2018 IL App (5th) 180161-U

NO. 5-18-0161

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DEAN SCOTT,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Madison County.
	)	
v.	)	No. 18-F-17
	)	
TARSIS FERREIRA,	)	Honorable
	)	Philip B. Alfeld,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Barberis and Justice Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: Order granting respondent's motion to dismiss affirmed where circuit court lacked jurisdiction over proceedings because Illinois was not the home state of the subject minor child, as defined in section 102(7) of the Uniform Child-Custody Jurisdiction and Enforcement Act (750 ILCS 36/102(7) (West 2016)) and where petitioner waived the issue of temporary emergency jurisdiction by failing to raise it in the circuit court and where such jurisdiction would not apply, notwithstanding the waiver.

¶ 2 The petitioner, Dean Scott, appeals the March 2, 2018, order of the circuit court of Madison County that granted the motion of the respondent, Tarsis Ferreira, to dismiss, *inter alia*, Dean's petition for an allocation of parental responsibilities and parenting time. The circuit court concluded that it lacked jurisdiction over the proceedings because

Illinois was not the home state of the parties' minor child. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 At the outset, we note that this is an expedited appeal, pursuant to Illinois Supreme Court Rule 311(a) (eff. July 1, 2018), because it involves the allocation of parental responsibilities or the relocation of an unemancipated minor. The decision was due to be filed on August 12, 2018. However, the decision is being issued beyond this date for good cause, as multiple motions for extensions of time resulted in delays of the progression of this case. See Ill. S. Ct. R. 311(a)(5) (eff. July 1, 2018). Once the briefing schedule was complete, this case was placed on the oral argument docket and argued before this court on September 27, 2018. We now issue our disposition.

¶ 5 On January 11, 2018, Dean filed a petition for an allocation of parental responsibilities and parenting time regarding the parties' child, J.S. The petition requested the circuit court to grant Dean joint parental decision making and reasonable parenting time with J.S. The following day, Dean filed a verified petition for a temporary restraining order and preliminary and permanent injunctive relief, which requested the circuit court to enter an order enjoining Tarsis from removing J.S. from the United States and the State of Illinois. The petition alleged that Tarsis threatened to flee with J.S. to Brazil, threatened that Dean would never see J.S. again, took J.S. from the home she shared with Dean on January 10, 2018, and had not responded to Dean's attempt to verify the whereabouts or safety of J.S. The same day, the circuit court entered a temporary restraining order, granting Dean's verified petition and enjoining Tarsis from removing

J.S. from the United States and the State of Illinois. On January 17, 2018, the circuit court entered an order again enjoining Tarsis from removing J.S. from the United States and the State of Illinois, and additionally ordering the parties to turn over any passports for J.S.—to be held by Dean's counsel—until further order of the court.

¶ 6 On January 29, 2018, Tarsis filed a motion to dismiss, pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (Act) (750 ILCS 36/101 *et seq*. (West 2016)). The motion alleged that the parties are the parents of J.S., Dean is a citizen of the United States, and Tarsis is a citizen of Brazil. The motion further alleged that Tarsis gave birth to J.S. in Brazil on October 24, 2016, and on September 24, 2017, came with J.S. to the United States via a six-month tourist visa, to visit Dean. According to the motion, during the visit, Tarsis fled to a domestic violence shelter with J.S., after which Dean filed the petition for an allocation of parental responsibilities and parenting time.

¶ 7 The motion to dismiss alleged that the circuit court lacked jurisdiction over the case because J.S. resided with Tarsis in Brazil from the date of his birth until he was 11 months old, at which time he came to the Unites States with Tarsis solely to visit Dean. The motion cited section 105(a) of the Act, which provides that a foreign country shall be treated by the circuit court as a state of the United States. 750 ILCS 36/105(a) (West 2016). Accordingly, the motion alleged that Illinois is not the "home state" of J.S. as defined in the Act and requested the circuit court to dismiss for lack of jurisdiction, the petition for an allocation of parental responsibilities and parenting time and any other motions filed by Dean. The motion further requested the circuit court to enter an order

vacating and dismissing the temporary restraining order and requiring the return of J.S.'s passport.

¶ 8 Per order of the circuit court, the parties submitted briefs on the jurisdiction issue. Subsequently, on March 1, 2018, a hearing on the motion to dismiss was conducted. There, Tarsis testified via an interpreter that the parties have one son together, J.S., who was one year and four months old at the time of the hearing. J.S. was born in Brazil on October 24, 2016. Tarsis testified that she is a Brazilian citizen who traveled legally with J.S. and her older son—of whom Dean is not the father—to the United States via tourist visas in order for J.S. to meet his grandparents—Dean's parents—who could not travel to Brazil for a visit because they were too old. Dean accompanied Tarsis and the boys on the flight from Brazil to the United States.

¶ 9 Tarsis testified that her older son was scheduled to return to Brazil to start school in late February 2018. She explained that, in order for her to be able to legally travel with her older son to the United States, she was required to go to the police station with the boy's father where both parents signed an authorization for her to travel with him. She emphasized that permission was not granted for the boy to live in the United States, but only to visit on the tourist visa that had a six-month time limit.

¶ 10 Tarsis noted that this was J.S.'s first trip to the United States. She testified that they arrived in the United States on September 24, 2017, and their tourist visas were set to expire six months later on March 24, 2018, after which they would be in the United States illegally if they remained. On cross-examination, Tarsis testified that J.S. has a United States passport, not a Brazilian passport, but all he needs to return to Brazil is a

return authorization, which she possesses. Tarsis indicated that her original intent was to stay in the United States for five months, "but after her situation at her home she wanted to come back to Brazil earlier." When asked about her Facebook profile page, which indicated that she lived in St. Louis, not Brazil, she responded that Facebook is social media and "not her real life." She admitted that she and Dean formerly planned to marry, but those plans never came to fruition.

¶ 11 Tarsis testified that she maintains health care for J.S. in Brazil and J.S. has extended family in Brazil, including aunts, uncles, cousins, and grandparents—her parents. She indicated that she has maintained possession of her apartment in Brazil, where she lives with J.S. and her older son, and her lease expires there in 2019. She explained that when she came to visit the United States, her father assumed paying the rent and utilities on her behalf there, but the plan was for her to resume paying those expenses when she returned.

¶ 12 Tarsis indicated that Dean purchased all of the travel tickets for the visit to the United States. She testified that although she never actually saw the return tickets for her and J.S., she believed that Dean purchased the tickets for them to return to Brazil on February 20, 2018. She explained that a return ticket is required to be allowed to travel to the United States from Brazil as a tourist. Accordingly, she believed Dean purchased the return tickets and kept possession of them.

¶ 13 Tarsis testified that she is still employed in Brazil as a hairdresser and cosmetologist for bridal and wedding events and will continue such employment upon her return. She acknowledged a log book from her employer which contained a date that

she "left" but explained that each event she is hired for serves as a separate contract with a different client, with beginning and ending dates that differ from other contracted events.

¶ 14 On cross-examination, Tarsis acknowledged her signature on an application for water service in Holiday Shores Sanitary District in Edwardsville. She explained that when she first arrived in the United States, she wanted her older son to enroll in an activity such as attending school or "some kind of education" so he could learn English. She testified that Dean informed her that to do so, proof of residency was required. Accordingly, Tarsis asked the Brazilian consulate if it was legal for her to obtain a utility bill in her name as a tourist in the United States. When she learned that it was indeed legal to do so, she signed the water bill application so she could enroll her son in school.

¶ 15 Dean testified that he currently lives in Edwardsville where Tarsis, her older son, and J.S. all lived with him from September 2017 to January 2018. He stated that the parties met in Brazil two or three years ago and were engaged on November 29, 2015, but by December 2017, it was "pretty clear it was over." Dean explained that he had been to an immigration attorney to gather information about marrying Tarsis and they were making plans but the relationship "broke down."

¶ 16 Dean testified that during the parties' relationship, he traveled to Brazil 11 times. His latest trip to Brazil was on September 20, 2017, and he returned to the United States on September 22, 2017, flying with Tarsis and the two boys and accompanying them through immigration. Dean confirmed that J.S. traveled on a United States passport and he was of the understanding that he would not be allowed to reenter Brazil on that

passport. He testified that there were tickets purchased for Tarsis and her older son to return to Brazil, but a return ticket was never purchased for J.S. He alleged that he and J.S. are United States citizens and Tarsis and her older son are Brazilian citizens.

¶ 17 Dean testified that when he arrived to Brazil on September 20, 2017, Tarsis was in the process of moving out of her apartment. He explained that they were boxing things up, taking down furniture, and "getting ready for the exit of the apartment [*sic*]." Dean indicated that Tarsis's mother also resided in the apartment, but she was also moving out and the apartment "was going to be vacant." He further testified that "the lease was broken at that point on the 24th of September" and he paid the fees for the termination of the lease.

¶ 18 Dean testified that the last time Tarsis held a regular job was the first week of March 2016, at which time she was granted a visa to come to the United States. He indicated that the parties had a discussion at that point, "and she was going to terminate her employment" and he "was going to take care of things." He stated that he gave her money every time he traveled to Brazil and wired money to her at other times. Dean testified that Tarsis traveled to the United States on March 12, 2016, and stayed for approximately six months.

¶ 19 Dean confirmed that Tarsis signed an application for water service to establish residency so her older son could attend school in Edwardsville. He added that when they enrolled the boy in school on September 26, 2017, he indicated on the registration documents that the family all resided together permanently because, at that time, the parties were planning on getting married. Dean denied that Tarsis planned to terminate

her son's enrollment in school in February 2018 so she could return to Brazil with the two boys. On cross-examination, Dean admitted that because J.S. is an infant, a return ticket is not necessary if he sits on someone's lap on the airplane and that a ticket for him would be required only if he sat in his own seat.

¶ 20 At the conclusion of the testimony, the circuit court inquired of all counsel: "If a foreign national marries an American citizen, do they automatically have the right to remain in this country?" Dean's counsel responded, "There is additional documentation that needs to be submitted in order to apply for a [v]isa, a change in status from tourist to spouse." Tarsis's counsel confirmed, "There is no automatic right to stay," to which Dean's counsel agreed. The circuit court inquired further, "And the child of a foreign national, what would that child have to go through to *** be allowed to remain in the United States?" Dean's counsel replied, "Our understanding is it would be a similar process, you have to file an I-539 for change in status of [v]isa."

¶ 21 The circuit court stated on the record as follows:

> "[T]he child wasn't here for six months prior to the initiation of the petition, and inasmuch as [Tarsis] was still a resident of the *** nation of Brazil at that time, as the Court indicated earlier, there is a jurisdiction that can decide these issues, and that is the home state of the minor child, which is Brazil."

¶ 22 The circuit court entered a written order on March 2, 2018, finding that, pursuant to the Act, Illinois lacks jurisdiction to make a custody determination or to allocate parental responsibilities or parenting time regarding J.S. because Brazil, not Illinois, is his home state. The circuit court dismissed with prejudice Dean's petition for allocation of

parental responsibilities and parenting time, dismissed the temporary restraining order, and ordered Dean's counsel to return J.S.'s passport to Tarsis. Dean filed a timely notice of appeal. Additional facts will be provided as needed in the remainder of this order.

¶ 23 ANALYSIS

¶ 24 The sole issue on appeal is whether the circuit court erred by granting Tarsis's motion to dismiss. We initially note that both parties conceded at the hearing that the motion to dismiss was brought pursuant to section 2-619(a)(1) of the Code of Civil Procedure, alleging a lack of subject matter jurisdiction, notwithstanding Tarsis's failure to set forth the same in the motion. See 735 ILCS 5/2-619(a)(1) (West 2016). "A motion to dismiss under section 2-619(a) admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleadings which defeat the claim." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. "When ruling on the motion, the court should construe the pleadings and supporting documents in the light most favorable to the nonmoving party." *Id*. "The court must accept as true all well-pleaded facts in [the] plaintiff's complaint and all inferences that may reasonably be drawn in [the] plaintiff's favor." *Id*. "The question on appeal is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Id*. (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). "When we review the trial court's ruling on a motion to dismiss, the standard of review is *de novo*." *Bouton v. Bailie*, 2014 IL App (3d) 130406, ¶ 7.

¶ 25 Here, Dean argues that the circuit court failed to apply the appropriate procedural analysis in evaluating the motion to dismiss. Specifically, Dean contends that there are genuine issues of material fact that are germane to the home state analysis and these conflicts should have been construed in his favor as the nonmoving party. We disagree. The circuit court granted the motion to dismiss for a lack of jurisdiction when it found that, pursuant to the Act, Illinois is not the home state of J.S.

¶ 26 Section 201(a) of the Act provides: "a court of this State has jurisdiction to make an initial child-custody determination *only if*:

> (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 ***." (Emphasis added.) 750 ILCS 36/201(a)(1) (West 2016).

¶ 27 The Act defines "child-custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." *Id.* § 102(3). This applies here, as the petition dismissed was an initial petition for an allocation of parental responsibilities and parenting time regarding J.S.

¶ 28 The Act defines "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." *Id.* § 102(7). In this case, Dean filed the petition for an allocation of parental responsibilities and parenting time on January 11, 2018. Tarsis's testimony established that she arrived in the United States with J.S. and

her older son on September 24, 2017.[1] Dean filed his petition less than four months later. These facts are unrebutted. Because the Act requires J.S. to reside in Illinois with a parent for at least six consecutive months prior to the filing of the petition—and that did not occur here—it was correctly determined that Illinois was not the home state of J.S. when the proceedings commenced. Accordingly, there was no genuine issue of material fact and Tarsis was entitled to judgment as a matter of law because the circuit court lacked jurisdiction over the proceedings and it was not erroneous for the circuit court to grant Tarsis's motion to dismiss on that basis.

¶ 29 Dean argues that "a circuit court's subject matter jurisdiction is conferred entirely by our state constitution." *McCormick v. Robertson*, 2015 IL 118230, ¶ 19. He further notes—and we agree—that, pursuant to the Act, " 'jurisdiction' must be understood as simply a procedural limit on when the court may hear initial custody matters, not a precondition to the exercise of the court's inherent authority" which is conferred solely by the state constitution. *Id*. ¶ 27. This application of the Act is precisely what occurred here. Using its inherent authority, the circuit court observed the procedural limits set forth in the Act to determine that it was not entitled to preside over the matter because the requisites of time in the Act had not been fulfilled to make Illinois the home state of J.S. Accordingly, the circuit court correctly concluded that it lacked jurisdiction to preside over the proceedings and make a custody determination over J.S.

[1]Dean testified that J.S. and Tarsis arrived in the United States on September 22, 2017. The difference of two days between Dean's testimony and that of Tarsis is of no consequence to the time requirements of the Act.

¶ 30 Dean next argues that Tarsis was not entitled to judgment as a matter of law because the circuit court failed to analyze "the totality of the [Act]" by disregarding the temporary emergency jurisdiction provisions within the Act. We find that Dean waived this issue by failing to raise it in his pleadings or at trial. See *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 58 (issues not raised in the circuit court are waived and do not merit consideration on appeal).

¶ 31 Here, Dean did not raise the issue of emergency temporary jurisdiction in the circuit court, but raises it for the first time on appeal. He claims that "the trial court failed to afford [him] the right to present all evidence necessary to make an appropriate home state determination." To this regard, he claims that there was limited testimony at the hearing and "multiple disagreements as to material facts." We find this argument lacks merit.

¶ 32 The circuit court ordered briefing on the jurisdictional issue prior to the hearing, after which the entire hearing was devoted to the presentation of evidence for the circuit court to determine whether Illinois was the home state of J.S. Dean had ample opportunity to present any arguments and evidence surrounding this issue at the trial level and cannot now claim that he was not afforded the opportunity to present such evidence. Regarding any factual disagreements, it is fundamental that "[r]esolving issues of credibility and conflicting evidence is a function which is peculiarly in the domain of the trial court." *Howard v. Zack Co.*, 264 Ill. App. 3d 1012, 1025 (1994). "Moreover, it is not the function of a reviewing court to reweigh the evidence." *Id.* For these reasons, we reject Dean's argument that he was not given the opportunity to present evidence.

¶ 33 Dean further contends that the circuit court erroneously rejected its jurisdiction under section 201 of the Act (750 ILCS 36/201 (West 2016)) and because it did so, it was required to consider whether it could exercise temporary emergency jurisdiction under section 204 (*id.* § 204). Again, we disagree. For the reasons set forth in our analysis of the home state issue, Dean's assertion that the circuit court erroneously concluded that it lacked jurisdiction is false. Furthermore, Dean essentially argues that the circuit court was required to comb through the Act, *sua sponte*, to search for any possible way to assert jurisdiction. Dean cites no authority—and we are aware of none—to support the contention that it was the circuit court's duty to prompt him to raise an issue that he failed to raise on his own. Accordingly, we reject Dean's argument and find the issue waived. See *Cholipski*, 2014 IL App (1st) 132842, ¶ 58.

¶ 34 Even assuming, *arguendo*, that Dean did not waive the issue, we find the circuit court still could not have exercised temporary emergency jurisdiction. Section 204(a) of the Act provides:

> "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." 750 ILCS 36/204(a) (West 2016).

¶ 35 In relation to this argument, Dean cites—also for the first time on appeal—the Illinois Domestic Violence Act of 1986 (IDVA) (750 ILCS 60/101 *et seq.* (West 2016)) Having decided to consider, *arguendo*, the issue of temporary emergency jurisdiction, we

will proceed in entertaining Dean's assertions regarding the IDVA. He claims that he was "abused" and indicates that, pursuant to section 103 of the IDVA, "abuse" is defined as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation *** ." *Id.* § 103(1). He further emphasizes the definition of "harassment" per the IDVA as:

> "knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner. Unless the presumption is rebutted by a preponderance of the evidence, the following types of conduct shall be presumed to cause emotional distress:
>
> * * *
>
> (v) *improperly concealing* a minor child from petitioner, *repeatedly* threatening to *improperly* remove a minor child of petitioner's from the jurisdiction or from the physical care of petitioner, repeatedly threatening to conceal a minor child from petitioner, or making a single such threat following an actual or attempted improper removal or concealment, *unless respondent was fleeing an incident or pattern of domestic violence* ***." (Emphases added.) *Id.* § 103(7)(v).

¶ 36 Dean argues that by entering the temporary restraining order that granted his verified petition, the circuit court accepted as true the following allegations of the petition which were sufficient to constitute harassment: (1) Tarsis threatened to flee to Brazil with J.S.; (2) threatened that Dean would never see J.S. again; (3) took J.S. from the home she

shared with Dean; and (4) did not respond to Dean's attempt to verify the whereabouts or safety of J.S.

¶ 37 We find that these facts do not, in fact, correlate with the definition of harassment under the IDVA. Notably, Dean fails to add that the record establishes that Tarsis fled with J.S. and her older son from Dean's home to a domestic violence shelter on January 10, 2018, one day before Dean filed the petition for an allocation of parental responsibilities and parenting time, and two days before he filed the verified petition for a temporary restraining order and preliminary and permanent injunctive relief. Tarsis fleeing to a domestic violence shelter falls under the exception to the definition of harassment by means of emotional distress per the IDVA, thereby rebutting the presumption of emotional distress and resulting in any alleged concealment of J.S. to not be classified as "improper." See 750 ILCS 60/103(7)(v) (West 2016).

¶ 38 Moreover, the definition requires *repeated* threats to *improperly* remove a child from the jurisdiction. See *id.* The verified petition alleges that Tarsis "threatened" to take J.S. to Brazil. There is no allegation that she *repeatedly* threatened, nor is there any evidence that Tarsis taking J.S. to Brazil would have been an improper removal, per the definition. This is so because the evidence established that Tarsis and the boys were in the United States on a six-month tourist visa that was set to soon expire. Tarsis testified that Dean purchased return tickets for her and the boys, which was required for them to be approved to travel to the United States under the tourist visa in the first place. Anything Tarsis allegedly indicated about taking J.S. back to Brazil was congruent with her intentions of using the return tickets Dean purchased for them to go back, thereby

satisfying the obligation to not remain in the United States with the boys illegally and dispelling Dean's contention that removing J.S. to Brazil was improper. The record further establishes that Tarsis was successfully served pleadings at the domestic violence shelter, which discredits Dean's claim that J.S. was concealed.

¶ 39 As aforementioned, even if the definitions were satisfied here to constitute "emotional distress," which is presumed to be "harassment," which in turn is considered "abuse" under the IDVA, the fact that Tarsis fled with the boys to the domestic violence shelter rebuts the presumption of emotional distress under the IDVA. Accordingly, we reject Dean's argument that the circuit court could have exercised temporary emergency jurisdiction pursuant to the Act, even if he had not waived the issue.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, we affirm the March 2, 2018, order of the circuit court of Madison County that dismissed with prejudice Dean's petition for allocation of parental responsibilities and parenting time, dismissed the temporary restraining order, and ordered the return of J.S.'s passport to Tarsis.

¶ 42 Affirmed.