FILED BY CLERK
SEP -9 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	
STEPHANIE BETH LEVY, Petitioner/Appellant,	2 CA-CV 2010-0039 DEPARTMENT B
and	MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
ANDREW PAUL LEVY, Respondent/Appellee.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20092491

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Ann Nicholson Haralambie, Attorneys, P.C.
By Ann M. Haralambie — Tucson

and

Law Offices of Robert G. Lewis, P.C. — Tucson
Attorneys for Petitioner/Appellant

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

¶1 Appellant Stephanie Levy appeals the trial court's rulings dismissing her petition for marital dissolution, denying her request to communicate with an out-of-state court regarding child custody matters, and denying her motion to amend the petition to request a legal separation from the appellee, Andrew Levy. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 "We view the record in the light most favorable to upholding the trial court's decision." *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 2, 207 P.3d 754, 755 (App. 2009). Stephanie lived in Arizona her whole life, including four years with her husband, Andrew, until she moved with him to Florida in March 2009 while pregnant with their son. Their child, C., was born there on June 7. On June 29, Stephanie and C. moved back to Tucson. She filed a petition for dissolution of marriage in the Pima County Superior Court three days later, on July 2. Stephanie has continuously lived in Tucson with her son since moving back. Andrew has continued to live in Florida, and he filed a petition for dissolution of marriage in a Florida circuit court in September 2009.

¶3 In December 2009, the superior court found Florida was the child's home state under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) or, alternatively, that the child had no home state—but Florida had jurisdiction to make an initial child custody determination under the Act. The court also found Stephanie was domiciled in Florida as of June 29 and therefore did not meet Arizona's ninety-day residency requirement at the time she filed her petition for dissolution in the Pima County

Superior Court. Consequently, the superior court granted Andrew's motion to dismiss the petition due to a lack of jurisdiction.

¶4 Stephanie moved to amend her petition to seek legal separation rather than dissolution. She also requested that the superior court communicate with the Florida circuit court to determine which jurisdiction would be most appropriate to rule upon issues related to child custody "[i]n the event that the [Superior] Court grants the motion to amend." The superior court denied the motion to amend and therefore declined to communicate with the circuit court.

¶5 Stephanie filed a notice of appeal in January 2010. In April, she filed with this court a copy of the Florida circuit court's April 2010 order dismissing Andrew's dissolution petition due to his failure to corroborate his Florida residency for six months preceding the commencement of the action, as required by Florida law.

Discussion

Amendment

¶6 Stephanie first challenges the trial court's denial of her motion to amend her petition, which would have converted it into a petition for legal separation rather than dissolution. The court denied the motion on the ground that her failure to meet the domicile requirement for dissolution precluded the amendment. Specifically, the court found this defect deprived it of subject matter jurisdiction, and the court concluded the petition was therefore "fatally flawed" and "not properly subject to amendment." We review the court's ruling on the motion to amend for an abuse of discretion, *see MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996), but we

review its interpretations of statutes and conclusions of law de novo. *See In re Reymundo F.*, 217 Ariz. 588, ¶ 5, 177 P.3d 330, 332 (App. 2008). We find no basis to disturb the court's ruling here.

¶7 Unlike a dissolution action, which requires one of the parties to have been domiciled in Arizona for the preceding ninety days, *see* A.R.S. § 25-312(1), a separation action may be filed if either party is domiciled in the state at the commencement of the action. A.R.S. § 25-313(1). However, in order for a decree of legal separation to be entered, a trial court must find "[t]he other party does not object to a decree of legal separation." § 25-313(4). "If the other party objects to a decree of legal separation, on one of the parties meeting the required domicile for dissolution of marriage, the court shall direct that the pleadings be amended to seek a dissolution of the marriage." *Id.*

¶8 Here, Andrew objected to the proceedings on jurisdictional grounds and had specifically argued, as the trial court found, that Stephanie had not met the domicile requirements for a dissolution of marriage.[1] His objection to "all succeeding pleadings, motions, and notices" in the action therefore prevented the court from entering a decree of separation.

¶9 Although Stephanie suggests on appeal she should have been permitted to amend her petition because she had been domiciled in Arizona for ninety days when she filed her motion, our statutes do not allow parties to recharacterize a petition for

[1]Although Stephanie states in her opening brief that she "continues to believe . . . that her move to Florida . . . did not constitute a change in domicile," she has not raised on appeal the issue of whether she established a domicile in Florida. We therefore do not address it.

dissolution and thereby avoid the domicile requirements of this distinct action. Section 25-313(4) permits an amendment in a separation action "on one of the parties meeting the required domicile for dissolution," including the time the separation action has been pending. *See Davies v. Russell*, 84 Ariz. 144, 147-49, 325 P.2d 402, 404-05 (1958) (observing, under predecessor statutes, party properly filing separation complaint could file original or amended complaint for divorce upon meeting residency requirements for divorce in same county). Section 25-312(1), in contrast, specifies that the relevant domicile period for dissolution is "ninety days prior to filing the petition."

¶10 Our supreme court observed long ago that the distinction drawn by the legislature between divorce and separation actions impacts a trial court's subject matter jurisdiction, *Davies*, 84 Ariz. at 148, 325 P.2d at 405, and jurisdiction is generally acquired at the commencement of an action. *See Allen v. Superior Court*, 86 Ariz. 205, 208, 344 P.2d 163, 166 (1959). Because Stephanie did not satisfy the domicile requirements for dissolution at the time she filed her petition for dissolution of marriage, the trial court did not have jurisdiction in this matter, and it arguably therefore did not have the authority to amend her petition in order to cure this jurisdictional defect. *See Parker v. Uchida*, 14 Ariz. 57, 60, 125 P. 715, 716 (1912) (defects in subject matter jurisdiction generally cannot be cured); *cf. Davies*, 84 Ariz. at 149-51, 325 P.2d at 406-07 (reasoning under superseded statute that subject matter jurisdiction of court not retroactively affected by petitioner's continued residence in county after separation complaint filed). *But see Herr v. Herr*, 211 P.2d 710, 712 (Wash. 1949) ("'The fact that an original petition is insufficient to confer jurisdiction does not deprive the court of

jurisdiction to proceed upon an amended petition which is sufficient.'"), *quoting* 49 C.J. 560, Pleading, § 777.

¶11 In any event, we need not resolve this question because we may affirm the trial court on another ground. *See Adage Towing & Recovery, Inc. v. City of Tucson*, 187 Ariz. 396, 398, 930 P.2d 473, 475 (App. 1996) (appellate court may affirm trial court's ruling on any ground supported by record). Rule 15(a)(2), Ariz. R. Civ. P., provides that a party seeking leave to amend a pleading "must attach a copy of the proposed amended pleading as an exhibit to the motion." The rule also specifies various formal requirements that a proposed amended pleading must meet. *Id.* At the December 10, 2009 hearing, Stephanie made an oral motion to amend her pleading and indicated she had a proposed amended pleading in her possession that she was prepared to file. She did not, however, file a written motion seeking leave to amend her pleading. Nor did she make her proposed amended pleading part of the record. Consequently, unlike *Graham v. Goodyear Aerospace Corp., Ariz. Div.*, 120 Ariz. 275, 275, 585 P.2d 884, 884 (App.), *aff'd*, 120 Ariz. 272, 585 P.2d 881 (1978), her proposed amended pleading is not found in the record on appeal. Given her failure to comply with Rule 15(a), we do not find the trial court abused its discretion in denying Stephanie's motion to amend.[2]

[2]Our decision on this issue renders Stephanie's argument regarding domicile moot. In sum, because we conclude the trial court properly denied the motion to amend, we need not decide whether the court erred in failing to find whether Stephanie had reestablished a domicile in Arizona by July 2.

UCCJEA

¶12 Stephanie next challenges the trial court's finding that Florida was C.'s home state under the UCCJEA and, thus, that it lacked jurisdiction to make a child custody determination. We generally defer to a trial court's factual findings that affect its jurisdiction, *cf. Bonner v. Minico, Inc.*, 159 Ariz. 246, 253-54, 766 P.2d 598, 605-06 (1988), but we review a court's legal conclusions about its jurisdiction under the UCCJEA de novo. *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 7, 207 P.3d 754, 756 (App. 2009). We will affirm a court's ruling whenever it has reached a legally correct result, regardless of the reason. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992).

¶13 Arizona and Florida are among the many states that have adopted the UCCJEA. *See* A.R.S. §§ 25-1001 through 25-1067; Fl. Stat. Ann. §§ 61.501–61.542. Under the Act, a child's home state has jurisdiction to make an initial custody determination, provided the child has a home state. A.R.S. § 25-1031(A)(1); *see* UCCJEA § 201 cmt. 1, 9 U.L.A. 672 (1999) (noting UCCJEA prioritized jurisdiction of home state over other jurisdictional bases). The Act defines a "[h]ome state" for a child under six months old as "the state in which the child lived from birth with a parent or person acting as a parent, including any period during which that person is temporarily absent from that state." A.R.S. § 25-1002(7)(b). If a child has a home state, another state does not have jurisdiction to make an initial child custody determination unless the home state declines to exercise jurisdiction as specified in § 25-1031(A)(2) or (3). *See* § 25-1031(B) (noting § 25-1031(A) provides "exclusive jurisdictional basis" for Arizona

courts to make child custody determination); *accord Welch-Doden v. Roberts*, 202 Ariz. 201, ¶ 39, 42 P.3d 1166, 1174-75 (App. 2002).

¶14 Here, the trial court's determination that Florida was C.'s home state was legally correct under the terms of §§ 25-1002(7)(b) and 25-1031(A)(1). Section 201(a)(1) of the UCCJEA—the basis of § 25-1031(A)(1)—provides that a state court has jurisdiction to make an initial child custody determination if the state "was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State." 9 U.L.A. at 671. Florida was C.'s home state "within six months before the commencement of the proceeding" under § 25-1031(A)(1) insofar as he had lived there "from birth" with his parents until June 29, § 25-1002(7)(b); and even though C. was absent from Florida at the commencement of the proceeding on July 2, his father continued to live in that state. *See* § 25-1031(A)(1). Thus, this case was governed by what is commonly referred to as the "extended home state" provision of the Act. UCCJEA § 201 cmt. 1, 9 U.L.A. at 672.

¶15 Because Florida was C.'s home state, the superior court had jurisdiction to make an initial child custody determination only if a Florida court "declined to exercise jurisdiction" on the grounds specified in A.R.S. §§ 25-1037 or 25-1038. § 25-1031(A)(2), (3). At the time of the superior court's ruling, the Florida circuit court had not declined to exercise its jurisdiction over the child custody proceeding. And even when the circuit court later dismissed Andrew's petition for dissolution of marriage, it did so because he had not satisfied the state's evidentiary requirements for documenting his

residency; it did not decline jurisdiction because Florida was an inconvenient forum, *see* § 25-1037, or because of a parent's unjustifiable conduct. *See* § 25-1038.

¶16 In sum, because Florida was C.'s extended home state and had not declined jurisdiction, the superior court correctly determined it lacked jurisdiction to make a child custody determination under the UCCJEA. This conclusion is consistent with the cases cited by Stephanie in her opening brief regarding home-state determinations for children under the age of six months. In those cases, the children were found to have no home state either because they temporarily lived in their birth states for a matter of days before adoption proceedings were commenced, *see Doe v. Baby Girl*, 657 S.E.2d 455, 457, 462-63 (S.C. 2008), or because their parents did not plan to live in the children's birth states. *See Carl v. Tirado*, 945 A.2d 1208, 1209-10 (D.C. 2008); *In re D.S.*, 840 N.E.2d 1216, 1218, 1222-23 (Ill. 2005). Here, by contrast, C. lived with his parents in Florida for several weeks during which time they intended to make Florida their permanent home. We therefore uphold the trial court's home-state determination and dismissal based on the UCCJEA.

Communication Between Courts

¶17 Last, Stephanie contends the superior court abused its discretion by denying her request that it communicate with the Florida circuit court about child custody matters. She acknowledges, however, that she predicated this issue on her claim that the superior court erroneously denied her motion to amend her petition. Because we have decided this issue against Stephanie, we need not decide whether the superior court failed to communicate with the Florida court pursuant to A.R.S. § 25-1036(B).

Disposition

¶18 For the foregoing reasons, we affirm. We deny Stephanie's request for attorney fees.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge