Circuit Court No. CINA-16-0121

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2677

September Term, 2016

IN RE: T.D.

Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: September 6, 2017

Appellant, A.M., appeals from a Concurrent Plan of Unification and Custody and Guardianship to a Relative decreed by the Circuit Court for Prince George's County sitting as a juvenile court (Engle, J.). In the instant appeal, Appellant posits the following questions for our review:

> l. Did the court have jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")[1] to make a custody determination?
>
> 2. Assuming, *arguendo,* that Maryland had jurisdiction, did the court err by exercising its jurisdiction, where Maryland is an inconvenient forum and Texas is a more appropriate forum?
>
> 3. Did the juvenile court err by exercising jurisdiction without adhering to the notice requirements of the Indian Child Welfare Act?

FACTS AND LEGAL PROCEEDINGS

The Prince George's County Department of Social Services ("DSS" and "the Department") filed a Child in Need of Assistance ("CINA")[2] Petition on July 29, 2016. A shelter care hearing took place over two days, July 29 and August 2, 2016. In the Shelter Care Order, the court noted that there is an indication that T.D. is alleged to be an Indian

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[1] CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT §§ 101–405, U.L.A. (1997). *See also* MD. CODE ANN., FAM. LAW ("F.L.") §§ 9.5-101–9.5-318.

[2] MD.CODE ANN., CTS. & JUD. PROC. § 3–801(f). "'Child in need of assistance' means a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs."

child[3] and that the Indian Child Welfare Act ("ICWA")[4] may apply. Also in the Order, the court found that it would be contrary to T.D.'s welfare to remain with his mother. The court listed the following findings:

> Required Findings: [ICWA]: There is an indication that the Respondent is an Indian child and, therefore, the ICWA may apply. Mother stated her grandmother is Cherokee.
>
> Required Findings: Reasonable and Active Efforts: Reasonable and active efforts to prevent or eliminate the need for removal of the Respondent were made by the Department, because the following circumstances existed: DSS had prior contact with the family with [Child Protective Services ("CPS")] involvement in Calvert and Charles Counties. DSS has also held a Family Involvement Meeting ("FIM").
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> ***
>
> Required Findings: Contrary to the Welfare: It continues to be contrary to the Respondent's welfare to remain in the home of the Respondent's mother, [A.M.], with whom the Respondent last lived on 7/28/16 because the following circumstances exist: on July 28, 2016, Limited Custody issue on allegations of neglect. DSS received a report that [A.M.] and her boyfriend [D.B.] and the Respondent along with another minor [C.H.[5]] were allegedly squatters on a farm in Brandywine, MD and had been moving from place to place. The property owner of the farm has dementia. The mother and her boyfriend have been allegedly stealing electricity while on the farm. The boyfriend has a conviction for 2nd degree murder in a domestic violence incident and reports to Prince George's County CPS were that he was a non-registered sex offender and currently in violation of probation. The mother has a past history of alleged child neglect in the state of Texas and in Calvert and Charles Counties. When Limited Custody was issued, the children were found living in a cluttered and dirty van. The Respondent's teeth are rotten and he

[3] "Indian child" is a legal, statutory definition that we use in reference to the applicable federal law. We are sensitive that tribal nomenclature is important and that many Native Americans and First Nation people prefer and use other terms.

[4] INDIAN CHILD WELFARE ACT OF 1978, 25 U.S.C. §§ 1901–1963 (2015).

[5] Minor child, C.H., who testified at the shelter hearing that she is nine years old, is A.M.'s adopted sister.

> had a very strong body odor. The other child located with the Respondent (Mother's adopted sister) had severely matted hair and a foot fungus. The Respondent also has been allegedly diagnosed with Congenital Adrenal Hyperplasia since birth, which is a life threatening illness. There are concerns about the Respondent's illness and medical follow up. There have also been alleged numerous reports of the mother being observed as intoxicated and drinking up to a pint of alcohol daily. She has alleged reported mental illness and health issues. On July 20, 2016, police allegedly found Mother drunk and the children without supervision. Tenants have allegedly observed the children out late without adult supervision and report that the Respondent was almost trampled by a horse. Tenants are also concerned that the children are around an alleged unregistered sex offender along with the conditions of the van being unfit and dirty. A FIM was held before the shelter care hearing. The court did not find Mother to be credible and there are concerns about the Respondent's living conditions, prior CPS history, Mother's mental health issues, and issues raised about Mother being intoxicated. There are also issues with truth and veracity and stability as there are about a number of things, including where Mother and Respondent actually live; Mother's relationship to [C.H.] (and [C.H.'s] real name/identity); Mother's employment (she repeatedly stated she and [D.B.] run shelters for homeless veterans and that she is the housing director for Southern Maryland Veterans' Association (SMVA) but SMVA is a charity that was in the news as closed by the Attorney General's Office earlier in 2016 for fraud; and how Mother came to be staying on the farm of the elderly woman with dementia and used her home, electricity and property.

An adjudication hearing began before a Family Magistrate, Kristen M. Hileman-Adams, on August 26, 2016. The parties agreed to sustain some of the allegations in the Amended CINA petition and scheduled a full-day hearing before a judge for the contested allegations. In the August 26th Order, the magistrate made the following findings of fact:

> The Respondent child's name is [T.D.] and his address was . . . Houston, Texas . . . . The Respondent child's DOB is January . . . 2014 and he is a 2 year old [sic] male who is not enrolled in school. The Respondent's mother's name is [A.M.] DOB: [2/80] and her address is . . . Houston, Texas . . . . The Respondent's father's identity is unknown. [S.D.] is listed on the Respondent's birth certificate, but it is acknowledged that he is not Respondent's biological father and he states his name should not be on the Respondent's birth certificate. Mother stated that the Respondent's biological father was a sperm donor whose identity is unknown.

The magistrate also noted the following information in the Order about Respondent's maternal grandmother:

> The maternal grandmother of the Respondent appeared today for the first time to get her adopted daughter [C.H.] out of foster care where she has been for the past month. When DSS in Texas met with the maternal grandmother, she was evasive about where she lived and gave them several addresses. She stated she moves around. When DSS finally was able to view one of the addresses where she lived, there were concerns about cleaning supplies out and other hazards that could pose an issue for [a] young child or a medically fragile child like the Respondent. The grandmother hung up during the FIM and did not appear for hearings up until today. It is unclear whether she would return the Respondent to Maryland if allowed to take him to Texas. Furthermore, there is no assurance that she will not allow Mother to take the Respondent or have unsupervised visitation with him and no way to enforce or monitor any agreement as she will be in Texas. There has been no [Interstate Compact on the Placement of Children ("ICPC")[6]] or approval for Texas to have the Respondent sent there for them to monitor to live with his grandmother. The court finds that it would not be appropriate or safe for the Respondent to be placed in his grandmother's custody at this time and that shelter care needs to continue pending the conclusion of the Adjudicatory Hearing[.]

Regarding the contested allegations from the Amended CINA petition, the magistrate stated the following:

> This court found good cause to set the balance of this matter before a judge. The mother has been in and out of the hospital. She has medical issues and reportedly has a variety of mental health issues and substance abuse issues. There is information about cases and investigations regarding Mother and Respondent . . . from Texas, Charles County, Calvert County and Prince George's County. There are a myriad of criminal and civil cases involving Mother, [S.D.], [D.B.], Respondent and Respondent's sibling(s) in Texas, Charles County, Calvert County and Prince George's County. The shelter care hearing took a long time to complete and had to be set over several days. There are a number of witnesses who may be called to testify, including possible out-of-state witnesses and experts.

[6] In re Adoption/Guardianship No. 3598, 347 Md. 295, 314 (1997). "The ICPC has been enacted . . . with the intended purpose of facilitating interstate adoption and increasing the number of acceptable homes for children in need of placement." It has been enacted in Maryland under Md. Code Ann., Fam. Law §§ 5–601 to 5–611.

Finally, the magistrate noted that the ICWA may apply to T.D. as A.M. stated that her mother was Cherokee.

On November 21, 2016, the contested adjudicatory hearing took place before Judge M. Engle on the Circuit Court of Prince George's County, sitting as a juvenile court, who determined that the allegations in the amended CINA petition were proven by a preponderance of the evidence and sustained the following facts:

> [O]n or about July 25, 2015, the [DSS] went to investigate a complaint of child neglect. When Ms. Mary Peyton from the [DSS] arrived, she observed T.D., age 2 years of age at the time, along with another minor, [C.H.], coming from a van, along with [A.M.] and [D.B.]. Both children appeared to be extremely [unkempt]. Ms. Peyton testified that [T.D] was in a dirty diaper and had extreme body odor. [C.H.] was observed to have matted hair, in a tank top and shorts.
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> Ms. Peyton testified, and was corroborated by photographs, of a van that was littered with trash, food, and highly unsanitary conditions. In addition, Ms. Peyton observed that [T.D.'s] teeth were rotten. Testimony also sustained information that [T.D] suffers from Congenital Adrenal Hyperplasia (CAH) since birth, which is a life-threatening illness.
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> Based upon the testimony taken during the hearing, the court finds it is contrary to the welfare to remain in the home of [A.M.], with whom [T.D.] last lived on July 25, 2016 because the following circumstances existed that [T.D.] was neglected, and is contrary to the child's welfare and that it is not now possible to return the child to that home.
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> The child has been neglected and the child's parents are unable to give proper care and attention to the child and child's needs.

A home study was ordered for A.M.'s residence, to be coordinated with the Texas DSS.

The disposition hearing was held on December 19, 2016. The court again found that

T.D. was neglected and that his parents were unable to properly care for him. The court declared T.D. to be a CINA and ordered limited guardianship to the Prince George's County Department of Social Services. Supervised visitation between T.D. and A.M was ordered, in addition to liberal telephone/electronic contact between T.D., his mother, siblings, grandmother and uncle. The court also ordered the DSS to complete the necessary documents for the ICPC in the instance that appropriate guardianship in Texas was secured. A home study, to be coordinated by the Prince George's County DSS and Texas DSS, was also ordered for the grandmother and uncle.

The court also addressed T.D.'s potential status as an Indian child for purposes of the ICWA, ordering the DSS to explore whether Respondent is a member of the Cherokee Tribe or otherwise eligible for membership such that the ICWA applies**:**

> There is an indication that the Respondent is an Indian child as indicated on prior shelter care orders and, therefore, the ICWA may apply, but no testimony in either hearing indicated any evidence that [the] ICWA would apply. Nonetheless, the [DSS] shall continue its inquiry into whether the child is an 'Indian child' and report the results of the inquiry to the court. Mother stated her grandmother was Cherokee.

The permanency planning hearing was on January 20, 2017. The mother was absent because she was under hospice care in Texas, but she was represented by counsel. The Department proposed a permanency plan of reunification and custody and guardianship with a relative. The mother asked the court to adopt a sole plan of reunification. The mother also requested that the court transfer the case to Texas. The court denied the request for two reasons: (1) moving him from his foster placement where he is "flourishing" is not in his interests and (2) there was sufficient evidence that he had multiple contacts with

Maryland. The court continued the CINA status and ordered a concurrent permanency plan of reunification and guardianship with relatives. This appeal followed.

MOTION TO DISMISS

On appeal, the Department asserts that the instant appeal should be dismissed. Appellant responds that she has "the right to an immediate appeal from an order establishing a concurrent permanency plan of reunification and custody and guardianship with a relative." Appellant acknowledges that that Order was not a final judgment. Appellant asserts, however, that the Order is an appealable interlocutory order and, "[t]herefore, this Court must reach the merits of whether the juvenile court had jurisdiction pursuant to the [UCCJEA]."

The Court of Appeals,

> on a number of occasions, [has] articulated and confirmed the rule that the right to seek appellate review of a trial court's ruling ordinarily must await the entry of a final judgment that disposes of all claims against all parties, and that there are only three exceptions to that rule: appeals from interlocutory orders specifically allowed by statute, predominantly those kinds of orders enumerated in Maryland Code, § 12–303 of the Cts. & Jud. Proc. Article; immediate appeals permitted under Maryland Rule 2–602(b); and appeals from interlocutory rulings allowed under the common law collateral order doctrine.

Maryland State Bd. of Educ. v. Bradford, 387 Md. 353, 382–83 (2005).

Applicable in the instant case, is Md. Code Ann., Cts. & Jud. Proc. § 12–303(3)(x), which provides that, a party may appeal from an interlocutory order, entered by a circuit court in a civil case, concerning the deprivation of "a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order[.]"

"In determining whether an interlocutory order is appealable, in the context of custody cases, the focus should be on whether the order and the extent to which that order changes the antecedent custody order." *In re Karl H.*, 394 Md. 402, 430 (2006). "If the change could deprive a parent of the fundamental right to care and custody of his or her child, whether immediately or in the future, the order is an appealable interlocutory order." *Id.*

In *Karl H.,* the Court of Appeals held "that a concurrent permanency plan that includes the option of adoption is sufficiently far enough along the continuum of depriving a parent of a fundamental right and is immediately appealable." *Id.* The Court reasoned that "[r]eunification and adoption are mutually exclusive goals, and are directly contradictory goals." *Id.* at 431. Specifically, the Court noted that "[t]he goal of adoption, however, guarantees that, under § 3–823(g) of the Family Law Article, after thirty days at the earliest, a petition will be filed to terminate a parent's rights along with the hope of reunification." *Id.* In cases of a permanency plan containing adoption,

> [a] parent is deprived of a six-month review of the permanency plan. The six-month review is replaced with a TPR hearing when 'adoption' is a component of the permanency plan. An interlocutory order which includes adoption as a possible outcome has the potential both to accelerate the termination and to terminate a parent's custodial rights; therefore, such orders adversely affect a parent's rights to care and custody and entitle the parent to an immediate appeal.

Id.

However, "[i]f the permanency plan calls for custody and guardianship by a relative but does not contemplate adoption . . . [p]arental rights are not terminated in such a

situation: the parents are free at any time to petition an appropriate court of equity for a change in custody, guardianship, or visitation." *In re Caya B.*, 153 Md. App. 63, 78 (2003). "The role of a guardian is . . . separate and distinct from that of a custodian of a child." *Toland v. Futagi*, 425 Md. 365, 390 (2012). A court may grant guardianship without terminating a parent's right to custody. *Id.*

In the instant case, the permanency plan ordered on January 20, 2017 was a concurrent plan of reunification and custody and guardianship with a relative. Adoption was not contemplated by the court or recommended by the Department. Accordingly, the concurrent plan did not deprive A.M. of "the fundamental right to care and custody" of T.D., either "immediately or in the future" as discussed in *Karl, H., supra*, and would not be an appealable interlocutory order under Cts. & Jud. Proc. § 12–303(3)(x).

However, A.M. does not appeal the merits of the permanency plan. Although she appeals from the Order itself, Appellant is actually appealing the jurisdictional issues of the Maryland juvenile court to hear the case.

"[T]he circuit court sitting as the Juvenile Court in a CINA proceeding is a court of general jurisdiction, and the presumption in favor of subject matter jurisdiction applies." *In re John F.,* 169 Md. App. 171, 183 (2006). The UCCJEA, however, "imposes limits on the courts' traditional subject matter jurisdiction to issue orders affecting a resident-parent's custody rights." *Pilkington v. Pilkington*, 230 Md. App. 561, 578 (2016).

Although the issue of a lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, *Lewis v. State*, 229 Md. App. 86, 101 (2016), *aff'd* 425

Md. 663 (2017), when the issue has been raised and addressed by a lower court, it then becomes a nonappealable interlocutory order. "A trial court's decision to deny a challenge to its jurisdiction does not settle or conclude the rights of any party or deny the party the means of proceeding further." *Gruber v. Gruber*, 369 Md. 540, 546 (2002). In the context of custody cases and competing state jurisdiction, an order denying a "challenge to the court's jurisdiction [does] not deprive [a parent] of the care and custody of his child or change the terms of such an order, and as such, the circuit court's decision does not constitute an appeal able interlocutory order under [Cts. & Jud. Proc.] § 12–303(3)(x)." *Id.*

In the instant case, the potential lack of subject matter jurisdiction was raised before the lower court at the January 20, 2017, permanency plan hearing. At that time, the court denied Appellant's request to move the matter to Texas pursuant to the UCCJEA. The court explained:

> From looking at the contacts, especially with the investigations with the child protection services, the court will find that there are significant contacts to the State of Maryland based on the different contacts that they had with the child protective services.

Patently, the lack of subject matter jurisdiction was raised and addressed by the court, with the court denying a challenge to its jurisdiction. Accordingly, we hold that the jurisdictional claims Appellant asserts, *i.e.*, that the lower court lacked jurisdiction under the UCCJEA and that, if the lower court did have jurisdiction, it erred by exercising its jurisdiction, are not appealable to this Court outside of a final judgment.

Moreover, we note that the last claim Appellant asserts on this appeal, namely that

the lower court erred in compliance with the notice requirements of the ICWA, was not preserved for our review, as Appellant concedes, and has been rendered moot subsequent to the filing of this appeal.[7] Therefore, we hold that the Department's Motion to Dismiss is granted.

THE DEPARTMENT'S MOTION TO DISMISS IS GRANTED.
COSTS TO BE PAID BY APPELLANT.

[7] Appellant concedes in her reply brief that the issue is moot. We note the supplementation to the record by the Department which states the following:

> At the status conference, the Department's caseworker, Shara Hayden MSW, proffered that she had spoken with Ms. K. ([A.M.'s] mother), when Ms. K. and T.D.'s uncle attended the December 2016 disposition hearing. During this conversation, Ms. K. referred Ms. Hayden to [A.M.'s] paternal relatives. After identifying the appropriate paternal relatives, Ms. Hayden notified the relevant Cherokee tribes about the state court proceeding and requested information about T.D.
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> The United Keetoowah Band of Cherokee Indians verbally informed Ms. Hayden that T.D. is not considered an Indian child. The Department is awaiting written confirmation. Ms. Hayden also sent a letter to the Eastern Band of Cherokee Indians, which responded by letter stating T.D. is neither registered nor eligible to register as a member of that tribe. And the Cherokee Nation Registration Office has no records for [A.M.'s] paternal grandparents. Additionally, the Bureau of Indian Affairs proffered no other likely tribes needing notice of T.D.'s CINA case.