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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 11-09-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN RE THE MATTER OF:) No. 1 CA-CV 09-0643
)
EDWARD LANDER, JR.,) DEPARTMENT B
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) Not for Publication -
) (Rule 28, Arizona Rules
SHELLI ACKLES,) of Civil Appellate Procedure)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-070813

The Honorable William L. Brotherton, Judge

AFFIRMED

The Law Offices of Wendy Raquel Hernandez, P.C.
By Wendy Raquel Hernandez
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G E M M I L L, Judge

¶1 Edward Lander, Jr. ("Father") appeals from the family court's order dismissing his petition to modify child custody. The court concluded that it did not have exclusive, continuing

jurisdiction to make a child custody determination and that, even if it had jurisdiction, Arizona was an inconvenient forum. Because we agree that the family court in Arizona no longer had jurisdiction, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶12 On November 21, 2008, the marriage of Father and Shelli Ackles ("Mother") was dissolved by consent decree. The decree was signed by Judge Brotherton and entered in Maricopa County Superior Court. As part of the decree, Father and Mother were given joint custody of their five minor children. The decree also referenced and approved of the parties' parenting plan, which designated Mother as the children's primary residential parent. The plan also provided parenting time for Father, which included six weeks during the summer and one weekend per month in Iowa.

¶13 In February 2009, Mother and the children moved from Arizona to Iowa. Also during the first half of 2009, Father moved from Arizona to Oklahoma. On June 8, 2009, Father picked up the children in Iowa for his summer parenting time and drove the children back to his home in Oklahoma. When Father picked up the children from Mother, he noticed "the children were covered in filth" and his daughter had burn marks on her arms. Father also noticed that the children were sunburned and were

wearing clothes that did not fit. The children also had "ringworm consistently all over their bod[ies]."

¶14 After Father and the children returned to Oklahoma, Father took the children to Child Protective Services ("CPS") to document the children's condition. Father also took the children to see a doctor. According to Father, CPS in Oklahoma advised Father to contact the court in Arizona if he wished to file a petition to modify custody of the children. As a result, Father and the children drove to Arizona and, on July 6, 2009, Father filed a petition to modify custody, parenting time, and child support in Maricopa County Superior Court. Father also filed an emergency petition for a post-decree temporary order to modify child custody.

¶15 That same day, Father appeared *ex parte* before Judge Padilla in Maricopa County Superior Court for a "Hearing Setting Pre-Issuance Hearing." Judge Padilla was substituting for Judge Brotherton, who was on vacation. At the beginning of the hearing, Judge Padilla questioned whether the court had jurisdiction to hear Father's petition because neither Father nor Mother lived in Arizona and the children lived in Iowa with Mother. Father explained to the court that the children had only been in Iowa for three months and that "Arizona was the last place they were the longest." Father also told the court he would move back to Arizona. Judge Padilla stated that the

court "will continue to exercise exclusive ongoing jurisdiction over the minor children since Arizona was previously the home state. And there's yet to be a wealth of information in this." He scheduled a hearing for temporary orders for July 16, 2009, and ordered the three oldest children be interviewed by Conciliation Services on July 13, 2009.

¶16 On July 16, 2009, Father and counsel for Mother appeared before Judge Padilla for a hearing on Father's emergency petition for temporary orders. At the hearing, the court determined that no emergency existed placing the children in immediate danger and the court therefore denied Father's emergency petition. The court also informed the parties that it would set a hearing date on Father's petition to modify custody and that the hearing would be before Judge Brotherton. After the court made its ruling, Mother's attorney raised the issue of jurisdiction. The court stated that "Arizona still retains jurisdiction" because Father had indicated he was moving back to Arizona. Father stated he was "here now" and that he had two residences, apparently meaning one in Arizona and one in Oklahoma.

¶17 That same day, Mother filed a motion to dismiss Father's petition to modify child custody. Mother argued that the petition should be dismissed because, under Arizona Revised Statutes ("A.R.S.") section 25-1032 (2007), the court lost

jurisdiction over the matter when Father moved to Oklahoma. Father did not file a response to the motion. On August 7, 2009, Father hired counsel.

¶18 On August 12, 2009, Judge Brotherton conducted a telephonic conference with the parties and each party's attorney.¹ After applying A.R.S. § 25-1032(A)(2), the court determined that it did not have jurisdiction and dismissed Father's petition. According to the court, it had exclusive, continuing jurisdiction until all the parties left Arizona, and once the parties left Arizona, "the jurisdictional chain [was] broken" and could not be put back together by moving back to Arizona. The court also stated that even if it had jurisdiction, it would decline to exercise its jurisdiction because Arizona was an inconvenient forum. Additionally, the court found that Arizona was no longer the children's "home" state.

¶19 On August 21, 2009, the court filed a signed minute entry order, dismissing Father's petition to modify child custody for the reasons given during the August 12, 2009 conference. Father filed a timely notice of appeal, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

¹ The court converted the scheduled August 12, 2009 hearing to a telephonic conference.

ANALYSIS

¶10 Father raises three issues on appeal. First, Father asserts that the court erred in concluding that Arizona no longer retained exclusive, continuing jurisdiction pursuant to A.R.S. § 25-1032. Second, Father argues that the trial court abused its discretion in determining that Arizona was an inconvenient forum pursuant to A.R.S. § 25-1037 (2007). Third, Father contends that the doctrine of res judicata prevented the court from "overturning" the jurisdictional ruling by Judge Padilla.

Exclusive, Continuing Jurisdiction

¶11 Father contends the court erred in concluding that Arizona no longer retained exclusive, continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").² Arizona adopted the UCCJEA in 2001. A.R.S. §§ 25-1001 to -1067 (2007). Whether a court has subject matter jurisdiction under UCCJEA is a question of law that we review de novo. See *In re Marriage of Tonnessen*, 189 Ariz. 225, 226, 941

² "The UCCJEA is a uniform statute that has been adopted by forty-five states . . . to create consistency in interstate child custody jurisdiction and enforcement proceedings." *Melgar v. Campo*, 215 Ariz. 605, 606, ¶ 7, 161 P.3d 1269, 1270 (App. 2007) (footnotes omitted).

P.2d 237, 238 (App. 1997) (addressing predecessor statute, the Uniform Child Custody Jurisdiction Act).³

¶12 Father argues that the court incorrectly interpreted A.R.S. § 25-1032(A)(2). An Arizona court has jurisdiction to make an initial custody determination if Arizona is the "home state" of the child. A.R.S. § 25-1031(A) (2007). Under § 25-1032(A), entitled "Exclusive continuing jurisdiction," after a court makes an initial determination, its jurisdiction continues until one of two events occurs:

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.
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.

³ Mother asserts that under Rule 35(B) of the Arizona Rules of Family Law Procedure, Father's failure to respond to the motion to dismiss gave the superior court "unfettered" discretion in granting the motion and also waived any jurisdictional argument on appeal. Rule 35(B), a permissive rule, provides that failure to respond to a motion *may* be deemed consent to the granting of the motion and the court *may* dispose of the motion summarily. Here, the court never referred to Rule 35(B) in its ruling and did not summarily dispose of the motion. As a result, it appears the court chose not to invoke Rule 35(B). Moreover, Rule 35(B) does not mention waiver. On this record, we reject these arguments of Mother.

(Emphasis added.) Jurisdiction is determined based on the facts at the time of commencement of the action. UCCJEA § 202 cmt. (2010). See *In re Marriage of Nurie*, 98 Cal. Rptr. 3d 200, 212 (App. 2009) (stating that under UCCJEA, which was adopted by California, “[s]ubject matter jurisdiction either exists or does not exist at the time an action is commenced”); *In re A.C.S.*, 157 S.W.3d 9, 16 (Tex. App. 2004) (explaining that jurisdiction must be examined according to the facts in existence when the motion to modify the prior custody order is filed).

¶13 Here, the court concluded that Arizona no longer had exclusive, continuing jurisdiction pursuant to § 25-1032(A)(2) because the children and parents had left Arizona. According to the court, once the parents and children left Arizona “the jurisdictional chain [was] broken” and could not be put back together simply by moving back to Arizona. Based on the record before us and the plain language of § 25-1032(A)(2), Arizona no longer had exclusive, continuing jurisdiction to make a child custody determination.

¶14 In accordance with § 25-1032(A)(2), the court’s jurisdiction did not automatically end in this case once Mother, Father and the children moved out of state. The parties’ departure from the original decree state does not, by itself, terminate exclusive, continuing jurisdiction. Rather, exclusive, continuing jurisdiction ends when the court

determines the parties no longer "presently reside" in the state that made the original custody determination. A.R.S. § 25-1032(A)(2). See *Nurie*, 98 Cal. Rptr. 3d at 220 (stating that "a judicial determination that all parties no longer reside in the decree state is required to divest that state of continuing, exclusive jurisdiction"); *State of N.M., ex rel. Children, Youth, & Families Dep't v. Donna J.*, 129 P.3d 167, 171 (N.M. Ct. App. 2006) (holding that "the UCCJEA language specifically requires action by either the home or another state before exclusive, continuing jurisdiction in the home state ceases"); *In re Lewin*, 149 S.W.3d 727, 736 (Tex. App. 2004) ("A court's exclusive continuing jurisdiction does not vanish immediately once all the parties leave the state."). As noted above, this jurisdictional determination focuses on the facts in existence when the petition to modify the prior custody order is filed. See UCCJEA § 202 cmt.

¶15 The family court did determine, and Father admitted, that at the time Father filed the petition on July 6, 2009, neither the parents nor the children resided in Arizona. Based on this determination, Arizona no longer had exclusive, continuing jurisdiction under § 25-1032(A)(2) and we affirm the court's order.⁴

⁴ Father does not contend that jurisdiction was proper under A.R.S. § 25-1032(B).

¶16 Because the family court did not have jurisdiction, we need not address the court's additional ruling that Arizona was an inconvenient forum. The court did not have jurisdiction to make that determination. See A.R.S. § 25-1037.

¶17 We also note that Father makes two additional arguments regarding the court's ruling that Arizona no longer had exclusive, continuing jurisdiction. First, Father argues Iowa was not the appropriate jurisdiction in which to file his petition to modify custody. Second, he argues the court inappropriately considered subjective issues in making its jurisdictional ruling. Based on the objective facts in the record, Arizona no longer has jurisdiction and these arguments are unpersuasive.

Res Judicata

¶18 Finally, Father asserts that Judge Padilla, during both the July 6 and July 16, 2009 hearings, ruled that Arizona had exclusive, continuing jurisdiction and therefore the doctrine of res judicata precluded the court from later altering Judge Padilla's rulings. We first note that Father's petition to modify custody was not before Judge Padilla. Rather, Judge Padilla was presiding over Father's emergency petition and Judge Brotherton presided over the petition to modify. We do not interpret Judge Padilla's comments regarding jurisdiction during

the July hearings to be a final ruling that the court had jurisdiction over the petition to modify.

¶19 Even if Judge Padilla is considered to have made an initial jurisdictional ruling in the modification proceedings, our conclusion remains the same. Father is essentially arguing that Judge Brotherton's ruling was precluded by the "horizontal appeal" rule. Under this principle, judges assigned to a case are discouraged from revisiting rulings by previously assigned judges unless circumstances have changed significantly or the prior ruling was manifestly erroneous. See *Donlann v. Macgurn*, 203 Ariz. 380, 385-86, ¶ 29, 55 P.3d 74, 79-80 (App. 2002). Here, a ruling by Judge Padilla that the court retained jurisdiction because Father said he was moving back to Arizona would be erroneous, and Judge Brotherton therefore would not be precluded from later determining that the family court in Arizona no longer had jurisdiction.

CONCLUSION

¶20 Because the evidence supported the family court's determination that neither parent nor any of the children resided in Arizona when Father filed his petition to modify child custody, the family court no longer had exclusive, continuing jurisdiction. Accordingly, we affirm the family court's order dismissing Father's petition to modify child custody.

¶21 Mother requests this court award her attorneys' fees pursuant to A.R.S. § 25-411(G) (Supp. 2009) and Rule 21 of the Arizona Rules of Civil Appellate Procedure. Section 25-411(G) authorizes an award of fees against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment. We make no such findings here, and we therefore deny Mother's request for an award of fees.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge