial court only had temporary emergency jurisdiction, it could not properly enter an adjudication order. Citing *J.W.S.*, she contends that following entry of the emergency nonsecure custody order, the trial court should have “defer[red] further proceedings in the action until the other state’s court ma[de] a determination as to whether it would exercise jurisdiction” or cede jurisdiction to North Carolina as the more appropriate forum. We disagree.

¶ 17 The trial court in *J.W.S.* “became aware of” a custody order previously entered in New York. *Id.* Though the trial court found in its adjudication order that New York had “opted not to exercise jurisdiction[,]” the record was devoid of any evidence to suggest the court had communicated with New York, as required by N.C. Gen. Stat. § 50A-204(d). *Id.* at 450, 669 S.E.2d at 857. Thus, this Court determined the trial court had no jurisdiction to enter the adjudication order. *Id.* at 453, 669 S.E.2d at 858. Where, as in this case, no previous child-custody determination exists and no child-custody proceeding has been commenced in the court of another state exercising jurisdiction in accordance with N.C. Gen. Stat. §§ 50A-201 through -203, a trial court is not obligated to contact other states that may exercise jurisdiction. N.C. Gen. Stat. § 50A-204(b) (2021).

¶ 18 It is only “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” that a trial court must “immediately communicate with the other

court.” N.C. Gen. Stat. § 50A-204(d) (2021). Respondent does not challenge the trial court’s finding that “[t]here were no custody actions filed before the filing of the petition in any other jurisdiction and there have been no custody actions commenced in any other jurisdiction since the filing of the petition.” Accordingly, respondent’s argument is misplaced.

¶ 19 Respondent further contends that any adjudication order entered pursuant to N.C. Gen. Stat. § 50A-204 is valid only if (1) North Carolina becomes the home state of the children, and (2) no other state has entered a child custody order and a child custody proceeding has not been commenced in another state. She argues that because North Carolina is not the home state, the order is invalid. This argument misconstrues the statutes and case law.

¶ 20 A child custody determination entered under N.C. Gen. Stat. § 50A-204(b) remains in effect until an order is obtained from a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, a child-custody determination made under [N.C. Gen. Stat. § 50A-204] becomes a final determination if it so provides, and this State becomes the home state of the child.

Id. § 50A-204(b). Thus, under the plain language of the statute, the instant adjudication order is valid and remains in effect until it is superseded by an order from a state with more “permanent” jurisdiction, ostensibly Pennsylvania. If no

child-custody proceeding is commenced in Pennsylvania, the adjudication order becomes final when this State becomes the children's home state. *See id.*

¶ 21 An adjudication order may be entered pursuant to a trial court's emergency jurisdiction under N.C. Gen. Stat. § 50A-204. In *In re M.B.*, the trial court specifically invoked N.C. Gen. Stat. § 50A-204 in its adjudication order, temporarily placing M.B. in DSS custody pending an investigation as to whether a child-custody proceeding had occurred in New York. 179 N.C. App. 572, 573, 635 S.E.2d 8, 9 (2006). On appeal, this Court concluded that the trial court had subject matter jurisdiction to enter "a temporary custody order pursuant to its temporary emergency jurisdiction." *Id.* at 576, 635 S.E.2d at 11.

¶ 22 The reasoning of *M.B.* was adopted in *In re E.X.J.*, in which this Court affirmed an order terminating the respondents' parental rights. 191 N.C. App. 34, 36, 662 S.E.2d 24, 25 (2008), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009). The underlying adjudication order was not appealed, *id.* at 45–46, 662 S.E.2d at 31, but the respondents challenged whether DSS had legal custody of the juveniles and standing to move for termination of their parental rights where custody of the juveniles had been awarded in an adjudication order entered under the exercise of temporary emergency jurisdiction, *id.* at 39, 662 S.E.2d at 27. We determined that because it was "undisputed" that there had been no custody proceedings commenced or prior court orders entered regarding the children in any other jurisdiction, "[b]y

operation of N.C. Gen. Stat. § 50A-204(b), . . . those custody orders remained in effect, and DSS had standing to file a petition or motion for termination of parental rights.” *Id.* at 41, 662 S.E.2d at 28 (internal quotation marks omitted).

¶ 23 In the present case, the unchallenged findings of fact establish that no prior child-custody determinations exist and that no child-custody proceedings have been commenced in Pennsylvania. Notwithstanding the trial court’s erroneous findings and conclusions regarding jurisdiction based on home state status, we conclude that the trial court had jurisdiction to enter the adjudication order pursuant to the temporary emergency jurisdiction provisions of N.C. Gen. Stat. § 50A-204(b).

B. Caretaker Status

¶ 24 As to respondent’s alternative argument, DSS contends that respondent failed to preserve for appellate review her arguments regarding caretaker status. We agree.

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.

N.C.R. App. P. 10(a)(1). “However, for waiver to occur the parent must have been afforded the opportunity to object or raise the issue at the hearing.” *In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018).

¶ 25 Pursuant to N.C. Gen. Stat. § 7B-101, a caretaker is “[a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting[,]” including, “an adult entrusted with the juvenile’s care[.]” N.C. Gen. Stat. § 7B-101(3) (2021). At the adjudication hearing, the trial court read respondent’s stipulation of the facts into the record, and though respondent clarified many of the handwritten amendments to the stipulation agreement, at no point did she argue Ms. M. and Mr. T. were not caretakers. Similarly, respondent raised no objections to the social worker’s testimony that “the children were left . . . in the care of[,]” and Myles was injured while he was in the care of, Ms. M. and Mr. T., and she did not challenge their caretaker status during cross-examination. Thus, she has failed to preserve her argument.

¶ 26 As respondent has raised no other arguments concerning the adjudication order, we affirm the trial court’s adjudication of Myles as an abused juvenile and of Mila and Myles as neglected juveniles. However, we reverse the trial court’s findings and conclusions that identify North Carolina as the children’s home state and purport to exercise jurisdiction based on the erroneous home state status.

III. Disposition

¶ 27 Because the disposition is predicated on the trial court’s conclusion that North Carolina was the children’s home state, we vacate the disposition order and remand for further consideration.

¶ 28 The Juvenile Code lists five dispositional alternatives for abused, neglected, or dependent children, and provides that “the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile[.]” N.C. Gen. Stat. § 7B-903(a) (2021). “A court’s decision on best interests is reviewed for abuse of discretion.” *In re D.L.*, 215 N.C. App. 594, 596, 715 S.E.2d 623, 624 (2011). “An abuse of discretion occurs when the trial court acts under a misapprehension of the law or its ruling is so arbitrary that it could not have been the result of a reasoned decision.” *In re R.P.*, 276 N.C. App. 195, 2021-NCCOA-66, ¶ 14 (citation and internal quotation marks omitted).

¶ 29 In the disposition order, the trial court ordered DSS to maintain legal and physical custody of Mila and Myles. While placement in DSS custody is one of the dispositional alternatives,

[i]n the case of a juvenile who has legal residence outside the State, the court may place the juvenile in the physical custody of the department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile’s home state.

N.C. Gen. Stat. § 7B-903(a)(6) (2021). As the unchallenged adjudicatory findings establish, Mila and Myles’ legal residence is Pennsylvania.

¶ 30 In *In re N.P.*, our Supreme Court concluded this “transfer option” in subsection (a)(6) was inapplicable to parents who reside out of state while North Carolina is their

child’s home state. 376 N.C. 729, 2021-NCSC-11, ¶ 15. But in cases where, as here, North Carolina is not the child’s home state, our appellate courts have yet to address the practical application of this second sentence. Therefore, we consider the effect of this provision in subsection (a)(6), specifically the legislature’s use of “may.”

¶ 31 Our Supreme Court has explained that “[t]he goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute’s enactment”:

When the meaning is clear from the statute’s plain language, we give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language is ambiguous, we must ascertain the General Assembly’s intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish. When we are determining legislative intent, the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute.

In re J.E.B., 376 N.C. 629, 2021-NCSC-2, ¶ 11 (citations and internal quotation marks omitted).

¶ 32 “As used in statutes, the word . . . ‘may’ is generally intended to convey that the power granted can be exercised in the actor’s discretion, but the actor need not exercise that discretion at all.” *Silver v. Halifax Cty. Bd. of Comm’rs*, 371 N.C. 855, 863–64, 821 S.E.2d 755, 761 (2018) (citation and internal quotation marks omitted).

However, “whether a particular provision in a statute is to be regarded as mandatory or directory depends more upon the purpose of the statute than upon the particular language used.” *Buford v. Gen. Motors Corp.*, 339 N.C. 396, 409, 451 S.E.2d 293, 300 (1994) (citation omitted).

¶ 33 The first use of the word “may” in subsection (a)(6) is clearly discretionary, allowing a trial court the option on disposition to place even nonresident children in the physical custody of a department of social services. However, the purpose of this placement is to facilitate the department’s return of the children “to the responsible authorities in [their] home state.” N.C. Gen. Stat. § 7B-903(a)(6) (2021). Thus, the second use of the word “may” mandates the return of nonresident children to their home state if the trial court opts to choose that dispositional alternative.

¶ 34 This construction aligns with the identified purposes of abuse, neglect, and dependency proceedings:

(2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.

(3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles’ needs for safety, continuity, and permanence; and

(4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary

or inappropriate separation of juveniles from their parents.

Id. § 7B-100. Return of the children to Pennsylvania also fulfills the specific purpose of dispositional determinations:

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the court should arrange for appropriate community-level services to be provided to the juvenile and the juvenile's family in order to strengthen the home situation.

Id. § 7B-900.

¶ 35 Thus, pursuant to subsection (a)(6), the children's placement with DSS should be temporary, and DSS should return Mila and Myles "to the responsible authorities" in Pennsylvania. *Id.* § 7B-903(a)(6). Accordingly, we conclude that the trial court's disposition was an abuse of discretion. *R.P.*, ¶ 14. Because the court's disposition was premised on an erroneous conclusion of law in both the adjudication and disposition orders, we vacate the disposition order and remand the matter for further consideration. In light of our holding, we do not address respondent's specific arguments concerning disposition.

IV. Conclusion

¶ 36 For the reasons stated above, we affirm the adjudication order in part and

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reverse in part as to the findings and conclusions related to North Carolina being the children's home state and jurisdiction being based on that erroneous status. We vacate the disposition order and remand for further proceedings consistent with this opinion, at which the trial court may, in its discretion, hear additional evidence.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED.

Before a panel consisting of Judges ZACHARY, MURPHY, and ARROWOOD.

Report per Rule 30(e).