[Cite as *In re M. B.*, 2010-Ohio-3979.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: M. B.	C.A. No. 25343
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. LC 09-11-10246

DECISION AND JOURNAL ENTRY

Dated: August 25, 2010

WHITMORE, Judge.

{¶1} Appellants, Dianne and Frederic B. ("Grandparents"), appeal from a judgment of the Summit County Court of Common Pleas that dismissed their complaint for legal custody of their granddaughter based on the court's conclusion that it lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). This Court reverses and remands.

I

{¶2} Grandparents are the parents of Tressa Smith ("Mother"), who is the mother of the child at issue in this case, M.B. M.B. was born in Ohio on January 9, 2002 and continued to reside in the Akron area for the next seven years. Mother and M.B. lived with Grandparents for approximately four years while Mother was attending nursing school. At other times, Mother and M.B. lived elsewhere in the area. The role that Grandparents played in M.B.'s life is not clear from the record.

{¶3} On August 13, 2009, Mother moved to South Carolina with M.B., her infant child, and her husband, who is not M.B.'s father. Because they apparently had limited financial resources, Mother and her family lived in three different places after arriving in South Carolina. By November, although Mother had secured part-time employment, her husband was still unemployed and they were living in a three-bedroom home with her husband's parents and other members of his family.

{¶4} On November 7, 2009, Mother and her husband got into a four-hour fight with her husband's parents about keeping their food in his parents' refrigerator. During the argument, the husband's father threatened Mother with physical harm. Although she later claimed that she was not frightened by the threats, Mother called Grandparents the next day and asked them to drive from Ohio to South Carolina to bring her and the children back to Grandparents' home. While Grandparents were driving to South Carolina, however, Mother called to tell them that she and the baby were staying in South Carolina with her husband, but she wanted them to take M.B. to Ohio. The parties dispute whether Mother asked Grandparents to take M.B. on a long-term basis or merely for a one-week vacation.

{¶5} After M.B. arrived in Ohio, she told Grandparents that she had been suffering from stomach aches and headaches almost every day and they could see that her eczema had flared up. They believed that M.B. had not been receiving adequate food or medical care while in South Carolina and that the worsening of her skin condition was due to stress. Mother insisted that she was giving M.B. adequate care and that M.B.'s headaches were due to allergies.

{¶6} On November 16, 2009, Grandparents filed a complaint in Summit County for legal custody of M.B. They also sought temporary emergency custody based on their allegations that M.B. was at risk of harm if she returned to South Carolina with Mother. The magistrate

granted an ex parte temporary emergency custody order and held a hearing on the emergency order the following day.

{¶7} Mother and Grandparents appeared at the hearing. Following the hearing, the magistrate continued the emergency order of temporary custody, reasoning that it was in M.B.'s best interest. Mother filed a motion to set aside the magistrate's order, which the trial court granted. The trial court concluded that it lacked jurisdiction to hear this action. Consequently, it ordered that M.B. be returned to Mother's custody and dismissed the case. Grandparents appealed and this Court issued a stay of the trial court's order removing M.B. from their custody. They have assigned one error for review.

III

Assignment of Error

> "THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' COMPLAINT FOR CUSTODY ON THE GROUNDS THAT OHIO DID NOT HAVE JURISDICTION OVER THE MINOR CHILD UNDER R.C. 3127.15[.]"

{¶8} In their sole assignment of error, Grandparents argue that the trial court erred in concluding that it lacked jurisdiction to hear their complaint for legal custody and by dismissing this case on that basis. We agree.

{¶9} Because this custody dispute is between parties living in different states, the trial court necessarily looked to Ohio's codification of the UCCJEA to determine whether Ohio had jurisdiction. The magistrate issued his temporary order pursuant to R.C. 3127.18(A)(2), which gives a court of this state "temporary emergency jurisdiction if a child is present in this state and *** [i]t is necessary in an emergency to protect the child because the child *** is subjected to or threatened with mistreatment or abuse."

{¶10} The magistrate had granted the temporary emergency order because there was evidence that M.B. might be at risk of mistreatment if she returned to South Carolina. In ruling on Mother's motion to set aside the magistrate's order, the trial court found that Ohio did not have temporary emergency jurisdiction under R.C. 3127.18 because there was no evidence that M.B. was subject to mistreatment or abuse "in this state where she is residing with [Grandparents]." In other words, the trial court construed R.C. 3127.18 to grant temporary emergency jurisdiction over a child present in this state only if the alleged mistreatment or abuse occurred in Ohio.

{¶11} However, there is no language in the statute to support the trial court's construction. See *Micah M. v. Arizona Dept. of Economic Security* (May 13, 2008), Ariz. App. Div. 2, No. 2 CA-JV 2008-0006, at *3 (construing identical language in Arizona's version of the UCCJEA temporary emergency jurisdiction provision). In fact, temporary emergency jurisdiction will typically be invoked in just this type of case, in which a child is visiting from another state and an in-state relative becomes aware that the child may be at risk of mistreatment or abuse if she returns home. See, e.g., id.; *MacDougall v. Acres* (1998), 427 Mass. 363. Courts in other states also have applied their version of this emergency jurisdiction provision in cases in which the threat of abuse was in another state and one of the parents fled with the child to escape the abuse. See, e.g., *Saavedra v. Schmidt* (Tex.App.2002), 96 S.W.3d 533; *Campbell v. Martin* (Me.2002), 802 A.2d 395. Consequently, the trial court erred in vacating the magistrate's temporary emergency custody order simply because the threat of mistreatment did not occur in Ohio.

{¶12} Although the magistrate had not yet addressed the issue of whether Ohio or South Carolina had ongoing jurisdiction in this case, the trial court did. The trial court found that South

Carolina, not Ohio, was the "home state" under the UCCJEA. The trial court apparently based its conclusion on the fact that M.B. had been residing in South Carolina at the time Grandparents commenced this custody action. As Grandparents correctly argue, however, the statutory definition of "home state" requires more than mere residence in a state. R.C. 3127.01(B)(7) defines "[h]ome state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of a child custody proceeding ***." It is undisputed that M.B. had resided in South Carolina for only two to three months prior to the commencement of this action, which does not satisfy the six consecutive months required by R.C. 3127.01(B)(7). Therefore, the trial court erred in concluding that South Carolina was M.B.'s home state.

{¶13} It is also undisputed, however, that M.B. had not resided in Ohio for the six consecutive months immediately proceeding the filing of this action. Therefore, it was necessary for the trial court to look further into the requirements of R.C. 3127.15(A) to determine whether Ohio had ongoing jurisdiction to decide this custody dispute. Grandparents maintain that Ohio has jurisdiction over this matter pursuant to additional language in R.C. 3127.15(A)(1) and/or pursuant to R.C. 3127.15(A)(2).

{¶14} In addition to "home state" jurisdiction as defined above, R.C. 3127.15(A)(1) gives Ohio home state jurisdiction if it "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." *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, at ¶34. Grandparents argue that Ohio has home state jurisdiction pursuant R.C. 3127.15(A)(1), as construed in *Rosen*.

{¶15} Although Grandparents insist that this provision applies in this case and that this issue was fully litigated below, the record does not support their argument. The parties competing for custody of the children in *Rosen* were their mother and father, so there was no need for the court to make a finding under R.C. 3127.15(A)(1) that they were "person[s] acting as parent." In this case, although the undisputed evidence established that M.B. lived in Ohio with Mother "within six months before the commencement of the proceeding" and that M.B. had recently moved to South Carolina and was arguably "absent from this state," the parties did not litigate the issue of whether Grandparents had been "acting as a parent" to M.B. so as to satisfy the requirements of R.C. 3127.15(A)(1).

{¶16} R.C. 3127.01(B)(13) defines "[p]erson acting as a parent" as someone "who meets both of the following criteria:"

> "(a) The person has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence from the child, within one year immediately before the commencement of a child custody proceeding; and
>
> "(b) The person has been awarded legal custody by a court or claims a right to legal custody under the law of this state."

{¶17} The parties did not present evidence to establish that Grandparents satisfied these criteria, nor did the trial court make any finding on that issue. In addition to the lack of evidence in the record, this Court would exceed its role as a reviewing court if it attempted to make that finding in the first instance. See *Valley City Electric Co., Inc. v. RFC Contracting, Inc.*, 9th Dist. No. 09CA009608, 2010-Ohio-964, at ¶20.

{¶18} Alternatively, Grandparents maintain that Ohio has jurisdiction pursuant to R.C. 3127.15(A)(2), which gives this state jurisdiction over the matter if:

> "(2) A court of another state [is not the home state] *** and both of the following are the case:

> "(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.
>
> "(b) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships."

{¶19} Although Grandparents point to evidence in the record that M.B. has a connection to Ohio, the parties have not had the opportunity to present evidence directly on these issues, nor has the trial court made the requisite findings of whether M.B. has a "significant connection" with this state and/or whether there is "substantial evidence" in this state concerning her "care, protection, training, and personal relationships."

{¶20} Because the trial court erred in dismissing this case for lack of jurisdiction, the assignment of error is sustained. This matter is remanded to the trial court to determine whether Ohio has jurisdiction pursuant to alternate provisions of R.C. 3127.15(A).

III

{¶21} Grandparents' assignment of error is sustained. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is reversed and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

JOY S. WAGNER, Attorney at Law, for Appellant.

HANK F. MEYER, Attorney at Law, for Appellee.