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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ELIZABETH ESPINOZA,

Appellant,

v.

RICCO ANTHONY ESPINOZA,

Respondent.

E059695

(Super.Ct.No. SWV1300635)

OPINION

APPEAL from the Superior Court of Riverside County. Bradley O. Snell,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Arnold & Porter, Candida M. Harty, and Emilia Morris for Appellant.

Moore, Schulman & Moore, Steven R. Striker and David S. Schulman for
Respondent.

INTRODUCTION¹

This appeal is a custody dispute between a husband and wife, Elizabeth Espinoza and Ricco Anthony Espinoza,² concerning their two children who were born in 2001 and 2008. Between May and August 2013, Elizabeth moved with the children back and forth between California and Virginia, filing legal actions first in Virginia and then in California. Elizabeth appeals from a judgment of dismissal after the Riverside County Superior Court denied her request for a domestic violence restraining order (DV-100) and the attached request for a child custody and visitation order (DV-105).

Between May and August 2013, legal proceedings were pending in a Virginia court at the same time as the California case. Because the Virginia court records are relevant to this appeal, we grant Ricco's motion to augment the record, filed May 1, 2014, with exhibits A, B, and D, but deny the motion as to exhibit C; and Ricco's motion for judicial notice, filed May 28, 2014. (Evid. Code, §§ 452, 455, and 459; Cal. Rules of Court, rule 8.252(a).) We consider exhibits K, L, and M for the limited purpose of understanding the posture of the Virginia case in February 2014.

On appeal, Elizabeth argues the Riverside court erred by not conducting an evidentiary hearing, by deferring to the jurisdiction of the Virginia court, and by

¹ All statutory references are to the Family Code unless stated otherwise.

² We use the parties' first names for ease of reference.

dismissing the DV-100 request. She contends the court violated the UCCJEA³ by not making a jurisdictional finding that California was an inconvenient forum for a child custody dispute and by not allowing evidence to be presented on the issue of jurisdiction.

Ricco counters that res judicata barred Elizabeth's claims and the Riverside court properly dismissed her action on the basis of inconvenient forum. Ricco also argues the appeal has been made moot by subsequent proceedings in which the Virginia court made temporary custody and visitation orders in February 2014. Elizabeth responds that, even if it is moot, the appeal involves an issue of important public interest.

Even if it is possibly moot, we will entertain the appeal in the interests of justice. We hold the Riverside court complied with the UCCJEA, finding California is an inconvenient forum, and that res judicata operates to bar the Riverside action.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. *California Family Law Proceedings (May 2013)*

On May 10, 2013, Ricco filed a petition for dissolution of marriage in Riverside County Superior Court. (Case No. SWD1301158.) On May 17, 2013, Ricco dismissed the petition without prejudice.

³ Uniform Child Custody Jurisdiction Enforcement Act, section 3400 et seq.

B. Virginia Proceedings for Protective Order and Child Custody (May-August 2013)

On May 11, 2013, Elizabeth left California for Virginia because she was afraid of being served with the California divorce action. In May 2013, Elizabeth filed a request for a protective order in Virginia based on her representation that Ricco had “made threats to bury [her] and has a female friend that will beat her until she is almost dead.” Elizabeth listed her address as Canyon Lake, California. A full hearing was set for July 11, 2013.

On July 10, 2013, Ricco filed petitions in Virginia seeking a custody determination for the two children. The petition listed them as living in Virginia for three years between June 2007 and July 2010, for four months in 2011, and for three months 2013; in Japan for a year in 2010 and 2011; and in Riverside County for 16 months between February 2012 and May 2013.

At the hearing on July 11, 2013, Elizabeth testified that, on May 15, 2013, in Virginia, Ricco had subjected her to threatening phone calls and emails. Elizabeth was equivocal about what she knew about Ricco filing the divorce petition in California in May 2013. After the hearing, the court made a finding of no “abuse” and that the evidence was “insufficient to establish probable cause that family abuse occurred.” A protective order was not entered.

On August 1, 2013, the Virginia court entered a temporary order giving Ricco legal and physical custody of the two children. The court found the children “ha[d] been removed from The Commonwealth. There is a reasonable apprehension of mistreatment

or abuse” and the children are “imminently likely to suffer serious physical harm if not returned immediately.” Additionally, the court found it had jurisdiction to protect the children, even if California was the home state, because Virginia proceedings were pending and Elizabeth had submitted to Virginia jurisdiction and sought relief from the Virginia court. The court also found “Virginia has substantial connection to the children. They have been here 3 1/2 of the last 5 years. [¶] Also, there was evidence presented of the mother’s possible mental, emotional & residential instability, in that she has given statements that she has a home in California, & is there ‘on vacation’ but is residing at an abuse shelter. . . . [¶] There is a concern about her erratic behavior.”

After a hearing on August 8, 2013, the Virginia court issued an order to show cause for mother’s failure to appear after she cancelled Ricco’s visitation and would not allow him to have telephone contact with the children. Elizabeth had left Virginia for California and not provided her address. Ricco had not submitted to a mental health evaluation as ordered by the court. Another hearing was set in Virginia for October 2013.

C. Riverside Domestic Violence Proceedings (August 2013)

On August 2, 2013, Elizabeth filed a DV-100 and a DV-105 in the Riverside County Superior Court. The DV-100 asked for a protective order against Ricco, whose address was listed as Fredericksburg, Virginia. Elizabeth’s address was in Lake Elsinore, California. The declaration stated Ricco has “threatened our lives and has done physical violence against me in front of our children.” The most recent incident of abuse occurred

on May 15, 2013, on the telephone. Other incidents occurred in September and December 2012, in April 2013, and on May 5, 2013. Elizabeth described Ricco committing forcible rape, throwing car keys at her and striking her head, threatening to beat her and to bury her and her family. Elizabeth had been “given a civil and military protective order in Virginia.” She claimed Ricco had violated the restraining order by sending gifts. Once he trapped her in a bedroom and would not let her leave. He tried to enlist her family against her.

In the DV-105, Elizabeth asked for joint legal and primary physical custody of the children with conditions on visitation. Elizabeth stated: “My husband threatened to kill me and our children, so I had to leave Virginia and come live in a Domestic Violence shelter for the safety of myself and our children.” The court granted temporary restraining and custody orders until August 22, 2013.

At the hearing on August 22, 2013, the Riverside court announced it had “conducted a chambers conference with both counsel prior to calling the case this afternoon because the Court has been contacted by . . . the equivalent to a family juvenile law court in Virginia. And I did have a conversation with the judge in that case, . . . ¶] Because there are two cases now filed in two separate jurisdictions, the judges needed to have a conversation pursuant to UCCJEA, since there are two children involved between the parents. . . . ¶] In reviewing with Judge Moore, he related, in essence that Ms. Espinoza, while living in Virginia, had filed for a restraining order against Mr. Espinoza

while he was still deployed in Japan, I believe, in the military. He has subsequently returned to the United States. A hearing was conducted in Virginia [on July 11].”

“During that hearing, where Mr. Espinoza and Ms. Espinoza were present, the Court had an extensive hearing regarding the issues of the alleged threats that were taking place. At the conclusion of that hearing, Judge Moore found that there was insufficient evidence to warrant a restraining order. And so the restraining order was denied.”

The Riverside court further recited that the Virginia court had ordered Elizabeth to have custody and Ricco to have visitation and the children were appointed a guardian ad litem under Virginia law. After an emergency hearing on August 1, 2013, the Virginia court found that Elizabeth had not complied with court orders and fled the jurisdiction with the children. The Virginia court ordered Ricco to have temporary custody and set a court date in October 2013. Subsequently, Elizabeth sought a temporary restraining order on August 1, 2013, in Riverside, “alleging the exact same incidents of the threats against her that were litigated in Virginia. . . . [¶] . . . All of the alleged threats did predate the hearing in Virginia. And therefore the temporary restraining order had been granted on facts that had been litigated in Virginia.”

After argument by counsel and a statement by Elizabeth, the court elaborated: “There are clearly jurisdictional issues that are in this case, and UCCJEA requires that the judges have conversations when there are two pending cases. . . . In that July hearing . . . the Court in Virginia took jurisdiction over custody and visitation” and made orders that the Riverside court recognized and “if there’s gonna be a change there either in change in

jurisdiction or where the case needs to be heard or a change in custody that it's the existing custody order from Virginia, it needs to take place there. [¶] *It may very well be that we end up in California because California ends up being the more logical place and a convenient forum.* Before we ever get to California, the matter has to go to Virginia, the issues there be resolved and that issue to be resolved. [Emphasis added.]”

The Riverside court then ordered Child Protective Services to take custody of the children because the Virginia court had already ordered Ricco to have custody and Elizabeth was a flight risk. The Riverside court dismissed the restraining order because it was based on old incidents that had already been reviewed by the Virginia court and there was no fresh information presented. Further proceedings have continued in Virginia. As of February 2014, Ricco had custody of the children and Elizabeth was entitled to visitation.

III

DISCUSSION

In summary, according to the record, Elizabeth and the children lived in Virginia for three years between 2007 and 2010. They lived for a year in Japan before returning to Virginia. They lived in California from October 2011 or February 2012 until May 2013 when Elizabeth returned to Virginia to avoid service of California divorce papers. While in Virginia, Elizabeth filed a petition for protective order for family abuse in May 2013. Ricco filed petitions for child custody in July 2013. When the Virginia court refused to grant a protective order in July 2013, Elizabeth returned to California, after which the

Virginia court granted temporary custody to Ricco on August 1, 2013. Elizabeth then filed the related requests for a restraining order and child custody on August 2, 2013, in Riverside. By the time the court ruled in the Riverside case on August 22, 2013, the Virginia court had already issued an order to show cause against Elizabeth on August 8, 2013.

A. *The UCCJEA*

The threshold question is whether the Riverside court had jurisdiction to make a child custody order. The Family Code permits the court to make a related child custody order in connection with an action brought under the Domestic Violence Prevention Act (DVPA). (§§ 3021, subd. (e), 3402, subd. (d), and 6323.) In the present case, the court dismissed mother's DVPA action, thus eliminating the statutory justification for a child custody order. Nevertheless, the court acted according to its inherent powers when it ordered the children placed in protective custody. To the extent the UCCJEA may be considered applicable under these circumstances, we will decide whether the Riverside court complied with the UCCJEA.

The UCCJEA applies when two states claim jurisdiction over custody of a child: "The exclusive method of determining subject matter jurisdiction in custody cases is the UCCJEA. (§ 3421, subd. (b).) . . . [¶] Subject matter jurisdiction either exists or does not exist at the time an action is commenced. (*Adoption of Zachariah K.* (1992) 6 Cal.App.4th 1025, 1035.) There is no provision in the UCCJEA for jurisdiction by reason of the presence of the parties or by stipulation, consent, waiver, or estoppel.

(*Adoption of Zachariah K.*, at p. 1035; *In re Marriage of Sareen* [(2007) 153 Cal.App.4th 371,] 376; *In re Marriage of Newsome* (1998) 68 Cal.App.4th 949, 955-956.) [¶] Under the UCCJEA, the state with absolute priority to render an initial child custody determination is the child’s home state on the date of commencement of the first custody proceeding or, alternatively, the state which had been his home state within six months before commencement if the child is absent from the home state but a parent continues to live there. (§ 3421, subd. (a)(1).) . . . [¶] . . . [¶]

“The UCCJEA takes a strict “first in time” approach to jurisdiction. Basically . . . once the court of an appropriate state (Fam. Code, § 3421, subd. (a)) has made a “child custody determination,” that court obtains “exclusive, continuing jurisdiction” (Fam. Code, § 3422, subd. (a).) The court of another state: [¶] (a) Cannot modify the child custody determination (Fam. Code, §§ 3421, subd. (b), 3422, subd. (a), 3423, 3446, subd. (b)); [and] [¶] (b) Must enforce the child custody determination (Fam. Code, §§ 3443, 3445, 3446, 3448, 3453)’ (*In re Marriage of Paillier* (2006) 144 Cal.App.4th 461, 469.)” (*In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 490-491.)

We apply a combined standard of review: “With respect to purely factual findings, we will defer to the trial court’s assessment of the parties’ credibility, . . . (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479; *Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1170-1171, fn. 1.) . . . Since subject matter jurisdiction is at issue, however, we are ‘not bound by the trial court’s findings and may independently weigh

the jurisdictional facts.’ [Citations.]” (*In re Marriage of Nurie, supra*, 176 Cal.App.4th at p. 492.)

Based on a UCCJEA conference with the Virginia court and the submissions made by the parties, the Riverside court found that, after Ricco initiated divorce proceedings in California, Elizabeth fled to Virginia and sought relief from the Virginia court. Ricco dismissed his California case and pursued a custody determination in Virginia. The Virginia court assumed jurisdiction and made custody orders before the Riverside court conducted its domestic violence hearing. The Virginia court, like a California court, had the right to exercise jurisdiction where exigent circumstances required the children at issue to be protected: “[E]ven when UCCJEA jurisdiction rests with another state or country . . . a California [or Virginia] court may exercise temporary jurisdiction if the child is present in this state and, as relevant here, the exercise of such jurisdiction 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).)” (*In re Marriage of Fernandez-Abin & Sanchez* (2011) 191 Cal.App.4th 1015, 1040-1041.) Because the Virginia court found the children faced imminent harm, it properly assumed jurisdiction before California even if California originally was their home state.

Furthermore, even when the UCCJEA applies, section 3427 allows a California court to decline jurisdiction when California is an inconvenient forum. That is what occurred here. The Riverside court recognized and accepted the jurisdiction of the Virginia court and made a specific finding that California was an inconvenient forum to

resolve the custody dispute: “*It may very well be that we end up in California because California ends up being the more logical place and a convenient forum.* Before we ever get to California, the matter has to go to Virginia, the issues there be resolved and that issue to be resolved. [Emphasis added.]” The court’s finding was based impliedly and expressly on the relevant factors to a waiver of jurisdiction: past or future domestic violence; the time the children lived in the two states; the distance between the states; the availability of evidence; and the suitability of the courts and their familiarity with the facts and issues. (§ 3427, subd. (b); *Brewer v. Carter* (2013) 218 Cal.App.4th 1312, 1320.) In the Riverside court below, Elizabeth did not articulate any contrary evidence to show why California was not an inconvenient forum for the parties. Only in her reply appellate brief does she finally argue that she did not seek custody in Virginia because she believed the children were safer in California. Based on the foregoing, we hold the Riverside court correctly found California was not a convenient forum and the Virginia court had properly assumed jurisdiction over the child custody issue.

B. Res Judicata

Elizabeth’s appeal of the denial of her request for a domestic violence protective order (DV-100) is almost certainly moot at this point. The Virginia court is presently exercising jurisdiction and both parties and the children have been living in Virginia since November 2013. A reversal and a remand for further proceedings would prove meaningless now that the family has made Virginia their home state for over a year. (§ 3402, subd. (g).)

Furthermore, the grounds for the DV-100 were based on allegations of events occurring in or before May 2013 and were fully considered by the Virginia court in the July 2013 hearing and order. The failure to apply res judicata under these circumstances would promote repetitive and contradictory litigation of the same issues. We agree the Riverside court properly denied the protective order based on its finding that Elizabeth's claims had already been litigated and denied in Virginia. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897; *Tyus v. Tyus* (1984) 160 Cal.App.3d 789, 792.)

IV

DISPOSITION

We affirm the judgment dismissing the DV-100. The parties shall bear their own costs on appeal.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.