DIVISION ONE
FILED: 03/23/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	1 CA-CV 09-0197
	)	
MELODY STERN,	)	DEPARTMENT D
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
GEORGE ROUX,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2006-006310

The Honorable Daniel G. Martin, Judge

AFFIRMED

Sterns and Tennen — Phoenix
By Leslie I. Tennen
Attorneys for Petitioner/Appellant

Angelini Law Offices — Fountain Hills
By Walter A. Angelini
Attorneys for Respondent/Appellee

J O H N S E N, Judge

¶1 Melody Stern ("Mother") appeals from a dissolution decree in which the superior court declined to exercise jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *See* Arizona Revised Statutes ("A.R.S.") §§ 25-1001 – 1067 (2007 & Supp. 2009). For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mother and George Roux ("Father") were married in British Columbia and have two minor children. Mother moved to Arizona with the two children on June 22, 2004. She brought the children back to British Columbia to visit Father on December 4, 2004, and returned to Arizona alone. On December 6, 2004, Father filed an Application to Obtain an Order in the Provincial Court of British Columbia, requesting custody and guardianship of the children. The Provincial Court issued an *ex parte* order for joint custody and guardianship. The order stated that the children were not to be removed from British Columbia and set a hearing for January 13, 2005.

¶3 Mother returned to British Columbia, responded to the order, and appeared at the hearing. The parties entered into an interim agreement allowing the children to live in British Columbia with Father from December 4, 2004 until May 19, 2005 and in Arizona with Mother from May 19, 2005 until August 19,

2005. The court adopted this agreement as an interim consent order entered on January 17, 2005. A court conference was held on May 16, 2005, at which the Provincial Court, pursuant to the parties' agreement, extended the schedule as follows: children with Mother in Arizona from May 19, 2005 to August 19, 2005; children with Father in British Columbia from August 19, 2005 to December 19, 2005; children with Mother in Arizona from December 19, 2005 to May 19, 2006; and children with Father in British Columbia from May 19, 2006 to September 19, 2006.

¶4 The parties also agreed that only Mother and Father could accompany the children during the exchanges, unless otherwise agreed to by the parties. Later, in connection with the transfer to take place on May 19, 2006, Father requested that his mother be allowed to pick up the children, but Mother refused. Father then obtained an *ex parte* order from the Provincial Court allowing his mother to pick up the children. Mother refused to allow the children to return to British Columbia with Father's mother, and ever since, they have remained in Arizona.

¶5 On May 29, 2006, Father filed a Statement of Claim in the Supreme Court of British Columbia, seeking sole custody and guardianship of the children. The Supreme Court issued an *ex parte* order for the immediate return of the children to British

Columbia and consolidated the Supreme Court and Provincial Court matters. After service, Mother responded, seeking dismissal of the action. That matter had not been ruled upon at the time the superior court heard this case.[1]

¶6 Mother filed her petition for dissolution in Maricopa County Superior Court on August 10, 2006. The superior court concluded that British Columbia was the children's home state under the UCCJEA and that British Columbia had exercised initial child custody jurisdiction in substantial conformity with the UCCJEA. The court dissolved the marriage but declined to exercise jurisdiction over child custody.

¶7 Mother filed a motion for new trial/motion to amend findings of fact, which the superior court denied. Mother timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶8 Mother contends the superior court erred in concluding that British Columbia was the children's home state and that British Columbia exercised initial jurisdiction in substantial conformity with the UCCJEA. We agree that British Columbia was not the home state in 2005, but affirm because the British

[1] The record on appeal does not indicate whether the Supreme Court of British Columbia since has ruled.

Columbia court properly exercised initial jurisdiction and continues to have exclusive, continuing jurisdiction.

A. Initial Jurisdiction.

1. Section 25-1031(A)(1).

¶9 Mother first argues that British Columbia did not properly exercise initial jurisdiction because it was not the children's home state. "We review this matter de novo because it involves a matter of statutory interpretation." *Melgar v. Campo,* 215 Ariz. 605, 606, ¶ 6, 161 P.3d 1269, 1270 (App. 2007).[2]

¶10 We note initially that under the UCCJEA, a foreign country is to be treated as another state. A.R.S. § 25-1005(A). According to the statute, Arizona must recognize and enforce a child custody determination of a foreign country that is "in substantial conformity with the jurisdictional standards of [the UCCJEA]" unless the foreign order "violates fundamental principles of human rights." A.R.S. § 25-1005(B), (C).

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[2] The Provincial Court's interim consent order, issued January 17, 2005, constituted the initial child custody determination for purposes of our analysis of jurisdiction. Father commenced the Provincial Court proceeding before Mother commenced the Arizona proceedings, and his December 2004 pleading in the Provincial Court sought custody and guardianship of the children, which constitutes a "child custody proceeding." *See* A.R.S. § 25-1002(4)(a), (5); *Melgar,* 215 Ariz. at 608-09, ¶ 17, 161 P.3d at 1272-73.

¶11 Arizona Revised Statutes § 25-1031(A) sets out the circumstances in which a court properly may exercise initial jurisdiction in a matter subject to the UCCJEA:

> Except as otherwise provided in § 25-1034 [emergency jurisdiction], a court of this State has jurisdiction to make an initial child custody determination only if any of the following is true:
>
> 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 and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> 2. A court of another state does not have jurisdiction under paragraph 1 or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under § 25-1037 or 25-1038 and both of the following are true:
>
> (a) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (b) Substantial evidence is available in this state concerning the child's care, protection, training and personal relationships.
>
> 3. All courts having jurisdiction under paragraph 1 or 2 have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate

> forum to determine the custody of the child under § 25-1037 or 25-1038.
>
> 4. A court of any other state would not have jurisdiction under the criteria specified in paragraph 1, 2 or 3.

¶12 At the parties' urging, the superior court relied on A.R.S. § 25-1031(A)(1) in ruling on jurisdiction. That subpart is based on a determination of "home state," which elsewhere is defined as "[t]he 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, including any period during which that person is temporarily absent from that state." A.R.S. § 25-1002(7)(a).[3] This definition of "home state" is narrower than the definition found in § 25-1031(A)(1). In *Welch-Doden v. Roberts,* 202 Ariz. 201, 42 P.3d 1166 (App. 2002), this court resolved this statutory conflict and held:

> "home state" for purposes of determining initial jurisdiction under § 25-1031(A)(1) is not limited to the time period of "six consecutive months immediately before the commencement of a child custody proceeding[.]" A.R.S. § 25-1002(7)(a). Instead, the applicable time period to determine "home state" in such circumstances is "within six months before the commencement of the [child custody] proceeding." A.R.S. § 25-1031(A)(1).

[3] Subsection 25-1002(7)(b) is not applicable here.

Id. at 208-09, ¶ 33, 42 P.3d at 1173-74.

¶13 Additionally, "child custody proceeding" includes proceedings "for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence, in which legal custody, physical custody or visitation with respect to a child is an issue or in which that issue may appear." A.R.S. § 25-1002(4)(a). Finally, a proceeding is "commenced" when the first pleading is filed in the proceeding. A.R.S. § 25-1002(5); *see also Melgar*, 215 Ariz. at 608, ¶ 17, 161 P.3d at 1272.

¶14 At the time Father filed his petition, on December 6, 2004, the children had not lived in either state "for at least six consecutive months immediately before the commencement" of the British Columbia proceedings. A.R.S. § 25-1002(7)(a). As a result, neither British Columbia nor Arizona was the home state of the children as defined by § 25-1002(7)(a).

¶15 We next consider the expanded "home state" provision in § 25-1031(A)(1). *See Welch-Doden*, 202 Ariz. at 208-09, ¶ 33, 42 P.3d at 1173-74. Consistent with the second clause of A.R.S. § 25-1031(A)(1), and as the superior court found, the children lived in British Columbia for more than six consecutive months *within* the six months before Father commenced the British Columbia proceeding. Section 25-1031(A)(1), however, also

requires the children to be absent from the state in which the proceeding is commenced at the time the proceeding commences. *In re Marriage of Nurie*, 176 Cal. App. 4th 478, 491, 98 Cal. Rptr. 3d 200, 212 (2009). But the children were not absent from British Columbia when Father filed his petition on December 6, 2004. Therefore, home state jurisdiction was not established pursuant to A.R.S. § 25-1031(A)(1).

¶16 Father asserts the children's absence from British Columbia on the filing date is not material and argues that concluding that no home state existed would be inconsistent with the UCCJEA's purpose of promoting the certainty of home state jurisdiction. *See Welch-Doden,* 202 Ariz. at 208, ¶ 32, 42 P.3d at 1173 (Statutory "conflict[s] should be resolved to strengthen (rather than dilute) the certainty of home state jurisdiction."). But we cannot disregard an express requirement in the statute. *See Phoenix Newspapers, Inc. v. Superior Court In and For County of Maricopa,* 180 Ariz. 159, 162, 882 P.2d 1285, 1288 (App. 1993). Thus, the fact that the children were present in British Columbia when Father commenced the proceeding deprived British Columbia of jurisdiction under § 25-1031(A)(1).

2. Section 25-1031(A)(2).

¶17 Because British Columbia did not have jurisdiction under § 25-1031(A)(1), the question becomes whether it had

jurisdiction to make an initial child custody determination in 2005 under A.R.S. § 25-1031(A)(2).[4] Pursuant to A.R.S. § 25-1031(A)(2), a court may determine child custody if:

> A court of another state does not have jurisdiction under paragraph 1 or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum . . . and both of the following are true:
>
> (a) The child and the child's parents, or the child and at least one parent . . . have a significant connection with this state other than mere physical presence.
>
> (b) Substantial evidence is available in this state concerning the child's care, protection, training and personal relationships.

¶18 Because Arizona lacked jurisdiction under A.R.S. § 25-1031(A)(1) at the time of the Provincial Court's first custody determination, the first requirement of A.R.S. § 25-1031(A)(2) was met. British Columbia, therefore, could exercise jurisdiction consistent with that provision if, at the time of the Provincial Court's first custody determination, Father established that he and the children had "a significant connection" with British Columbia "other than mere physical presence," and that "[s]ubstantial evidence [was] available in

[4] Although the superior court relied on A.R.S. § 25-1031(A)(1), we may affirm its judgment for other reasons. *See Linder v. Brown & Herrick,* 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997).

[British Columbia] concerning the child[ren]'s care, protection, training and personal relationships." A.R.S. § 25-1031(A)(2).

¶19 There is no question that at the time of the 2005 order, the children and Father had "a significant connection" to British Columbia other than "mere physical presence." The issue is whether "[s]ubstantial evidence" was available in British Columbia "concerning the child[ren]'s care, protection, training and personal relationships." According to a comment to the UCCJEA, "The jurisdictional determination should be made by determining whether there is sufficient evidence in the State for the court to make an informed custody determination. That evidence might relate to the past as well as to the 'present or future.'" UCCJEA § 201, cmt. 2, 9 Uniform Laws Annotated ("U.L.A.") Part IA 672 (1997); *see also Mikesell v. Waterman*, 197 P.3d 184, 189 (Alaska 2008).

¶20 The children were born in British Columbia and lived there with both parents until June 2004, when the younger child was nearly one year old. Father and Mother lived with Father's mother until just prior to the time the second child was born. When the British Columbia court ruled in 2005, in addition to Father and his mother, the children's great-grandmother and two aunts also lived in British Columbia. Prior to the December 2004 filing, there was some evidence of the children's care in

Arizona because Mother had lived in Arizona with both children for approximately five months, but that does not mean there was not substantial evidence of the relevant factors in British Columbia. Moreover, as the superior court stated, "for purposes of determining jurisdiction under the UCCJEA, the fact that the children have resided in Arizona since December 2005 is of little moment." We conclude that there was sufficient evidence available to the court in British Columbia "for the court to make an informed custody determination."

3. Substantial conformity.

¶21 The UCCJEA specifically prohibits courts from exercising jurisdiction when another proceeding commenced in substantial conformity with the UCCJEA is currently pending. A.R.S. § 25-1036(A); *see* A.R.S. § 25-1005(B),(C).

¶22 Mother argues British Columbia's exercise of jurisdiction was not in substantial conformity with the UCCJEA because it was not based on considerations of home state status as that term is defined under the UCCJEA.

¶23 Substantial conformity is a factual inquiry. The California Court of Appeals, for example, held that India did not act in substantial conformity with the UCCJEA when an Indian court made a custody determination after the family had lived in India for only nine days. *In re Marriage of Sareen,* 153 Cal.

App. 4th, 371, 377, 62 Cal. Rptr. 3d 687, 691-92 (2007). The court recognized that the order may have been in conformity with Indian law, but "[s]uch a minuscule amount of time in India does not come close to establishing the connection to the state required by the UCCJEA for the exercise of custody jurisdiction." *Id.* at 377, 62 Cal. Rptr. 3d at 692. Similarly, in *Karam v. Karam,* 6 So. 3d 87, 91 (Fla. App. 2009), the court held that the French court in Guadeloupe did not exercise jurisdiction in substantial conformity with the UCCJEA because it did not focus on where the children lived at the time the custody proceeding was commenced. The court said, "[T]he record is clear that the children did not reside in Guadeloupe for six continuous months preceding the filing of the Husband's petition. Thus, the French trial court did not exercise its jurisdiction over the Husband's child custody proceeding in substantial conformity with the UCCJEA." *Id.*

¶24 By contrast, the British Columbia Provincial Court did act in substantial conformity with the UCCJEA in entering its custody determination. Although there is no similar six-month rule governing a child's habitual residence under Canadian Law, *see* Family Relations Act, R.S.B.C., c. 128, § 44(2) (1996) ("CFRA"), Canadian courts consider what evidence exists in a province and how long the children have been present. *Poole v.*

Jackson, [1997] B.C.J. 2321 (B.C.S.C.) (Can.), at ¶¶ 13-14. In *Poole*, the British Columbia Supreme Court expressly declined to exercise jurisdiction over a custody dispute because the child was not habitually residing in British Columbia at the commencement of the application for a custody order and more evidence relating to the child was in Ontario. *Id.* at ¶ 15. This suggests that the British Columbia courts interpret the CFRA in substantial conformity with the UCCJEA.

¶25 Mother also contends British Columbia did not exercise jurisdiction in conformity with the UCCJEA because its orders were *ex parte* and she did not have notice and an opportunity to be heard as required by the UCCJEA. *See* A.R.S. § 25-1008. The UCCJEA provides, however, that notice is not required when one consents to jurisdiction. A.R.S. § 25-1008(C). Mother submitted to the jurisdiction of the Provincial Court when she filed a response to the initial *ex parte* order and then again when she agreed to the stipulated custody and visitation order. Therefore, we reject Mother's argument that she was not given notice and an opportunity to be heard.

B. Exclusive, Continuing Jurisdiction.

¶26 A court that properly has exercised initial jurisdiction under the UCCJEA retains exclusive, continuing jurisdiction. A.R.S. § 25-1032. Mother nevertheless argues the

Provincial Court could not exercise exclusive, continuing jurisdiction over this matter because it lacked the power to enter final custody orders. But the original Provincial Court action was consolidated with the proceeding in the British Columbia Supreme Court. *See* CFRA, c. 128, §§ 5, 8. Canadian statutes and case law teach that proceedings consolidated under this authority are handled as one case and not as two separate proceedings. *Id.; see also Andrew v. Scholz,* [1997] Carswell B.C. 2200 (B.C.S.C.) (Can.) at ¶ 14.

¶27 Mother argues the Provincial Court custody order was temporary and no longer effective at the time of the superior court action. But the UCCJEA definition of "child custody determination" includes temporary orders for legal or physical custody or visitation orders. A.R.S. § 25-1002(3)(a). Moreover, as discussed above, the Provincial Court matter was joined with the Supreme Court proceeding, after which the Supreme Court issued an order in May 2006 commanding Mother to return the children to British Columbia. The Supreme Court of British Columbia may issue final custody and visitation orders that can be served on nonresidents. *See* CFRA at ¶ 5. The Supreme Court has not declined jurisdiction and, so far as our record indicates, the case (and the order to return) still are pending before it.

¶28 Because the Provincial Court properly exercised initial jurisdiction and the Supreme Court retained exclusive, continuing jurisdiction, the superior court properly deferred to British Columbia's exercise of jurisdiction over this custody matter.

CONCLUSION

¶29 For the foregoing reasons, we affirm the judgment of the superior court.

/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/_____
PATRICIA A. OROZCO, Presiding Judge

/s/_____
JON W. THOMPSON, Judge