

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

MOHAMMED S. AL ESSA,
Petitioner/Appellant,

and

SAMAH AKRAM SAMMARRAIE,
Respondent/Appellee.

No. 2 CA-CV 2016-0224-FC
Filed July 28, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20162815
The Honorable James E. Marner, Judge

APPEAL DISMISSED

COUNSEL

Sidney F. Wolitzky, Tucson
Counsel for Petitioner/Appellant

Law Office of Lenore Tsakanikas, PLLC, Tucson
By Lenore Tsakanikas
Counsel for Respondent/Appellee

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Kelly¹ concurred.

ESPINOSA, Judge:

¶1 Mohammed Al Essa appeals from the trial court's order finding Pima County Superior Court to be an inconvenient forum for his marriage dissolution proceedings. Because we lack jurisdiction to consider the appeal, it is dismissed.²

Factual and Procedural Background

¶2 Al Essa and Samah Sammarraie were married in Baghdad, Iraq, in 2004, and are the parents of three minor children. The family moved to Tucson in June 2015, and in July 2016 Sammarraie and the children travelled to Albany, New York, to visit her family. When they did not return, Al Essa initiated marriage dissolution proceedings in Pima County Superior Court.

¶3 In October 2016, the trial court conducted a hearing pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in which Sammarraie and a court-appointed lawyer representing the children requested that all future

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

²The order appealed from was not signed, and therefore not appealable. *See* Ariz. R. Fam. Law P. 81(A) ("All judgments shall be in writing and signed by a judge."). Accordingly, we stayed the appeal to have the order signed. On further review, however, as noted below, we conclude we lack jurisdiction even had the order been signed.

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legal proceedings occur in New York. After the court was informed of judicial proceedings currently pending in New York, it heard evidence of alleged domestic violence, the witnesses of which were located in that forum, and questioned Al Essa to “make sure that [his] voice [wa]s heard in this matter.” The court then made specific findings on the eight statutory factors set forth in A.R.S. § 25-1037, observing that Sammarraie and the children had been in New York “coming up on four months” and the children were in school there. It additionally noted the children were represented by a court-appointed lawyer in New York, and due to budget constraints they would not be provided with a “Best Interest Attorney” in Arizona.

¶4 At the conclusion of the hearing, the trial court ruled, “based on the eight [statutory] factors and the last factor . . . about the Best Interest Attorney[],” that although Arizona was the home state under the UCCJEA, it would be an inconvenient forum. The court requested that the New York family court “take jurisdiction of this matter,” and Judge Rivera of the Albany County Family Court, who participated in the hearing by telephone, stated he was “able and willing to take . . . jurisdiction.”

¶5 Al Essa filed a motion for reconsideration, which the trial court denied, and this appeal followed. On review, Al Essa argues the court erroneously found Arizona an inconvenient forum as a result of misapplying the statutory factors. He also contends that both “courts” failed to consider that Sammarraie’s removing the children from Arizona constituted “unjustifiable conduct,” and that “New York should have declined jurisdiction.” For the reasons discussed below, we lack jurisdiction to address his claims.

Discussion

¶6 This court has an independent duty to determine its appellate jurisdiction, which is strictly circumscribed by law. *Baker v. Bradley*, 231 Ariz. 475, ¶ 8, 296 P.3d 1011, 1014-15 (App. 2013).³

³In his opening brief, Al Essa merely asserts, “Because [he] is appealing a judgment entered in the Pima County Superior Court, the Court of Appeals—Division II has jurisdiction.” Such a

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The trial court's minute entry finding Arizona to be an inconvenient forum is not a final, appealable order under A.R.S. § 12-2101(A)(1). "The UCCJEA is a uniform statute that has been adopted . . . to create consistency in interstate child custody jurisdiction and enforcement," *Melgar v. Campo*, 215 Ariz. 605, ¶ 7, 161 P.3d 1269, 1270 (App. 2007), and a finding of an inconvenient forum does not necessarily result in the transfer of an entire marriage dissolution proceeding to another jurisdiction, § 25-1037(D) ("A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce . . . while still retaining jurisdiction over the divorce or other proceeding."). Although the trial court here broadly stated "the Albany [c]ourt is willing and able to take on jurisdiction of this matter," it did not dismiss Al Essa's petition for dissolution of marriage, which may yet have property or other issues outstanding, and it did not certify that the inconvenient forum finding was separately appealable under Rule 78(B), Ariz. R. Fam. Law P.

¶7 Nor is the order finding Arizona an inconvenient forum appealable pursuant to § 12-2101(A)(3). Under that statute, a party may appeal from an order "affecting a substantial right made in any action when the order in effect determines the action and prevents judgment from which an appeal might be taken." We cannot say, however, that the order "in effect determine[d] the action."

¶8 Al Essa's additional argument that "Arizona should have accepted jurisdiction because of Ms. Sammarraie's 'unjustifiable conduct'" is misplaced. Under both A.R.S. § 25-1038(A) and N.Y. Dom. Rel. Law § 76-g(1), the state being asked to assume jurisdiction "shall decline to exercise its jurisdiction" where a party seeking to invoke jurisdiction "has engaged in unjustifiable conduct." Thus, the provision makes clear that it is not incumbent upon the Arizona court to "accept" jurisdiction because Sammarraie allegedly engaged in unjustifiable conduct, but rather it was an issue to raise before the New York court, over which we, again, lack jurisdiction.

statement does not adequately state the basis for our jurisdiction as required by our procedural rules. *See* Ariz. R. Civ. App. P. 13(a)(4).

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Conclusion

¶9 Because we lack jurisdiction, we must dismiss Al Essa's appeal. Nothing in this decision, however, precludes him from filing a new notice of appeal should the trial court enter an appealable order. And if appealed, the parties may stipulate to submission on the previously filed briefs and record. *See Stevens v. Mehagian's Home Furnishings, Inc.*, 90 Ariz. 42, 45, 365 P.2d 208, 210 (1961) (noting parties permitted to "file a consent to" permit appellate court to "hear the second appeal on the record and briefs prepared for the present appeal as thus supplemented").

¶10 The appeal is dismissed.