

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of K.P., Minor.

UNPUBLISHED
December 19, 2013

No. 315649
Grand Traverse Circuit Court
Family Division
LC No. 12-003387-NA

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Respondent appeals by right from the trial court's March 11, 2013, order of disposition in this child protective proceeding, which followed an earlier order denying respondent's motion to dismiss for lack of jurisdiction. We affirm.

The instant case involves an initial petition for jurisdiction over respondent's minor child, K.P. ostensibly due to respondent and the child's father's¹ continued drug use and incidents of domestic violence, and their inability to provide proper care and custody of K.P.. Respondent moved to dismiss the petition, on the ground that she had previously granted a power of attorney over K.P. to the child's maternal aunt. Despite petitioner's initial objections, the trial court granted respondent's motion to dismiss following a hearing on August 17, 2012.

However, on September 13, 2012, a second petition was filed concerning K.P., repeating much of the allegations in the initial petition. This petition also contained the relevant addition that the aunt had stated that she was no longer willing to serve as guardian under the power of attorney due to respondent's interactions with her in violation of the visitation agreement, and respondent's actions in placing the aunt in the middle of the disputes between petitioner and respondent. According to petitioner, respondent had also threatened to rescind the guardianship and take K.P. out of the state.

On October 22, 2012, respondent moved to dismiss for lack of jurisdiction, again arguing that respondent had granted power of attorney over the minor to the aunt. In response, petitioner filed an answer alleging that the power of attorney was void for lack of respondent-father's consent, that the power of attorney was invalid on account of not being in writing, that the power

¹ K.P.'s father is not a party to this appeal.

of attorney, if valid, had been withdrawn by the maternal aunt prior to the filing of the instant petition, and that the petition was valid due to prior acts of abuse and neglect.

A hearing on respondent's motion was held on November 8, 2012. Following the presentation of arguments, the circuit court denied respondent's motion to dismiss due to lack of jurisdiction. In support of its denial, the circuit court found that the aunt had unilaterally indicated her unwillingness to continue as attorney, and that such unilateral withdrawal permitted petitioner to file its petition in this matter. The child's father subsequently tendered a plea of responsibility on February 5, 2013, and an order of disposition was entered on March 11, 2013.

First, respondent argues that the lower court erred by finding that the child in question was without proper care or custody. We disagree.

Whether a court has subject-matter jurisdiction is a question of law. *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 37; 494 NW2d 787 (1992). Questions of law are reviewed de novo. *Minority Earth Movers, Inc v Walter Toebe Constr Co*, 251 Mich App 87, 91; 649 NW2d 397 (2002).

Under Michigan law, a parent, without court intervention, may give proper custody of a child to a relative, if that custody is otherwise proper. *Matter of Taurus F*, 415 Mich 512, 535; 330 NW2d 33 (1982). Here, the record shows that, prior to the filing of the initial petition, respondent had given care and custody of the child in question to a maternal aunt, who was provided with power of attorney and deemed an appropriate caregiver by petitioner.

The record also shows, however, that on the date the second petition in this case was filed, the maternal aunt had unilaterally indicated that she no longer wished to exercise care or custody over the child unless such care and custody was conferred on her by the jurisdiction of the court. Accordingly, following the maternal aunt's withdrawal as caregiver under the power of attorney agreement, and due to the other allegations, which included parental drug abuse and domestic violence, no proper care and custody over the child existed prior to the filing of the petition in question. Therefore, because the child in question was without proper care or custody at the time the petition was filed, the lower court did not err by finding that it had subject matter jurisdiction over the instant case.

Respondent also argues that the petition in this matter was barred by the doctrine of collateral estoppel. We disagree.

"Collateral estoppel precludes relitigation of issues between the same parties." *VanVorous v Burmeister*, 262 Mich App 467, 479; 687 NW2d 132 (2004). "Generally, the proponent of the application of collateral estoppel must show 'that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.'" *Trakhtenberg*, 493 Mich at 48.

Here, the parties had previously litigated the issue of whether or not the existence of a valid power of attorney precluded the exercise of jurisdiction by the state. In this matter, however, the parties litigated whether or not the power of attorney that had previously been in place had been revoked by the maternal aunt's unilateral withdrawal. Thus, while the two issues

are similar, they are not the same, and the changed circumstances surrounding the care and custody of the child in question rendered the doctrine of collateral estoppel inapplicable.

Therefore, because the petition in this case was not barred by the doctrine of collateral estoppel, the lower court did not err by denying respondent's motion to dismiss. Accordingly, we affirm both this order and the subsequent order of disposition.

Affirmed.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Cynthia Diane Stephens