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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Matter of:

JULIE D. MILLER, *Petitioner/Appellee*,

v.

RYAN S. MILLER, *Respondent/Appellant*.

No. 1 CA-CV 22-0610 FC
FILED 3-19-2024

Appeal from the Superior Court in Maricopa County
No. FC2021-007929
No. FC2022-090017
The Honorable Tracey Westerhausen, Judge

AFFIRMED

COUNSEL

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Counsel for Petitioner/Appellee

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By Amy W. Hoffman
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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Anni Hill Foster joined.

C A T T A N I, Judge:

¶1 Ryan S. Miller ("Father") challenges the superior court's decision to decline jurisdiction under Arizona's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") based on its findings that Father engaged in unjustifiable conduct and that Idaho, where Julie D. Miller ("Mother") lives, was a more convenient forum. *See* A.R.S. §§ 25-1037 (inconvenient forum); -1038 (unjustifiable conduct). He also appeals the award of attorney's fees to Mother. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The parties divorced in California in 2017, and the resulting California custody order provided for joint legal decision-making authority. Because Mother planned to move to Texas with the two children, the parenting plan gave Father parenting time on long holiday weekends, spring break, most of the summer, and one week of the winter break. Father was to pay for all travel expenses. Father moved to Arizona in 2018 and continued to follow the long-distance parenting plan. Mother moved from Texas to Idaho with the children in August 2020. She registered the California custody order in Idaho, and Father did not object.

¶3 Under the parenting plan, the children were to come to Arizona for Father's summer parenting time in June 2021. In emails, the parties discussed the children's desire to attend school in Arizona. Father proposed "flip-flopping" the parenting plan, and Mother stated that she wanted the kids to be happy and would not stop them from spending time with Father.

¶4 In August 2021, the parties discussed by email how they would handle long-distance travel to Idaho, both noting that the arrangement was temporary. Father proposed paying for eight flights a year, booked by Mother two months in advance, for a maximum cost of $300 per flight. A month later, Mother sent Father a list of flights for fall

break, Thanksgiving, and winter break and asked Father to book and pay for the flights. Shortly thereafter, Mother added a list of flights for the holidays through April 2022.

¶5 Later that year, when Mother asked when the children were coming to Idaho, Father responded that Mother owed him for some expenses but she could visit the children in Arizona (with two weeks' notice). The superior court later found that this was "a not-so-veiled threat to withhold the children for financial motives." Mother wrote several more emails in October and November asking for the children's Thanksgiving flight information. Three days before the holiday, Father responded that he had already answered and that she was "badgering and pestering" him. The superior court later found that this, too, was "a not-so veiled threat to withhold the children."

¶6 On December 6, 2021, Mother asked for the children's Christmas flight information, and Father replied, "Flights for Christmas asked and answered." Mother flew to Arizona to pick up the children on December 30, 2021, but one child was too ill to travel, so Mother returned to Idaho after spending two days with the children in Arizona.

¶7 Meanwhile, on December 14, 2021, Mother filed a petition to enforce the California order in Idaho. She then filed a petition to enforce in Arizona on December 30, 2021, but she did not serve Father with the Arizona enforcement petition and voluntarily withdrew it just eight days later. The superior court did not properly docket Mother's notice of withdrawal when she filed it, however, and the superior court ordered the parties to appear for an evidentiary hearing on the enforcement petition.[1]

¶8 On January 3, 2022, Father initiated a separate action in Arizona in which he sought to register and modify the California custody order. Father also responded to Mother's enforcement petition (three days after it was voluntarily withdrawn) asking the court to decide its jurisdiction on an expedited basis and to issue temporary orders. The court continued the evidentiary hearing on enforcement and scheduled a status conference on jurisdiction, and Mother's attorney filed a notice of appearance in Arizona. Mother then moved to dismiss Father's modification petition.

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[1] In February 2022, the court granted Mother's "motion to withdraw filed January 7, 2021," and in a later proceeding, the court added the motion to the record. These procedural irregularities do not affect our analysis.

¶9 Meanwhile, the Idaho court held an expedited enforcement hearing on January 10, 2022. Father appeared at the Idaho hearing without counsel. The Idaho court ordered him to return the children to Idaho, which he did.

¶10 At the Arizona status conference, the superior court consolidated the two Arizona cases and dismissed Father's petition because Idaho had exercised jurisdiction. Father sought relief from this ruling in a special action, and this court vacated the dismissal order, directing the superior court to consider whether Arizona was now the children's home state and to confer with the Idaho court.

¶11 The superior court then held an evidentiary hearing to address jurisdiction as well as Mother's motion to dismiss Father's modification petition. After conferring with the Idaho court, the superior court concluded Idaho was the children's "home state," the principal basis for jurisdiction under the UCCJEA. *See* A.R.S. §§ 25-1031(A)(1), -1033. Noting that Idaho was in fact exercising jurisdiction, the court then declined to exercise jurisdiction based on Father's unjustifiable conduct, *see* A.R.S. § 25-1038(A), and on the grounds that Arizona was an inconvenient forum, *see* A.R.S. § 25-1037.

¶12 Father moved for relief from judgment under Arizona Rule of Family Law Procedure ("Rule") 85 and for reconsideration under Rule 35.1, then appealed before the superior court ruled. He filed a second Rule 85 motion to correct a clerical error. This court stayed the appeal to permit the superior court to rule on the pending motions. The superior court granted relief as to the clerical error but denied Father's first (substantive) Rule 85 motion and awarded attorney's fees to Mother. Father amended his notice of appeal to add the fee award, but not the denial of substantive Rule 85 relief. We have jurisdiction under A.R.S. § 12-2101(A)(2).

DISCUSSION

I. Jurisdiction Under the UCCJEA.

¶13 Arizona has adopted the UCCJEA to resolve issues of "subject matter jurisdiction in interstate child custody disputes." *J.D.S. v. Franks*, 182 Ariz. 81, 86 (1995); *see* A.R.S. §§ 25-1001 to -1067. We consider de novo the superior court's assessment of jurisdiction under the UCCJEA. *In re Marriage of Tonnessen*, 189 Ariz. 225, 226 (App. 1997). "But to the extent a court's jurisdictional decision depends on its resolution of disputed facts, we will accept the court's findings if they are supported by reasonable

evidence." *Tracy D. v. Dep't of Child Safety*, 252 Ariz. 425, 429, ¶ 10 (App. 2021).

A. Unjustifiable Conduct Under A.R.S. § 25-1038.

¶14 A court that has jurisdiction under the UCCJEA "shall decline to exercise its jurisdiction" if it acquired jurisdiction "because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct." A.R.S. § 25-1038(A). This provision prevents one parent from creating or manipulating jurisdiction by unjustifiable means. *See also Unif. Child Custody Jurisdiction & Enf't Act* § 208 cmt. (Unif. L. Comm'n 1997) ("If the conduct that *creates* the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties.") (emphasis added). If the parents "acquiesce[]" to the court's exercise of jurisdiction, however, the court may retain the case. A.R.S. § 25-1038(A)(1).

1. Father's Conduct.

¶15 Here, the superior court found that Father had engaged in unjustifiable conduct to keep the children in Arizona to make Arizona the children's home state and thereby create jurisdiction under the UCCJEA. *See* A.R.S. §§ 25-1031(A)(1) (home state jurisdiction), -1033 (jurisdiction to modify), -1002(7)(a) (defining "home state" as where the child has lived with a parent for the six months immediately preceding the custody proceeding). Specifically, the court found that Father (1) falsely claimed that the parties agreed the children would live in Arizona permanently, whereas both parties had in fact acknowledged it was a temporary arrangement; (2) falsely promised to pay for the children's travel to visit Mother in Idaho to induce Mother to agree to send the children to Arizona; and (3) took the children to healthcare providers in Arizona without consulting Mother, then invoked his joint legal decision-making authority to prevent the children from seeing healthcare providers in Idaho.

¶16 Father first argues that, even assuming his conduct was unjustifiable, the conduct cited by the superior court did not *create* Arizona's jurisdiction as necessary for § 25-1038 to apply. Father relies on the parties' June 2021 agreement that children would live in Arizona and asserts that any visits to Idaho that he denied would, at most, have been temporary absences from Arizona, which would not affect home state jurisdiction. *See* A.R.S. § 25-1002(7)(a). But the court's ruling was not focused on the lack of visits in themselves but rather emphasized that, by falsely promising to pay for visits, Father persuaded Mother to agree to the children's move to Arizona under false pretenses. This finding is supported

by Mother's testimony that if she had known Father would not pay for the children to travel, she would not have agreed to have them attend school in Arizona. That is, Father's unjustifiable conduct created Arizona's home state jurisdiction because the children came to Arizona in June 2021 based on Father's false promise that he would pay for regular visits to Idaho.

¶17 Father's argument that the children's move to Arizona was not temporary is, for the same reason, unavailing. Whether the parties' agreement was for a permanent or temporary move ultimately does not matter given the superior court's finding that but for Father's false promise to pay for the travel to Idaho, Mother would not have agreed that the children could stay in Arizona, temporarily or otherwise. Although Father disagrees with how the court weighed the evidence, the court accepted Mother's testimony on this issue and found Father was not credible, both factual determinations to which we defer. *See Antonetti v. Westerhausen*, 254 Ariz. 364, 370, ¶ 25 (App. 2023).

¶18 Father next argues the superior court erred by citing as unjustifiable conduct his taking the children to Arizona healthcare providers without consulting Mother and then withholding consent when Mother attempted to have the children see Idaho healthcare providers. The court reasonably determined that Father attempted to create stronger connections in Arizona by preventing the children from establishing similar connections in Idaho. Although such conduct does not bear on whether Arizona acquired home state jurisdiction, it is plausibly construed as an attempt to influence a decision regarding whether Arizona is a more appropriate forum than Idaho, which likewise affects exercise of jurisdiction under the UCCJEA. *See* A.R.S. § 25-1037(B)(6).

2. Acquiescence.

¶19 Father asserts that the superior court erred because Mother acquiesced to Arizona's jurisdiction. *See* A.R.S. § 25-1038(A)(1) (requiring the court to decline to exercise its jurisdiction created by unjustifiable conduct "unless . . . [t]he parents . . . have acquiesced in the exercise of jurisdiction"). Father cites three actions that he argues constituted acquiescence to Arizona's jurisdiction.

¶20 First, Father notes that Mother filed a petition to enforce the California custody order in Arizona. But she never served Father with the petition, and she withdrew it before Father responded. A petitioner may voluntarily dismiss a petition "by filing a notice of dismissal before the opposing party files a response." Ariz. R. Fam. Law P. 46(a). This "right to

dismiss is absolute, self-executing, and accomplished automatically by [petitioner's] filing a notice of dismissal." *Goodman v. Gordon*, 103 Ariz. 538, 540 (1968).[2] Mother's never-served and promptly withdrawn petition does not indicate acquiescence to Arizona's jurisdiction.

¶21 Second, Father notes that Mother's attorney filed a general appearance, which Father argues resulted in Mother acquiescing to Arizona's jurisdiction. But while a general appearance may subject that party to *personal* jurisdiction, *see Tarr v. Superior Court*, 142 Ariz. 349, 351 (App. 1984), the UCCJEA governs *subject matter* jurisdiction. *See* A.R.S. § 25-1031(C); *see also*, Kathleen A. Hogan, *Understanding the UCCJEA*, 39 Fam. Advoc. 16, 20 (2017) ("UCCJEA jurisdictional requirements relate to subject matter jurisdiction over custody disputes."). The cases on which Father relies pertaining to personal jurisdiction do not bear on waiver of a party's objection to subject matter jurisdiction under the UCCJEA. And here, Mother's attorney expressly reserved jurisdictional defenses when accepting service less than a week after filing a notice of appearance, and Mother moved to dismiss Father's petition (expressly challenging subject matter jurisdiction) two days after that.

¶22 None of Mother's filings leading up to the evidentiary hearing conceded the propriety of Arizona's jurisdiction under the UCCJEA, and the only "affirmative action" she requested was for the court to dismiss or deny Father's motions, all without conceding that Arizona was the proper forum. Mother's attorney's one-sentence notice of appearance notwithstanding, Mother's filings within a week thereafter make clear her objection to Arizona exercising jurisdiction in this case. *Cf. Tarr*, 142 Ariz. at 351 (reiterating that "the court will always look to matters of substance rather than form, and a party's conduct, as well as other circumstances" to assess waiver of jurisdictional objection). Such participation does not constitute acquiescence to jurisdiction in Arizona.

¶23 Although Father asserts that Mother participated on the merits without objecting to jurisdiction, Mother's position has been consistent—Idaho should exercise jurisdiction even though Father's conduct caused Arizona to be the home state. Accordingly, we affirm the superior court's decision to decline jurisdiction under § 25-1038(A).

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[2] Because Rule 46 is based on Arizona Rule of Civil Procedure 41, *see* Ariz. R. Fam. Law P. 46, committee cmt. (2007), we may consider cases interpreting the language of the civil rule. *See* Ariz. R. Fam. Law P. 1(c).

B. Inconvenient Forum Under A.R.S. § 25-1037.

¶24 A court that has jurisdiction under the UCCJEA may nevertheless "decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and another state is a more appropriate forum." A.R.S. § 25-1037(A). The court considers eight non-exclusive factors to make this determination. A.R.S. § 25-1037(B). Here, after considering all eight factors, the superior court found Arizona to be an inconvenient forum when contrasted with Idaho. We review this ruling for an abuse of discretion. *Hubert v. Carmony*, 251 Ariz. 531, 533, ¶ 7 (App. 2021).

¶25 Father primarily challenges the superior court's assessment of three of the § 25-1037(B) factors. First, he argues the amount of time the children lived in Idaho is only slightly more than their time in Arizona, so the court erred by weighing that factor in favor of Idaho. *See* A.R.S. § 25-1037(B)(2) ("The length of time the child has resided outside this state."). Mother characterizes the children's time in Idaho as "far greater" than in Arizona, and Father asserts to the contrary that there was only a "negligible" difference. But even Father concedes the children had spent *more* time in Idaho: ten months in Idaho compared to seven months in Arizona at the time he petitioned to modify the custody order in January 2022. Thus, the record supports the court's finding that the children had been in Idaho longer, and we do not reweigh the evidence on appeal. *Antonetti*, 254 Ariz. at 368, 370, ¶¶ 13, 25.

¶26 Second, Father faults the superior court for failing to explain how his greater financial resources were relevant to the inconvenient forum analysis, asserting that this finding is thus neutral. *See* A.R.S. § 25-1037(B)(4) ("The relative financial circumstances of the parties."). Father does not dispute that his monthly income exceeds Mother's by more than $1,600. Father's greater income weighs on feasibility of travel, particularly given his unwillingness to pay for the children to travel to visit Mother. Although we agree this factor is entitled to little weight, it is only one of several weighing in favor of Idaho as a more convenient forum.

¶27 Third, Father argues the superior court erred by finding that the Idaho courts could decide the issues more expeditiously. *See* A.R.S. § 25-1037(B)(7) ("The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence."). Here, the Idaho court has already ruled, albeit temporarily, on the merits of where the children should be, whereas the Arizona court has not. Additionally, Mother testified that a modification petition was pending in

Idaho, and the Idaho court was awaiting the Arizona court's decision. Father contends that this finding conflicts with the superior court's finding of insufficient evidence to determine which court was more familiar with the pending litigation. *See* A.R.S. § 25-1037(B)(8) ("The familiarity of the court of each state with the facts and issues in the pending litigation."). But the two factors address different issues, so the findings are not incompatible. Father asserts that the Idaho court acted more expeditiously only because it was unaware of the jurisdictional issues, whereas Arizona proceedings were delayed because the superior court properly held a hearing to address the simultaneous proceedings. *See* A.R.S. § 25-1036. Although Father testified that Mother misrepresented to the Idaho court that there were no other on-going proceedings, the superior court was not obligated to credit his testimony, and we do not reweigh the evidence on appeal. *Antonetti*, 254 Ariz. at 370, ¶ 25.

¶28 Father notes that the doctrine of inconvenient forum should be used sparingly, *see Parra v. Cont'l Tire N. Am., Inc.*, 222 Ariz. 212, 214, ¶ 8 (App. 2009), and he asserts that the court should not cede jurisdiction when the factors are, in his view, "essentially neutral." But the superior court was in the best position to weigh the inconvenient forum factors and did not find them "essentially neutral." Because the record supports the court's findings that Idaho is a more convenient forum, the court did not abuse its discretion by declining to exercise jurisdiction under § 25-1037. *See id.*

II. Attorney's Fees in Superior Court.

¶29 Father argues the superior court erred by awarding Mother $21,000 in attorney's fees. The court entered the award under A.R.S. §§ 25-324(A), -403.08(B), and -1038(C), and an award of fees is mandatory when the court declines jurisdiction because of a party's unjustifiable conduct. *See* A.R.S. § 25-1038(C). Because we affirm the court's ruling on Father's unjustifiable conduct, we likewise affirm the fee award.

III. Attorney's Fees and Costs on Appeal.

¶30 Both Father and Mother seek an award of attorney's fees on appeal under A.R.S. § 25-324. After considering the relevant factors and in an exercise of our discretion, we deny both requests. As the prevailing party, Mother is entitled to her costs on appeal upon compliance with ARCAP 21. *See* A.R.S. § 12-342.

CONCLUSION

¶31 We affirm.

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