NO. COA14-349

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

LARA GERHAUSER
(formerly VAN BOURGONDIEN),
Plaintiff,

v.

Moore County
No. 02 CVD 1315

MARTIN R. VAN BOURGONDIEN,
Defendant.

Appeal by plaintiff from orders entered 13 June 2013, 28 June 2013, and 3 December 2013 by Judge James P. Hill in District Court, Moore County. Heard in the Court of Appeals 9 September 2014.

Wyrick Robbins Yates & Ponton LLP by Tobias S. Hampson and K. Edward Greene, for plaintiff-appellant.

Doster, Post, Silverman, Foushee, Post & Patton, P.A. by Jonathan Silverman, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from three orders entered by the trial court, the first two modifying custody of the parties' two minor children, and the third addressing post-trial motions filed by plaintiff. For the reasons below, the trial court did not have modification jurisdiction under N.C. Gen. Stat. § 50A-201(a)

(2013). Accordingly, we vacate the trial court's orders entered on 13 June 2013, 28 June 2013, and 3 December 2013.

I. Background

The parties were married in 1998 and later that year, Mary[1] was born. The next year they had a son, Daniel. During the marriage, the parties and children lived in Moore County, North Carolina. In 2002, the parties separated, and on 23 September 2002, plaintiff filed a complaint in Moore County seeking custody of the children as well as other claims that are not relevant to this appeal. Defendant counterclaimed for custody also. On or about 16 January 2003, the Moore County District Court entered a consent order that granted joint custody of the children to both parties, with primary physical custody to plaintiff; this order also resolved the other pending claims between the parties.

On 9 July 2003, plaintiff was remarried to Charles Gerhauser. On 27 September 2004, defendant filed a motion for temporary custody or, in the alternative, modification of the prior custody order. In this motion, defendant alleged that plaintiff had remarried to Mr. Gerhauser and that due to his military service, plaintiff was planning to move to either

[1] We have used pseudonyms for the minor children.

Hawaii or California. Defendant sought to prevent plaintiff from removing the children from North Carolina. Plaintiff, Mr. Gerhauser, and the children moved to Hawaii on or about 30 October 2004. After a series of motions and temporary orders addressing plaintiff's move to Hawaii and other issues not relevant to this appeal, on 6 December 2004, the Moore County trial court entered a consent order addressing plaintiff's move to Hawaii with the minor children that modified the visitation schedule to provide for longer visits with defendant during holidays and spring and summer school breaks.

In 2005, defendant remarried, to Karen. On 10 August 2009, defendant and Karen moved to Palm Harbor, Florida. On 30 October 2009, plaintiff filed a motion to modify custody, alleging that she and the children had moved "back to the continental United States[,]"[2] that defendant had moved to Florida, and that defendant had failed to pay for or provide transportation for visitation when he was supposed to do so, resulting in missed visits, and requested that defendant be ordered to pay for all transportation and that his visits be

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[2] Plaintiff did not allege where she lived at the time, nor does our record include an Affidavit of Status of Minor Children stating where the children were residing at the time or when they began to reside there. According to a 27 September 2010 order, they were living in Lehi, Utah and had been there "for several years."

"decreased to a number that he will actually use." On 18 December 2009, defendant also filed a motion to modify custody, alleging that he lived in Palm Harbor, Florida and that plaintiff lived in Lehi, Utah. He also alleged that plaintiff had interfered with his visitation and communication with the children and that the children wanted to reside with him.

On 18 August 2010, the Moore County District Court entered a consent Memorandum of Judgment that was incorporated into a formal consent order entered on 27 September 2010. This consent order modified the visitation schedule. The trial court found that "[d]efendant now resides in Florida" and that "[p]laintiff and the minor children now reside in Lehi, Utah and have for several years." The order granted the parties joint legal custody, with plaintiff having primary physical custody and defendant secondary physical custody. The order set out a schedule with long visitation periods during summer breaks and school holidays and included provisions regarding payment for the children's travel expenses for visitation.

In December 2011, Mr. Gerhauser moved to Germany pursuant to a military deployment due to his service in the Utah Army National Guard as a liaison officer to the Special Operations Command in Stuttgart, Germany. On or about 28 February 2012,

plaintiff moved to Germany to join him, taking the minor children of the parties as well as the four children born to their marriage. Plaintiff did not tell defendant about the move to Germany until she was already there.

On 27 March 2012, defendant filed a motion for contempt, to modify visitation and custody, and for payment for travel expenses, alleging that he had received an email from plaintiff after her move to Germany and that she had not discussed the move with him nor did she provide an address to contact the children until 8 March 2012. Based on defendant's motion, the trial court entered an order to appear and show cause that required plaintiff to appear with the minor children on 21 May 2012 in Moore County District Court. In response, plaintiff filed a motion to dismiss, for judgment on the pleadings, for sanctions, and to modify child support. She alleged that her move to Germany did not cause any need for a change to visitation and that she could not take the children out of school to come to court on 21 May 2012. She also alleged that defendant's motion to modify was frivolous and requested that "[s]anctions be imposed against [d]efendant and his [a]ttorney."

On 25 June 2012, defendant filed an amended motion to modify custody and for contempt. He alleged that North Carolina

continued to have "exclusive jurisdiction over the issue of child custody" pursuant to N.C. Gen. Stat. § 50A-202 (2011). He also made allegations regarding plaintiff's move to Germany without informing him in advance, her failure to inform him regarding the children's address, healthcare providers, or any details of Mr. Gerhauser's assignment in Germany with the United States Army and that she had alienated the children from defendant in various ways and interfered with his communication with them.

On 13 August 2012, the hearing upon plaintiff's and defendant's pending motions began; it resumed on 25 October 2012, and counsel made closing arguments on 1 November 2012. The trial court took the case under advisement and entered a "Memorandum of Decision" on 13 June 2013, which was incorporated into a formal order entered on 28 June 2013.[3] In the order, although neither party had raised any question regarding the trial court's jurisdiction over the custody matter, the trial court recognized the issue presented by the fact that neither the parties nor the children had resided in North Carolina for

[3] There is no substantive difference between the "Memorandum of Decision" filed on 13 June 2013 and the formal order filed on 28 June 2013, so we will refer to the 28 June 2013 Order in this opinion and for purposes of our discussion treat it as the only order addressing the modification of custody.

several years. The trial court therefore included various findings of fact and conclusions of law regarding jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). The trial court found that Utah had been the children's home state as of 28 February 2012, but as of the date of commencement, they had moved to Germany and their absence from Utah was not a temporary absence. The trial court ultimately determined that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2)." The trial court granted to defendant primary legal and physical custody of the children, subject to visitation with plaintiff.

On 24 June 2013, plaintiff filed a motion for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2013), alleging several grounds for new trial. She also filed two affidavits that included detailed allegations regarding various irregularities that she claimed impaired her ability to present her evidence at trial as well as factual allegations disputing various findings of fact. She also averred various changes in the circumstances of the children during the time between the trial and the trial court's entry of the order, alleging that

many of the circumstances upon which the trial court had based the change of custody had changed because the family had moved to a new residence in Germany. On 11 July 2013, plaintiff filed an additional motion, for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 (2013), for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415 (2013), and a motion for stay. This motion included allegations regarding the nine-month delay between the trial and the entry of the judgment and changes in circumstances during that time and, for the first time, directly raised the issue of the trial court's jurisdiction to modify custody under the UCCJEA. Plaintiff alleged that

> North Carolina does not have jurisdiction of this matter under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as codified in North Carolina at N.C.G.S. § 50A-101 et seq. Specifically, the state of Utah has continuing exclusive jurisdiction over this matter in that Utah is the home state of the children on the date of the commencement of the proceeding and had been for the 6 months before the commencement of the proceeding and any absence from the State of Utah is and was temporary and did not deprive Utah of jurisdiction. This Court specifically found Utah was the residence of Plaintiff and where the children resided. This Court erroneously determined the children and Plaintiff were not "temporarily absent" due to Plaintiff's husband's military deployment to Germany, which is governed by a Status of Forces Agreement

> with Germany (which places significant restrictions on Plaintiff's presence and ability to remain, work and reside in Germany), on the basis there was no specific date certain for a return to the United States. However, this fact itself assumes the deployment is and was temporary—and certainly was so at the time of the commencement of this modification action which occurred weeks after Plaintiff's relocation to be with her deployed husband and that Plaintiff had no intent or expectation to remain permanently in Germany, even if there is no specifically set date for return. Therefore, Utah held exclusive, continuing jurisdiction over this matter. Consequently, the custody modification ordered by this Court is void for lack of subject matter jurisdiction.

On 9 September 2013, the trial court heard plaintiff's post-trial motions, and on 3 December 2013, the trial court entered a single-spaced, 23-page order denying plaintiff's motions. The trial court had the benefit of a trial transcript when considering plaintiff's motions and addressed each of plaintiff's claims of irregularity in detail, rejecting each one. The trial court also concluded that it had jurisdiction under the UCCJEA, although for a different reason than stated in the 28 June 2013 Order. But for purposes of this appeal, the relevant issue is the trial court's subject matter jurisdiction under the UCCJEA, and we will confine our analysis of the orders to that issue, as addressed in detail below. On 27 December

2013, plaintiff filed notice of appeal from the 13 June 2013 Memorandum of Decision, the 28 June 2013 Order, and the 3 December 2013 Order.

II. Appellate Jurisdiction

Plaintiff has filed notice of appeal from three orders: the 13 June 2013 Memorandum of Decision, the 28 June 2013 Order, and the 3 December 2013 Order. The 13 June 2013 Memorandum of Decision appears to be a transcription of the trial court's oral findings, conclusions of law, and decretal provisions, which were then repeated nearly verbatim in the formal order entered on 28 June 2013. As it was written, signed by the trial court, and filed with the Moore County Clerk of Court on 13 June 2013, it would appear that entry of the order actually occurred on 13 June 2013. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2013) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."). Plaintiff timely filed her Rule 59 motion for new trial on Monday, 24 June 2013.[4] Plaintiff's time to appeal from the 13 June 2013 Order as

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[4] A motion under Rule 59 must be served no later than 10 days after entry of the order. *Id.* § 1A-1, Rule 59(b). Under N.C. Gen. Stat. § 1A-1, Rule 6(a),

> [i]n computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute,

well as the 28 June 2013 Order was tolled by the Rule 59 motion. *See Wolgin v. Wolgin*, 217 N.C. App. 278, 281, 719 S.E.2d 196, 198-99 (2011). Because plaintiff filed her motion for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 on 24 June 2013, the time for appeal from both of the June 2013 orders was tolled pending disposition of the motion; we need not be concerned about which order—13 June or 28 June—is the modification order, for purposes of this appeal. The notice of appeal was timely filed after disposition of the Rule 59 motion and we have jurisdiction to address the appeal on the merits.

III. Trial Court Jurisdiction under the UCCJEA

Plaintiff argues first that the "Trial Court Erred in Determining North Carolina has Jurisdiction under the UCCJEA in

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> including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.

Id. § 1A-1, Rule 6(a) (2013). Our record does not reveal when the 13 June Memorandum of Decision was actually served upon the parties, but we need not be concerned about that date since the motion was timely based on the date of entry.

its Initial Custody Order" and next that the "Trial Court Erred in its Order on Plaintiff's Post-Trial Motions by Making a 'Clerical' Correction which altered the entire basis of Jurisdiction under the UCCJEA." In our review of the trial court's denial of plaintiff's Rule 59 motions as to "lack of subject matter jurisdiction," the lower court's findings of fact are binding on this Court when supported by competent evidence; we review its conclusions of law *de novo*. *Hammond v. Hammond*, 209 N.C. App. 616, 631, 708 S.E.2d 74, 84 (2011); *Burton v. Phoenix Fabricators & Erectors, Inc.*, 194 N.C. App. 779, 782, 670 S.E.2d 581, 583, *disc. rev. denied*, 363 N.C. 257, 676 S.E.2d 900 (2009).

> Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties. Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial. Because litigants cannot consent to jurisdiction not authorized by law, they may challenge jurisdiction over the subject matter at any stage of the proceedings, even after judgment. Arguments regarding subject matter jurisdiction may even be raised for the first time before this Court.

In re T.R.P., 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citations and quotation marks omitted).

Plaintiff's second argument is that the trial court referred to its change in the basis for jurisdiction under the UCCJEA in the 3 December 2013 Order as a correction of a "clerical error," but it is actually a substantive change and thus not a proper ground for modification of the 28 June 2013 Order. We need not address this second argument in detail. The trial court did not merely cite an incorrect subsection of N.C. Gen. Stat. § 50A-201 in the 28 June 2013 Order; the trial court quoted large portions of the statute in detail and made findings of fact and conclusions of law based upon the provisions of N.C. Gen. Stat. § 50A-201(a)(2), concluding that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2)."

In the 3 December Order, the trial court made additional findings of fact addressing the jurisdictional issue, again quoted relevant statutory provisions, and reached a different conclusion of law, after having the benefit of the parties' post-trial affidavits and arguments regarding jurisdiction. In that order, the trial court concluded that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27,

2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(4)." Considering each order as a whole, the change from the 28 June 2013 Order is clearly substantive and well beyond a "clerical" correction under N.C. Gen. Stat. § 1A-1, Rule 60. It is true that the effect of the order was unchanged, as the decretal provisions did not change. But the trial court did not merely make a typographical error when referring to 50A-201(a)(2) instead of 50A-201(a)(4).

> The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984); *Vandooren v. Vandooren*, 27 N.C. App. 279, 218 S.E.2d 715 (1975). We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error.

Hinson v. Hinson, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *disc. rev. denied*, 316 N.C. 377, 342 S.E.2d 895 (1986).

But ultimately, whether the trial court should or should not have made any changes to the original order as to jurisdiction, our inquiry is still the same: we must review *de novo* whether there was any ground for the exercise of subject matter jurisdiction under the UCCJEA, whether under N.C. Gen.

Stat. § 50A-201(a)(2) as stated by the 28 June 2013 Order, N.C. Gen. Stat. § 50A-201(a)(4) as stated by the 3 December Order, or some other basis. *See Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003) ("Because the trial court's sole basis for exercising subject matter jurisdiction is erroneous, we may review the record to determine if subject matter jurisdiction exists in this case."); *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. rev. denie*d, 352 N.C. 676, 545 S.E.2d 428 (2000) ("[A] court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking.").

In her briefs before this Court, plaintiff argues that the trial court erred in concluding that it had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(4) because Utah was the children's "home state" on 27 March 2012, the date of commencement of this modification proceeding.[5] Defendant responds that the trial court properly concluded under N.C. Gen. Stat. § 50A-201(a)(4)

[5] We are addressing only the 2013 orders in this opinion because we are limited to reviewing the orders on appeal, but it would appear that the same analysis would apply to the trial court's 2010 order based on the facts of the case. Although we are vacating only the 2013 orders on appeal, it would appear that the last order that the trial court had jurisdiction to enter was the December 2004 consent order addressing plaintiff's move to Hawaii.

that "[n]o court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)." *See* N.C. Gen. Stat. § 50A-201(a)(4). For the reasons discussed below, we believe there is a third way.

A. Initial Child Custody Jurisdiction

i. Statutory Framework

N.C. Gen. Stat. § 50A-202 sets out when North Carolina has "[e]xclusive, continuing jurisdiction" over a custody proceeding:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:
>
> (1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not 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; or
>
> (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.
>
> (b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that

> determination only if it has jurisdiction to make an initial determination under G.S. 50A-201.

Id. § 50A-202.

Here, it is undisputed that the children and their parents, the parties, did not reside in North Carolina as of the date of commencement. Thus, under N.C. Gen. Stat. § 50A-202(b), North Carolina may have jurisdiction to modify custody only if "it has jurisdiction to make an initial determination under G.S. 50A-201." *See id.* § 50A-202(b).

N.C. Gen. Stat. § 50A-201 sets forth four grounds for the court to exercise "[i]nitial child-custody jurisdiction":

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or 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;
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> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
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> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
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> (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
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> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).
>
> (b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

Id. § 50A-201(a), (b).

It is undisputed that North Carolina was not the "home state" of the children on the date of commencement and was not the "home state" within six months prior to the commencement, nor did any parent remain in North Carolina, so North Carolina cannot exercise jurisdiction under (a)(1). *See id.* § 50A-201(a)(1).

Additionally, no other state has been asked to exercise jurisdiction. Plaintiff asserts that Utah was the "home state"

and argues in her reply brief that "there is no record Utah has declined to exercise jurisdiction under section 50A-201(a)(3)." We do not read this statement as a double-negative assertion that Utah *has* been requested to exercise or *has exercised* jurisdiction over this custody proceeding. Despite a full custody trial, post-trial motions and affidavits filed over several months, and hearings on post-trial motions addressing the issue of jurisdiction, the record does not reflect, and neither party has informed the court, that either party ever asked any other state's court to exercise jurisdiction over this custody proceeding, and a state could not decline to exercise jurisdiction if no one filed a custody proceeding in that state. In addition, we note N.C. Gen. Stat. § 50A-209(a) requires that

> each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:
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> (1) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, the pleading or affidavit shall identify the court, the case number, and the date of the child-custody determination, if any;

> (2) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, the pleading or affidavit shall identify the court, the case number, and the nature of the proceeding; and
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> (3) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

Id. § 50A-209(a) (2013). "The purpose of requiring that this information be filed under oath is to assist the court in deciding if it can assume jurisdiction." *Pheasant v. McKibben*, 100 N.C. App. 379, 382, 396 S.E.2d 333, 335 (1990), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417 (1991). In addition, after the initial pleading, the parties have an affirmative and continuing obligation "to inform the court of any proceeding in this or any other state that could affect the current proceeding." N.C. Gen. Stat. § 50A-209(d). Neither party informed the trial court of "any proceeding in this or any other state that could affect the current proceeding." *See id.*

ii. Home State Jurisdiction

Since subsection (a)(1) is not applicable, we must consider the grounds that the trial court considered in its orders. Under N.C. Gen. Stat. § 50A-201(a)(2), we must consider whether "[a] court of another state does not have jurisdiction under subdivision (1)." *Id.* § 50A-201(a)(2). Subdivision (1), as noted above, is "home state" jurisdiction. *Id.* § 50A-201(a)(1). Plaintiff contends that on the date of commencement, Utah was the children's "home state."

For purposes of our review in this appeal, the relevant date is the date of commencement of this custody modification proceeding. *See id.* Under N.C. Gen. Stat. § 50A-102(5), "commencement" refers to "the filing of the first pleading in a proceeding." *Id.* § 50A-102(5) (2013). Under N.C. Gen. Stat. § 50A-102(4), a "child-custody proceeding" is "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." *Id.* § 50A-102(4). Thus, the date of commencement of this proceeding was 27 March 2012, when defendant filed his first motion requesting modification of custody and visitation based upon plaintiff's relocation to Germany. On that date, the trial court found, and neither party challenges, that plaintiff and the children lived in Aichelbergneg, Germany. Defendant lived in Dunedin, Florida at

the time. In the 28 June 2013 Order, the trial court made the following additional findings regarding whether Utah was the "home state" of the children:

> 30. At time of entry of "Consent Order for Modification of Child Custody, and Visitation," on September 27, 2010, [Mary] and [Daniel] resided in the primary physical custody of [plaintiff in Lehi], Utah. Said minor Children continued to reside . . . primarily at same location until on or about February 28, 2012, when they moved, with [plaintiff], to Aichelbergneg, Germany, where they remain living at close of this Hearing . . . with [Mr. Gerhauser at] Kelly Barracks Military Base in Germany, none of these individuals having subsequently returned to live in Utah.
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> . . .
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> 31. At time of entry of "Consent Order for Modification of Child Custody, and Visitation, on September 27, 2010, [defendant] resided in the State of Florida, where he has since continued to reside and where he resided on date of filing of "Motion to Show Cause for Contempt, to Modify Visitation, Custody, Payment of Travel," on March 27, 2012.
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> . . .
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> 39. [Mary] and [Daniel] did not live in Utah with [plaintiff] for six consecutive months immediately preceding commencement of the child custody proceeding now before the Court. Said minor Children left Utah and moved with [plaintiff] to live in Germany on or about 02/28/12, some 26 or more days[[6]]

[6] 27 March 2012 was actually 28 days after 28 February 2012.

> before commencement of the child custody proceeding now before the Court; therefore, Utah was not then the "home state" for the said minor Children. As of or on or about February 28, 2012, Utah was the "home state" for [Mary] and [Daniel], as they had been living there with [plaintiff] for six consecutive months immediately preceding that date, which was within the six months immediately preceding commencement of the child custody proceeding now before the Court; however, [Mary] and [Daniel] became absent from Utah as of on or about February 28, 2012, and [plaintiff] became absent from Utah with them at the same time, leaving no parent or person acting as a parent remaining living in Utah. [Mary], [Daniel] and [plaintiff] left Utah on or about February 28, 2012, knowing not when they would return, precluding characterization of their absence as "temporary." See: N.C.G.S. 50A-102(7). No other state would qualify as "home state" for [Mary] or [Daniel] and/or have jurisdiction, pursuant to N.C.G.S. 50A-201(a)(1), as of filing of the "Motion in the Cause for Contempt, to Modify Visitation, Custody, Payment of Travel," on 3/27/12. This Court therefore has jurisdiction to modify the "Consent Order for Modification of Child Custody and Visitation" of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2).

Plaintiff argues that the trial court erred in its conclusion that Utah had lost its home state status because plaintiff and the children had moved to Germany prior to the date of commencement of the proceeding. Plaintiff does not challenge the sufficiency of the evidence to support the trial

court's findings of fact but contends that the trial court erred in concluding that her absence from Utah was not temporary.

The first inquiry as to jurisdiction under the UCCJEA is always the determination of the child's "home state," if any. *Id.* § 50A-201(a)(1). N.C. Gen. Stat. § 50A-102(7) defines "home state" as

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period.

Id. § 50A-102(7). We must then consider whether the trial court properly determined that plaintiff's absence from Utah was not a "temporary absence."

Our courts have adopted a "totality of the circumstances approach" to the issue of temporary absence. *See Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004).

> Under the UCCJEA, the "home state" definition permits a court to include a temporary absence of a parent or child from the state within the six months before the filing of the custody action as time residing in North Carolina. N.C. Gen. Stat. § 50A–102(7). This Court has held that the proper method for determining whether an absence from the state is a temporary absence is by assessing the totality of the circumstances. *Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004). In

> *Chick*, we noted the totality of the circumstances test encompasses the length of the absence and the intent of the parties. *Id.* at 450, 596 S.E.2d at 308. The test also permits greater flexibility than other tests by allowing for the "consideration of additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise." *Id.*

Hammond, 209 N.C. App. at 633, 708 S.E.2d at 85.

Plaintiff's argument that the trial court erred in finding that her absence from Utah was not a temporary absence is much like the argument of the mother in *Chick*, who contended that "the parties' intent at the time of the move should determine whether the absence is a temporary absence for purposes of home state determinations." *See Chick*, 164 N.C. App. at 449, 596 S.E.2d at 308. Plaintiff argues that she believed that the move to Germany was temporary, and that her husband's orders for deployment at that time only ran to 30 September 2012. Although plaintiff's intent may be a relevant factor, it is by no means controlling. Here, the trial court made additional findings of fact in the 3 December 2013 Order addressing in greater detail the reasons for its conclusion that the absence was not temporary:

> 25. In the underlying case at bar, the Court determines it appropriate to make additional Findings of Fact, from a review of the

evidence previously received during the trial of this child custody case, along with one (1)
additional finding from the Plaintiff's circumstances at [the] time [of] this Hearing, in re-examining this issue, pursuant to Plaintiff's Motions, and determining that Plaintiff and the Parties' minor Children's flight from the State of Utah, effective February 28, 2012, does not constitute a period of temporary absence, pursuant to N.C.G.S. 50A-102(7):

A. Plaintiff's Husband, Mr. Gerhauser[,] was not an active duty member of the United States Military. Mr. Gerhauser sought appointment by the United States Military to a full-time support position, which resulted in his receipt of original "unaccompanied" orders to station in Germany.

B. Plaintiff and her Husband, Mr. Gerhauser[,] expended substantial effort to have Mr. Gerhauser's "unaccompanied" order[s] changed to "accompanied" orders, authorizing Mr. Gerhauser to be accompanied by Plaintiff and these Parties' minor Children in Germany.

C. Defendant's Exhibit 1 in the underlying trial of this Matter, subject of these Motions, "Gerhauser Base Order, HEADQUARTERS UTAH NATIONAL GUARD, Office of the Adjutant General," stated, in pertinent parts, "(o) Dependent travel and shipment of household goods and personal baggage of authorized in IAW-JFTR" and further, that Mr. Gerhauser, Plaintiff's Husband was "ordered to Active Duty . . . for the period of time shown plus allowable travel time" to Kelly Barracks in Germany, with the period of time shown being from December 02, 2011 through September 30, 2012.

> D. When Plaintiff and the Parties' minor Children departed from Utah, they had no idea when they would return.
>
> E. Plaintiff and Mr. Gerhauser moved their entire Family, including the Parties' minor Children from Utah to Germany.
>
> F. Plaintiff and Mr. Gerhauser went to the extent of having their vehicles shipped from Utah to Germany with them.
>
> F. [(sic)] Plaintiff and Mr. Gerhauser went to the effort and extent of renting out their residence which they occupied and in which they and the Parties' minor Children lived in the State of Utah, evidencing that they had no intent of returning anytime in the near future or that they even knew when they might return.
>
> G. At the time of the presentation of the Parties['] closing arguments in the underlying trial, November 01, 2012, Plaintiff and Mr. Gerhauser, along with the Parties' minor Children[,] had resided in Germany for eight (8) months.
>
> H. At the time of the Hearing on these Motions, Plaintiff and Mr. Gerhauser had resided in Germany for a period of eighteen (18) months, Mr. Gerhauser having voluntarily extended his and his Family's stay in Germany, still with no return date in sight.

In addition to these findings, in the 28 June 2013 Order, the trial court considered the motives and circumstances of plaintiff's move to Germany and her failure to inform defendant in advance of the impending move:

92. [Plaintiff] failed to inform [defendant] that [plaintiff] was moving [Mary] and [Daniel] out of the United States to Germany before doing so because [plaintiff] did not want [defendant] to have [an] opportunity to file an action in court to allow the Court to determine whether such a move was in the said minor Children's best interests. [Plaintiff]'s actions were in disrespect of the Court's continuing responsibility to appropriately determine the best interests of [Mary] and [Daniel].

. . .

98. [Plaintiff] knew as early as during the Summer of 2011, and shared with [Mary] and [Daniel], that they would be moving overseas with [Mr. Gerhauser] and their half-siblings.

99. [Mr. Gerhauser] received military orders to move to Germany on or about November 29, 2011. [Mr. Gerhauser] immediately shared this information with [plaintiff]. [Plaintiff] knew that she intended to move [Mary] and [Daniel] to Germany some 88-days prior to their actual move to Germany.

100. [Plaintiff] told her Mother, Mary Scribner, [Mary] and [Daniel]'s maternal Grandmother[,] that [plaintiff] and [Mary] and [Daniel] were moving to Germany on or about January 12, 2012, some 46-days prior to [plaintiff] actually taking [Mary] and [Daniel] to Germany.

101. Though they were told by [plaintiff] that they were preparing to move to Germany, [plaintiff] instructed [Mary] and [Daniel] to not inform [defendant] of their impending move.

In considering the totality of the circumstances, the trial court properly considered Mr. Gerhauser's voluntarily seeking deployment to Germany, making extra efforts to get "accompanied" orders so the entire family could come, and plaintiff's concealment of the move until it was accomplished. Plaintiff stresses that when she first moved, the length of the deployment was only until 30 September 2012 and contends that the Court should not consider anything that happened after that date. It is true that the determination must be made as of the date of commencement, but the trial court should not ignore a party's actions taken after the relevant date in evaluating the party's credibility and intentions. The trial court properly concluded that plaintiff's actions after the move bolstered its determination that the move was not temporary. *See id.* at 449, 596 S.E.2d at 308 (adopting "totality of the circumstances" approach to issue of temporary absence).

Plaintiff argues that

> a rule in which when a military family is deployed overseas it [(sic)] automatically removes "home state" jurisdiction from the state in which they resided, simply because the family did not know when the deployment would end would be very unjust and subject military families to forum shopping from aggrieved former spouses in child custody matters. At a minimum, the fact [that] a military family is deployed overseas not

> knowing when they will return should not <u>preclude</u> a trial court from considering the absence temporary based on the totality of the circumstances—which, in this case, demonstrate the Gerhausers did intend to return to their home in Utah, where [plaintiff] remained a citizen and resident as found by the trial court.

We do not agree with plaintiff that the trial court considered the military deployment as "automatically" removing Utah's home state jurisdiction, nor do we endorse such a rule. The trial court considered many factors in making this determination. We also do not endorse a rule that a military deployment, even if the initial orders provide for a limited time period, is always a temporary absence. A military deployment is just one of the circumstances that a trial court may consider in determining whether an absence from a state is temporary.[7] And as noted above, although the determination is made based upon the

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[7] As few North Carolina cases have addressed this issue, we have also reviewed cases of other states applying this same provision of the UCCJEA or its predecessor, the Uniform Child Custody Jurisdiction Act ("UCCJA"). Some courts have considered a military deployment as not a "temporary absence." *See, e.g.*, *Carter v. Carter*, 758 N.W.2d 1, 9 (Neb. 2008); *Consford v. Consford*, 711 N.Y.S.2d 199, 205 (N.Y. App. Div. 2000); *L.H. v. Youth Welfare Office*, 568 N.Y.S.2d 852, 856 (N.Y. Fam. Ct. 1991). Others have considered military deployment as a "temporary absence." *See, e.g.*, *Lemley v. Miller*, 932 S.W.2d 284, 287 (Tex. App. 1996) (per curiam). But in all of these cases, the courts considered various other circumstances of the parties and children in addition to the deployment to make the determination.

circumstances on the date of commencement, the court need not ignore what happened afterwards, as this evidence may or may not tend to support the moving parent's claims. For example, in *Lemley v. Miller*, the court considered what happened after the initial military deployment to support its determination that the parent's relocation was a temporary absence:

> Important to our determination that the child's residency in Germany was a temporary absence is that, immediately before the family left for Germany, Lemley and the child resided in Harker Heights for one and one-half years. Additionally, when returning to the United States from Germany, Lemley and the child came back directly to Harker Heights where they continue to reside. Based upon the facts of this case, no other state but Texas had even the opportunity to become the child's home state.

932 S.W.2d at 287.

Here, Mr. Gerhauser actively sought "accompanied" status so that his family could come to Germany and then sought to stay in Germany after the initial assignment; his extended assignment was not forced upon him in disregard to his wishes or plans. In addition, even after defendant filed the motion to modify, plaintiff still did not inform defendant of her husband's new orders extending his assignment in Germany for a year, through September 2013, until she was "asked on the stand in open Court, under oath, in [the] hearing, on October 26, 2012." Mr.

Gerhauser and plaintiff had their vehicles shipped to Germany, and they relocated six children, at least three of whom were of school age, in the middle of a school year. These actions indicate that he and plaintiff intended to stay in Germany for an extended and indefinite period of time, with, as the trial court found, "no return date in sight" even as of the last hearing. Thus, on *de novo* review, we agree that plaintiff's absence from Utah on the date of commencement was not a "temporary absence" and Utah was no longer the "home state" of the minor children. Although Utah had been the "home state" within six months prior to the commencement of the proceeding, no parent continued to live in Utah, so Utah did not have "home state" jurisdiction. *See* N.C. Gen. Stat. § 50A-201(a)(1).

Although the parties have not made any argument regarding the possibility that another state may have jurisdiction under N.C. Gen. Stat. § 50A-201, we note that the findings of fact do raise questions of whether either Florida or Germany may have jurisdiction. Pursuant to N.C. Gen. Stat. § 50A-105(a), "[a] court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Parts 1 and 2 [of the UCCJEA]." *Id.* § 50A-105(a) (2013). N.C. Gen. Stat. § 50A-201 and 202 are included in Part 2 of the UCCJEA, so

we must treat Germany no differently than Utah, Florida, or North Carolina. *See id.*

The children lived in Germany on the date of commencement, but they had been there for only approximately 28 days and not "six consecutive months immediately before commencement," so Germany was not the "home state" of the children on the date of commencement. *See id.* § 50A-102(7). The children had visited defendant in Florida prior to the date of commencement, but they had not lived there for "six consecutive months immediately before the commencement." *See id.* The children had no "home state" on the date of commencement, so we must proceed to consider significant connection jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2).

iii. Significant Connection Jurisdiction

If there is no home state, N.C. Gen. Stat. § 50A-201(a)(2) then directs that "a court of this State has jurisdiction to make an initial child-custody determination" where

> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; *and*
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships.

Id. § 50A-201(a)(2) (emphasis added).

This jurisdiction is normally referred to as "significant connection" jurisdiction. We generally determine jurisdiction by examining the facts existing at the time of the commencement of the proceeding. *See Carolina Marina & Yacht Club, LLC v. New Hanover Cnty. Bd. Of Comm'rs*, 207 N.C. App. 250, 252, 699 S.E.2d 646, 648 (2010), *disc. rev. denied*, ___ N.C. ___, 706 S.E.2d 253 (2011). Neither plaintiff nor defendant argued that any state has "significant connection" jurisdiction in this case when the jurisdiction issue was addressed upon the post-trial motions.[8] In the 28 June 2013 Order, the trial court relied on (a)(2) in finding that North Carolina had significant connection jurisdiction. The trial court found that "[t]he [p]arties have

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[8] Plaintiff's brief before this Court does at least acknowledge this alternative:

> Even assuming arguendo Utah did not have home state jurisdiction, there are at least two states on this record which would have "significant connection" jurisdiction under subsection (a)(2): Utah and, to a lesser degree, Florida. This is because each parent had substantial connections to Utah or Florida, respectively. Moreover, as the children had primarily been living, schooled, and engaged in social and other activities as well as personal relationships in Utah for the several years preceding this action, such evidence would clearly be located there.

voluntarily litigated all matters regarding custody and support of [Mary] and [Daniel] in this [c]ause, and neither [p]arty objects to this Court continuing to exercise jurisdiction to decide this [c]ause." This custody case did have a long history of litigation in Moore County and neither party had objected to jurisdiction, but since jurisdiction cannot be conferred by consent, this finding does not support a conclusion of jurisdiction under (a)(2). *See Foley*, 156 N.C. App. at 411, 576 S.E.2d at 385 ("Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel."). In the 3 December 2013 Order, the trial court instead relied on (a)(4), sometimes called jurisdiction by necessity or default jurisdiction, after concluding that no state would have jurisdiction under (a)(1), (a)(2), or (a)(3). *See* N.C. Gen. Stat. § 50A-201(a)(4).

As mentioned above, the record raises other issues regarding significant connection jurisdiction that have not been argued by the parties. It is understandable that each party had his or her own reasons for not wanting to make an argument as to whether "any other state" might have significant connection jurisdiction, where there are four potential states to consider under the facts of this case. This custody case has been long, hard-fought, and expensive, both financially and emotionally, to

all involved. Perhaps it was cheaper and easier for the parties to continue litigating their case in North Carolina, where it had been since 2002, than to start over with new litigation in another state. But the policy and intent behind the UCCJEA and the Parental Kidnapping Prevention Act ("PKPA") is to ensure that custody orders are enforceable in any state because the issuing court has exercised jurisdiction in accord with the UCCJEA and PKPA. This jurisdictional rule must be enforced in all cases. *See Williams v. Williams*, 110 N.C. App. 406, 409, 430 S.E.2d 277, 280 (1993) ("To determine jurisdiction of child custody issues, the trial court must follow the mandates of the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A (1989), and North Carolina's Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. §§ 50A-1—50A-25 (1989)."). Although differing in some respects, the provisions of the PKPA and UCCJEA are substantially similar. The PKPA provides in pertinent part:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

28 U.S.C. § 1738A(g) (2012); *see also* N.C. Gen. Stat. § 50A-106 (2013).

On *de novo* review of jurisdiction under the UCCJEA, we must now consider what the parties did not: whether any other state, here Florida, Utah, or Germany, would have had significant connection jurisdiction on 27 March 2012, the date of commencement of this proceeding. Fortunately, the trial court made extensive and detailed findings of fact in both orders, none of which are challenged by the parties, so we have adequate factual findings upon which to make legal conclusions of significant connection jurisdiction in this case.

1. North Carolina

Defendant argues that if North Carolina did not have jurisdiction under N.C. Gen. Stat. § 50A-201(a)(4) as found in the trial court's last order, it has jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2) as found in the first order. Defendant contends that

> [t]his matter has been litigated by the parties in Moore County, North Carolina since September[] 2002—twelve years. Because the matter of child custody has been litigated in this state for over a decade, the amount of historical evidence pertaining to the welfare of the children is substantial enough to make this State the proper jurisdiction under "significant connection" jurisdiction.

Defendant cites no authority to support the proposition that the history of the litigation itself can be the "significant connection" and "substantial evidence" that would confer jurisdiction. In fact, N.C. Gen. Stat. § 50A-207 supports our conclusion that these factors alone cannot confer jurisdiction. *See* N.C. Gen. Stat. § 50A-207 (2013). Under N.C. Gen. Stat. § 50A-207(b), when a court "*which has jurisdiction* under this Article" is considering declining jurisdiction because it is an inconvenient forum, the court may consider several factors, including "(5) [a]ny agreement of the parties as to which state should assume jurisdiction . . . and (8) [t]he familiarity of the court of each state with the facts and issues in the pending litigation." *Id.* § 50A-207(a), (b) (emphasis added). But the court must first have jurisdiction, as determined under N.C. Gen. Stat. § 50A-201(a)[9], before it may consider these factors, and it may consider them only as part of a determination of whether the court should decline to exercise its jurisdiction, where another state would also have jurisdiction.

[9] N.C. Gen. Stat. § 50A-201(b) provides that "[s]ubsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State." *Id.* § 50A-201(b).

As noted briefly above, we conclude that North Carolina did not have significant connection jurisdiction. Neither parent lived in North Carolina; plaintiff and the children moved away in 2004, more than seven years before the date of commencement of this proceeding. The only connection North Carolina had to the children on the date of commencement was the custody litigation in Moore County. The litigation itself is clearly not the sort of "significant connection" required by N.C. Gen. Stat. § 50A-201(a)(2). It is true that there was "substantial evidence" available in North Carolina regarding the children, since the parties had a full custody trial and they presented extensive evidence regarding the children's "care, protection, training, and personal relationships." *Id.* § 50A-201(a)(2). But N.C. Gen. Stat. § 50A-201(a)(2) requires both a "significant connection" and "substantial evidence," so North Carolina does not have "significant connection" jurisdiction. *See id.*

2. Utah

Plaintiff argues that Utah would have significant connection jurisdiction. Under the orders, Utah is the most obvious candidate state for significant connection jurisdiction. Even though no parent continued to live in Utah on the date of commencement, plaintiff and the children had only been away from

Utah for approximately 28 days, after having lived there for about five and a half years. The trial court found that "[p]laintiff . . . remains a citizen of the United States and a resident of the State of Utah, but currently resides in or about Aichelbergneg, Germany." **[RP 131]** Plaintiff and her husband still own the home in which the children lived, which they rented out when they moved to Germany. **[RP 221]** As the children lived in Utah, attended school, received medical care, and generally carried on their lives in Utah for five and a half years, they still had "significant connections" to Utah only 28 days after leaving. There was also "substantial evidence" available in Utah regarding the children's "care, protection, training, and personal relationships" as they had been living there for five and a half years. *See id.* Thus, Utah would have had "significant connection" jurisdiction on 27 March 2012. *See id.*

3. Germany

The trial court also made extensive findings of fact about Germany. On the date of commencement, the children had lived there approximately 28 days. They had just begun the process of getting settled in Germany when defendant filed his motion. The trial court found that "[w]hen [plaintiff] arrived in Germany

with all 6 minor [c]hildren, [plaintiff] did not know where they would be staying. They stayed in a hotel on base at Kelley Barracks Military Base for about a week after their arrival in Germany." **[RP 153]** At that time, the children had not developed a "significant connection" to Germany, nor would there have been time for "substantial evidence" regarding the children's "care, protection, training, and personal relationships" to develop. *See id.* Germany did not have "significant connection" jurisdiction on 27 March 2012. *See id.*

4. Florida

Plaintiff's brief also recognizes the possibility that Florida could have significant connection jurisdiction, and we agree that it does. Although the children had not lived in the primary physical custody of defendant as of the date of commencement, defendant shared joint legal custody of the children since the first custody order, and since defendant's move to Florida in 2009, the children had spent extended times in Florida during summers and holidays. In addition, they have a half-brother and step-siblings in Florida. The trial court made extensive findings of fact about defendant's home and family in Florida, including his wife Karen and the children's relationships with their step-family. The trial court made

findings about the children's housing, activities, relationships, and household duties while in Florida. From these findings, it is clear that the children had developed relationships with their brother, step-siblings, and others in Florida long before 2012, based upon their time visiting there. There was also "substantial evidence" available in Florida, based on these relationships and activities. *See id.* Thus, Florida also had "significant connection" jurisdiction as of 27 March 2012. *See id.*

We have also considered whether N.C. Gen. Stat. § 50A-201(a)(2) requires us to decide which of the two states, Utah or Florida, had more significant contacts and substantial evidence, and we have found no authority directly on point, either in North Carolina or elsewhere. Reading the statute as a whole, N.C. Gen. Stat. § 50A-201(a)(4) requires us to determine only whether a "court of any other state" would have jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1), (2), or (3). *Id.* § 50A-201(a)(4). If so, "this state" does not have jurisdiction. *Id.* In this particular situation, we do not believe it is necessary or appropriate for us to consider which of the two states had the *most* "significant connections" and "substantial evidence" in March 2012. It is sufficient for us to determine that either of

them could have exercised significant connection jurisdiction, consistent with the mandates of the UCCJEA and PKPA. Even if we were to address which state had the most "significant connections," our ruling would have no effect on how this case may proceed after this appeal, since that will depend upon the home state and other relevant circumstances of the children and parties on the "date of commencement[,]" when a new motion or proceeding regarding custody is filed. *See id.* § 50A-201(a)(1).

iv. More Appropriate Forum Jurisdiction

N.C. Gen. Stat. § 50A-201(a)(3) provides that a court of this State has jurisdiction to make an initial child-custody determination only if "[a]ll courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208." *Id.* § 50A-201(a)(3). As noted above, Utah and Florida had significant connection jurisdiction as of the date of commencement, so they are courts having jurisdiction under (a)(2). As also discussed above, no party has informed the trial court of "any proceeding in this or any other state that could affect the current proceeding." *See id.* § 50A-209(d). Neither Utah nor Florida has declined to exercise jurisdiction for any

reason, including under N.C. Gen. Stat. § 50A-207 or N.C. Gen. Stat. § 50A-208. Thus, North Carolina could not exercise jurisdiction under section 50A-201(a)(3). *See id.* § 50A-201(a)(3).

v. Jurisdiction by Necessity

N.C. Gen. Stat. § 50A-201(a)(4) provides that a court of this State has jurisdiction to make an initial child-custody determination only if "[n]o court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)." *Id.* § 50A-201(a)(4). We have determined that both Utah and Florida would have had "significant connection" jurisdiction under subdivision (2) on 27 March 2012. Since another state would have jurisdiction under the criteria of (a)(2), North Carolina cannot exercise jurisdiction by necessity under subdivision (4). *See id.* The trial court erred in concluding that no other state would have had jurisdiction under subdivisions (1), (2), or (3); thus, the trial court erred in exercising jurisdiction under (a)(4). *See id.*

IV. Conclusion

Because the trial court did not have subject matter jurisdiction under N.C. Gen. Stat. § 50A-201(a), we vacate the orders entered on 13 June 2013, 28 June 2013, and 3 December

2013. Because all three orders must be vacated, we need not consider plaintiff's arguments regarding the trial court's modification of primary custody or the delay in entry of the custody modification order.

VACATED.

Chief Judge MCGEE concurs.

Judge BRYANT dissents in a separate opinion.

NO. COA14-349

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2013

LARA GERHAUSER
(formerly VAN BOURGONDIEN)
Plaintiff,

v.

Moore County
No. 02 CVD 1315

MARTIN R. VAN BOURGONDIEN,
Defendant.

BRYANT, Judge, dissenting.

Because I do not believe the trial court's findings of fact lead unavoidably to the conclusion that jurisdiction in this forum is extinguished, I respectfully dissent.

Even if the parties lack a significant connection to North Carolina, a North Carolina court may exercise jurisdiction provided courts of the alternative forums decline to exercise such. *See* N.C.G.S. § 50A-201(a)(3) (A court of this State has jurisdiction to make a child-custody determination if "[a]ll courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child . . . ."). No court in an alternative

forum has been presented with the question of assuming jurisdiction.

Moreover, I do not believe the jurisdictional framework of the UCCJEA, as codified in our General Statutes, compels that this forum relinquish jurisdiction over a current child custody matter when no other forum has assumed jurisdiction. As noted by the majority at the time the custody action was revived in 2012, the minor children had no home state, and the record reflects no acknowledgment by the parties or a court of an alternative forum as to an intent to exercise jurisdiction. Vacating the trial court's order absent an acknowledgement that jurisdiction would be exercised by another forum is not a relinquishment of jurisdiction; it is an extinguishment. *See* N.C.G.S. § 50A-202 (Official Comment) ("[T]he original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction. . . . [T]he State with exclusive, continuing jurisdiction may relinquish jurisdiction when it determines that another State would be a more convenient forum under the principles of Section 207."); *see also In re Baby Boy Scearce*, 81 N.C. App. 531, 538–39, 345 S.E.2d 404, 409 (1986) ("Once

jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined." (citations omitted)).

For this reason, I would reverse the trial court's order and remand it for a determination of what forum will exercise jurisdiction. *See* N.C.G.S. § 50A-110(a) ("Communication between courts") ("A court of this State may communicate with a court in another state concerning a proceeding arising under [the UCCJEA as codified in General Statutes, Chapter 50A, Article 2].").

Also, I write separately to note the majority's analysis concluding that North Carolina, as a forum, lacks jurisdiction over this child custody matter is precariously perched on the following observation and extrapolation: "The only connection North Carolina had to the children on the date of commencement was the custody litigation in Moore County. The litigation itself is clearly not the sort of 'significant connection' required by N.C. Gen. Stat. § 50A-201(a)(2)."[10]

This conclusion is influenced by an analysis of factors listed in section 50A-207.1 authorizing a court to decline the

[10] The majority acknowledges that "there was substantial evidence available in North Carolina regarding the children, since the parties had a full custody trial and they presented extensive evidence regarding the children's care, protection, training, and personal relationships." (citation and quotations omitted).

exercise of jurisdiction where this forum is determined to be inconvenient. While I acknowledge there is little guidance directly addressing the question of when a history of litigation, standing alone, can connote a significant connection to a forum, I am not persuaded that the history of litigation as evidenced here is irrelevant to that consideration.

The custody litigation commenced in Moore County in 2002 and was revived in 2004, 2009, and 2010, prior to the current action filed in 2012. While plaintiff and the minor children moved from North Carolina in 2004 and defendant moved from North Carolina in 2009, both parties participated in current proceedings before the Moore County District Court and failed to raise the issue of jurisdiction or the possibility of alternative forums prior to the trial court's 28 June 2013 order declaring the exercise of jurisdiction proper in North Carolina. It would appear that while jurisdiction cannot be conferred by the consent of the parties, the impropriety of North Carolina's exercise of jurisdiction was not immediately obvious. Whether it is of legal significance may be debatable but, it is apparent the parties felt a connection to this State that was not insignificant.