IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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In re the Matter of:

ERIC HUBERT, *Petitioner/Appellant*,

*v.*

JENNIFER CARMONY, *Respondent/Appellee*.

No. 1 CA-CV 20-0362 FC
FILED 4-29-2021

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Appeal from the Superior Court in Maricopa County
No. FC2019-094466
The Honorable Joan M. Sinclair, Judge

**VACATED AND REMANDED**

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COUNSEL

Eric Hubert, Phoenix
*Petitioner/Appellant*

Defenders of Children, Phoenix
By Nina Joy Edidin, Jami Cornish
*Co-counsel for Respondent/Appellee*

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By Daniel Seth Riley
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**MEMORANDUM DECISION**

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Maria Elena Cruz joined.

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**H O W E**, Judge:

**¶1** Eric Hubert ("Father") challenges the family court's ruling declining to exercise jurisdiction under Arizona's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). For the following reasons, we vacate and remand for an evidentiary hearing.

**FACTUAL AND PROCEDURAL BACKGROUND**

**¶2** Father petitioned in May 2019 seeking a paternity order and joint legal decision-making authority for the parties' minor child. In November 2019, Father moved the court for alternate service, alleging that Jennifer Carmony ("Mother") had moved to El Paso, Texas, with the child and was avoiding service. He served Mother with the petition in El Paso on November 18, 2019.

**¶3** Father filed an amended petition in January 2020, seeking sole legal decision-making authority and limited supervised parenting time for Mother. He also requested temporary orders, expressing serious concerns about Mother's mental health, alleging that she had "withheld the child from Father for over seven (7) months," and expressing concern that she "may flee to . . . another country." That same month, the court entered temporary orders (1) requiring that Mother return the child to Arizona; (2) granting Father sole legal decision-making authority, and (3) granting Mother eight hours of weekly supervised parenting time. The court also set an evidentiary hearing for February 4, 2020.

**¶4** Mother moved to dismiss Father's petition, alleging that he had a significant history of domestic violence and that he had violated an order of protection entered in El Paso. She participated in the evidentiary hearing with her Texas counsel, who explained that related matters were pending in a Texas court that raised "possible jurisdiction issues." The family court determined that it had jurisdiction, appointed a best interests attorney for the child, and set a May 2020 trial date. It later entered new temporary orders implementing joint legal decision-making authority and

a week-on/week-off parenting time schedule with exchanges to take place in Tucson.

**¶5** In April 2020, Father asked the court to hold Mother in contempt, contending he had not seen the child since August 2019. Approximately ten days before trial, Mother moved on an expedited basis to continue the trial and to change jurisdiction under the UCCJEA. She contended that the matter should be adjudicated in Texas because "Father has engaged in unjustified conduct, has lied on verified pleadings filed with this Court, and Texas is the more convenient forum." Noting the Texas court had reset a temporary orders hearing for May 12, 2020, Mother also requested that the family court "participate in a Judicial Conference" with the Texas court and "decline and relinquish jurisdiction." While Father opposed Mother's motion, he did not oppose her request that the two courts confer.

**¶6** Thereafter, the family court issued a minute entry stating that it had "held a UCCJEA conference with a judge in El Paso, Texas relative to jurisdiction over this case." The court ruled that

> [t]he Petitioner lives in Arizona and the Respondent and child are now in Texas. Cases have been filed in both states. Despite the fact that the Respondent fled Arizona with the child, there are allegations of domestic violence between the parties and the Petitioner agreed to an order of protection in Texas which included the child. The Petitioner also has criminal charges in Texas. After consultation, both courts agreed that Texas was the most convenient forum to resolve the issues between the parties. Arizona declines jurisdiction over this case.

On these bases, the court vacated trial and its temporary orders.

**¶7** Father moved for reconsideration and moved for a new trial, but the court denied Father's motions. Father timely appealed.

## DISCUSSION

**¶8** A family court may decline to exercise UCCJEA jurisdiction "if it determines that [Arizona] 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). We review the court's ruling on this issue for an abuse of discretion. *Tiscornia v. Tiscornia*, 154 Ariz. 376, 377 (App. 1987) (applying the former Uniform Child Custody Jurisdiction Act).

**¶9** The parties agree that Arizona is the child's "home state" and that Arizona may exercise jurisdiction under the UCCJEA. A.R.S. § 25–1031(A); *Welch-Doden v. Roberts*, 202 Ariz. 201, 205 ¶ 15 (App. 2002). Before declining jurisdiction, the Arizona court must determine whether another state's exercise of jurisdiction is appropriate. A.R.S. § 25–1037(B). In doing so, 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.
>
> 8. The familiarity of the court of each state with the facts and issues in the pending litigation.

*Id*.

**¶10** The court also may communicate with courts in other states concerning the proceedings. A.R.S. § 25–1010(A); *see also* Comment to UCCJEA § 207. The court may allow the parties to participate in the communication. A.R.S. § 25–1010(B). If they cannot participate, the court must give them an opportunity "to present facts and legal arguments before a decision on jurisdiction is made." *Id*. If communication occurs beyond the matters of "schedules, calendars, court records and similar matters," the court must make a record of the communication, inform the parties promptly of it, and grant them access to the record. A.R.S. § 25–1010(C), (D).

**¶11** Father argues that consideration of all eight listed factors in A.R.S. § 25–1037(B) is mandatory, citing *Matter of McAndrews*, 193 A.3d 834 (N.H. 2018), and that the court abused its discretion by not considering all factors listed in A.R.S. § 25–1037(B) before declining to exercise jurisdiction. Mother argues that Father waived this issue by not raising it with the family court. Father, however, raised this issue in his motion for reconsideration and his motion for new trial. Furthermore, we decline to apply waiver in this instance because the child's best interests are at issue. *See, e.g., Nold v. Nold*, 232 Ariz. 270, 273 ¶ 10 (App. 2013) ("[I]f the best interests of the child trump the consequences ordinarily imposed for violations of the rules, then they should not be ignored under the discretionary doctrine of waiver.").

**¶12** As to the merits of Father's argument, A.R.S. § 25–1037(B) provides that the court "shall consider all relevant factors including" the specifically listed factors. A.R.S. § 25–1037(B). Generally, the use of the word "shall" in a statute "indicates a mandatory intent by the legislature." *Ins. Co. of N. Am. v. Superior Court In & For County of Santa Cruz*, 166 Ariz. 82, 85 (1990). But we can interpret the word "shall" as directory if that interpretation best serves the legislative purpose. *HCZ Const., Inc. v. First Franklin Fin. Corp.*, 199 Ariz. 361, 364 ¶ 11 (App. 2001). "The essential difference between a mandatory and a directory provision is that failure to comply with a directory provision does not invalidate the proceeding to which it relates, while failure to follow a mandatory provision does." *Id*. at 364 ¶ 9 n.1.

**¶13** When construing a statute derived from a uniform act such as the UCCJEA, this Court may consider decisions from other jurisdictions to achieve uniformity in interpretation. *Orca Communications Unlimited, LLC v. Noder*, 236 Ariz. 180, 184 ¶ 17 (2014). In *McAndrews*, the special master's decision on which the family court relied reflected consideration of some, but not all, of the factors listed in New Hampshire's version of the UCCJEA inconvenient forum statute. *McAndrews*, 193 A.3d at 837. The New Hampshire Supreme Court vacated the family court's ruling declining UCCJEA jurisdiction, concluding that its

> failure to provide a meaningful analysis of the factors that it relied upon in reaching its conclusion and its failure to address each specific factor required by the UCCJEA are untenable and unreasonable to the prejudice of the petitioner's case.

*Id*. at 841.

**¶14** Other state courts have similarly held that "all relevant factors must be considered in strict compliance with the inconvenient forum provision" of the UCCJEA. *In re Teagan K.-O.*, 242 A.3d 59, 72 n.21 (Conn. 2020); *see also In re Custody of N.G.H.*, 92 P.3d 1215, 1218 (Mont. 2004) (Montana's version of the UCCJEA "requires first that the District Court enter findings regarding why exercising its jurisdiction is inappropriate under the [eight statutory] factors."); *Watson v. Watson*, 724 N.W.2d 24, 34 (Neb. 2006); *Hogan v. McAndrew*, 131 A.3d 717, 724 (R.I. 2016); *In Interest of S.W.*, 424 P.3d 7, 11–12 (Utah 2017); *Murillo v. Murillo*, 684 S.E.2d 126, 128 (Ga. Ct. App. 2009); *In re Adoption of Baby Boy M.*, 193 P.3d 520, 526 (Kan. Ct. App. 2008); *Velasquez v. Ralls*, 665 S.E.2d 825, 827 (N.C. Ct. App. 2008); *Prizzia v. Prizzia*, 707 S.E.2d 461, 468 (Va. Ct. App. 2011). Those courts that do not require express findings as to each factor still generally require "findings that are sufficient to inform the parties of the court's reasoning and sufficient for effective appellate review." *Shanoski v. Miller*, 780 A.2d 275, 280 (Me. 2001); *see also Watson*, 724 N.W.2d at 34.

**¶15** Here, the family court's order, at a minimum, does not allow for effective appellate review. The court only addressed whether domestic violence had occurred, which constitutes only part of factor (1). In determining the factual dispute underlying this factor, the court ruled on the parties' written submissions without conducting an evidentiary hearing. To the extent the parties' credibility was at issue, the court's failure to hold an evidentiary hearing to resolve that dispute was improper. *See Volk v. Brame*, 235 Ariz. 462, 464 ¶ 2 (App. 2014) ("It is fundamental to due process that a court provide a forum for witness testimony, and that it refrain from resolving matters of credibility on documents alone."); *see also Greene v. Sawicki*, 1 CA–CV 17–0007 FC, 2018 WL 3118051, at *5 ¶ 19 (App. June 26, 2018) (mem. decision) (holding that the failure to conduct an evidentiary hearing to resolve disputed facts relevant to a § 25–1037(B) analysis—in particular, disputed domestic violence allegations—constitutes an abuse of discretion). The family court, therefore, abused its discretion by declining to exercise UCCJEA jurisdiction without (1) evaluating all relevant factors including the eight factors listed in § 25–1037(B) and (2) conducting an evidentiary hearing to resolve relevant factual disputes. *See, e.g., Prizzia*, 707 S.E.2d at 469 ("Because it did not allow the parties to present evidence pertaining to the statutory factors, the trial court could not have based its decision on a proper review of those factors.").

**¶16** Mother nonetheless contends that the family court's failure to make a record under A.R.S. § 25–1010(D) of its conference with the Texas court analyzing the A.R.S. § 25–1037(B) provisions constituted harmless

error, citing *Black v. Black*, 114 Ariz. 282 (1977). In *Black*, the family court conducted an off-the-record interview with the parties' minor children as part of its parenting time determinations. *Id*. at 284. While our supreme court "agree[d] that [the interview] should only have been conducted pursuant to a stipulation between the parties," it found harmless error because it could affirm judgment "apart from any consideration of the . . . interview." *Id*. Here, the order declining jurisdiction cites the court's "consultation" with the Texas court in which they agreed that "Texas was the most convenient forum to resolve the issues between the parties." Given the paucity of the court's findings, however, we cannnot affirm the order without considering this "consultation." As such, assuming without deciding that the failure to create a proper record under § 25–1010(D) could be deemed harmless error in some cases, it was not harmless error in this case.

**¶17** Father also contends that the court should have stayed, rather than dismissed, the case under A.R.S. § 25–1037(C). We agree. Should the court determine on remand that Arizona is an inconvenient forum, it must stay this case in favor of the ongoing Texas proceedings. A.R.S. § 25–1037(C); *see also* Comment to UCCJEA § 207 ("[T]he court may not simply dismiss the action.").

## CONCLUSION

**¶18** For these reasons, we vacate the order declining jurisdiction and remand for an evidentiary hearing addressing the A.R.S. § 25–1037(B) factors and any other relevant factors. *See* Comment to UCCJEA § 207 (stating that the list of statutory factors "is not meant to be exclusive.").


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