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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re LETICIA A. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

CHRISTINA A.,

Defendant and Appellant.

D063361

(Super. Ct. No. NJ14719A-D)

APPEAL from findings and orders of the Superior Court of San Diego County,
Michael J. Imhoff, Commissioner. Reversed and remanded with instructions.

Andrea R. St. Julian, under appointment by the Court of Appeal, for Defendant
and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County
Counsel and Dana C. Shoffner, Deputy County Counsel, for Plaintiff and Respondent.

Christina A. appeals orders sustaining findings under Welfare and Institutions
Code section 300, subdivision (d) and removing her daughters from her custody. She

contends the juvenile court does not have subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam. Code, § 3400 et seq.).¹ Christina also argues there is not substantial evidence to support the findings that her daughters were at risk of sexual abuse as a result of the maternal grandfather's sexual abuse of their 10-year-old male cousin, and there were no reasonable means to protect her daughters without removing them from her care. She also contends the court erred when it did not recognize her husband, Juan B., as C.B.'s presumed father and denied her request to place the children with him.

We conclude that a hearing on the issue of subject matter jurisdiction is required on this record, which indicates the parents and children had a home in Mexico and the mother and children also lived with the maternal grandparents in San Diego County. Accordingly, we reverse the jurisdictional and dispositional findings and orders and remand the matter to the juvenile court to conduct a hearing on whether it has subject matter jurisdiction under the UCCJEA.

FACTUAL AND PROCEDURAL BACKGROUND

Christina is the mother of four daughters, who are now ages 10, seven, five and three (collectively, the children). The two oldest girls, Leticia A. and Karina A., are the product of her first marriage. Their father is not involved in their lives. In 2008, Christina married Juan B., the father of the two youngest girls. Their daughter, C.B., was born a month before they married and a month after Christina divorced her first husband.

¹ Unless otherwise indicated, statutory references are to the Family Code.

Juan and Christina's youngest daughter, B.B., was born in 2009. Juan, Christina and the children lived in San Diego County. At some point in time (not clear in the record), Juan was deported to Mexico. He was unable to reenter the United States.

In July 2012, the San Diego County Health and Human Services Agency (Agency) received a report that the children's maternal grandfather had sexually abused his 10-year-old stepgrandson (grandson) by fondling his genitals and penile/anal penetration. The sex acts were committed over a two-year period and took place in the grandparents' home.

In August, the social worker learned that Christina and the children lived in the grandparents' home and interviewed the family. Leticia and Karina denied being sexually abused. Christina did not believe that her father sexually molested his grandson. She backed her father "100 [percent]." Christina agreed not to allow the children to have unsupervised contact with their grandfather, who consented to moving out of the home. In late September, the social worker visited the home. The grandfather was present. Christina told the social worker that she was living with Juan in Tijuana. She had the youngest two children in her care. The two oldest children were attending school in San Diego County. When questioned separately, the older girls each said their grandfather was living at the home.

The Agency detained the children in protective custody. Leticia and Karina were placed together, and C.B. and B.B. were placed together, in separate foster homes. The children were described as polite, cheerful, playful and talkative.

Christina asked the Agency to place the children in Juan's care. The Agency initiated an evaluation of his home through the Mexican social services agency, Desarrollo Integral de la Familia (DIF). The court determined Juan was B.B.'s presumed father and deferred a paternity finding for C.B.

The Agency reported there was an arrest warrant for Juan on charges related to kidnapping, sexual battery and false imprisonment of a former girlfriend in San Diego County in 2008. The social worker said it was the likely reason Juan did not return to the United States.

In October, the social worker reported that Christina was living with Juan in Tijuana, Baja California, Mexico. On Halloween, Christina took C.B. and B.B. with her to Mexico in violation of court orders. The Agency and law enforcement were not able to locate them.

On November 26, the court held a jurisdiction and disposition hearing in Leticia's and Karina's cases. After receiving the Agency's reports in evidence, the court found that the girls were at substantial risk of being sexually abused by their maternal grandfather and removed them from Christina's custody.

In January 2013, Christina voluntarily returned C.B. and B.B. to the Agency's custody. At their jurisdictional and dispositional hearing, Christina submitted on the Agency's reports. The court found that the children were at risk of sexual abuse and removed them from Christina's custody under a family reunification plan. The court denied Christina's request to place the children with Juan.

This appeal followed. Christina also filed a petition for writ of habeas corpus (writ), case No. D063883, alleging the juvenile court did not have subject matter jurisdiction and the children were being wrongfully detained. This court ordered the writ to be considered with this appeal.²

DISCUSSION

I

Subject Matter Jurisdiction Under the UCCJEA

Christina contends the facts before the juvenile court clearly raised the issue whether it had subject matter jurisdiction under the UCCJEA. She argues the juvenile court failed to consider the issue and this court is obliged to independently review the facts as presented in the record on appeal. Christina argues reversal is required because the record does not support a finding of home state jurisdiction and the juvenile court did not hold a hearing on emergency jurisdiction.

Subject matter jurisdiction either exists or does not exist at the time the child custody action is commenced. It cannot be conferred by stipulation, consent, waiver or estoppel. (*In re A.C.* (2005) 130 Cal.App.4th 854, 860 (A.C.)) The UCCJEA is the exclusive method for determining subject matter jurisdiction for child custody proceedings in California. (Welf. & Inst. Code, § 3421, subd. (b); A.C., at p. 860.) It applies to juvenile dependency proceedings and international custody disputes. (A.C., at p. 860.)

² Because we grant the relief sought in the appeal, the issues raised in Christina's writ are moot.

In all disputes involving the UCCJEA, the threshold question is whether a state may properly assume jurisdiction. (*Plas v. Superior Court* (1984) 155 Cal.App.3d 1008, 1013.) A court has jurisdiction if it is the home state of the child because the child lived in the state with a parent or person acting as a parent for the six consecutive months immediately before the commencement of the child custody action, another state does not have jurisdiction or declines to exercise jurisdiction or if the child is present in the state and it is necessary in an emergency to protect the child. (§§ 3421³ & 3424.)⁴ Before a child custody determination is made under the UCCJEA, notice and an opportunity to be heard must be given to all persons entitled to notice under state law in child custody proceedings, any parent whose parental rights have not previously been terminated and

³ Under section 3421, subdivision (a), a state has jurisdiction to make an initial custody order if any of the following are true: "(1) 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. [¶] (2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum under Section 3427 or 3428, and both of the following are true: [¶] (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. [¶] (3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 3427 or 3428. [¶] (4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3)."

⁴ A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse. (§ 3424, subd. (a).)

any person having physical custody of the child. (§ 3425; *A.C.*, *supra*, 130 Cal.App.4th at p. 864 [finding of emergency jurisdiction may only be made after a full and fair evidentiary hearing].)

We have independently examined the record in this case. (*In re Jaheim B.* (2008) 169 Cal.App.4th 1343, 1348 (*Jaheim B.*) [reviewing court independently reweighs jurisdictional facts].) The record indicates the parents had a home in Mexico, the mother and children also stayed or lived with the maternal grandparents in California, and the mother and two of the children may have been living in Mexico at the time the child custody proceedings were commenced. This evidence is sufficient to raise a question whether the juvenile court has subject matter jurisdiction under one or more provisions of the UCCJEA. We conclude that Christina is entitled to notice and an opportunity to be heard, including the right to present evidence and cross-examine witnesses, on the issue of whether the juvenile court has subject matter jurisdiction. We further conclude that the juvenile court is the appropriate forum for such a hearing.⁵

" [I]t is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law" (*In re Zeth S.* (2003) 31 Cal.4th 396,

⁵ When the issue of subject matter jurisdiction is not raised until after the jurisdictional or dispositional hearing, the better practice is to file a section 388 petition on grounds of new evidence or a petition for writ of habeas corpus directly in the juvenile court. This will allow the juvenile court to make the necessary findings of fact after a full and fair hearing and, if an appeal is filed, allow the appellate court to independently review the jurisdictional facts. It will also conserve juridical resources and avoid unnecessary delay for the child and parents.

405 (*Zeth S.*)⁶ The parties acknowledged at oral argument the jurisdictional facts will depend in large part on the credibility of the witnesses. Remanding the matter to the juvenile court for a hearing will allow the juvenile court to determine the jurisdictional facts and preserve the due process rights of the parties to present evidence and cross-examine witnesses.⁷ (§ 3425.) Therefore, we remand the matter to the juvenile court for an evidentiary hearing on the issue of subject matter jurisdiction. (*Ibid.*; *A.C.*, *supra*, 130 Cal.App.4th at p. 864 [requiring full and fair hearing to determine jurisdictional facts].)

DISPOSITION

The jurisdictional and dispositional findings and orders are reversed. The matter is remanded to the juvenile court to hold a hearing on the issue whether it had subject

⁶ Although appellate courts are authorized to make findings of fact on appeal under Code of Civil Procedure section 909, the authority should be exercised sparingly. Absent exceptional circumstances, no such findings should be made. (*Zeth S.*, *supra*, 31 Cal.4th at p. 405.)

⁷ We are aware that this court independently reviewed the jurisdictional facts in the record in *Jaheim B.* even though the juvenile court in that case did not make a determination on the record concerning subject matter jurisdiction. However, in that case, the juvenile court proceeded as required under the UCCJEA by communicating with a court in the other state. It learned there was no child custody determination or pending child custody proceeding in that state. (*Jaheim B.*, *supra*, 169 Cal.App.4th at pp. 1346 fn. 2, 1348; § 3410; see §§ 3424, subd. (d), 3426.) Although the jurisdictional findings were not explicitly made on the record in *Jaheim B.*, the procedural history of that case shows that the juvenile court was aware of the jurisdictional issues and determined there was no other state with jurisdiction over the child custody proceedings.

matter jurisdiction under the UCCJEA at the time the proceedings were commenced.⁸

The matter must be given priority on the calendar and handled expeditiously. (§ 3407.)

Unless there is no need for continued detention, the children are to remain in protective custody pending hearing. (Welf. & Inst. Code, § 319, subd. (b).) If the juvenile court determines that it has subject matter jurisdiction, then it shall conduct new hearings pursuant to Welfare and Institutions Code section 300 et seq.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

⁸ We recognize that emergency jurisdiction requires that the child be "present in this state" but does not specify the point in time in which the child's presence is required. (§ 3424, subd. (a); compare § 3421, subd. (a) [the date of the commencement of the proceeding determines home state jurisdiction]; see § 3402, subd. (e) [commencement means the filing of the first pleading in a proceeding].)