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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-304

Filed 18 April 2023

Surry County, No. 21 JT 84

IN THE MATTER OF: J.B.

Appeal by respondent-mother from order entered 10 February 2022 by Judge William F. Southern III in Surry County District Court. Heard in the Court of Appeals 4 April 2023.

Zachary S. Brintle for petitioner-appellee.

Edward Eldred for respondent-appellant mother.

No brief on behalf of the guardian ad litem.

PER CURIAM.

Respondent, the mother of minor child Jamie¹, appeals from the trial court's order terminating her parental rights. Since we hold the trial court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to terminate respondent's parental rights, we vacate the trial court's order and remand for entry of an order dismissing the action.

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

I. Background

This case arises from a private termination action filed by petitioner, Jamie's paternal grandmother. Jamie was born in Virginia in March 2020; and, shortly after her birth, the Department of Social Services (DSS) obtained nonsecure custody of her. Respondent provided DSS with petitioner's name as a possible relative placement, and Jamie was placed with petitioner in Surry County in April 2020.

On 24 September 2020, the Carroll County, Virginia, District Court entered a consent order continuing custody of Jamie with petitioner. Respondent was granted supervised visitation premised on the submission of a clean drug screen. The Virginia order stated that it was a "final order" and that "[n]either physical nor legal custody of the child[] shall be transferred without notice to the GAL and/or DSS and by appropriate court order."

On 23 April 2021, petitioner filed a petition for adoption of Jamie in Surry County. On 14 July 2021, petitioner filed a petition to terminate respondent's parental rights in Surry County District Court alleging the grounds of neglect and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1) and (7) (2021). The petition alleged respondent had visited Jamie once since her placement with petitioner in April 2020 and that respondent continued to have substance abuse issues.

Following a hearing held 12 January 2022, the trial court entered an order on 10 February 2022 terminating respondent's parental rights. The court found that it had jurisdiction over the parties and subject matter jurisdiction over the case. The

court concluded that grounds existed to terminate respondent's parental rights as alleged in the petition and that termination of respondent's parental rights was in Jamie's best interests.² Respondent appealed.

II. Analysis

Respondent's sole argument on appeal is that the trial court lacked subject matter jurisdiction under the UCCJEA to terminate her parental rights because Virginia did not relinquish its jurisdiction; and, therefore, the order must be vacated. We agree.

"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 (2007) (marks omitted), *aff'd pr curiam*, 362 N.C. 170 (2008). "The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. Consequently, a court's lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. 343, 345-46 (2009) (marks and citations omitted). "Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo" on appeal. *In re M.R.J.*, 378 N.C. 648, 654 (2021).

Our Juvenile Code grants district courts

² The order also terminated the parental rights of Jamie's father; however, he has not appealed and is not a party to this appeal.

exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.

N.C. Gen. Stat. § 7B-1101 (2021). However, the jurisdictional requirements of the UCCJEA must also be satisfied in order for the trial court to obtain jurisdiction in termination of parental rights actions. *In re S.E.*, 373 N.C. 360, 364 (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.” *In re M.R.J.*, 378 N.C. at 661.

Here, the trial court found that respondent was incarcerated in Virginia at the time of the termination hearing and that, prior to her incarceration, she was a resident of Grayson County, Virginia. Before exercising jurisdiction under N.C. Gen. Stat. § 7B-1101 to terminate the parental rights of a nonresident parent, the trial court must “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 (2021).

A. Jurisdiction under N.C. Gen. Stat. § 50A-201

Section 50A-201 “addresses the jurisdictional requirements for initial child-custody determinations.” *In re J.W.S.*, 194 N.C. App. 439, 446 (2008). Here, the record establishes that the initial custody determination for Jamie was made by the

Virginia District Court in Carroll County on 24 September 2020, approximately ten months before the termination petition was filed. Thus, N.C. Gen. Stat. § 50A-201 does not apply. *Id.*

Petitioner argues the Virginia order determining initial custody is invalid because it “does not reflect – whether in specific findings or elsewhere in the record – whether [Jamie’s father] was a party to that action or whether his due process rights were in any way considered[,]” nor does it establish that it was entered in conformity with the UCCJEA. Therefore, petitioner contends the Virginia order is “fatally defective” and North Carolina had initial, exclusive jurisdiction under the UCCJEA to terminate respondent’s parental rights.

“[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.” *State v. Holliman*, 155 N.C. App. 120, 123 (2002) (marks omitted). Petitioner relied on the Virginia order below as an attachment to her petition to terminate respondent’s parental rights. Petitioner also held the order out as valid at the termination hearing, presenting it to the court as evidence and requesting the court take judicial notice of the order. Petitioner will not be permitted to “swap horses” on appeal and now argue the Virginia custody order is invalid. *Id.*

Moreover, “[n]othing in the UCCJEA requires North Carolina’s district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1).” *In re N.B.*, 240 N.C.

App. 353, 358 (2015). As the initial custody order was entered by a Virginia court, North Carolina lacked jurisdiction under N.C. Gen. Stat. § 50A-201 to enter an order terminating respondent’s parental rights. *See In re K.U.-S.G.*, 208 N.C. App. 128, 132 (2010) (holding a trial court lacked jurisdiction under N.C. Gen. Stat. § 50A-201 to enter a termination order where the initial custody determination was made by a Pennsylvania court).

B. Jurisdiction under N.C. Gen. Stat. § 50A-203

The remaining possible basis for jurisdiction is N.C. Gen. Stat. § 50A-203, which “outlines the requirements for a North Carolina court to have jurisdiction to modify a child-custody determination.” *In re N.R.M.*, 165 N.C. App. 294, 299 (2004). “Modification” is defined 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.” N.C. Gen. Stat. § 50A-102(11) (2021).

Here, the Virginia court entered an order on 24 September 2020 granting custody of Jamie to petitioner and allowing respondent supervised visitation. Thus, at the time the North Carolina termination petition was filed on 14 July 2021, there was an existing order from another state pertaining to the custody of Jamie. Accordingly, any change to the Virginia order would be a modification under the UCCJEA.

Under N.C. Gen. Stat. § 50A-203, a North Carolina court may not modify a

child custody determination of a court of another state

unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) *and*:

- (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 (2021) (emphasis added). “[T]he original decree [s]tate is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree [s]tate stating that it no longer has jurisdiction.” *In re N.R.M.*, 165 N.C. App. at 300.

1. Initial Determination Jurisdiction under N.C. Gen. Stat. § 50A-201

A North Carolina court has jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a)(1) if North Carolina “was 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[.]” N.C. Gen. Stat. § 50A-201(a)(1) (2021). “‘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.” N.C. Gen. Stat. § 50A-102(7) (2021).

Here, it is undisputed that Jamie has lived with petitioner in North Carolina since April 2020. Therefore, North Carolina was Jamie’s home state at the time the termination petition was filed on 14 July 2021. Accordingly, the first jurisdictional requirement for a modification under N.C. Gen. Stat. § 50A-203 is satisfied.

2. N.C. Gen. Stat. § 50A-203(1) and (2)

However, one of the requirements under subsections 50A-203(1) or (2) must also be met, and neither one is satisfied in this case. There is nothing in the record indicating that a Virginia court entered an order determining “it no longer has exclusive, continuing jurisdiction under G.S. 50A-202” or that North Carolina “would be a more convenient forum under G.S. 50A-207[.]” *See* N.C. Gen. Stat. § 50A-203(1) (2021). Indeed, there is nothing in the record to suggest that a Virginia court was contacted regarding this matter. Thus, the Surry County District Court did not gain jurisdiction over the case through N.C. Gen. Stat. § 50A-203(1).

With regard to N.C. Gen. Stat. § 50A-203(2), neither a North Carolina court nor a Virginia court determined that respondent no longer resided in Virginia. To the contrary, as stated earlier, the trial court found that respondent was incarcerated in Virginia at the time of the termination hearing and that, prior to her incarceration, she was a citizen and resident of Grayson County, Virginia. Therefore, respondent continued to reside in Virginia throughout the case, and the Surry County District Court did not obtain jurisdiction through N.C. Gen. Stat. § 50A-203(2).

Since neither prong of N.C. Gen. Stat. § 50A-203 is satisfied, the trial court lacked subject matter jurisdiction to terminate respondent's parental rights. *In re J.A.P.*, 218 N.C. App. 190, 193 (2012) (holding the trial court lacked subject matter jurisdiction under the UCCJEA to modify a New Jersey custody order where neither N.C. Gen. Stat. § 50A-203(1) nor (2) was satisfied). Accordingly, we vacate the trial court's order terminating respondent's parental rights to Jamie and remand for entry of an order dismissing petitioner's action. *See In re N.R.M.*, 165 N.C. App. at 301.

III. Conclusion

For the reasons stated above, we vacate the trial court's 10 February 2022 order terminating respondent's parental rights and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

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

Report per Rule 30(e).