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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-314

Filed 3 December 2024

New Hanover County, Nos. 22JT145, 22JT146

IN RE: J.L.S. & B.J.D.

Minor Juveniles.

Appeal by respondent from order entered 9 January 2024 by Judge J.H. Corpening II in New Hanover County District Court. Heard in the Court of Appeals 27 August 2024.

Parry Law, PLLC, by Edward Eldred, for respondent-appellant-father.

Amanda Dennis, pro se, no brief filed for petitioner-appellee-mother.

GORE, Judge.

On 9 January 2024, the trial court entered an order terminating respondent-father's parental rights ("TPR" Order) to his minor children "Jean" and "Ben."¹ On 16 January 2024, respondent timely filed written notice of appeal. This Court has jurisdiction to hear this case pursuant to N.C.G.S. §§ 7A-27(b)(2) and 7B-1001(a)(7) (2023).

¹ Pseudonyms.

Respondent presents two issues on appeal: (1) whether the trial court lacked subject matter jurisdiction to modify a child-custody determination made by a Vermont court under the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) N.C.G.S. § 50A-203; and (2) whether the trial court erred in adjudicating the existence of grounds to terminate for neglect.

Upon review, the record contains no competent evidence to support a determination that a Vermont court relinquished its exclusive, continuing jurisdiction over the minor children in this case. Thus, the trial court lacked subject matter jurisdiction to modify Vermont’s prior determination under § 50A-203. We must, therefore, vacate and remand the trial court’s TPR Order.

I.

On 8 September 2022, petitioner-mother privately filed a petition to terminate respondent-father’s parental rights to their children, Jean and Ben. Petitioner is a citizen and resident of New Hanover County, North Carolina. Respondent is a citizen and resident of Bennington County, Vermont. North Carolina is the home state of the minor children as defined by § 50A-102(7).

Petitioner and respondent met in 1999 while they both lived in Vermont. Respondent was twenty years old, and petitioner was seventeen. Both parties described the relationship as volatile with regular arguing and multiple break ups followed by reconciliations. Their daughter, Jean, was born in 2007, and their son, Ben, was born in 2011.

On 2 September 2012, respondent was arrested in Bennington County, Vermont, for sexual assault by coercion on petitioner. Respondent was later convicted in connection with this charge and sentenced to seven (7) years to life in prison. The Vermont Superior Court entered a Modified Custody Order on or about 13 March 2013, in Bennington County, Vermont, awarding petitioner primary legal and physical custody and responsibilities of the minor children.

Prior to trial, and while under pretrial release, respondent was charged with multiple crimes related to assault and injuries that Ben sustained while in respondent's care. While the assault charges were later dismissed, the Vermont court entered an order suspending all visitation for respondent pursuant to his arrest on those charges. Respondent has not seen his children since 2013.

Respondent was released from prison on or about 2 July 2020. In May 2021, he filed a Motion for Visitation in Vermont. According to petitioner, the Vermont Superior Court dismissed respondent's Motion because "they didn't have any legal standing because I had lived [in North Carolina] with the children for so long[,] and Vermont didn't have jurisdiction over the case."

Respondent filed a Complaint for visitation in North Carolina in July 2022. Two months later, petitioner filed a TPR petition in District Court, New Hanover County, advancing three grounds: neglect, abandonment, and incapability. The petition alleged North Carolina had jurisdiction to make an initial child-custody determination and that "Attorney Brian K. Mathage filed a Motion to Dismiss on

[UCCJEA] grounds to which the Vermont Superior Court agreed and dismissed [r]espondent's Motion to Modify on the auspice that North Carolina is the minor children's home state." Respondent's Answer admitted that allegation "upon information and belief."

The trial court adjudicated the TPR petition in September 2023. After the close of all the evidence, the trial court concluded that respondent's parental rights could be terminated for neglect. The trial court then concluded that it was in the minor children's best interests to terminate respondent's parental rights. Respondent timely filed written notice of appeal to this Court from the trial court's TPR Order.

II.

On appeal, respondent argues there is no record evidence showing that a Vermont court relinquished its exclusive, continuing jurisdiction under § 50A-202, or that a Vermont court determined that North Carolina would be a more convenient forum under § 50A-207. Thus, respondent argues, the trial court lacked subject matter jurisdiction to modify Vermont's child-custody determination under § 50A-203. We agree.

"[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, 346 (2009) (citation omitted). "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 (2010) (citation omitted).

The UCCJEA serves to "[a]void jurisdictional competition and conflict with

courts of other States in matters of child custody” and to “[p]romote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child[.]” § 50A-101 cmt. 1–2. “The UCCJEA applies to proceedings in which child custody is at issue, including those involving . . . termination of parental rights; and a trial court must comply with its provisions to obtain jurisdiction in such cases.” *In re S.E.*, 373 N.C. 360, 364 (2020). “North Carolina’s version of the UCCJEA is codified in Chapter 50A, Article 2 of the General Statutes.” *In re R.G.*, 899 S.E.2d 377, 384 (N.C. Ct. App. 2024).

In this case, the record fully supports the trial court’s finding that a Vermont court entered a Modified Custody Order on 13 March 2013.

Thus, at the time of the petition to terminate respondent’s parental rights, there was an existing order from another state pertaining to the children at issue. Accordingly, any change to that [Vermont] order qualifies as a modification under the UCCJEA. Under the applicable modification provision, [N.C.G.S.] § 50A-203, a North Carolina court cannot modify a child-custody determination made by another state unless two requirements are met.

In re N.R.M., 165 N.C. App. 294, 299 (2004).

Under the applicable provisions of [N.C.G.S.] § 50A-203, a North Carolina court may modify an out-of-state child custody determination if both (1) North Carolina “has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2)” *and* (2) “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.”

In re T.R., 250 N.C. App. 386, 389 (2016) (cleaned up) (quoting § 50A-203(1)).²

“[O]ur courts have generally looked for a foreign court order making one of the two determinations under N.C.G.S. § 50A-203 to determine whether the foreign court has relinquished jurisdiction under the UCCJEA. As a general trend, where such an order exists this Court considers jurisdiction to have been relinquished by the other state. Where such orders are missing, this Court has concluded the trial court’s orders must be vacated due to a lack of subject matter jurisdiction. However, this Court has never expressly held that a court order is the only method by which a sister state can relinquish jurisdiction over a child custody proceeding. . . . [T]his Court has accepted a sufficiently trustworthy proxy for a court order relinquishing jurisdiction.

In re R.G., 899 S.E.2d at 386 (citations omitted). A viable proxy for a court order relinquishing jurisdiction “possesses all of the substantive attributes of a court order[.]” *In re T.R.*, 250 N.C. App. at 391 (accepting a docket entry), and “contains sufficient indicia of veracity and officiality[.]” *In re R.G.*, 899 S.E.2d at 387 (accepting a judge’s letter).

In this case, the first requirement under § 50A-203 is met. Evidence in the record supports the trial court’s finding that North Carolina is the “home state” of the minor children within the meaning of § 50A-102(7). The second requirement under § 50A-203(1) is not. No competent evidence in the record shows that a Vermont court either “determine[d] 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.

² Section 50A-203(2) is inapplicable because respondent is a citizen and resident of Vermont.

50A-207[.]” § 50A-203(1) (emphasis added). The trial court found that “Vermont Superior Court dismissed [r]espondent’s Motion to Modify on grounds that North Carolina is the minor children’s home state, and Vermont no longer has home state jurisdiction.” The record before us does not, however, contain that Vermont order, or any other “sufficiently trustworthy proxy for a court order relinquishing jurisdiction.” *In re R.G.*, 899 S.E.2d at 386; *see also In re N.R.M.*, 165 N.C. App. at 301 (holding that “neither method of obtaining jurisdiction under [N.C.G.S.] § 50A-203(1) is satisfied[.]” where “there is nothing in the record showing that Arkansas made such a determination.”).

Here, the only indication that a Vermont court relinquished its jurisdiction comes from party representations. Petitioner alleged the Vermont court dismissed respondent’s Motion to Modify custody “on the auspice that North Carolina is the minor children’s home state[.]” and respondent’s Answer only admitted this allegation “upon information and belief.” Petitioner testified the Vermont court dismissed respondent’s May 2021 Motion for lack of jurisdiction, and respondent’s attorney stated Vermont dismissed the May 2021 visitation Motion because “obviously, Vermont doesn’t have jurisdiction anymore because the family had been residing in North Carolina since 2017.”

Petitioner’s pleadings and testimony do not “possess[.] all the substantive attributes of a court order.” *In re T.R.*, 250 N.C. App. at 391. Nor can respondent’s pleadings be construed as conclusive and binding upon the parties where he only

admitted the possibility that an allegation was true—upon information and belief—and “[s]ubject matter jurisdiction cannot,” in any event, “be conferred by consent, waiver, or estoppel[,]” *Foley v. Foley*, 156 N.C. App. 409, 411 (2003). “Furthermore, it is axiomatic that the arguments of counsel are not evidence.” *State v. Collins*, 345 N.C. 170, 173 (1996).

“Although North Carolina qualifies as the home state of the children, the second requirement for modification jurisdiction is not met. Thus, the trial court lacked subject matter jurisdiction to enter the [TPR] order.” *In re N.R.M.*, 165 N.C. App. at 301. “Because we resolve this appeal on the basis of lack of subject matter jurisdiction, we do not address the merits of respondent’s argument.” *Id.*

III.

For the foregoing reasons, the order of the trial court must be vacated, and this case remanded to the New Hanover County District Court for additional proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).