THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0795, In the Matter of Jonathan F. Lutz and Crystal L. Fonteneau, the court on August 19, 2009, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is not necessary for the disposition of this appeal. Crystal L. Fonteneau (mother) appeals an order recommended by the Marital Master (Love, M.) and approved by the Superior Court (Groff, J.), granting primary custody of the parents' minor child to Jonathan F. Lutz (father). We affirm.

At trial, the mother attempted to admit evidence challenging New Hampshire's jurisdiction over the case. The trial judge dismissed the challenge in a bench colloquy with counsel for the mother:

> THE COURT: Counsel, what's the relevance of this?
> MS. WOLFSON: Well there's one issue about -- there are jurisdictional issues here, Your Honor.
> THE COURT: There is no jurisdictional issue here.

We uphold the rulings and findings of the trial court unless they are unsupported by the evidence or tainted by error of law. In re Juvenile 2005-426, 154 N.H. 336, 339 (2006). In this case, the evidence clearly supports the jurisdictional ruling.

Because the daughter, Jenney Lutz, was over six months old when this action commenced, jurisdiction lies in her "home state," pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA). See RSA 458-A:3, I(a) (2004). Both New Hampshire, see RSA ch. 458-A (2004 & Supp. 2008), and Massachusetts, see Mass. Gen. Laws Ann. ch. 209B (West 2007), substantially adopted the UCCJA. The "home state" is:

> the state in which the child at the time of the commencement of the custody proceeding has resided with his parents . . . [or] a parent . . . for at least 6 consecutive months.

RSA 458-A:2, V (2004). Jenney, who was born December 1, 2006, resided in New Hampshire for more than six consecutive months; in fact, Jenney

apparently spent almost all of the eight months before the father filed his petition for custody on August 6, 2007, in New Hampshire. It is inconsequential that the mother did not move from Massachusetts to New Hampshire until March of 2007, because jurisdiction follows the residency of the child and not the mother. See id.

Even assuming, arguendo, that Jenney did not spend six consecutive months of her life in New Hampshire, jurisdiction may attach under a different provision of the UCCJA when there is no home state. Massachusetts is not Jenney's home state, notwithstanding that she was born there, and no other state meets the six-month requirement of the home state provision. The UCCJA provides that a state may assert jurisdiction when it is in the best interest of the child, either because the child and at least one parent have a significant connection to the state and there is substantial evidence therein, or because it appears that no other state would have jurisdiction. See RSA 458-A:3, I(b), (d) (2004). New Hampshire's exercise of jurisdiction was in Jenney's best interest, especially in light of the goals of the UCCJA. See RSA 458-A:1 (2004). The father resided with her in New Hampshire, and most of the evidence necessary to make a custody decision was in New Hampshire. Jenney has a significant connection to New Hampshire and satisfies RSA 458-A:3, I(b). Further, it appears that no other state would have jurisdiction, satisfying RSA 458-A:3, I(d).

Finally, even assuming that Massachusetts were Jenney's home state by virtue of her birth there, the UCCJA contemplates the existence of concurrent jurisdiction for initial custody decrees. See RSA 458-A:6, I (2004); Clarke v. Clarke, 126 N.H. 753, 756 (1985) (recognizing that "more than one State may have initial jurisdiction").

Jurisdiction over this case is undeniable, and we dismiss the mother's challenge.

The mother also argues that introduction and consideration of the Massachusetts Department of Social Services (DSS) report violated her due process rights. Our review of the record shows that this argument was not properly preserved. "Generally, a party must make a specific and contemporaneous objection during trial to preserve an issue for appellate review." Milliken v. Dartmouth-Hitchcock Clinic, 154 N.H. 662, 665 (2006) (quotation and brackets omitted). Furthermore, the appellant "is responsible for providing a record sufficient to decide the questions of law" that are raised. State v. Menard, 133 N.H. 708, 711 (1990); see Sup. Ct. R. 13(2). We will generally not review any part of the record that has not been provided in an appendix. Sup. Ct. R. 13(3).

Counsel for the mother urged us at oral argument to review the issue under our plain error rule. See Sup. Ct. R. 16-A. "Under our rule, we consider the following elements: (1) there must be error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." State v. Henderson, 154 N.H. 95, 96 (2006). Here, there is no error. The mother's due process argument is based upon the DSS finding that she alleges the trial court should have ignored. The content of the DSS finding, or its putative effect on the case, is not apparent to us. The content is not mentioned in the docket sheet, it is not attached to any pleading, it is not in the exhibit list, nor in the appendix to the mother's brief. In the trial court's order, the DSS report was mentioned factually, as part of the reason for the mother's ire with the grandmother, but there is no evidence that the content of the report had any effect on the marital master's recommendation or the ultimate custody decision.

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk

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