IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

TANJA WIENER,
Appellant,

and

JOHN MCCRORY,
Appellant.

No. 2 CA-CV 2021-0071-FC
Filed December 27, 2021

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NOT FOR PUBLICATION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 Gila County
No. S0400DO201400006
The Honorable Timothy M. Wright, Judge

VACATED AND REMANDED

COUNSEL

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Counsel for Appellant

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By Joseph E. Collins
Counsel for Appellee

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 Tanja Wiener ("Mother") appeals from the trial court's ruling refusing her request to decline jurisdiction under Arizona's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").[1] She contends the court erred in failing to hold a hearing or make adequate factual findings when denying her motion. We agree, and we therefore vacate the trial court's order and remand for an evidentiary hearing.

Factual and Procedural Background

¶2 The material facts are undisputed. In 2007, Mother married John McCrory ("Father") in Nebraska. They had a child in October 2012. In July 2013, the parties and the child relocated to Arizona. Six months later, in January 2014, Mother filed for divorce in Arizona.

¶3 In her petition, Mother requested that she be designated the child's primary residential parent and explained that she "desire[d] to permanently relocate with the minor child from Arizona to Missouri," as she "does not have family or friends in Arizona." By the time the decree of dissolution was entered by the Arizona trial court in September 2014, Mother and child were residing in Missouri. Father continues to reside in Arizona.

¶4 The joint parenting plan submitted with the decree provided a long-distance parenting time schedule, with the child residing primarily with Mother in Missouri. It provided Father with four one-week access periods per year. The trial court modified this parenting time schedule in August 2016 to provide Father with three one-week periods and one two-week period per year. In this ruling, the court also denied Mother's request to relocate with the child to Germany.

[1]*See* A.R.S. §§ 25-1001 to 25-1067.

¶5 In May 2020, Mother commenced proceedings in Missouri by filing a petition for registration of a foreign judgment, the Arizona decree of dissolution as modified by subsequent rulings. She argued the Missouri court "should assume jurisdiction of the parties and the minor child in this matter" after the registration being sought because "[s]ubstantial evidence exists" in Missouri concerning the child's "care, medical treatment, protection, training, school, family, support network, activities, and personal relationships." Then, in September, Mother filed in Missouri a motion to transfer jurisdiction there, reiterating the same arguments and requesting a UCCJEA conference. At the same time, she filed in Missouri a motion to modify the parenting plan.

¶6 In January 2021, Mother filed in the Arizona trial court a motion asking the court to "decline to exercise continuing jurisdiction" pursuant to A.R.S. § 25-1037.[2] She contended that Arizona no longer has exclusive continuing jurisdiction under A.R.S. § 25-1032(A)(1) and is no longer the "home state" of the child, who had by that point lived in Missouri with Mother for seven continuous years. She argued that Missouri is the more appropriate forum and that Arizona is an inconvenient forum, addressing the eight factors listed at § 25-1037(B). She then asked the court to participate in a UCCJEA conference with the Missouri court where she had commenced proceedings in May 2020 and filed motions in September 2020. Father opposed the motion.

¶7 In February 2021, the trial court summarily denied Mother's motion. The court first found that Arizona is still the child's home state under § 25-1032. It then refused to decline jurisdiction, to find Arizona to be an inconvenient forum, and to find that Missouri is a more appropriate forum under § 25-1037. As grounds therefore, the court found that:

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[2] Although Mother titled her filing a "Motion to Transfer Jurisdiction," she did not request such affirmative relief from the Arizona trial court. And, indeed, § 25-1037 does not contemplate an order to "transfer jurisdiction" to another state; rather, it provides that, if a court of this state declines to exercise its jurisdiction because it "determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings on condition that a child custody proceeding be promptly commenced" in the other state. § 25-1037(A), (C). Venue was not at issue below, and Father's related arguments on appeal are irrelevant. Nor are we persuaded by father's argument that this is not "a true UCCJEA case." Mother properly filed her motion under § 25-1037.

(a) because the parties reside more than 1,000 miles apart, one party will be inconvenienced by any forum selection; (b) the parties have litigated their case in Arizona for more than six years, including "numerous evidentiary hearings," resulting in an Arizona file containing "over 150 pleadings, rulings, etc."; (c) the child has extended family in Arizona on Father's side, while all of Mother's extended family reside outside the United States; and (d) although Mother alleges domestic violence, she "has provided no information about how a Missouri Court would be in a better place to 'best protect the parties and the child' against such allegations." Finally, the court declined to conduct a substantive UCCJEA conference with the Missouri court. The court entered a signed version of its order on April 20. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101.[3]

Discussion

¶8 We review a trial court's ruling on an inconvenient forum motion under § 25-1037 for an abuse of discretion. *See Hubert v. Carmony*, 251 Ariz. 531, ¶ 7 (App. 2021). "An error of law constitutes an abuse of discretion." *Id.*

¶9 Mother challenges the trial court's failure to hold a hearing, as well as its failure to make findings regarding all eight factors listed at § 25-1037(B). She contends that our opinion earlier this year in *Hubert* controls and requires that the trial court's ruling be vacated. We agree.[4]

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[3]*See* Ariz. R. Fam. Law P. 78(g)(1); *Klebba v. Carpenter*, 213 Ariz. 91, ¶ 6 & n.3 (2006) (requirement that all judgments must be signed "applies not only to final judgments disposing of all issues between the parties, but also to any other orders made appealable by statute," including special orders after final judgment appealable pursuant to § 12-2101(A)(2)); *see also Hall Fam. Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 387 (App. 1995) (signed order, expressly confirming earlier minute entry, satisfies requirement that appeal be based on signed order).

[4]When the trial court issued its judgment in this case, *Hubert* had not yet been decided and our published cases had not yet addressed whether § 25-1037(B), in particular, requires trial courts to conduct a hearing or make explicit findings on all eight listed factors. Thus, the trial court did not violate existing jurisprudence when denying Mother's motion without satisfying the requirements later made clear in *Hubert*. But the legal reasoning presented in *Hubert* regarding the interpretation of the statute was equally available to the trial court even before *Hubert*'s publication, and

¶10 In *Hubert*, the trial court had declined to exercise jurisdiction over a custody matter. 251 Ariz. 531, ¶¶ 6-7. The appellant father argued that the court had "erred by not holding a hearing to consider all the factors set forth in A.R.S. § 25-1037(B)." *Id.* ¶ 1. We agreed, holding that "before declining to exercise jurisdiction, a trial court must (1) expressly consider all relevant factors, including the factors listed in A.R.S. § 25-1037(B), and make the necessary factual findings and (2) conduct an evidentiary hearing to resolve relevant factual disputes." *Id.* We therefore vacated the trial court's order and remanded for an evidentiary hearing. *Id.*

¶11 This case presents the opposite posture: a trial court's refusal to relinquish jurisdiction under § 25-1037. However, *Hubert*'s reasoning applies with equal force here.

¶12 In *Hubert*, the appellant father argued that consideration of all factors listed in § 25-1037(B) is mandatory. 251 Ariz. 531, ¶ 10. We agreed, explaining that, "[i]n keeping with the general interpretation of [forum non conveniens] statutes and common law, A.R.S. § 25-1037 should be interpreted to require that a court make express findings about all relevant factors on the record." *Id.* ¶¶ 11-12. We also noted that "[t]he statute uses the phrase 'shall consider,' which indicate[s] a mandatory intent that all the factors be considered." *Id.* ¶ 12.[5] And "[t]he best evidence that the court has done so is express findings on the record," which "facilitate effective appellate review" of the trial court's decision on the motion. *Id.* This reasoning applies whenever a trial court has been asked pursuant to

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we appropriately apply it here. *Cf. Tucson Newspapers, Inc. v. City of Tucson*, 172 Ariz. 378, 382 (App. 1992) (citing U.S. Supreme Court opinion published after trial court ruling at issue on appeal); *see also State v. Bible*, 175 Ariz. 549, 586 n.33 (1993) (appellate court may consider cases decided after trial).

[5] Father's passing argument to the contrary ignores the plain language of the statute. Although the trial court's decision whether to decline jurisdiction on inconvenient forum grounds is discretionary, as evidenced by the use of the phrase "*may* decline to exercise jurisdiction," § 25-1037(A) (emphasis added), the statute establishes that the court "*shall* consider whether it is appropriate for a court of another state to exercise jurisdiction" and, "[f]or this purpose . . . *shall* consider all relevant factors including" the eight listed factors, § 25-1037(B) (emphasis added).

§ 25-1037 to decline jurisdiction on the ground that Arizona is an inconvenient forum, regardless of how the trial court rules on that request.[6]

¶13 Mother contends the trial court here "made findings on only 50% of the factors contained in A.R.S. § 25-1037," failing to make *any* findings regarding: the length of time the child has resided outside Arizona (factor 2); the "relative financial circumstances of the parties" (factor 4); any agreement between the parties as to which state should assume jurisdiction (factor 5); and the "ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence" (factor 7). § 25-1037(B)(2), (4), (5), (7). Father concedes that "the Court made only a few [findings]," but he blames this failure on Mother, arguing she "did not file a request for findings under Rule 82(a)(1)," Ariz. R. Fam. Law P., such that "any fault for a failure of written findings on the record is Mother's," not the court's. But Mother was not required to request that the trial court make the findings already required under § 25-1037(B). Moreover, as Mother notes, any such request for findings would have been premature, as no hearing had been (or was ever) scheduled.

¶14 Mother also argues that the findings the trial court did make on a number of the remaining factors were insufficient. We agree. In particular, although the court noted that Mother had alleged domestic violence, it found only that she had "provided no information about how a Missouri Court would be in a better place to 'best protect the parties and the child' against such allegations."[7] This was not a finding addressing

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[6]In *Hubert*, we also looked to other jurisdictions' treatment of the forum non conveniens provision of the UCCJEA, concluding that "[t]he majority of courts considering the question hold that a trial court must enter findings reflecting its consideration of each of the factors." 251 Ariz. 531, ¶ 13. We thus held that, "to maintain uniform interpretation of the UCCJEA," Arizona trial courts "must consider all factors listed" in § 25-1037(B) "and any other relevant factor and make appropriate findings on those factors," and that the failure to do so constitutes an abuse of discretion. *Id.* ¶ 14.

[7]With regard to this finding, Father contends Mother should have "set forth in an affidavit, the specific evidence she would have presented, had she been given the opportunity, in Missouri and not in Arizona." But § 25-1037 contains no such affidavit requirement. The case Father cites in support of his contention discusses the need for an affidavit from a party seeking to modify a custody order under A.R.S. § 25-411, not from a party

"[w]hether domestic violence has occurred and is likely to occur in the future" (the first prong of factor 1).[8] § 25-1037(B)(1). As to the "nature and location of the evidence required to resolve the pending litigation, including testimony of the child" (factor 6), § 25-1037(B)(6), the court found only that the child "has extended family in Arizona on her paternal side," whereas all her "maternal extended family reside outside of the United States." This finding failed to address the current location of the child (Missouri), as well that of her teachers, medical providers, medical records, friends, and acquaintances (all Missouri, according to Mother's motion).

¶15 Father contends Mother has waived her arguments regarding missing and inadequate findings, contending she "could have raised these issues in her motion for reconsideration and her motion for a new trial, but did not." But Mother expressly raised and discussed the factors, and her arguments regarding them, in her motion and her reply in support of that motion. She was not required to file a post-judgment motion asking the trial court to correct its error of law before seeking appellate review to correct that error. Regardless, waiver does not apply here, as the child's best interests are at issue. *Hubert*, 251 Ariz. 531, ¶ 10 (citing *Nold v. Nold*, 232 Ariz. 270, ¶ 10 (App. 2013) (best interests of child "should not be ignored under the discretionary doctrine of waiver")).

¶16 In short, the trial court failed to address four of the eight factors listed at § 25-1037(B) and addressed others incompletely, despite having been presented with arguments regarding those factors by the parties. The court's statement that it "ha[d] reviewed the factors set forth in subsection B" is insufficient to cure this defect, because the court was required to "consider all factors listed in A.R.S. § 25-1037(B) and any other relevant factor and make appropriate findings on those factors." *Hubert*,

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who is requesting that the trial court decline to exercise its jurisdiction under § 25-1037. *See In re Marriage of Dorman*, 198 Ariz. 298 (App. 2000).

[8]Father contends the trial court "specifically found no history of domestic violence," but this finding was contained in the 2014 dissolution decree and only addressed whether domestic violence had occurred during the marriage, not Mother's concerns regarding domestic violence related to corporal punishment as articulated in her 2021 motion. Father's assertion that the court "specifically found that Missouri was not in a better position than Arizona to deal with domestic violence" appears to contradict the record.

251 Ariz. 531, ¶ 14. The court's failure to do so was an abuse of discretion. *See id.*

¶17 In *Hubert*, we also concluded that, "[n]ot only did the court err in failing to make express findings, it also erred in failing to conduct an evidentiary hearing on the A.R.S. § 25-1037(B) factors." *Id.* ¶ 15. As we explained, due process requires the trial court to both "provide a forum for witness testimony" and "refrain from resolving matters of credibility on documents alone." *Id.* Particularly where "factual disputes may have existed about the parties' credibility and the enumerated factors," the court must "conduct an evidentiary hearing to resolve those disputes." *Id.*; *see also Solorzano v. Jensen*, 250 Ariz. 348, ¶ 9 (App. 2020) (due process entitles party to be heard at meaningful time in meaningful manner, to offer evidence, and to confront witnesses); *Volk v. Brame*, 235 Ariz. 462, ¶ 14 (App. 2014) (that "due process requires the court to allow parties a reasonable opportunity to present testimony whenever resolution of a material contested issue hinges on credibility" is a "fundamental proposition").

¶18 This case involved precisely the sort of factual disputes regarding the enumerated factors and the parties' respective credibility on those disputes that required the trial court to conduct a hearing. For instance, in his opposition to Mother's motion, Father asserted that "the child has more personal relationships in Arizona than she does in [Missouri]." He then alleged: "Mother does not show credibility that she intends to reside in Missouri for any length of time," contending she actually seeks "to permanently relocate herself and the minor child to Germany."[9] In her reply in support of her motion, Mother disputed these claims, noting she has purchased a home in Missouri, has resided with the child in Missouri since the child was a baby, and the child "has a substantial support network in Missouri," where she "attends a school she loves." Mother stated that she "has no intent to leave any of those things." These and other[10] competing claims regarding whether Arizona or Missouri was

[9]Father repeats this allegation on appeal, contending "relocation to Germany . . . appears to be Mother's ultimate goal here."

[10]For example, Father alleged that he "is the more stable parent, having retained the same employment for over five years, receiving numerous promotions and recognition," adding that he is a homeowner in Arizona and is pursuing a master's degree. He also argued that Mother's motion was "not made in good faith but to expand litigation." He contended Mother had sought the change in jurisdiction "to seek an unjustified increase in child support" and to "significantly increase [his]

the more appropriate forum should have been addressed at an evidentiary hearing—a "forum for witness testimony" that would have provided the trial court an opportunity to address factual disputes[11] and "resolv[e] matters of credibility." *Hubert*, 251 Ariz. 531, ¶ 15; *see also Solorzano*, 250 Ariz. 348, ¶ 13 (when factual issue "closely contested," improper for trial court to find one party more credible "without seeing and hearing either testify" as "there was no adversarial check on the information on which the court ruled").

Attorney Fees and Costs

¶19 Both parties have requested their attorney fees and costs on appeal, pursuant to A.R.S. § 25-324. Given that *Hubert*, on which our decision rests, was issued after the trial court entered the judgment in question and Mother initiated the present appeal, in our discretion we decline to award either party attorney fees. As the prevailing party, Mother is entitled to recover her costs on appeal, A.R.S. § 12-341, upon her compliance with Rule 21(b), Ariz. R. Civ. App. P.

Disposition

¶20 For the foregoing reasons, we vacate the trial court's ruling denying Mother's inconvenient forum motion and remand for an evidentiary hearing to allow the court to address all the § 25-1037(B) factors and any other relevant factors, and to make express findings.

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expenses related to holding [her] accountable and enforcing parenting time." As we explained in *Hubert*, a trial court must refrain from "resolving [such] matters of credibility on documents alone." 251 Ariz. 531, ¶ 15; *see also Volk*, 235 Ariz. 462, ¶ 17 (reiterating that "trial courts cannot properly assess credibility without allowing the parties an opportunity to present oral testimony").

[11] As Mother explains, Father's reference to summary judgment overlooks that the parties in this case placed a number of significant factual disputes before the trial court.