

IN THE COURT OF APPEALS OF IOWA

No. 8-990 / 08-0812
Filed March 26, 2009

IN THE MATTER OF THE GUARDIANSHIP OF

**A.B.G., JR. and A.L.G.,
Wards,**

**A.B. and Y.B., Guardians,
Appellants,**

**T.K., Intervenor,
Appellee.**

Appeal from the Iowa District Court for Winneshiek County, John Bauercamper, Judge.

The guardians appeal from a district court ruling terminating a guardianship for lack of subject matter jurisdiction. **REVERSED AND REMANDED.**

Eric Borseth of Borseth Law Office, Altoona, for appellants.

Lance W. Lange of Belin, Lamson, McCormick, Zumbach, & Flynn, P.C.,
Des Moines, for appellee.

Karl Knudson, Decorah, for children,

Heard by Mahan, P.J., and Miller and Doyle, JJ.

MILLER, J.

The guardians appeal from a district court ruling terminating a guardianship of two minor children for lack of subject matter jurisdiction. We reverse and remand.

Tara and Anthony are the parents of A.J., born in May 1999, and A.G., born in October 2003. Tara and Anthony were never married, but lived together off and on for several years until early 2005. Both children were born in St. Louis, Missouri, and lived there with one or both parents, other family members, or friends from the time of their birth until approximately March 2005. Tara and Anthony apparently had their final breakup in February 2005 and Tara went to live with her new boyfriend, Curt. During February and March 2005 Anthony had both children living with him alone in Missouri. Why Anthony had the children on his own during this time is disputed. Tara claims Anthony was hiding the children from her and that is why she had no contact with them. Anthony claims Tara told him she wanted nothing to do with him or the children when she moved out to pursue her romantic relationship with Curt.

Anthony could not hold a job or a residence in Missouri and moved with the children to Decorah, Iowa, to live with his maternal aunt and uncle, Yvonne and Andrew, sometime near the end of March 2005. While in Iowa, Anthony applied for and received food stamps for April and part of May 2005. He also obtained employment in Iowa in May 2005. However, in May 2005 Anthony began talking to Tara again and decided to move back to Missouri with the children. He drove back to Missouri, picked up Tara, and they drove back to

Iowa, picked up A.J. and A.G., and all drove back to Missouri. This occurred around May 16 or 17, 2005.

There is a dispute in the record as to what precisely occurred once Anthony, Tara, and the children were back in Missouri. Anthony asserts that as soon as they returned Tara moved back in with Curt and left him with the children again. He testified he then stayed with Tara's sister for a short time but Tara continued to refuse to have any contact with him or the children. He returned the children to Iowa once again near the end of June 2005 to stay with Yvonne and Andrew so the children would not have to "live out of the car" and continue to be shuffled around. Anthony signed a "Consent to Guardianship" dated June 30, 2005, consenting to Yvonne and Andrew having guardianship of A.J. and A.G.

Anthony briefly returned to Missouri to try to find work but could not and returned to Iowa and moved in with his aunt and uncle near the end of July 2005. Anthony's application for public assistance from the Iowa Department of Human Resources for A.J. and A.G. was granted on August 3, 2005, he obtained employment in Iowa in September 2005, and he registered for school at Northeast Iowa Community College. A.J. began kindergarten at the Decorah Community Schools in August 2005 and it appears he attended there for the first quarter through late October 2005. In October 2005 Anthony decided he did not like Decorah and in very late October or early November 2005 moved back to St. Louis with the children and remained there until February 2006.

Tara claims, however, that she and Anthony lived together in Missouri from the time they returned with the children in mid-May until he returned the

children to Iowa without informing her he was going to do so. Tara asserts that at no time between August 2005 and October 2005 did Anthony contact her and she had no idea where the children were until Anthony returned to Missouri with them in about late October 2005.

It is undisputed that Anthony and the children returned to Missouri in late October or early November 2005 and remained there until early February 2006. However, once again Anthony and Tara dispute what occurred in Missouri during this approximately four-month period.

It is clear that A.J. was enrolled in school in St. Louis from December 2, 2005, to February 6, 2006. Tara claims she cared for the children the majority of this time, while Anthony claims he was taking care of the children ninety percent of the time and Tara had little to no interest in them other than for tax purposes. Tara testified that she had a dentist appointment on February 6, 2006, and she left the children with Anthony the night before so he would be able to take A.J. to school the next morning. She claims he did not return the children to her when he was scheduled to, but instead again disappeared with the children and she had no idea where he had gone.

Anthony contends he continued to have problems with Tara, finding employment, finding a place to live, and caring for the children during this period of over three months. He testified he had to live with various friends and family during this time because he could not find work or housing, yet he continued to be the children's primary caretaker and responsible for taking A.J. to school daily. Anthony claims that after two weeks without Tara seeing or attempting to see the

children he decided once again to move with the children to Iowa in February 2006 to live with Yvonne and Andrew and try to get his life back together.

A.J. was once again enrolled in the Decorah Community Schools in February 2006. Yvonne and Andrew filed a petition on February 15, 2006, seeking to be appointed as guardians for A.J. and A.G. The district court entered an order authorizing service on Tara by publication and mailing to her last known address, and appointed a guardian ad litem for the children. On May 2, 2006, the court entered an order finding that notice to Tara had been accomplished by mailing and by proof of publication provided to the court, and appointing Yvonne and Andrew as guardians of A.J. and A.G.

On March 9, 2007, Yvonne filed a petition requesting the State of Iowa to collect child support from Tara. Tara sent a letter to the Winneshiek County Clerk of Court on April 6, 2007, attempting to challenge the guardianship. This is the first evidence in the record before us of any action taken by Tara to attempt to challenge the guardianship and have the children returned to her care. On October 11, 2007, Tara filed a motion in Iowa district court to intervene and terminate the guardianship.

Trial to the court was held on March 5 and 6, 2008. On March 5, 2008, the morning of trial, Tara filed a motion to dismiss for lack of subject matter and personal jurisdiction. She argued the district court did not have jurisdiction of her person because she was not provided sufficient notice of the guardianship proceeding under Iowa Code sections 598B.108(1) (2007) and 633.554(2)(b)(1), and did not have subject matter jurisdiction under section 598B.201. At the

outset of the trial the court summarily overruled Tara's motion to dismiss as untimely but allowed her to amend her earlier motion to allege lack of jurisdiction as a ground of defense to the guardianship petition.

On March 13, 2008, the district court entered a ruling granting Tara's motion to intervene, terminating the guardianship effective May 31, 2008, and ordering the children returned to their parents on June 1, 2008. In granting the motion the court concluded Iowa was not the children's home state at the time of the commencement of the guardianship proceeding pursuant to Iowa Code sections 598B.102(7) and 598B.201(1)(a), and that none of the exceptions to the home state rule under subsections (1)(b), (1)(c), and (1)(d) of section 598B.201(1) were applicable to the facts of this case. The guardians appealed and filed a motion to stay the termination of the guardianship and the transfer of the children pending the appeal. Our supreme court granted the motion to stay in an order filed May 23, 2008.

On appeal the guardians claim the district court erred in concluding that because Iowa was not the "home state" of the children at the commencement of the guardianship proceeding Iowa could not exercise jurisdiction over the guardianship of the children. They further claim the court erred in not dismissing Tara's motion to terminate the guardianship and continuing their guardianship of the children. They argue the Iowa court does have jurisdiction under Iowa Code section 598B.201(1)(b).

The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA),¹ Iowa Code chapter 598B, sets forth the jurisdictional requirements for an Iowa court to make a child-custody determination. See Iowa Code §§ 598B.201 (listing the exclusive circumstances under which a court of this state has jurisdiction to make an initial child-custody determination); 598B.102(3) (defining “child-custody determination”); 598B.102(8) (defining “initial determination”). Section 598B.201(1) “is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.” Iowa Code § 598B.201(2). We give de novo review to questions of subject matter jurisdiction under the UCCJEA. See *In re Jorgensen*, 627 N.W.2d 550, 555 (Iowa 2001) (holding review of questions of subject matter jurisdiction under the former UCCJA is de novo); *St. Clair v. Faulkner*, 305 N.W.2d 441, 445 (Iowa 1981) (same). Subject matter jurisdiction may be raised at any time and is not waived even by consent. *Jorgensen*, 627 N.W.2d at 554.

Iowa Code section 598B.201 provides, in relevant part:

1. Except as otherwise provided in section 598.204, a court of this state has jurisdiction to make an initial child-custody determination only if any of the following applies:

a. 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.

b. A court of another state does not have jurisdiction under paragraph “a”, 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 section 598B.207 or 598B.208 and both of the following apply:

¹ This act repealed and replaced all the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA). See 1999 Iowa Acts ch. 103 § 47.

(1) 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.

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

"Home state" is defined 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 before the commencement of a child-custody proceeding." Iowa Code § 598B.102(7). A "child-custody proceeding" is "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue" and includes a guardianship proceeding. Iowa Code § 598B.102(4).

In order to determine whether Iowa properly had subject matter jurisdiction to establish this guardianship we must first examine the six months immediately before the February 15, 2006 filing of the petition for guardianship, the period from August 15, 2005 to February 15, 2006. The children and Anthony lived in Iowa and established connections with Iowa from very late July 2005 to very late October 2005. Anthony was granted public assistance from the Iowa Department of Human Resources for A.J. and A.G. on August 3, 2005 and qualified for food stamps in Iowa through October 2005. Anthony obtained employment in Iowa in September 2005 and was registered for school at Northeast Iowa Community College. A.J. began kindergarten at the Decorah Community Schools in August 2005 and attended school there through late October 2005. At the end of October or beginning of November Anthony moved with the children back to Missouri. Anthony returned with the children to Iowa around February 6, 2006, and the petition for guardianship was then filed

February 15, 2006. A.J. was again enrolled in the Decorah Community Schools in February 2006. Therefore, the children resided in Decorah, Iowa, for a little over two and a half of the relevant six months (August 15, 2005 to very late October 2005, and February 6, 2006 to February 15, 2006) and in St. Louis, Missouri, for a little over three months of the relevant time frame (very late October 2005 to February 6, 2006).

We conclude that neither Iowa nor Missouri qualified as the children's "home state" under section 598B.102(7), because the children and a parent had not lived in either state for at least six consecutive months immediately before the commencement of the guardianship proceeding on February 15, 2006. Thus, neither a court of this state nor a court of another state had jurisdiction under section 598B.201(1)(a).

Because no state was the children's home state, Iowa had jurisdiction to modify physical care provided two requirements were met.² First, the children and at least one of their parents must have had a "significant connection" with Iowa other than mere physical presence, and second, "substantial evidence" concerning the children's "care, protection, training, and personal relationships must be present in Iowa." Iowa Code § 598B.201(1)(b).³ For the following reasons, we believe both of these requirements were met.

² We note the district court found that none of the exceptions to the home state rule under paragraphs (b) through (d) of subsection 598B.201(1) applied to the facts of this case without analyzing these requirements in its ruling.

³ The requirements of a significant connection and substantial evidence regarding the children are actually preceded by two threshold alternatives under § 598B.201(1)(b). The first, and the one applicable in this case, is when no other state is the children's home state. The second is when another state is the children's home state, but that state has declined jurisdiction. Although the first alternative is set off by a comma, the second

We find that Anthony and the children had established significant connections with Iowa, especially while living here with Anthony's aunt and uncle from late July 2005 through late October 2005. During that time Anthony obtained employment, enrolled in college, secured public assistance, and enrolled A.J. in the Decorah public schools. A.J. attended the Decorah schools from late August to late October. The children established additional connections by developing relationships with extended family members, making friends, attending church with Yvonne and Andrew, and receiving medical care.

Although Anthony and the children did return to Missouri from late October 2005 to February 6, 2006, and A.J. attended school there from December 2, 2005 to February 6, 2006, upon Anthony's return to Iowa with the children in February 2006 the children clearly re-established their Iowa connections with family and friends and A.J. re-established his connection with the Decorah Community Schools. The notes from A.J.'s teacher demonstrate the relationship he had established with the Decorah schools and express enjoyment at having him back. Furthermore, despite Tara's assertion to the contrary, it appears from the record that at the time the petition was filed on February 15, 2006, A.J. had attended school in Iowa for at least as long, if not longer, than he had attended in Missouri. Anthony and the children had significant connections with Iowa other than mere physical presence at the time the guardianship petition was filed.

is not. Under such circumstances, statutory construction would normally lead to a conclusion that the significant connection and substantial evidence requirements are to be applied only when the second alternative, a declining of jurisdiction by the children's home state, exists. Under the uniform act, however, this is clearly not the case. See Unif. Child Custody Jurisdiction & Enforcement Act § 201(a)(2) (setting off both alternatives from the significant connection and substantial evidence requirements).

We further find that substantial evidence regarding the children's care, protection, training and personal relationships is available in Iowa. Such evidence includes the children's school and medical records and testimony from family members, friends, teachers, and medical care providers.

We therefore conclude the Iowa district court did have subject matter jurisdiction, pursuant to Iowa Code section 598B.201(1)(b), to make an initial child-custody determination and the district court was incorrect in concluding it did not. We reverse the district court's determination that it was without subject matter jurisdiction. We remand the case for the court to address any remaining issues raised by the parties but not reached because the court found itself to be without subject matter jurisdiction.

REVERSED AND REMANDED.