IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERIKA KRAGEN,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND PAUL M. GAUDET, DISTRICT JUDGE,
Respondents,
and
MICHAEL KRAGEN,
Real Party in Interest.

No. 86626-COA

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original, emergency petition for a writ of mandamus or prohibition challenges district court orders in a divorce action assuming jurisdiction over child custody issues and establishing temporary custody. Real party in interest Michael Kragen has filed an answer, as directed, and petitioner Erika Kragen has filed a reply.

FACTS AND BACKGROUND

Erika and Michael have three minor children. They lived in California for several years before moving to Nevada sometime in early August 2022. On January 31, 2023, at the latest, Erika moved with the children to California, while Michael remained in Nevada. Thereafter, Michael filed a complaint for divorce in Nevada, and Erika filed a petition for legal separation and a domestic violence restraining order in California. Both parties sought custody in their pleadings, giving rise to the child custody jurisdiction issues before us now.

In Michael's complaint, which was filed two days before Erika's petition, he stated—on a form asking only for the month and year—that the children had lived with the parties in Nevada for 6 months, beginning in August 2022. With her petition, Erika filed a UCCJEA declaration stating that the parties moved to Nevada on August 1, 2022. In her answer and counterclaim to the Nevada complaint, however, Erika averred that the parties moved to Nevada on August 3, 2023. Additionally, Michael's resident witness's affidavit stated that Michael has lived in Nevada as of August 2, 2022. Thus, the date on which the parties moved to Nevada is unclear from the pleadings; this matters because, under NRS 125A.085(1), home state status is conferred only after 6 months' residency.

After instituting the divorce proceedings, Michael filed a motion for the children's return, asking the Nevada court to confirm its jurisdiction and enter a temporary custody order. In the motion, he claimed a move date of August 1 and argued that Nevada was the children's home state within 6 months of the case's commencement. Included in the motion's exhibits was a U-Haul receipt ostensibly showing a container box drop-off and referencing what appears to be a truck delivery date of August 1 and a truck delivery pickup date of August 3, 2022.

Erika opposed the motion, raising issues of domestic violence, and she filed a countermotion to dismiss for lack of jurisdiction, alternatively asking the Nevada court to hold a UCCJEA conference with the California court. She asserted that the parties moved to Nevada on August 3 or later and included in her exhibits a different U-Haul receipt indicating that a truck reservation was made on August 2, with a pickup date of August 3. Additionally, Erika claimed that images of text messages she provided reflect the parties leaving California on the night of August 3

and arriving in Nevada early on August 4, and she provided a bank statement indicating a purchase at a stop in Barstow on August 4. Her exhibits also included a March 28 California restraining order that temporarily gave her sole legal and joint physical custody over the children, allowing Michael 2 hours of supervised parenting time twice a week and prohibiting him from removing the children from the county without permission.

The day after Erika's opposition and countermotion were filed, the Nevada court heard the matter on an order shortening time. Apparently without considering Erika's domestic violence allegations or the California court's order and without taking any testimony, the Nevada court found that both parties were competent parents and temporarily granted them joint legal and physical custody with a week-on/week-off schedule, pending a UCCJEA conference with the California court. This ruling, while not reduced to writing until after the UCCJEA conference, subjected Erika to inconsistent custody rulings from the two courts.

A UCCJEA conference was held two weeks later, during which the judges apparently discussed the circumstances and pleadings, with the California court ultimately deferring to the Nevada court and the Nevada court taking the matter under advisement. Afterward, the Nevada court entered an order finding that the parties had lived together with the children in Nevada from August 2022 through January 2023, for a total period of 6 months, and concluding that it thus had home state jurisdiction. The court's earlier temporary custody order was upheld. The court expressly stated that its decision was based on the parties' declarations, presumably meaning the California declaration with respect to Erika, as

her Nevada pleadings and arguments contended that jurisdiction lie in California.

Erika moved for reconsideration, providing an amended declaration that she had filed into the California case stating August 3 as the move date. However, the Nevada court refused to reconsider its decision, explaining that it was based on Erika's original California declaration, in which she admitted that the parties and children resided in Nevada from August 1, and stating that "subsequent assertions were later made for what this Court believes Mother would benefit her in the state of California." The court reaffirmed its prior temporary custody orders and stated that Erika would be responsible for the initial transportation because she had not followed the prior temporary orders thus far.

DISCUSSION

In her petition seeking writ relief, Erika argues that the Nevada court lacks jurisdiction to resolve the child custody issues, Nevada not having obtained home state status because the children did not live in the state for a full 6 months. She further argues that the district court arbitrarily and capriciously exercised its discretion in failing to consider all the evidence, instead basing its decision on her pre-amendment declaration and the vague dates provided by Michael. Finally, she asserts that the court manifestly abused its discretion in making temporary custody orders without considering the children's best interest. Having considered the parties' briefs, we agree with her latter two arguments.

Jurisdiction

Under NRS Chapter 125A, Nevada's codification of the UCCJEA, courts must first look to whether home state jurisdiction exists. NRS 125A.305(1)(a); *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704

(2009) ("The UCCJEA thus elevates the 'home state' to principal importance in custody determinations."). Home state jurisdiction attaches when "[t]his 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 6 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." NRS 125A.305. "Home state" is defined as "[t]he state in which a child lived with a parent or a person acting as a parent for *at least 6 consecutive months*, including any temporary absence from the state, immediately before the commencement of a child custody proceeding."[1] NRS 125A.085(1) (emphasis added). In Nevada, "'[m]onth' means a calendar month, unless otherwise expressed." NRS 10.025.

"The UCCJEA sets strict jurisdictional requirements before a court of this state may exercise jurisdiction over an initial child custody determination . . . ." *Kelly v. Kelly*, 759 N.W.2d 721, 727 (N.D. 2009). NRS 125A.085(1) requires residence of "at least 6 consecutive months"; thus, residency of less than 6 months is insufficient. *See Frizzie v. Frizzie*, No. A-2551-04T5F, 2005 WL 2738776, at *2 (N.J. Super. Ct. App. Div. Oct. 25, 2005) ("We disagree that substantial compliance with the 'home state' definition of the UCCJEA suffices." *Cf. Bless v. Bless*, 318 N.J. Super. 90, 100-01 (App. Div. 1998) (under UCCJEA's predecessor, the Uniform Child Custody Jurisdiction Act, N.J.S.A. 2A:34-28 to -52, Switzerland was not

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[1]Michael argues that Nevada has jurisdiction because the parents lived in the same state and 6 months' UCCJEA residency is not required when all parents and the children live in the same state. But he points to no authority for this proposition, and in any event, the parents were not living in the same state at the time the actions were filed.

child's 'home state' because child had lived there for 'only a little more than five months')."). Based on the evidence offered by the parties, it is disputed whether the children lived in Nevada for a full 6 months; Michael claims they have based on an August 1 move date, and Erika claims they have not based on an August 3 or 4 move date.[2]

In assuming jurisdiction, the district court treated Erika's original California declaration as a binding judicial admission. But the declaration was filed in a case before another court, and it was later amended. As a result, although the original California declaration may be considered as evidence in determining the move date if properly introduced, it is not binding on the Nevada court or conclusive as to the move date. *See Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981) (explaining that, while an admission in the pleading in one proceeding is admissible in another proceeding, "it [is] not a judicial admission, and thus not binding or conclusive" in the other proceeding); *NGX Co. v. G.B. Petroleum Servs., LLC*, No. CV 05-1120 WJ/RLP, 2006 WL 8444119, at *2 (D.N.M. June 9, 2006) ("While an earlier inconsistent pleading may be admissible at trial as evidence of inconsistent declarations, an amended pleading does supersede the earlier pleading for purposes of defining the issues to be tried and [the earlier pleading] is no longer a binding judicial admission."); *see generally Whittlesea Blue Cab Co. v. McIntosh*, 86 Nev.

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[2]Contrary to Erika's argument, Michael's reply to her countercomplaint admitting that the parties resided at a Henderson address from August 3 to January 22 does not necessarily mean that the parties did not reside in Nevada before August 3, although it is one factor that may be considered. In the same document, Michael denied her allegation that the parties moved to Nevada on August 3.

609, 612, 472 P.2d 356, 357-58 (1970) (discussing the admission of pleadings and amended pleadings as evidence in a subsequent proceeding). Further, to the extent that the court suggested Erika is trying to assert a position in the Nevada proceedings that is contrary to her position in the California proceedings, it failed to address the judicial estoppel factors. *Kaur v. Singh*, 136 Nev. 653, 658, 477 P.3d 358, 363 (2020) (concluding that the district court erred when it did not make findings regarding the five-factor test in its determination of whether judicial estoppel applied); *cf. Friedman v. Eighth Judicial Dist. Court*, 127 Nev. 842, 852, 264 P.3d 1161, 1168 (2011) (recognizing that a court cannot obtain subject matter jurisdiction under the UCCJEA by estoppel or admission). Thus, the Nevada court improperly relied on Erika's original California declaration as conclusive in determining the parties' contested move date.

Michael asserts that, in denying Erika's subsequent offers of proof, the Nevada court made an unreviewable credibility determination. If so, however, the district court abused its discretion in doing so without holding an evidentiary hearing. *Nelson v. Eighth Judicial Dist. Court*, 138 Nev., Adv. Op. 82, 521 P.3d 1179, 1185 (2022) (recognizing that district courts should hold an evidentiary hearing when fact and credibility determinations must be made); *see generally Hubbard v. Houghland*, 471 F. App'x 625, 626 (9th Cir. 2012) (recognizing that determining the credibility of a declaration where facts are disputed requires an evidentiary hearing). Michael further argues that substantial evidence supports the court's finding and that Erika's failure to provide to this court the transcript of the UCCJEA conference and some of the California documents means this court must presume the missing documents support the court's decision, but the Nevada court made clear that its decision was based on the parties'

declarations and nothing more. As a result, Michael's arguments are unavailing.

The district court had before it conflicting evidence of the parties' time in Nevada, and therefore, the district court should have held an evidentiary hearing to resolve the issue. *E.g.*, *Brandt v. Brandt*, 268 P.3d 406, 413 (Colo. 2012) (recognizing, in a dispute as to whether jurisdiction was lost, that factual disputes concerning the UCCJEA's residency requirement necessitate an evidentiary hearing); *see also Arcella v. Arcella*, 133 Nev. 868, 871-72, 407 P.3d 341, 346 (2017) (concluding that the court abused its discretion when, instead of conducting an evidentiary hearing, the court decided the matter solely "upon contradictory sworn pleadings [and] arguments of counsel" (quoting *Mizrachi v. Mizrachi*, 132 Nev. 666, 678, 385 P.3d 982, 990 (Ct. App. 2016))). Accordingly, we conclude that a writ of mandamus is warranted to compel the district court to vacate its orders assuming jurisdiction and to conduct an evidentiary hearing on the issue. *Lewis v. Second Judicial Dist. Court*, 113 Nev. 106, 112, 930 P.2d 770, 774 (1997) (considering, but ultimately denying, a mandamus petition to determine whether the district court arbitrarily or capriciously exercised its discretion in deciding it had jurisdiction to resolve child custody matters, citing *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). If the evidentiary hearing results in a determination that home state jurisdiction is unavailable, the court may then consider the applicability of other bases for jurisdiction under NRS 125A.305.

Temporary custody

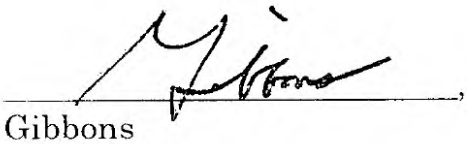
We note that the district court lacked authority to issue a temporary custody order before determining that it had jurisdiction and while the more restrictive California emergency custody order was in place.

See Lewis, 113 Nev. at 108, 930 P.2d at 772 (recognizing, under the UCCJEA's predecessor, that "a determination of subject matter jurisdiction by the district court is a threshold requirement"). After the court concluded that it had home state jurisdiction, it upheld its temporary order granting the parties joint legal and physical custody, still without taking evidence or making any findings as to the children's best interest despite Erika's domestic violence allegations, which it determined it would not consider until trial. This was a manifest abuse of discretion. Although joint legal and physical custody are generally preferred, NRS 125C.002; NRS 125C.0025, substantiated allegations of domestic violence must be considered in making any custody determination, *see* NRS 125C.0045(1)(a) (providing that a court may make custody decisions pending a final determination if in the best interest of the child); NRS 125C.0035(5) (recognizing that domestic violence impacts best interest determinations); *see generally Feaster v. Feaster*, 452 S.E.2d 428, 429 (W. Va. 1994) (noting that the trial court "should have considered the allegations of domestic violence when making [an] award of temporary custody"). Thus, if the district court determines, after an evidentiary hearing, that it has jurisdiction over the child custody issues, the court must reconsider its temporary custody order in light of any supported domestic violence allegations. *See* NRS 125C.0035(4)(k) and (5).

Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the

district court to vacate the orders concluding that home state jurisdiction exists and to reconsider the matter after an evidentiary hearing.[3]



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Paul M. Gaudet, District Judge, Family Division
Onello Law Group, PLLC
Claflin Law Ltd.
Eighth District Court Clerk

[3]In light of this order, Erika's request for a writ of prohibition is denied.