IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

ERIN MILEY, *Petitioner/Appellant*,

v.

CURTIS PHELPS, *Respondent/Appellee*.

No. 1 CA-CV 22-0118 FC
FILED 9-8-2022

Appeal from the Superior Court in Yavapai County
No. V1300DO202180237
The Honorable Linda Wallace, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

Colburn Hintze Maletta PLLC, Phoenix
By Darin Robert Colburn, Timothy Hintze, David Maletta, Donald D. Colburn
Counsel for Petitioner/Appellant

Curtis Phelps, Unity, NH
Respondent/Appellee

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the court, in which Presiding Judge David D. Weinzweig and Judge D. Steven Williams joined.

H O W E, Judge:

¶1 Erin Miley ("Mother") appeals the family court's order denying her motion to amend the order of dismissal or for reconsideration. For the following reasons, we vacate the order denying the motion and remand for further proceedings and findings consistent with this decision.[1]

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Curtis Phelps ("Father") were never married but share two minor children—one born in Arizona, the other in New Hampshire. Paternity has not been formally determined. The parties and children historically split their time between Arizona and New Hampshire. They lived in New Hampshire from June 11, 2019, to October 18, 2019. They lived in Arizona from October 18, 2019, to July 10, 2020. They returned to New Hampshire on July 10, 2020, until December 12, 2020. Most recently, they lived in Arizona from December 12, 2020,[2] to June 18, 2021, and in New Hampshire from June 18, 2021, until Mother decided to return with the children on August 21, 2021. In August 2021, while they were all in New Hampshire, Father petitioned for legal decision-making. The New Hampshire family court ordered the parties to remain in the state. But in August, Mother took the children back to Arizona, where she petitioned for legal decision-making, parenting time, and child support. She alleged that they lived in Arizona for four years but took annual summer trips to New Hampshire. She also alleged that Father committed domestic violence against her as the children watched and that he extended their trips against

[1] Father did not file an answering brief. In our discretion, we decline to consider this a confession of error. *See Nydam v. Crawford*, 181 Ariz. 101, 101 (App. 1994).

[2] The record shows that Father claims this time period is from January 2021, not December 2020.

her will. She alleged that she left New Hampshire after Father petitioned there "to ensure their safety."

¶3 Father responded to the petition and simultaneously moved to dismiss for lack of jurisdiction. In his motion, he argued that the parties and children resided in New Hampshire since June 2021 and that New Hampshire had been their primary residence from 2017 until Mother "fled" to Arizona in August. He alleged that the parties intended to raise the kids in New Hampshire and that the children received medical and dental services in New Hampshire. He also alleged that Mother consumed toxic substances and committed domestic violence against him. He also noted that the New Hampshire court conducted a hearing in October about jurisdiction and decided to communicate with the Arizona court about this issue. Mother alleged in her response that the children had begun dental services in Arizona and then "sought out services" in New Hampshire, but that their pediatrician was in Arizona. She added that she obtained an Arizona driver's license on her most recent return. She further alleged that in 2017, Father threatened her with a butcher knife while she was holding their newborn daughter.

¶4 The Arizona family court conducted a Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") conference with the New Hampshire court without the parties or their counsel present. The courts considered that Father petitioned first in New Hampshire, and that the parties filed tax returns and received Medicaid benefits in Arizona but recently voted in New Hampshire. They also noted that Mother recently renewed her driver's license in New Hampshire. The New Hampshire court noted that it "had the six-month requirement" but did not "know if [the parties] ever spent six months consecutive in New Hampshire." The courts agreed that although the parties "ha[d] some indicia of residency in both locations," New Hampshire "ha[d] the greater claim to jurisdiction." The Arizona court granted Father's motion and dismissed the case because "[j]urisdiction was accepted in the State of New Hampshire after conference." Twenty-five days later, Mother moved to amend the order of dismissal or for reconsideration under Arizona Rule of Family Law Procedure ("Rule") 83(a)(1)(F)–(H) and Rule 35.1. The court denied the motion. Mother timely appealed.

DISCUSSION

¶5 Mother argues that the court erred (1) in conducting the UCCJEA conference without providing the parties opportunity to present facts and legal argument under A.R.S. § 25–1010 and (2) in failing to conduct

an evidentiary hearing under A.R.S. § 25–1037(B) before declining jurisdiction, depriving Mother of due process. We review the family court's denial of a motion for reconsideration for an abuse of discretion. *Tilley v. Delci*, 220 Ariz. 233, 238 ¶ 16 (App. 2009). But we review de novo questions of law that relate to such motions, including questions about subject-matter jurisdiction under the UCCJEA. *In re Marriage of Margain & Ruiz-Bours*, 251 Ariz. 122, 126 ¶ 10 (App. 2021); *McGovern v. McGovern*, 201 Ariz. 172, 175 ¶ 6 (App. 2001). An error of law constitutes an abuse of discretion. *Hubert v. Carmony*, 251 Ariz. 531, 533 ¶ 7 (App. 2021).

¶6 The court erred in denying Mother's motion to amend or reconsider. A primary purpose of the UCCJEA is "to avoid jurisdictional competition and conflict," *Margain & Ruiz-Bours*, 251 Ariz. at 127 ¶ 13 (internal quotations omitted) (quoting *Welch-Doden v. Roberts*, 202 Ariz. 201, 208 ¶ 32 (App. 2002)). Since the child's home state has jurisdictional priority, *id.*, a conflict between state jurisdictions should be resolved to "strengthen" and not "dilute the certainty of home state jurisdiction," *Welch-Doden*, 202 Ariz. at 208 ¶ 32. To fulfill the UCCJEA's purpose, the Arizona family court "may communicate with a court in another state concerning a proceeding." A.R.S. § 25–1010(A). The court may, but is not required to, allow the parties to participate in that communication. A.R.S. § 25–1010(B); *Hubert*, 251 Ariz. at 534 ¶ 9. If the parties do not participate, however, the court must give them an opportunity "to present facts and legal arguments before a decision on jurisdiction is made." A.R.S. § 25–1010(B).[3]

¶7 Here, the court did not conduct the UCCJEA conference in the manner prescribed in Arizona's UCCJEA statutes. *See* A.R.S. § 25–1001 to –1067. The purpose of the UCCJEA conference was to determine which state had jurisdiction to make the initial child custody determination, *see* A.R.S. § 25–1031, specifically whether Arizona or New Hampshire was the home state. Jurisdiction had not yet been determined in New Hampshire when the court participated in the UCCJEA conference with the Arizona court. Neither the parties nor their counsel were present at the conference. And although the court had the preexisting record before it, which included the parties' pleadings, motions, and responses, it did not provide the parties an opportunity to present facts and legal argument before the conference. *See Welch-Doden*, 202 Ariz. at 203 ¶¶ 6–7 (stating that Arizona court held evidentiary hearing on jurisdiction issue, during which it conferred with Oklahoma court about the status of the Oklahoma matter pursuant to A.R.S.

[3] New Hampshire has an identical rule. *See* N.H. Rev. Stat § 458–A:9(II).

§ 25–1010). Mother, in fact, contends that she first learned of the conference upon receiving the order dismissing the case. Therefore, the court erred in denying Mother's motion.

¶8 Mother also argues that the Arizona court erred in declining jurisdiction without the proper A.R.S. § 25–1037(B) findings. But before it can decline jurisdiction, Arizona must first be the home state or otherwise have jurisdiction under UCCJEA. A.R.S. § 25–1037(A); *Melgar v. Campo*, 215 Ariz. 605, 608 ¶ 16 n.7 (App. 2007). If the Arizona court determines that it has jurisdiction, it may then determine whether it is an inconvenient forum and decline jurisdiction because the court of another state is a more appropriate forum. A.R.S. § 25–1037(A). The court makes this determination after holding an evidentiary hearing and making express findings on the factors about the parties and children, their connections to the state, and whether the state is an appropriate forum to adjudicate the case. A.R.S. § 25–1037(B)(1)–(8); *Hubert*, 251 Ariz. 534 ¶ 12, 535 ¶¶ 14–15. Failing to make such factual findings is an abuse of discretion. *Hubert*, 251 Ariz. at 535 ¶ 14. If the court finds that New Hampshire is the more appropriate forum, then it should stay, rather than dismiss, the case. A.R.S. § 25–1037(C); *Hubert*, 251 Ariz. at 536 ¶ 17.

¶9 Further, Arizona "shall not exercise jurisdiction" if another child custody proceeding simultaneously has commenced in a state that has "jurisdiction substantially in conformity with this chapter," A.R.S. § 25–1036(A), which may mean that the state in which that court is located is the child's home state, *see Welch-Doden*, 202 Ariz. at 211 ¶ 47 (finding that even though mother filed the child custody proceeding first in Arizona, it did not have jurisdiction "substantially in conformity with this chapter" because Oklahoma had home state jurisdiction), or was a more appropriate forum, *see* A.R.S. § 25–1037. Whether New Hampshire has jurisdiction substantially in conformity with this chapter is unclear because the record indicates that the court did not clearly apply the statutory standard to determine whether it is the home state. If Arizona is the children's home state "on the date of the commencement of the [child custody] proceeding," it has home state jurisdiction. A.R.S. § 25–1031(A)(1). Arizona also has home state jurisdiction if it was the home state "within six months before the commencement of the proceeding," A.R.S. § 25–1031(A)(1), or when "a child lived with a parent . . . for at least six consecutive months immediately before the commencement" of the proceeding, A.R.S. § 25–1002(7)(a).[4] The former statute modifies and enlarges the latter. *See Welch-Doden*, 202 Ariz.

[4] New Hampshire has an identical six-month standard for determining the home state. *See* N.H. Rev. Stat. § 458–A:1(VII), –A:12(I)(a).

at 208 ¶ 33. If the children resided in more than one state six months immediately before the commencement of the proceeding, then "the applicable time period to determine 'home state' in such circumstances is 'within six months before the commencement of the [child custody] proceeding.'" *Id.* at 208–09 ¶ 33 (quoting A.R.S. § 25–1031(A)(1)).

¶10 Here, the courts did not clearly determine whether New Hampshire or Arizona was the home state to make the initial child custody determination. The record provides some indication that the six-month rule was briefly considered, since the New Hampshire court noted, "We had the six-month requirement. I don't know if they've ever spent six months consecutive in New Hampshire." But the finding that some indicia of residency existed in both locations, yet New Hampshire had "the greater claim to jurisdiction," was vague and did not resolve the issue. The courts should have considered how long the children spent in each state. *See Welch-Doden*, 202 Ariz. at 206 ¶ 20, 208–09 ¶¶ 33, 36 (holding that Oklahoma is the home state because the child lived there for six consecutive months and in Arizona for four consecutive months immediately before the petition; Oklahoma was the home state "*within* six months of the filing of the petition . . . and thus ha[d] initial jurisdiction"). Instead, the conference involved discussions about who petitioned first and where the parties filed their tax returns, voted, and renewed their driver's licenses.

¶11 We vacate the order and remand to allow the family court to hold a hearing pursuant to the UCCJEA and make additional findings and conclusions to determine whether Arizona or New Hampshire is the children's home state. To the extent that the parties dispute their dates of travel and other relevant facts, the family court must resolve those disputes. If the court determines that the children do not have a home state, then the court must analyze the children's substantial connections with the adjudicating state and other factors under A.R.S. § 25–1031(A)(2). *Welch-Doden*, 202 Ariz. at 205 ¶ 19.

CONCLUSION

¶12 For the foregoing reasons, we vacate the order and remand for further proceedings and findings consistent with this decision. Mother requests her reasonable attorney's fees under A.R.S. § 25–324, which requires that we consider both the financial resources of the parties and the reasonableness of their positions throughout the proceedings. Neither party, however, has provided information of their financial resources. We cannot comply with the statutory requirements and therefore decline to award her attorney's fees. *See Hustralid v. Stakebake*, No. 1 CA-CV 21-0073

FC, 2022 WL 3097906, at *7 ¶ 29 (Ariz. App. Aug. 4, 2022) (denying fee requests because neither party provided information of their financial resources or pointed to the record where their financial information could be found). Further, an award of fees and costs would be premature until the jurisdiction issue is resolved. *See Duckstein v. Wolf*, 230 Ariz. 227, 235 ¶ 27 (App. 2012) (declining fee request until personal jurisdiction issue is resolved). On remand, the family court has discretion to award attorney's fees and costs both for the trial court proceedings and this appeal. *Id.*

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