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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of

KIMBERLEY DAWN POHL, *Petitioner/Appellee,*

v.

KENT DOUGLAS POHL, *Respondent/Appellant*.

No. 1 CA-CV 18-0159 FC
FILED 9-26-2019

Appeal from the Superior Court in Maricopa County
No. FC2014-090269
The Honorable Jeffrey A. Rueter, Judge

AFFIRMED

COUNSEL

Kimberley Dawn Pohl, Alberta, Canada
Petitioner/Appellee

Katz & Bloom, Phoenix
By Norman M. Katz
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge James B. Morse Jr. joined.

W E I N Z W E I G, Judge:

¶1 Kent Douglas Pohl ("Father") appeals the superior court's order declining to exercise jurisdiction to modify a child custody determination. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Kimberley Dawn Pohl ("Mother") were married and later divorced in the Province of Alberta, Canada. They share one child, R.P., born in Alberta in December 2004. The Court of Queen's Bench of Alberta entered the divorce decree in December 2007 after four years of marriage, awarding joint legal custody to the parents, with Mother designated the primary parent, and granting visitation rights to Father described as "generous and liberal access to the child[.]" Father was ordered to pay child support.

¶3 The Canadian court often modified the terms of its divorce decree between 2008 and 2011. It modified Father's visitation rights and child support obligations in September 2008 when he decided to relocate to the United Kingdom and change employment, causing a significant decline in his income. It then modified Father's visitation rights in May 2010, reaffirming his weekly webcam access and granting him holiday access to R.P. in the summer, winter and spring. The court again modified Father's child support obligations in June 2010 after evaluating the parties' incomes.

¶4 The Canadian court also modified the divorce decree in February 2011, finding a "material change in circumstances" and authorizing Mother to move to Arizona with the child over Father's objection, ordering that Mother "shall be at liberty to move [with the child] to Mesa, Arizona." Moreover, the court modified Father's visitation rights and monthly child support obligations. Father was given parenting time every summer and every other winter, but needed to provide notice of his visitation plans.

¶5 Mother moved to Arizona in 2011 and registered the Canadian divorce decree and related orders in Maricopa County Superior Court in April 2015. In her affidavit, Mother indicated she "want[ed] to register the order[,]" "be able to enforce the order in Arizona[,]" and "be able to change the order in Arizona." She claimed that Father was in arrears on child support, which Father disputed. Father did not object to registering the decree in Arizona, but he complained about Mother's interference with his visitation rights.

¶6 The superior court was often asked to enforce the Canadian divorce decree. Father first petitioned the court for help in May 2015 after Mother refused to confirm that she would make R.P. available for Father to exercise his parenting time in the summer of 2015. After an evidentiary hearing, the court entered an order (the "2015 Order") to enforce "the current order of parenting time and child support entered February 2011 in Canada." The 2015 Order set forth Father's travel dates and assorted requirements to ensure safe and informed travel, including ongoing communication between the parties.

¶7 Father again moved to enforce the decree to ensure his parenting time for the 2015 winter break, but Mother relented before the court got involved. Even still, Mother called the police thereafter because Father had taken R.P to visit San Francisco, which she believed to violate the decree.

¶8 Father later petitioned the court in March 2016 for an order to show cause, seeking to enforce parenting time and hold Mother in contempt. He claimed that Mother had unilaterally ended his weekly webcam access with R.P. and refused Father's request for summer parenting time in 2016. Mother claimed her denial of summer access was proper because Father had not provided an itinerary as required under the superior court's 2015 Order. Mother also claimed she scheduled a trip for herself and R.P. over the same dates. Father claimed the 2015 Order only applied to his summer 2015 parenting time.

¶9 In October 2016, the superior court held Mother in contempt of court, finding that she "willfully violated a court order by failing to produce the child for Father's summer 2016 parenting time." The court determined that Mother had interfered with Father's parenting time and access, denying his only chance for parenting time in 2016 and preventing webcam access to his child. The court also bemoaned that Mother booked "an out of country vacation for the child over the exact dates that Father was requesting in the summer of 2016" only to "thwart Father's parenting

time with the child." The court crafted a remedy for Father to receive additional webcam access and parenting time, including "the entire winter break in 2016." The court also granted Father's request for an award of attorney's fees because "Mother acted unreasonably in the litigation."

¶10 Father filed a notice of non-compliance and request for hearing in January 2017 after Mother stopped his webcam access to the child and again "refused to cooperate with Father" about his 2017 summer parenting time. The court scheduled a March 2017 hearing. At the hearing, the parties advised the superior court that they had "reached an agreement on all issues," which the court approved "as dictated into the record this date as a binding agreement pursuant to Rule 69, *Arizona Rules of Family Law Procedure*." The agreement recognized that Father had unlimited telephonic access to the child and set forth the specific dates in May and June 2017 for Father to exercise his parenting time.

¶11 A few months later, Mother decided to return to Alberta, Canada with R.P. She informed Father of her decision on August 7, and he petitioned the Arizona superior court to modify legal decision making, parenting time and child support on August 31. Father requested sole legal decision-making authority and custody of R.P. because Mother never sought or received the superior court's permission to relocate and never sought his input or consent, creating "a substantial and continuing change of circumstances which warrants a modification of the existing orders."

¶12 Mother disagreed. She argued she was not "in violation of the current orders as the current Order of Queens' Bench of Alberta . . . allowed Mother, at her liberty, to move to Arizona [and never] den[ies] Mother the ability to return." She also filed a "motion to change jurisdiction" arguing that Arizona lacked jurisdiction to modify the Canadian orders and the superior court should decline jurisdiction because Arizona is not a convenient forum. Father countered that only Arizona had jurisdiction, not Canada.

¶13 The superior court granted Mother's motion on January 31, 2018, based on two independent grounds, including that (1) Alberta, Canada was the "home state" under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), and (2) if Arizona has jurisdiction to modify the divorce decree, the superior court "declin[ed] to exercise its jurisdiction" because "Canada is the more appropriate forum" and "Arizona is no longer a convenient forum" under A.R.S. § 25-1037. The court stressed that Mother returned to Canada and Father resides in the

United Kingdom, leaving no parent in the jurisdiction. Father timely appealed here.

¶14 Father separately moved the Canadian court to return the child to Arizona under the Hague Convention. The Canadian court denied Father's application on July 17, 2018.[1] The Canadian court likewise reasoned R.P. should not be returned to Arizona because "[n]o one resides in Arizona" and "[t]here is no one in Arizona to look after the child," which would place R.P. "in an intolerable situation." The court stressed that Mother lives in Alberta while Father resides in the United Kingdom, and the child "attended school in Alberta over the last school year." The court described Father's position as "hard to understand" because "while he resides in the United Kingdom and sees his child twice a year, he nevertheless wants the child to return to a jurisdiction that the father has no connection to and has never had any connection to." The Canadian court then anticipated Father's arguments here:

> One can only surmise that perhaps the father believes he may have more success in any applications he were to bring in Arizona than in Alberta but as I pointed out to him during his argument, this court is well equipped to deal with all matters pertaining to the child including custody, access and support, even more so since the original orders in that regard were all granted in Alberta. All of the father's and mother's extended family also reside in Alberta.

DISCUSSION

¶15 Father challenges the order granting Mother's motion to change jurisdiction, arguing the superior court erroneously found that Canada was the "home state" under the UCCJEA and that Arizona was an inconvenient forum under A.R.S. § 25-1037(A)–(B).

¶16 As an initial matter, we are not persuaded that the superior court lacked jurisdiction to modify the divorce decree because Alberta is the "home state" under the UCCJEA. After all, the superior court entered a Rule 69 agreement that modified the Canadian decree and expanded the

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[1] We take judicial notice of the Canadian order on appeal. *Regan v. First Nat'l Bank*, 55 Ariz. 320, 327 (1940) ("[C]ourts [may] take judicial notice of other actions involving similar parties and issues and of the pleadings therein, and that in passing upon the pleadings in one action they may and should consider the record in the other."). Ariz. R. Evid. 201.

court's role beyond mere enforcement. The court's actions represented an implicit determination that "the child, the child's parents, and any person acting as a parent do not presently reside in" the Province of Alberta. A.R.S. § 25-1032(A)(2). Even so, we affirm the superior court's decision based on its finding that Arizona is no longer a convenient forum under A.R.S. § 25-1037.

¶17 Arizona law directs that "[a] court of this state that has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." A.R.S. § 25-1037(A). The statute sets forth a non-exclusive list of potential relevant factors to consider, including (1) whether prior domestic violence has occurred and which state can best protect the parties and the child; (2) how long the child has lived outside Arizona; (3) the distance between Arizona and the alternative jurisdiction; (4) the nature and location of evidence to resolve the pending litigation; (5) whether the courts are familiar with the facts and issues; (6) whether the courts can expeditiously resolve the issues; (7) any jurisdictional agreements between the parties; and (8) their relative financial circumstances. A.R.S. § 25-1037(B). Also relevant is the child's best interests. *Welch-Doden v. Roberts*, 202 Ariz. 201, 210-11, ¶ 43 (App. 2002).

¶18 Father argues the superior court erred in finding that Arizona was an inconvenient forum and the Canadian court was the more appropriate forum. We review the superior court's findings for an abuse of discretion. *Tiscornia v. Tiscornia*, 154 Ariz. 376, 377 (App. 1987).

¶19 We find no abuse of discretion. The first and seventh factors are irrelevant because the record includes no allegations of prior domestic violence and no jurisdictional agreement. Meanwhile, the record includes ample evidence that the remaining factors lean in favor of the Canadian court and against the superior court.

¶20 R.P. was born and presently resides in Alberta. R.P. has lived more than half his life in Alberta, including the last two formative years. He also attended school in Alberta for the past school year.

¶21 We find the distance between Arizona and Alberta to be unimportant because nobody lives in Arizona. As to the nature and location of evidence, both Mother and R.P. live in Alberta, and any documentary evidence from the Arizona proceedings is readily available to

the Canadian court. The extended families of Mother and Father also live in Alberta.

¶22 The relative financial circumstances do not weigh in favor of Arizona because neither Father nor Mother lives in Arizona. Father now resides in the United Kingdom and presented no evidence to show that Arizona litigation is less expensive or time-consuming than Canadian litigation. We are not persuaded by Father's general statement that his "costs of litigation would be greatly increased" if the case was heard in Alberta. Father has long directed this satellite litigation from another continent—thousands of miles from Alberta and even further from Arizona. As for an income comparison, the record shows that Father has historically made well more income than Mother.

¶23 The Canadian court is both familiar with the facts of this litigation and ready to expeditiously consider and decide the contested issues. The Canadian court recently addressed this very point, assuring the parties that it "is well equipped to deal with all matters pertaining to the child including custody, access and support, even more so since the original orders in that regard were all granted in Alberta." The Canadian court was significantly involved in this case since the initial divorce in 2007 through when Mother and R.P. moved to Arizona in 2011. The Canadian court issued the initial divorce decree and relevant orders. The parties then appeared before the Canadian court on several occasions seeking to modify the decree and related orders.

¶24 The Canadian court is particularly well suited to consider Father's argument that Mother returned to Alberta in violation of the divorce decree and should not be rewarded for her alleged misconduct. The Canadian court can likewise grant Father the relief he seeks—modifications to child custody and parenting time. The superior court did not err in finding that Arizona was no longer a convenient forum.

CONCLUSION

¶25 We affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA