MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

Danielle E. Miller,
Appellant-Respondent,

v.

Jose A. Vasquez,
Appellee-Petitioner.

March 15, 2021

Court of Appeals Case No. 20A-JP-1491

Appeal from the Lake Superior Court

The Honorable Thomas Stefaniak, Jr., Judge

The Honorable Aimee M. Talian, Magistrate

Trial Court Cause No. 45D06-1911-JP-1061

Mathias, Judge.

[1] Danielle Miller ("Mother") appeals the Lake Superior Court's final custody order, which awarded Jose Vasquez ("Father") sole legal custody over their

only child ("Daughter"). Mother presents two issues for our review, which we restate as the following:

I. Whether the trial court had authority under the Uniform Child Custody Jurisdiction Act to enter the final custody order; and

II. Whether the trial court's final custody order deprived Mother of due process.

[2] We reverse.

Facts and Procedural History

[3] Father, a resident of Illinois, visited Mother's Highland, Indiana home one evening in 2019 and found Daughter crying in a soiled diaper. Mother was nearby, apparently in a deep sleep, and she did not respond when Father tried to wake her.

[4] Soon thereafter, on November 7, 2019, Father filed an emergency petition to establish custody, parenting time, and child support. Appellant's App. at 11–12. The petition alleged Mother's home was a "toxic environment," in part because she was "experiencing substance abuse issues." *Id.* at 12. The trial court held a hearing on Father's emergency petition on November 13, at which both parties appeared pro se. That same day, the trial court entered an initial custody determination awarding Father temporary custody of Daughter. *Id.* at 13.

[5] About one month later, on December 19, the trial court held a status hearing. At that hearing, Mother informed the court she had recently moved to Illinois,

and Father informed the court he lived in Illinois. Tr. p. 13. The trial court presided over the hearing, without objection, and then scheduled another status hearing for March 5, 2020.

[6] During the March 5 hearing, the parties again stated that they lived in Illinois. *Id.* at 24. The trial court again proceeded without objection. The court told the parties that if they reached an agreement on custody or parenting time, "then that's one less thing that you're asking the Court to decide." *Id*. at 27. The court further explained, "You obviously know everything that's happened in your lives and in your daughter's, so you're in the best position to make decisions regarding all of this." *Id*. The parties assured the court they would work together on reaching an agreement. Accordingly, the court instructed that "the first thing you have to talk about is legal custody." *Id.* The court also expressed to the parties that "[i]f when you come back you have an agreement on some or all of those issues, we'll talk about that and I'll make it a court order." *Id*. at 29.

[7] On May 13, after allowing the parties a couple of months to talk things over, the trial court held an evidentiary hearing. Again, though Mother and Father both lived in Illinois, neither party objected to or otherwise questioned the court's authority over the matter. When the court asked whether they had reached an agreement on custody or parenting time, the parties explained that while they were unable to agree on a physical custody arrangement, they agreed to share joint legal custody. Tr. pp. 40–41. The court explicitly acknowledged that agreement: "Yes, okay. So we have joint legal." *Id*. And at the hearing's

conclusion, the trial court confirmed that "[w]e have an agreement as to joint legal custody." Tr. p. 56.

[8] Later that day, the trial court issued an order formally adopting the parties' agreement and awarding them joint legal custody. Appellant's App. at 15–16. The May 13 order expressly declined to decide the issues of physical custody and child support until a final evidentiary hearing could be held. *Id.*

[9] About six weeks later, on June 29, Mother filed a "Motion to Change Venue." *Id*. at 17. Although the majority of the proceedings had concluded and the final hearing was scheduled to be held in just two weeks, Mother's motion proposed that "it would be easier on both parties to transfer this case" to an Illinois trial court. *Id*. The court took Mother's motion under advisement. *Id.* at 18.

[10] On July 15, the trial court held the final evidentiary hearing. Both parties presented evidence, and the court entered its final custody order that same day. Appellant's App. at 8–9. Notably, even though the parties had agreed two months earlier to share joint legal custody, the final custody order awarded Father sole legal custody:

> [T]here has been a substantial and continuing change of circumstances as to warrant a modification of custody and/or parenting time.
>
> The Court has considered the factors under I.C. 31-14-13-2, specifically: the age and sex of the child, the child's adjustment to home, school, and community, and the mental and physical health of all individuals involved.

> The Court finds it to be in the best interest of the minor child that [Father] be awarded physical and legal custody of [Daughter].

Id.

[11] Mother now appeals, arguing that the trial court lacked jurisdiction to enter the final custody order. She further argues that even if the trial court had jurisdiction, the court committed reversible error when it awarded Father sole legal custody. We address each claim in turn.

Jurisdiction

[12] Mother argues that the trial court "did not have jurisdiction to modify its emergency custody determination," rendering the final custody order void. Appellant's Br. at 12. More specifically, she suggests the court lost subject matter jurisdiction by operation of the Uniform Child Custody Jurisdiction Act ("UCCJA") when it learned that the parties no longer lived in Indiana. We disagree.

[13] While Mother's claim sets out to challenge the trial court's jurisdiction, the question before us is not one of jurisdiction—it is a question of procedure. *Brown v. Lunsford*, 63 N.E.3d 1057, 1060 (Ind. Ct. App. 2016) ("Attorneys and judges alike frequently characterize a claim of procedural error as one of jurisdictional dimension.") (quoting *K.S. v. State*, 849 N.E.2d 538, 541 (Ind. 2006)). As we have previously explained, "the jurisdictional limits imposed by the UCCJA are not that of subject matter jurisdiction." *Hays v. Hockett*, 94 N.E.3d 300, 306 (Ind. Ct. App. 2018), *trans denied*.

[14] Subject matter jurisdiction is a court's power to hear and determine cases that fall into a general class of actions. *Troxel v. Troxel*, 737 N.E.2d 745, 749 (Ind. 2000). An Indiana trial court has subject matter jurisdiction "when the Indiana Constitution or a statute grants the court authority to hear cases of the general class to which a particular case belongs." *Brown*, 63 N.E.3d at 1060 (quoting *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E.2d 453, 459 (Ind. 2012)). Superior courts—such as the Lake Superior Court here—possess "original and concurrent jurisdiction in all civil cases." I.C. §§ 33-29-1-1.5, -1.5-2. Trial courts are thus generally empowered to hear and determine all types of disputes, including child custody disputes. *Hays*, 94 N.E.3d at 306.

[15] A trial court's authority to exercise its broad subject matter jurisdiction is not unrestrained, however. While the UCCJA neither vests nor confers subject matter jurisdiction, its provisions refine trial courts' authority to determine particular child custody disputes. *See In re Marriage of B.K. & B.P.*, 873 N.E.2d 729, 735 (Ind. Ct. App. 2007), *trans denied*. When a child custody case involves an interstate dimension, the UCCJA limits a court's authority to make initial custody determinations and to modify existing custody determinations. *Id.*

[16] Mother does not dispute the trial court's authority to make its initial custody determination. She challenges only the court's subsequent orders, asserting that the trial court lost its subject matter jurisdiction in December 2019 when she and Daughter moved to Illinois. We generally review a trial court's decision to exercise jurisdiction over a child custody proceeding for an abuse of discretion,

Barwick v. Ceruti, 31 N.E.3d 1008, 1014 (Ind. Ct. App. 2015), but we need not do so here because Mother has waived this issue.

[17] Mother's claim of procedural error is not transformed into a subject-matter jurisdictional challenge just because she calls it one. *See K.S.*, 849 N.E.2d at 541–42 ("Real jurisdictional problems would be, say, a juvenile delinquency adjudication entered in a small claims court . . . . [C]haracterizing other sorts of procedural defects as 'jurisdictional' misapprehends the concepts."). Whereas true subject matter jurisdiction challenges can be raised at any time, the procedural issue of whether a court has authority under the UCCJA to modify custody is waived if not raised at the earliest opportunity. *B.K. & B.P.*, 873 N.E.2d at 736.

[18] Faced with this rule, "a party who was asleep at the wheel has a powerful incentive to couch a claim of procedural error as a jurisdictional defect either to circumvent the doctrine of waiver or to open up an avenue for collateral attack." *Brown*, 63 N.E.3d at 1061. But when a party submits to a court's authority to determine custody, the party cannot later claim the court's decision to exercise that authority is reversible error. *See Christensen v. Christensen*, 752 N.E.2d 179 (Ind. Ct. App. 2001).

[19] Here, Mother did not raise her claim of procedural error at the earliest opportunity. She moved with Daughter to Illinois in December 2019, but she then waited six months before suggesting that the trial court should relinquish its authority in favor of an Illinois court. By the time she filed her motion to

change venue in June 2020, Mother had already actively participated in four out of the five hearings, and she had already been awarded joint legal custody. In short, Mother submitted to the court's authority without issue for several months. She did not timely challenge the court's decision to exercise its authority under the UCCJA. For all of these reasons, we conclude Mother has waived this claim.

[20] We turn next to Mother's claim that the trial court deprived her of due process.

Due Process

[21] Two months after the trial court adopted the parties' agreement and awarded joint legal custody, the court decided in its final custody order to modify that arrangement by awarding Father sole legal custody. Mother argues that the trial court's modification is reversible error because she "received neither notice that the court was going to consider the issue of legal custody at final hearing nor an opportunity to be heard on that issue."[1] Appellant's Br. at 14–15. We agree.

[22] We review custody modifications for an abuse of discretion, and we grant great latitude and deference to the trial court. *Bailey v. Bailey*, 7 N.E.3d 340, 345 (Ind. Ct. App. 2014). We also note that Father has not filed an appellee's brief. When an appellee fails to file a brief, we do not develop an argument on the appellee's behalf. *C.V. v. C.R.*, 64 N.E.3d 850, 852 (Ind. Ct. App. 2016). Instead, we may

[1] Mother does not appeal the trial court's rulings as to physical custody or child support. She challenges only the trial court's modification of legal custody.

reverse the trial court's judgment if the appellant's brief establishes prima facie error. *Riggen v. Riggen,* 71 N.E.3d 420, 422 (Ind. Ct. App. 2017). Prima facie error is error "at first sight, on first appearance, or on the face of it." *Id.*

[23] One way a court may abuse its discretion in modifying a custody order is by failing to follow the proper procedure. *Bailey*, 7 N.E.3d at 343. Longstanding Indiana law prohibits trial courts from ordering a change of custody sua sponte. *In re W.R.H.*, 120 N.E.3d 1039, 1041 (Ind. Ct. App. 2019); *see also In re Henderson*, 453 N.E.2d 310, 315 (Ind. Ct. App. 1983) (quoting *State ex rel. Davis v. Achor*, 75 N.E.2d 154, 157, 225 Ind. 319 (1947)).

[24] It is fundamental that parties receive reasonable notice and an opportunity to be heard before a standing custody arrangement is amended. *White v. White*, 796 N.E.2d 377. Generally, this means a modification can be ordered only after: (1) a party has filed a petition requesting such a modification; (2) the other party has notice of the filing; and (3) both parties have had the opportunity to be heard at a proper evidentiary hearing. *W.R.H.*, 120 N.E.3d at 344. Moreover, a court cannot modify custody unless it finds that modification is in the best interests of the child, and that there is a substantial change in one or more of the factors enumerated in the child custody statute. I.C. § 31-17-2-21; *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016).

[25] Here, the trial court appears to have largely ignored these fundamental procedures and considerations. Neither party requested any modification to the

joint legal custody arrangement adopted by the court's May 13 Order.[2] In the absence of any such request, Mother had no reason to prepare an argument or marshal evidence on the issue of legal custody for the final hearing. In fact, the court had already informed both parties that the only issues for consideration at that hearing were physical custody, tax exemption, health insurance, and child support. *See* Appellant's App. at 15–16. And the court repeated that announcement at the start of the final hearing: "We are set for final hearing on the issues of physical custody, tax exemption, health insurance, and child support." Tr. p. 60. In short, during the two months that elapsed between the court's May 13 Order and its final custody order, legal custody was never mentioned.

[26] Moreover, despite the trial court finding "there has been a substantial and continuing change of circumstances as to warrant a modification of custody," the court did not enter specific factual findings demonstrating a substantial change related to any of the factors warranting a custody modification under Indiana Code section 31-17-2-8.[3] *See* Appellant's App. at 8–9. Instead, the court stated in a single sentence that it considered "the age and sex of the child, the

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[2] It is true that Indiana Trial Rule 15(B) permits issues not raised by the pleadings to be tried by the express or implied consent of the parties. But, to find that an issue was tried by consent, the parties must have had some notice that the issue was before the court, and both parties must actually litigate the new issue. *See Bailey*, 7 N.E.2d at 344. Nothing in the record indicates to us that the issue of legal custody was tried by consent here.

[3] We note that the trial court "considered the factors under Indiana Code section 31-14-13-2." Appellant's App. at 8. However, that statute is found under the chapter titled "Custody Following Determination of Paternity." Here, because there was no determination of paternity, and because paternity was never at issue, Section 31-14-13-2 is inapplicable.

child's adjustment to home, school, and community, and the mental and physical health of all individuals involved." Appellant's App. at 8. Whether or not detailed findings are expressly required, the importance of the considerations set forth in Section 31-17-2-8 should not be reduced to mere buzzwords in a custody order. *Wilson v. Myers*, 997 N.E.2d 338, 341 (Ind. 2013). The absence of such findings is troubling here given the irregularity of the court's decision to modify legal custody without anyone having asked it to. *See Bailey*, 7 N.E.3d at 346.

[27] In sum, Mother has made a prima facie showing that the trial court modified legal custody of Daughter without following the proper procedures. Because the trial court awarded Father sole legal custody without any request from the parties to modify their standing joint legal custody arrangement, Mother had no notice that a potential modification was before the court. For all of these reasons, we conclude that the trial court abused its discretion when it sua sponte modified legal custody of Daughter.

Conclusion

[28] Mother waived her challenge to the trial court's exercise of authority under the UCCJA. However, the trial court abused its discretion when it awarded Father sole legal custody of Daughter. We reverse the trial court's final custody order and remand for proceedings consistent with this opinion.

[29] Reversed.

Altice, J., and Weissmann, J., concur.