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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

2210283

A.M.H.

v.

D.E.H., Jr.

2210342

D.E.H., Jr.

v.

A.M.H.

Appeals from Marshall Circuit Court
(DR-20-900419)

PER CURIAM.

In October 2020, A.M.H. ("the mother") filed a petition in the Marshall Circuit Court ("the trial court") seeking to enforce and to modify the child-custody provisions of an August 2019 divorce judgment ("the Louisiana judgment") entered by the Jefferson Parish District Court in the State of Louisiana ("the Louisiana court") that, among other things, divorced her from D.E.H., Jr. ("the father"); named the mother as the designated domiciliary parent of the parties' child, D.E.H. III ("the child"); awarded the father certain visitation with the child, including visitation every other weekend from Thursday to Monday; and ordered the father to pay child support. The mother also filed in the trial court a motion seeking temporary emergency custody of the child based upon an allegation that the father had sexually abused the child. On October 8, 2020, the trial court entered an ex parte order awarding the mother temporary emergency custody and setting a pendente lite hearing for December 9, 2020.

The father, who was then represented by attorney James Hess, filed a motion to dismiss the mother's custody-modification action on October 27, 2020. In that motion, the father contested the trial court's personal

jurisdiction over him and asserted that the trial court lacked subject-matter jurisdiction to enforce or to modify the Louisiana judgment, in part because the mother had not properly registered the Louisiana judgment under the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), Ala. Code 1975, § 30-3B-101 et seq. The father also incorporated into his motion to dismiss the arguments raised in a November 2017 motion to dismiss that he had previously filed in the Cullman Circuit Court in an action commenced by the mother in 2017, which motion the father attached to his motion to dismiss. The November 2017 motion to dismiss asserted that the father did not have minimum contacts with the State of Alabama, that, as a result, the Cullman Circuit Court lacked personal jurisdiction over him, and that Alabama's version of the UCCJEA required personal jurisdiction over a party in order to enter a custody determination that would bind that party. Alabama Comment to Ala. Code 1975, § 30-3B-201; Ex parte Diefenbach, 64 So. 3d 1091, 1096 (Ala. Civ. App. 2010).

The trial court continued the pendente lite hearing until December 23, 2020. At that time, the father was represented by attorney Sreekanth B. Ravi, who appeared with the father at the pendente lite hearing.

When the trial court asked if any pretrial motions or issues needed to be addressed, Ravi failed to raise the father's pending motion to dismiss on the issues of personal jurisdiction and subject-matter jurisdiction. After that hearing, the trial court entered a pendente lite custody order maintaining sole physical custody of the child with the mother and permitting the father to exercise supervised visitation within Alabama on the second Sunday of each month from 2:00 p.m. to 5:00 p.m.; the mother was permitted to designate the visitation supervisor. The trial court set the action for a "further pendente lite hearing" to be held on February 17, 2021. The father filed a motion seeking reconsideration of the pendente lite order on January 6, 2021, based on concerns that the mother would choose a visitation supervisor antagonistic toward the father, but the father did not assert a personal-jurisdiction defense in that motion.

On February 18, 2021, the trial court entered a second pendente lite custody order. That order maintained sole physical custody of the child with the mother but expanded the father's visitation to the second and fourth Sunday of each month from 2:00 p.m. to 5:00 p.m. The trial court set the matter for a trial to be held in June 2021.

In March 2021, the father, still represented by Ravi, filed a motion entitled "Motion for Expedited Final Hearing and Motion to Dismiss." In that motion, the father again raised the issue of personal jurisdiction. He also asserted, without specific citation to Ala. Code 1975, § 30-3B-202, that the Louisiana court retained "continuing and exclusive" jurisdiction over the issue of custody of the child. In response to the father's motion, the trial court entered an order on March 8, 2021, stating, in pertinent part, that, "[i]f the [father] wishes the case to be dismissed or transferred to Louisiana pursuant to the UCCJEA, he shall present any relevant statute and case law in support of his position" at a hearing to be held on March 31, 2021.

On March 29, 2021, the mother filed a motion to disqualify Ravi from representing the father because Ravi had joined a law firm with which she had consulted. The trial court set the mother's motion to be heard on March 31, 2021, the same day that the father's motion to dismiss was to be heard. After the hearing on March 31, 2021, Ravi agreed to voluntarily withdraw, and the father retained attorney Brian E. Beck. Because of the motion to disqualify and the impending

withdrawal of Ravi, the trial court did not receive arguments addressed to the father's motion to dismiss at the hearing on March 31, 2021.

On April 12, 2021, the father, through Beck, requested that the trial court reschedule a hearing on the father's motion to dismiss. The trial court set the father's motion for a hearing, via Zoom, a videoconferencing service, on April 22, 2021. The order setting that hearing stated that "[b]oth counsel shall be prepared to present argument, including necessary statutory authority or caselaw, on the issue of jurisdiction."

After the April 22, 2021, hearing, the trial court entered an order denying the father's motion to dismiss. In its order, the trial court, after indicating that it had considered testimony, evidence, and arguments of counsel, specifically addressed only the issue of subject-matter jurisdiction, stating:

"Ala. Code [1975,] § 30-3B-203 dictates the process for this Court to exercise jurisdiction to modify a previous custody determination. Specifically, this Court finds that a court of this state would be a more convenient forum pursuant to Ala. Code [1975,] § 30-3B-207 and that this Court now would have jurisdiction to make an initial determination pursuant to Ala. Code [1975,] § 30-3B-201(a)(1). The [father] offered no definitive proof that the State of Louisiana continued to exercise jurisdiction over the subject-matter. Additionally, there was no evidence offered that the aforementioned statutory factors do not apply. For the Court to grant a dispositive motion, evidence (or at the very least a proffer of

evidence through argument) relevant to the applicable statute must be offered for the Court to be able to grant the relief sought.

"In denying the relief, the Court was left to decipher jurisdiction through the limited means of a review of the pleadings and consideration of the testimony offered at the emergency hearing. The ... mother has exercised physical custody of the child in the State of Alabama for a period approaching three (3) years. The child, except for visiting her father, has resided exclusively in the State of Alabama for that time. Therefore, the State of Alabama would be the child's home state if this were an initial child custody proceeding. See Ala. Code [1975,] § 30-3B-201(a)(1). For determining whether or not the State of Louisiana would be an inconvenient forum, the Court reviewed and applied limited information provided at the hearing to the factors in Ala. Code [1975,] § 30-3B-207(b)."

In May 2021, the father acquired new counsel, Shane Holloway, who requested a continuance of the trial on the custody-modification petition scheduled to be held in June 2021. Neither the mother nor the guardian ad litem that had been appointed for the child objected, so the trial court continued the trial to November 2021. Also in June, the father filed a motion seeking to have the mother held in contempt for failing to permit him to visit with the child via FaceTime, a videoconferencing service, and requesting an increase in the amount of his pendente lite visitation. The trial court set the issue of pendente lite visitation for a hearing to be held in July 2021 but deferred consideration of the

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contempt issue until the trial on the merits scheduled to be held in November 2021. The trial court later rescheduled the trial for August 26, 2021, and ordered that both the visitation issue and the contempt issue would be heard at that time; the trial court then rescheduled the trial on the merits from August 26, 2021, to September 23, 2021.

At the trial on September 23, 2021, the father again challenged the trial court's subject-matter jurisdiction under the UCCJEA and its personal jurisdiction over him. Counsel for the mother pointed out that the father had had several attorneys and conceded that the father had initially raised the issue of personal jurisdiction by motion; however, counsel for the mother contended that, because Ravi had never requested that the trial court consider the issue of personal jurisdiction at the December 2020 pendente lite hearing, the issue of personal jurisdiction had been waived. The trial court indicated on the record that it believed that the personal-jurisdiction argument had not been timely asserted or supported. Regarding the trial court's subject-matter jurisdiction over the mother's custody-modification action under the UCCJEA, the trial court indicated that the father had not presented at any hearing specific legal citations to statutes or caselaw or facts relevant to the

determination of subject-matter jurisdiction under the UCCJEA. However, the trial court indicated that it would reconsider "the jurisdictional issue" after the conclusion of the trial on the merits, and it later set a hearing on the jurisdictional issues for October 5, 2021.¹

On November 4, 2021, the trial court entered a final judgment that, among other things, modified the visitation provisions of the Louisiana judgment by awarding the father unsupervised visitation on the first and third weekends of each month from Friday at 6:00 p.m. until 6:00 p.m. on the following Sunday, on certain holidays, and from June 15 to July 15 of each year. In the judgment, the trial court stated that it had communicated with the Louisiana court and had held a hearing on the jurisdictional issue on October 5, 2021, at which, it said, the parties had been permitted to present legal arguments and evidence. The judgment further provided that "[t]he State of Alabama would be the more convenient jurisdiction/forum for any ongoing custody and visitation dispute between the parties. Louisiana has declined to exercise continuing jurisdiction over the parties; therefore, Alabama is the proper

¹We were not provided with a transcript of that hearing if one exists.

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jurisdiction." In addition, the judgment concluded that the father had waived the issue of personal jurisdiction but stated that, if he had not, that the father "had provided testimony [at the trial that] supports a conclusion that this court has personal jurisdiction over the [father]."

The mother filed a postjudgment motion on November 15, 2021, and the father filed a postjudgment motion on December 2, 2021. The trial court denied both postjudgment motions on December 21, 2021. The mother filed a notice of appeal to this court on December 30, 2021; her appeal was assigned case number 2210283. The father filed a notice of appeal to this court on January 20, 2021; his cross-appeal was assigned case number 2210342.

Because the father raises jurisdictional arguments on appeal and because we find the father's subject-matter-jurisdiction argument to be dispositive, we will not set out the mother's arguments or consider those arguments in this opinion. See B.N. v. Madison Cnty. Dep't of Hum. Res., 151 So. 3d 1115, 1122 (Ala. Civ. App. 2014) (pretermittting other arguments raised on appeal when resolution of a jurisdictional issue was

dispositive). We also pretermitt discussion of the father's personal-jurisdiction argument.²

The father is correct that, at the time the mother commenced her custody-modification action, the trial court lacked subject-matter jurisdiction to modify the Louisiana judgment under the UCCJEA, except insofar as the trial court began exercising temporary emergency jurisdiction under the UCCJEA. See Ala. Code 1975, § 30-3B-204

²We note that, as the plaintiff, the mother bore the burden of establishing that the trial court had personal jurisdiction over the father. Ex parte Vega-Lopez, 297 So. 3d 1273, 1278 (Ala. Civ. App. 2019). Because the mother did not make any averments in her custody-modification petition relating to minimum contacts to establish personal jurisdiction over the father, the father was not required to present evidence to controvert such nonexistent jurisdictional averments. See Ex parte W.C.R., 98 So. 3d 1144, 1145 (Ala. Civ. App. 2012); Ex parte Vega-Lopez, 297 So. 3d at 1279. Furthermore, the father's participation in the litigation after the April 2021 denial of his motion to dismiss did not waive his personal-jurisdiction defense on appeal. See Ala. Code 1975, § 6-8-101 ("A party may raise the defense[] of ... insufficiency of service of process and, losing thereon, proceed to litigate on the merits; and, losing on the merits, the party may appeal and, on appeal, attack the judgment both on the merits and on such ground[] ... as he urged below."). Committee Comments on 1973 Adoption of Rule 12, Ala. R. Civ. P. ("[A] party can claim on appeal error in overruling his jurisdiction objections even though he went ahead and contested on the merits after those objections we overruled."); Hubbard v. State ex rel. Hubbard, 625 So. 2d 815, 816 (Ala. Civ. App. 1993) (explaining that a party's participation in litigation after raising the issue of the court's alleged lack of personal jurisdiction over him did not waive the defense).

(providing that a court may exercise temporary emergency jurisdiction over a child-custody determination when the child is present in this state and the child is abandoned or action by a court is necessary to protect the child from an emergency threatening the child's welfare). As the father informed the trial court, pursuant to Louisiana's version of the UCCJEA, specifically, La. Stat. Ann. § 13:1814, which is substantially similar to § 30-3B-202, the Louisiana court retained exclusive, continuing jurisdiction to modify the child-custody determination in the Louisiana judgment.³ Because the child was present in Alabama and because the

³The Louisiana statute provides, in pertinent part:

"A. Except as otherwise provided in R.S. 13:1816, a court of this state which has made a child custody determination consistent with R.S. 13:1813 or 1815 has exclusive, continuing jurisdiction over the determination until:

"(1) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

"(2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state."

mother alleged facts indicating that the child needed to be protected from alleged abuse, the trial court was able to exercise temporary emergency jurisdiction over the custody-modification action instituted by the mother pursuant to § 30-3B-204. However, because the mother's petition clearly sought modification of the Louisiana judgment, the trial court was required by § 30-3B-204(d) to "immediately communicate" with the Louisiana court and by § 30-3B-204(c) to "specify in [its temporary emergency order] a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under [§ 30-3B-201 through § 30-3B-203]," neither of which the trial court did. The trial court failed to recognize the applicability of the UCCJEA or to comply with any of its requirements, despite having had the application of the UCCJEA raised by the father in his initial motion to dismiss. The UCCJEA provides that it governs subject-matter jurisdiction, which cannot be created by the consent or assent of the parties; in other words, a lack of subject-matter jurisdiction under the UCCJEA cannot be waived. M.B.L. v. G.G.L., 1 So. 3d 1048, 1051 (Ala. Civ. App. 2008). Thus, when the UCCJEA is implicated, a trial court, in order to satisfy itself that it has subject-matter jurisdiction, should

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consult the UCCJEA and follow the procedures outlined therein, regardless of whether the parties have specifically directed the trial court to applicable sections of the UCCJEA.

Instead of complying with the requirements of § 30-3B-204 in December 2020, the trial court continued to exercise jurisdiction over the mother's custody-modification action without communicating in any way with the Louisiana court. In April 2021, the trial court determined, purportedly in compliance with Ala. Code 1975, § 30-3B-203, that it had subject-matter jurisdiction over the custody-modification action because, it stated, (1) it had determined that "a court of this state would be a more convenient forum pursuant to Ala. Code 1975, § 30-3B-207," (2) the father had "offered no definitive proof that the State of Louisiana continued to exercise jurisdiction over the subject matter," and (3) "the State of Alabama would be the child's home state if this were an initial child custody proceeding," because the child had been living in Alabama for three years at the time of the April 2021 hearing. See Ala. Code 1975, § 30-3B-201(a)(1) (setting out home-state jurisdiction over an initial child-custody determination). However, the trial court improperly applied § 30-3B-203(1).

Section 30-3B-203 provides, in its entirety:

"Except as otherwise provided in Section 30-3B-204, [Ala. Code 1975,] a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 30-3B-201(a)(1) or (2)[, Ala. Code 1975,] and:

"(1) The court of the other state determines it no longer has continuing, exclusive jurisdiction under Section 30-3B-202[, Ala. Code 1975,] or that a court of this state would be a more convenient forum under Section 30-3B-207[, Ala. Code 1975];
or

"(2) A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state."

Because it is undisputed that the father remains a resident of Louisiana, the only provision under which the trial court could have proceeded is § 30-3B-203(1), which authorizes only the state that made the existing child-custody determination to determine whether another state would be a more convenient forum. Thus, in the present case, the court that should have determined whether Alabama was a more convenient forum was the Louisiana court, not the trial court.

When the father again raised the issue of subject-matter jurisdiction at the outset of the September 2021 trial, the trial court

indicated that, had it been informed that it should have communicated with the Louisiana court at an earlier point in the proceeding, it would have done so. Apparently, upon consideration of the father's arguments and review of the UCCJEA, the trial court determined, after the trial, that it should communicate with the Louisiana court. The record on appeal does not contain a "record" of the trial court's communication with the Louisiana court,⁴ see Ala. Code 1975, § 30-3B-110(d) (requiring that a trial court make a record of a communication with a court of another jurisdiction and to grant access to that record to the parties), and it is not clear whether the parties were permitted to participate in that communication. See Ala. Code 1975, § 30-3B-110(b) (permitting, but not requiring, a trial court to allow the parties to participate in the communication with the court of another state). However, in the final judgment, the trial court represented that the Louisiana court had communicated that it declined to exercise its continuing exclusive jurisdiction and had "notified" the trial court that Alabama was the more convenient forum.

⁴The term "record" is defined in Ala. Code 1975, § 30-3B-110(e), as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

We faced a similar dilemma in B.N., which involved the initial exercise of temporary emergency jurisdiction in a dependency proceeding by an Alabama juvenile court over a child whose custody had previously been determined by the judgment of a Mississippi court. B.N., 151 So. 3d at 1121. Like the trial court in the present case, the juvenile court in B.N. indicated in a judgment that it had communicated with the Mississippi court and that the Mississippi court had conceded that the juvenile court was "the proper court to assert jurisdiction over the custody of the child." Id. However, we explained that the juvenile court had failed to comply with the UCCJEA because the record failed to disclose that the juvenile court had made any record of its reported communications with the Mississippi court or to demonstrate that the juvenile court had provided any such record to the parties as required by § 30-3B-110(d). Id. at 1122.

Because the trial court failed to comply with the UCCJEA in any manner until after the completion of the trial in this matter, we conclude that the trial court lacked subject-matter jurisdiction to hold the trial and to enter the November 4, 2021, judgment. See J.D. v. Lauderdale Cnty. Dep't of Hum. Res., 121 So. 3d 381, 386 (Ala. Civ. App. 2013). A judgment

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entered by a court without subject-matter jurisdiction is void. Fuller v. Fuller, 93 So. 3d 961, 966 (Ala. Civ. App. 2012). A void judgment will not support an appeal. G.S. v. R.L., 259 So. 3d 677, 682 (Ala. Civ. App. 2018). Accordingly, we dismiss the father's appeal with instructions that the trial court set aside the November 4, 2021, judgment and all orders entered after February 2021. Because we have determined that the November 4, 2021, judgment is void for lack of subject-matter jurisdiction, we also dismiss the mother's appeal.⁵

2210283 -- APPEAL DISMISSED WITH INSTRUCTIONS.

2210342 -- CROSS-APPEAL DISMISSED WITH INSTRUCTIONS.

Thompson, P.J., and Edwards, Hanson, and Fridy, JJ., concur.

Moore, J., concurs specially.

⁵Apparently at the request of counsel for the father, the Louisiana court filed with this court a certified transcript from a January 4, 2022, hearing before the Louisiana court. Because that transcript is not a part of the record before this court, we will not consider it. Etherton v. City of Homewood, 700 So. 2d 1374, 1378 (Ala. 1997) (quoting Cooper v. Adams, 295 Ala. 58, 61, 322 So. 2d 706, 708 (1975)) (explaining that an appellate court may not consider materials not contained in the record on appeal and restating that general rule, as follows: "'(1) Argument in brief reciting matters not disclosed by the record cannot be considered on appeal. (2) The record cannot be impeached on appeal by statements in brief, by affidavits, or by other evidence not appearing in the record.'").

MOORE, Judge, concurring specially.

I concur that the appeals should be dismissed. The Marshall Circuit Court ("the trial court") lacked jurisdiction over the case, and, thus, its judgment purporting to modify the child-custody determination in the parties' divorce judgment ("the Louisiana judgment") entered by the Jefferson Parish District Court of the State of Louisiana ("the Louisiana court") is void. I write specially to address the improper procedure that the trial court used to assert jurisdiction over the case.

Section 30-3B-203(1), Ala. Code 1975, a part of the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), Ala. Code 1975, § 30-3B-101 et seq., provides that an Alabama court that has jurisdiction to make an initial child-custody determination may modify a foreign child-custody determination if the foreign court determines that the Alabama court "would be a more convenient forum under [Ala. Code 1975, §] 30-3B-207." Section 30-3B-203(1) contemplates that any determination made by a foreign court that an Alabama court would be a more convenient forum shall be made in compliance with Ala. Code 1975, § 30-3B-207, which provides, in pertinent part:

"(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is

appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

"(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

"(2) The length of time the child has resided outside this state;

"(3) The distance between the court in this state and the court in the state that would assume jurisdiction;

"(4) The relative financial circumstances of the parties;

"(5) Any agreement of the parties as to which state should assume jurisdiction;

"(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

"(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and,

"(8) The familiarity of the court of each state with the facts and issues in the pending litigation."

Louisiana has adopted an identical provision controlling the procedure by which a court of that state determines that a court of another state is a more convenient forum. See La. Stat. Ann. § 13:1819.

Like § 30-3B-207, the Louisiana statute provides that a court with continuing, exclusive jurisdiction over a child-custody determination may decline to exercise that jurisdiction only "if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." It also provides that before a court can make that determination "the court shall allow the parties to submit information and shall consider all relevant factors." A court cannot determine that another forum is a more convenient forum without receiving evidence from the parties regarding the relevant factors and making an informed determination based on that evidence. See Brewer v. Carter, 218 Cal. App. 4th 1312, 1320, 160 Cal. Rptr. 3d 853, 859 (2013). Moreover, the UCCJEA contemplates that the determination that another state's court is a more convenient forum will be made in a written order or judgment, see Ala. Code 1975, § 30-3B-102(3) & (8), not in a discussion between two judges in an unrecorded telephone conversation. See Velasquez v. Ralls, 192 N.C. App. 505, 508, 665 S.E.2d 825, 827 (2008); Landa v. Norris, 313 N.W.2d 423, 425 (Minn. 1981) (construing Minnesota's Uniform Child Custody Jurisdiction Act, the predecessor to its Uniform Child Custody Jurisdiction and Enforcement Act, as

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requiring a formal written determination by the foreign court declining jurisdiction and stating that "informal comments cannot serve as the basis for an exercise of jurisdiction by the courts of [Minnesota]"); see also Ala. Code 1975, § 30-3B-110 (regulating telephone communications between courts and requiring that any substantive conversation regarding jurisdiction shall be recorded).

In this case, the Louisiana court purportedly determined that the trial court would be the more convenient forum to adjudicate the custody-modification petition without making a formal, written determination and based solely on a telephone conversation with the trial-court judge without any input from the parties and without assessing any evidence relating to the various relevant factors set forth in the controlling statutes. That procedure did not comply with § 30-3B-207 and § 30-3B-110 and did not vest the trial court with jurisdiction to modify the custody determination in the Louisiana judgment under § 30-3B-203(1).

Furthermore, although the UCCJEA authorizes an Alabama court to request that a foreign court make a determination as to which court is the more convenient forum, see § 30-3B-207(a), the UCCJEA contemplates that that request should be made early in the litigation.

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See Marler v. Lambrianakos, 281 So. 3d 415, 425 (Ala. Civ. App. 2018)

("Jurisdiction under the UCCJEA is determined at the time of the commencement of an action."). As the main opinion correctly determines, the trial court lacked jurisdiction to modify the custody determination in the Louisiana judgment when the action was commenced. Although the trial court had a duty to immediately inquire into its jurisdiction and although its jurisdiction had been repeatedly challenged, the trial court proceeded to preside over the custody-modification action for almost one full year, even to the point of trying the case, before it even attempted to comply with the UCCJEA to acquire the jurisdiction it was lacking. As this case illustrates, the jurisdictional issue should have been confronted and resolved at the outset of the litigation so that time, expenses, and judicial resources were not wasted in violation of not only the letter, but also the spirit, of the UCCJEA.