

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION

DOCKET NO. 18W-0135-WD

MICHAEL CADENA,
Plaintiff

v.

AMBER BUCK,
Defendant

FINDINGS OF FACT, RATIONALE, AND ORDER
On Complaint for Modification of Foreign Order
(filed on April 24, 2018)

On August 31, 2018, an evidentiary hearing was held before the Court, Cronan, J., presiding, on the issue of whether this Court should exercise emergency jurisdiction over the parties' minor child, Michael Cadena, Jr. ("Mikey"), pursuant to G. L. c. 209B, § 2. Michael Cadena ("Father") was present at the hearing and was represented by Anna Shapiro, Esq. and Diane Nordbye, Esq. Amber Buck ("Mother") was present at the hearing and was represented by Michael Doton, Esq. and Tristan Bullington, Esq. (admitted *pro hac vice*). At the evidentiary hearing, four exhibits were introduced into evidence and five witnesses, including Father, testified. Mother did not testify.¹ After hearing and due consideration, the Court hereby issues the following Findings of Fact, Rationale, and Order:

I. Findings of Fact

1. Father and Mother were never married to each other. Their child, Mikey, was born on February 12, 2014 in Illinois. Mikey is currently four years of age.
2. Father currently lives with Mikey and Father's mother, Barbara McDougall ("Ms. McDougall"), in Weymouth, Massachusetts.
3. According to Father's Complaint for Modification of Foreign Order, Mother currently lives in Normal, Illinois.
4. Mikey was in foster care from March 2016 to May 2016. Thereafter, Mikey was with Father for one week and then returned to foster care, where he remained until September 2016. Father testified that Mikey was placed in foster care following the results of Father's drug test after Father admitted smoking marijuana.

¹ Father did not solicit any testimony from Mother.

5. Mikey has expressed to Ms. McDougall many fears he has, including being alone, bad guys getting him, going to the bathroom, getting lost, getting hurt, and being without his father.
6. Mikey currently sleeps in the same bed as Father and at times has night terrors.
7. Mikey is not currently toilet trained and wears diapers. Father and Ms. McDougall have been trying to toilet train him for the last year without success.
8. Ms. McDougall admitted recording calls between Mikey and Mother. Mikey has become upset during and after several of the calls.
9. Ms. McDougall described Mikey's body as having marks, including a discolored ear and discolorations on his legs. Mikey got these marks while he was still living in Illinois.
10. Father testified that Mikey sustained burns on his arms and patches on his legs in 2016. However, Father also described Mikey as never really having hurt himself and as a normal boy with bruises.
11. Father testified that based on his observation, Mikey seems afraid of Mother.
12. When Mikey began attending daycare in Massachusetts in 2017, he would cry. Mikey's daycare teacher, Diane Burton ("Ms. Burton"), testified credibly that it took Mikey a few months to adjust to attending daycare, but that she saw improvement and that Mikey appeared to her to be happier over time.
13. Ms. Burton also observed that Mikey seemed attached to his father.
14. Ms. Burton testified credibly that Mikey had difficulty learning the alphabet and writing his name.
15. Ms. Burton described occasions at daycare where Mikey would hit or scratch himself when he got upset.
16. Mikey's daycare records in evidence detail incidents of Mikey hitting/kicking on other children, talking about punching on other children, and hitting or scratching himself between September 2017 and January 2018 (i.e., between seven months and one year prior to the evidentiary hearing).
17. Patricia Tai, M.D. ("Dr. Tai") at South Shore Pediatrics is Mikey's pediatrician. The most recent pediatric visit record in evidence was a physical in April 2018. Dr. Tai had no concerns regarding Mikey's growth, feeding, and skin, and she indicated that Mikey's general appearance is "well developed well nourished, in no acute distress, looks well."
18. Dr. Tai's discussion/summary from Mikey's April 2018 pediatric well visit indicated that Father attempted to videotape Mike's reaction to a request to take his pants off for the exam, but that Father stopped after Dr. Tai advised him that she did not think it was appropriate.
19. Mikey has been treating with Dr. Carol Garfinkle ("Dr. Garfinkle") for therapy from the end of 2017 to the present. Dr. Garfinkle is a clinical psychologist in private practice.

20. Dr. Garfinkle has discussed with Father ways to manage Mikey's regressive behaviors regarding toilet training and using a pacifier, how to support his son, how to set limits, and how to address his son's tantrums.
21. Father testified credibly that he has observed Mikey brushing his teeth and that he does a good job. Mikey's dental records in evidence indicate that his most recent dentist visit was in April 2018 for a regular checkup. Mikey's oral hygiene was described as "fair." The note indicated that Mikey did not want his teeth brushed that day because he did not like the toothpaste flavors, and that his father should bring him in again at which time they will use the toothpaste Mikey uses at home.

II. Rationale

The Order issued by the Court (Cronan, J.) on August 3, 2018 scheduling this evidentiary hearing stated that the matter is before the Court following the Court's "decision to deny 'emergency jurisdiction' over the matter while an Illinois Court exerts jurisdiction over the underlying custody case." In the August 3, 2018 Order, the Court cautioned the parties that "its powers in this matter, and the purpose of this hearing, are narrow" under G. L. c. 209B, § 2 (a) (3). The August 3, 2018 Order also stated that "[t]he Court shall not disturb the orders of the Illinois court requiring Father and [Mikey] to return to that state."

Massachusetts General Laws Chapter 209B, § 2 (a) provides that a Massachusetts court has jurisdiction to make a custody determination by initial or modification judgment only if one of its four subsections is satisfied. Section 2 (a) (3), which pertains to emergency custody jurisdiction, requires the following in order for the Court to exercise jurisdiction: "[T]he child is physically present in the commonwealth and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child from abuse or neglect or for other good cause shown, provided that in the event that jurisdictional prerequisites are not established pursuant to any other paragraph of this subsection and a court of another state shall be entitled to assert jurisdiction under any other subparagraph of this paragraph then a court exercising jurisdiction pursuant to this clause of paragraph (3) may do so only by entering such temporary order or orders as it deems necessary unless the court of the other state has declined to exercise jurisdiction, has stayed its proceedings or has otherwise deferred to the jurisdiction of a court of the commonwealth." In addition, "[b]ecause more than one State of the United States [is] involved, the issue is informed not only by State law. . . but also by Federal law, the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000)." *Adoption of Yvette*, 71 Mass. App. Ct. 327, 336-337 (2008). The portion of the PKPA pertaining to emergency custody jurisdiction provides as follows: "A child custody . . . determination made by a court of a State is consistent with the provisions of this section only if – (1) such court has jurisdiction under the law of such State; and (2) one of the following conditions is met: . . . (C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse." 28 U.S.C. § 1738A (c).


Mikey is physically present in Massachusetts. However, no evidence at the evidentiary hearing suggests that it is necessary for this Court to exercise emergency jurisdiction in order to

protect Mikey from abuse. Mikey's difficult adjustment to daycare, behavioral issues at daycare and at home, distress during and following calls with his Mother, attachment to Father, and delays in toilet training do not constitute evidence suggesting that Mikey is in need of protection from abuse. Records from Mikey's most recent pediatric and dental visits do not reflect anything concerning regarding Mikey's health. Although there are currently marks on Mikey's body from minor injuries, Father described Mikey as a normal boy with bruises. The Court finds that Father has failed to demonstrate that "it is necessary in an emergency to protect [Mikey] from abuse or neglect" pursuant to G. L. c. 209B, § 2 (a) (3) or that "it is necessary in an emergency to protect [Mikey] because he . . . has been subjected to or threatened with mistreatment or abuse" pursuant to 28 U.S.C. § 1738A (c) (2) (C) (ii).

III. Order

Following an evidentiary hearing and consideration of the evidence and all reasonable inferences drawn therefrom, this Court **DECLINES** to exercise emergency jurisdiction over Michael Cadena, Jr. pursuant to G. L. c. 209B, § 2 (a) (3).

Date: 9/18/18



Paul M. Cronan, Associate Justice
Norfolk Probate and Family Court