

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

LISA A. MARTINDALE,	:	
Plaintiff-Appellant,	:	
v.	:	Case No. 14CA30
ERIC J. MARTINDALE,	:	<u>DECISION AND</u>
Defendant-Appellee.	:	<u>JUDGMENT ENTRY</u>
	:	RELEASED: 02/04/2016

APPEARANCES:

Micaela Deming, Micaela Deming, Esq. LLC, Columbus, Ohio, and Sierra L. Meek, Nolan & Meek Co., L.P.A., Nelsonville, Ohio, for Appellant.

David J. Winkelmann, Millfield, Ohio, for Appellee.

Hoover, J.

{¶ 1} Lisa A. Martindale (“appellant”) appeals the judgment of the Athens County Common Pleas Court that dismissed her complaint for legal separation against Eric J. Martindale (“appellee”). We find that the trial court erred by failing to consider the factors provided for determining whether a court is an inconvenient forum pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”). Therefore, we sustain a portion of appellant’s third assignment of error, find the remaining portions of the third assignment of error and the other assignments of error moot, reverse the judgment of the trial court, and remand the matter for proceedings consistent with this decision.

I. Facts and Procedural Posture

{¶ 2} The parties were married in March 2011. At the time of the commencement of these proceedings, the parties had two children, A.M. and M.M. According to the appellant's parenting proceeding affidavit, the parties had lived in Athens, Ohio, from August 2011 through February 2012. Appellee was an active member of the United States military; and the parties moved to Camp Lejeune, North Carolina, where they lived from February 2012 through June 2012. In June 2012, the family then moved to Pennsylvania. By November 24, 2013, the appellant had moved back to Athens, Ohio, with the parties' minor children. At that time, the appellant was pregnant with twins.¹

{¶ 3} On December 20, 2013, appellant filed a petition for a domestic violence civil protection order in the Athens County Court of Common Pleas. This action was captioned *Lisa Ann Martindale v. Eric John Martindale* and was designated as Case No. 13DV0072. Appellant claimed that appellee had "pose[d] a threat to [her] and the parties' children." According to both of the appellant's custody affidavits, the trial court granted the civil protection order against the appellee in favor of the appellant. The custody affidavits indicated "CPO granted."² However, according to appellee's "Statement of the Case and Facts," the Athens County Domestic Relations Magistrate declined to impose a further order in Case N. [sic] 13DV0072 on or about October 1, 2014."³

¹ The twins were born in July 2014. According to the appellant's brief, the twins were just over two months old at the time of the filing of the appellant's brief in September 2014.

² On December 20, 2013, in *Lisa Ann Martindale v. Eric John Martindale*, Case No. 13DV0072, the magistrate granted the "Domestic Violence Civil Protection Order (CPO) Ex Parte" in favor of Lisa Ann Martindale and against Eric John Martindale. The parties' two minor children, M.M., DOB: 07/29/12 and A.M., DOB: 08/24/11, were "persons protected by [the] order". The ex-parte civil protection order included "Supervised visitation only—said visitation to occur in Ohio."

³ In *Lisa Ann Martindale v. Eric John Martindale*, Case No. 13DV0072, "Findings of Fact and Conclusions of Law; Magistrate's Order Denying Petition for Domestic Violence Civil Protection Order" was filed on October 31, 2014. The magistrate denied the petition for the civil protection order and ordered the termination of the ex-parte civil protection order filed on December 20, 2013. However, the trial court has neither adopted nor rejected the Magistrate's Order.

{¶ 4} On January 6, 2014, appellant filed her complaint for legal separation in the same court that she filed the petition for the civil protection order. In the complaint, appellant requested a legal separation from appellee, custody of the parties' minor children, spousal support, and child support. On January 7, 2014, the magistrate issued an ex-parte temporary order that designated appellant as the temporary custodian and primary residential parent of the parties' two minor children. The magistrate ordered that the appellee's "visitation shall be subject to the directives of the Courts [sic] Orders in Case No. 13DV0072." The magistrate further ordered that the "children shall not be removed from the State of Ohio without further order of this court." The appellant perfected service of the legal separation action upon the appellee on or about January 10, 2014, by U.S certified mail.

{¶ 5} On January 24, 2014, appellee filed a motion to dismiss the complaint for legal separation. Appellee alleged that the parties had been residents of Pennsylvania for one year prior to appellant visiting her family in Athens County, Ohio. Appellee further argued that his employment, the parties' marital residence, and their personal belongings were all located in Pennsylvania. Lastly, appellee contended that he had filed a complaint for divorce in Pennsylvania on January 2, 2014. Appellee also filed a motion for visitation in the trial court in Athens, Ohio, on February 19, 2014.

{¶ 6} Appellant filed a memorandum in opposition to appellee's motion to dismiss. In her memorandum, appellant argued that the six month residency requirement for divorce and annulment actions do not apply to legal separation actions. Appellant set forth grounds for the legal separation alleging that appellee was guilty of extreme cruelty and that the parties were incompatible. Service was perfected upon the appellee. Although appellee had filed a divorce action in Pennsylvania, he did not obtain service upon the appellant until February 2014.

Appellant pointed out that the legal separation action in Ohio was substantively different from appellee's divorce action in Pennsylvania. Appellant claimed that she was not requesting a termination of the marriage; rather, she was requesting child support, spousal support, division of property, and orders regarding the parties' children. On the other hand, appellee was seeking a termination of the marriage.

{¶ 7} Furthermore, appellant argued that she had filed a companion case, the domestic violence civil protection order case, in Athens, Ohio. The trial court granted the ex-parte civil protection order in favor of appellant protecting her and the minor children. In the ex-parte civil protection order, appellee was granted supervised visitation to occur in Ohio. Appellant explained that as a part of appellee's divorce action, the Pennsylvania court had granted an emergency custody order on January 7, 2014. However, after a phone conference with counsel, the Pennsylvania court then vacated the emergency custody order on January 14, 2014, "pending resolution of jurisdiction and/or the merits of an abuse action pending in Athens County, Ohio, filed by Defendant-Mother."

{¶ 8} Next, appellee filed "Charges in Contempt and Motion to Show Cause" on April 16, 2014. This motion was filed with two case numbers in the case caption: under the Civil Protection Order case, Case Number 13DV072 and also the Legal Separation case, Case Number 14DR3. However, the record does not reflect that the two cases were ever consolidated. The contempt motion was based on an order issued by the trial court under Case Number 13DV0072 which set forth that appellee's "visitation shall be Sunday, April 6, 2014 from 6:00 p.m. to Monday, April 7, 2014 at 4:00 p.m. [Appellee] shall continue to have a family member present with him. Thereafter, visitation shall be as ordered March 7, 2014." The appellee claimed that

appellant did not present the children for the court ordered visitation. Appellee requested reimbursement for the costs he incurred for his trip to Ohio among other things.

{¶ 9} Without holding an evidentiary hearing, the magistrate issued a “Magistrate’s Decision” on April 18, 2014. In the decision, the magistrate set forth the procedural posture of the case. Next, the magistrate stated that “[t]here is no dispute that the parties’ marital residence and most of their personal belongings are situated in Pennsylvania. There is also no dispute that the children’s home state is Pennsylvania.” The magistrate then acknowledged that a “plaintiff need not be a resident of Ohio for a specific period of time in order to maintain an action for legal separation, and may amend the action for legal separation to one for divorce upon meeting the residency requirements.” The magistrate subsequently stated the following:

In the present matter, Defendant DOES desire a divorce but is unable to plead such and the Court is unable to grant such, at the present time, due to residency requirements. In the Pennsylvania case, Plaintiff can counterclaim for legal separation if she desires to do so.

In order to allow both parties to pursue his/her chosen cause of action, and for the issue of parental rights and responsibilities to be addressed by the children’s home state, this matter should be prosecuted in the State of Pennsylvania. Therefore, it is the Magistrate’s recommendation that this matter be dismissed with court costs assessed equally to the parties to be paid in full within ninety (90) days.

* * *

{¶ 10} On April 23, 2014, the appellant then filed a request for findings of fact and conclusions of law. On the same date, appellant also filed her objections to the magistrate’s

decision and a motion for leave to file supplemental objections after the findings of fact and conclusions of law have been filed.

{¶ 11} On May 2, 2014, the magistrate filed the “Magistrate’s Decision; Findings of Fact and Conclusions of Law”. The findings of fact were substantially the same as the original magistrate’s decision with the exception that the findings of fact contained a finding of fact that “Defendant is an active member of the U.S. military.” The rest of the findings of fact contained the same information as stated in the original magistrate’s decision. The conclusions of law were identical to the information set forth in the original magistrate’s decision.

{¶ 12} On May 16, 2014, the appellant filed an amended parenting proceeding affidavit to correct the date that she moved to Athens, Ohio, after living in Pennsylvania. In the original parenting proceeding affidavit, appellant had stated that she moved to Athens in November 2012 when she actually moved to Athens in November 2013. The amended affidavit also reflected the places in which the younger minor child, M.M., lived.

{¶ 13} Appellant then filed a motion for extension of time to file objections on May 16, 2014. The appellee filed an objection to appellant’s motion for extension of time claiming that the matter was scheduled for a final hearing on May 30, 2014, and that appellant was just attempting to delay the matter.

{¶ 14} On May 19, 2014, appellant filed a motion for extension of time to file objections identical to the one that she filed on May 16, 2014, with the exception that her attorney did not sign the certificate of service. Also, on May 19, 2014, appellant filed her objection to magistrate’s decision and her request for evidentiary hearing. On May 20, 2014, the trial court granted the motion for extension of time to file the objections; extending the time for appellant to file objections to on or before May 23, 2014.

{¶ 15} In appellant's objection to magistrate's decision and request for evidentiary hearing, appellant argued that 1) the trial court had the authority to proceed with the legal separation action; 2) the trial court had jurisdiction over the minor children; and 3) Athens County, Ohio, is the most convenient forum for the issues of child support, spousal support, property division, and the allocation of parental rights and responsibilities. Appellant set forth other relevant facts that were included in the appellant's UCCJEA Affidavit, Amended Affidavit, and Affidavit of Property but that the magistrate did not reflect in her findings of fact. The appellant further pointed out that the Athens County Court of Common Pleas had exercised initial jurisdiction over the parties' minor children through its Ex Parte Domestic Violence Protection Order issued in Case Number 13DV0072 in December 2013. Appellant also stated that the Athens County Court of Common Pleas again exercised jurisdiction over the minor children when it issued the Magistrate's Ex Parte Temporary Order filed in January 2014. The appellant explained that Pennsylvania law does not permit the filing of an action for legal separation. Appellant argued that the appellee, however, would be able to counterclaim for divorce in Ohio since appellant would meet the residency requirements as of the end of May 2014. Appellant then explained in detail why the magistrate's decision was incorrect in concluding that the children's home state is Pennsylvania and that Ohio is a Forum Non Conveniens.

{¶ 16} On May 21, 2014, the appellee filed "Defendant's Response to Plaintiff's Objection to Magistrate's Decision Filed May 19, 2014 and Motion to Adopt Magistrate's Decision." The appellee claimed that the appellant's objections were filed outside the time period and that "[a]ll information contained in the filing is outside of record and nothing [appellant] has objected to is contrary to law with nothing to further a decision." On May 30, 2014, the trial

court filed an entry that found that the appellant had properly sought an extension of time to file her objections and which denied the appellee's motion to adopt the magistrate's decision.

{¶ 17} On June 4, 2014, the trial court issued an "Order to Show Cause" setting forth a hearing date for the motion to show cause which was filed on April 16, 2014. The hearing was scheduled for August 25, 2014. Likewise, the order to show cause was filed under the two case numbers, Case Numbers 14DR0003 and 13DV0072.

{¶ 18} Prior to the contempt hearing, on July 11, 2014, the trial court filed the "Judgement [sic] Entry on Plaintiff's Objections to Magistrate's Decision; Entry." In the entry, the trial court denied the appellant's request for an evidentiary hearing. The trial court stated that "[a]s no transcript is provided and Plaintiff argues facts purportedly in the record, the Court is not inclined to hear additional evidence and is ready to render its decision based upon the record and objections before it." Next, the trial court stated the following:

Plaintiff did not file a transcript of the proceedings in support of her position.

Defendant sets forth facts used by the Magistrate in support of her [sic] position.

The Court adopts the Magistrate's facts and findings and incorporates them herein as if fully rewritten.

The Court notes that it may adopt any finding of fact in the Magistrate's Decision without further consideration unless the party who objects to that finding supports the objections with a copy of all relevant portions of the transcript of the Magistrate's hearing. *Purpura v. Purpura* (1986), 33 Ohio App.3d 237, 239; *Fetters v. Penn, dba Pool World* (March 9, 1999), Scioto App. No. 98CS2581, unreported.

Therefore, the Court is left with its own review of the record in light of the parties [sic] filings.

After careful consideration of the record and objections, and after finding no error of law, the Court finds that Plaintiff's objections are not well taken and overrules same. The Court hereby adopts the Magistrate's Decision.

* * *

The trial court then dismissed the complaint for legal separation and assessed court costs to the parties.

{¶ 19} Appellant timely filed her notice of appeal of the trial court's decision.

II. Assignments of Error

{¶ 20} On appeal, appellant asserts four assignments of error for review:

ASSIGNMENT OF ERROR NO. 1:

The trial Court erroneously dismissed Appellant's legal separation action.

ASSIGNMENT OF ERROR NO. 2:

The trial Judge erroneously dismissed Appellant's objection to the Magistrate's decision below for failure to submit a transcript where no hearing was held.

ASSIGNMENT OF ERROR NO. 3:

The trial Court erred in dismissing Appellant's case, *sua sponte*, without first determining where jurisdiction may lie and without affording her the opportunity for a hearing or to present evidence on the issue of jurisdiction and venue under the UCCJEA.

ASSIGNMENT OF ERROR NO. 4:

The trial Court's decision to dismiss the case contradicts the purposes of the UCCJEA.

III. Law and Analysis

{¶ 21} Appellant contends in her first assignment of error that the trial court erred in dismissing her legal separation action. Appellant claims that even if the UCCJEA may divest a trial court of its jurisdiction to make an initial custody determination in connection with a legal separation action, it does not divest a trial court of its jurisdiction to proceed on the remaining issues.

{¶ 22} In her second assignment of error, appellant argues that the trial court erroneously dismissed her objection to the magistrate's decision for failure to submit a transcript where no hearing was held. Appellant claimed that she was entitled to a hearing on the issue of whether her legal separation complaint should be dismissed for lack of jurisdiction over the children. Appellant contends that the trial court erroneously determined that a transcript was available; and since no transcript was presented to the trial court to determine the merits of the objections, that the trial court erred in its decision to adopt and affirm the magistrate's decision.

{¶ 23} Appellant's third assignment of error claims that the trial court erred by dismissing her case without first determining where jurisdiction may lie and without affording her the opportunity for a hearing or to present evidence on the issue of jurisdiction and venue under the UCCJEA. Appellant contends that the trial court erred by not holding a hearing on the jurisdictional issues and by not conducting a conference with the Pennsylvania court to determine jurisdiction and venue. Appellant also argues that the trial court failed to consider the factors provided for determining whether a court is an inconvenient forum.

{¶ 24} In appellant's fourth assignment of error, she asserts that the trial court's decision to dismiss the case contradicts the purposes of the UCCJEA. Appellant claims that the dismissal of her action is contrary to the intent of the UCCJEA's venue provisions. Appellant highlights the facts that the parties have four children—two that were born before the appellant moved to Ohio and twins that were born after she was already living in Ohio. Appellant insists that no state is willing or able to issue orders regarding the twins to provide full relief to the claims of either divorce or legal separation. Appellant essentially makes the argument that Pennsylvania is a forum non-conveniens and that Ohio would be the preferred venue because of the situation with the twins and also the following information: (1) the Athens County Court has already exercised jurisdiction over the two oldest children in the civil protection order case; and the Athens County Court knew that appellant was pregnant with twins at the time of issuance of the order; (2) the distance from appellant's home to the Pennsylvania court is considerable and appellant would have to drive the four children to Pennsylvania for court; (3) no communication took place with the Pennsylvania court to ensure that Pennsylvania would indeed accept jurisdiction; (4) appellant is unemployed and caring for the children while appellee is the sole provider for the family, but is not providing any financial support to the appellant or the children since they left in November 2013.

{¶ 25} The appellee claims that the trial court lacks subject matter jurisdiction, at a minimum, with respect to the child custody and support issues because of the operation of the UCCJEA. Appellee contends that judicial economy precludes a duplicative proceeding in Ohio when all issues could be resolved in Pennsylvania. Appellee argues that appellant is attempting to use the legal separation to circumvent the UCCJEA. Appellee then contends that the Ohio

Supreme Court's decision in *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, is supportive of his position.

{¶ 26} Because all four of the appellant's assignments of error intertwine, we will consider them together. These proceedings are governed by the UCCJEA which Ohio adopted and codified at R.C. 3127, et seq. The Ohio Supreme Court discusses the UCCJEA in *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶¶ 20-31:

“To help resolve interstate custody disputes, the Uniform Child Custody Jurisdiction Act (‘UCCJA’) was drafted in 1968 and adopted by Ohio in 1977.” *Justis v. Justis* (1998), 81 Ohio St.3d 312, 314, 691 N.E.2d 264, citing former R.C. 3109.21 to 3109.37, 137 Ohio Laws, Part I, 359. A purpose of the UCCJA was “to avoid jurisdictional competition and conflict with courts of other jurisdictions” in custody matters. *In re Palmer* (1984), 12 Ohio St.3d 194, 196, 12 OBR 259, 465 N.E.2d 1312. This purpose, however, was defeated by departures from the original text of the UCCJA in many states and by inconsistent decisions by state courts during about 30 years of litigation. See Uniform Child Custody Jurisdiction and Enforcement Act, Prefatory Note (1997), 9 Uniform Laws Ann. 649, 650.

To rectify this problem, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) in 1997 to replace the UCCJA. Prefatory Note, 9 Uniform Laws Ann. 649, 650; *Watson v. Watson* (2006), 272 Neb. 647, 651, 724 N.W.2d 24.

“The most significant change[] the UCCJEA makes to the UCCJA is giving

jurisdictional priority and exclusive continuing jurisdiction to the home state.” Annotation, Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act (2002), 100 A.L.R.5th 1, 20, Section 2 [b]. The UCCJEA “eliminates a determination of ‘best interests’ of a child from the original jurisdictional inquiry.” *Stephens v. Fourth Judicial Dist. Court* (2006), 331 Mont. 40, 2006 MT 21, 128 P.3d 1026, ¶ 7.

Since the conference’s adoption of the UCCJEA, over 40 states, including Ohio and West Virginia, as well as the District of Columbia and the Virgin Islands, have repealed their versions of the UCCJA and adopted the UCCJEA. See Table of Jurisdictions Wherein Act Has Been Adopted, 9 Uniform Laws Ann. (Supp.2007) 90–91. In Ohio, the UCCJEA is codified in R.C. Chapter 3127.

R.C. 3127.15(A) specifies the following jurisdictional grounds for an Ohio court to make an initial determination in a child-custody proceeding:

“Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state has jurisdiction to make an initial determination in a child custody proceeding only if one of the following applies:

“(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.

“(2) A court of another state does not have jurisdiction under division (A)(1) of this section or a court of the home state of the child has declined to exercise jurisdiction on the basis that this state is the more appropriate forum under section 3127.21 or 3127.22 of the Revised Code, or a similar statute of the other state, and both of the following are the case:

“(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.

“(b) Substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships.

“(3) All courts having jurisdiction under division (A)(1) or (2) of this section 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 section 3127.21 or 3127.22 of the Revised Code or a similar statute enacted by another state.

“(4) No court of any other state would have jurisdiction under the criteria specified in division (A)(1), (2), or (3) of this section.”

Thus, the UCCJEA, as codified in Ohio, provides four types of initial child-custody jurisdiction: home-state jurisdiction, significant-connection jurisdiction, jurisdiction because of declination of jurisdiction, and default jurisdiction. R.C. 3127.15(A)(1) through (4). “ ‘Home state’ means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of a child custody proceeding * * *.” R.C. 3127.01(B)(7).

{¶ 27} “The UCCJEA defines a trial court’s subject-matter jurisdiction to issue a child custody determination.” *In re R.M.*, 2013-Ohio-3588, 997 N.E.2d 169, ¶ 79 (4th Dist.) “ ‘The existence of the trial court’s subject-matter jurisdiction is a question of law that we review de novo.’ ” *Barber v. Williamson*, 4th Dist. Ross No. 11CA3265, 2012-Ohio-4925, ¶ 12, quoting *Yazdani–Isfehiani v. Yazdani–Isfehiani*, 170 Ohio App.3d 1, 2006-Ohio-7105, 865 N.E.2d 924, ¶ 20 (4th Dist.); *see also In re E.G.*, 8th Dist. Cuyahoga No. 98652, 2013-Ohio-495, ¶ 9 (“An appellate court, however, reviews issues relating to subject matter jurisdiction de novo, as such a determination is a matter of law.”). In addition, “[a] motion to dismiss for lack of subject matter jurisdiction raises a question of law, subject to the de novo standard of review.” *Enz v. Lewis*, 4th Dist. Scioto No. 10CA3357, 2011-Ohio-1229, ¶ 10, citing *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005–Ohio–3815, 834 N.E.2d 15, ¶ 13 (10th Dist.); *see also State ex rel. Rothal v. Smith*, 151 Ohio App.3d 289, 2002–Ohio–7328, 783 N.E.2d 1001, ¶ 110 (9th Dist.).

{¶ 28} In this case, the magistrate found that the home state of the parties’ minor children was Pennsylvania. Because she found that Ohio was not the children’s home state, she found it necessary to dismiss the child custody issues. The magistrate then opined that since the parties’ property was located in Pennsylvania, and in order to allow both parties to pursue his or her

chosen cause of action, that it was most logical and more judicially efficient and economical for the matter to be heard in Pennsylvania. The trial court did “its own review of the record,” agreed with the magistrate, and adopted her findings and decision.

{¶ 29} “ ‘Home state’ means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of a child custody proceeding * * *.” R.C. 3127.01(B)(7). After a de novo review of the record, it is clear that the parties’ children did not live in Ohio for “at least six consecutive months immediately preceding the commencement of” the action filed by the appellant. The children moved from Pennsylvania to Ohio on or about November 24, 2013. The appellant filed her complaint for legal separation along with her request for custody of the children and support in the trial court on January 6, 2014. If this case would be viewed only according to the provisions of R.C. 3127.15(A), it would seem that the trial court did not possess jurisdictional grounds to make an initial determination in a child-custody proceeding.

{¶ 30} However, this does not end the analysis. R.C. 3127.18(A) and (B) provide the following:

(A) A court of this state has temporary emergency jurisdiction if a child is present in this state and either of the following applies:

(1) The child has been abandoned.

(2) It is necessary in an emergency to protect the child because the child * * * is subjected to or threatened with mistreatment or abuse.

(B) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under sections 3127.15 to

3127.17 of the Revised Code or a similar statute of another state, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

{¶ 31} “A plain reading of R.C. 3127.15(A) shows that R.C. 3127.18 is an exception to the four types of jurisdiction listed in R.C. 3127.15.” *In re R.M.*, 2013-Ohio-3588, 997 N.E.2d 169, at ¶ 91, citing *In re S.S.*, 2d Dist. Montgomery No. 22980, 2008-Ohio-294, ¶ 35, fn. 3. “This means that an Ohio court must have jurisdiction under R.C. 3127.15(A) to make an initial custody determination, but if it does not, then R.C. 3127.18 may empower it to exercise temporary emergency jurisdiction.” *Id.* R.C. 3127.18(B) also provides that Ohio could become the home state under certain circumstances.

{¶ 32} In the case sub judice, the appellant had filed a petition for a civil protection order in *Lisa Ann Martindale v. Eric John Martindale*, Case No. 13DV0072; the trial court granted an ex-parte civil protection order on December 20, 2013, which by its terms was effective until December 20, 2018. The minor children were protected parties in the ex-parte civil protection order. The trial court, thus, exercised temporary emergency jurisdiction pursuant to R.C. 3127.18(A). This timing of this case is important. It is a highly unusual case in that almost ten months elapsed before the magistrate’s recommendations were made upon the full hearing on the

Domestic Violence Civil Protection Order (DVCPO) petition. On October 31, 2014, the magistrate issued “Findings of Fact and Conclusions of Law; Magistrate’s Order Denying Petition for Domestic Violence Civil Protection Order.” In this document, the magistrate “denied” the petition and “ordered” termination of the Ex Parte Civil Protection Order filed on December 20, 2013. Notably, however, the trial court has not adopted or rejected the magistrate’s recommendations. Therefore, the terms of the ex-parte order are still in effect. Consequently, we find that the trial court in this case—which is the same court as the one that dealt with the domestic violence civil protection order issues—continues to have jurisdiction to hear the custody and child support issues through the domestic violence civil protection order case. This finding is limited to this exceptional set of circumstances.⁴

{¶ 33} Next, we note that it appears that R.C. 3127.18(B) would not apply since appellee did commence a proceeding in Pennsylvania. Therefore, Ohio could not become the home state by operation of R.C. 3127.18(B).

{¶ 34} Nonetheless, we find that the trial court did have subject matter jurisdiction to hear and decide the emergency custody issues set forth in the petition for the domestic violence civil protection order. And since the trial court has not resolved the civil protection order case, it would have subject matter jurisdiction to hear the custody issues. We next must examine the trial court’s actions with respect to its dismissal of the entire legal separation action along with the custody and support issues.

{¶ 35} Although a de novo standard of review is applied when determining the issue of the trial court’s subject matter jurisdiction, once the subject matter jurisdiction is established, a trial court’s decision as to whether to exercise its jurisdiction pursuant to the UCCJEA should

⁴ This finding is not meant to encourage litigants, who otherwise would not be able to avail themselves of the jurisdiction of a court, to then use the emergency mechanisms of the domestic violence civil protection order statutes to then obtain jurisdiction.

only be reversed if the court committed an abuse of discretion. *Beck v. Sprik*, 9th Dist. Medina No. 07CA0105-M, 2008-Ohio-3197, ¶ 7; *In re Collins*, 5th Dist. Guernsey No. 06CA000028, 2007-Ohio-4582, ¶ 15; *Rodriguez v. Fietze*, 4th Dist. Athens No. 04CA14, 2004-Ohio-7121, ¶ 22. The phrase “abuse of discretion” connotes more than an error of judgment; rather, it implies that the trial court’s attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Moreover, when applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

{¶ 36} Forum non conveniens disputes in child custody cases are statutorily governed by the UCCJEA in R.C. 3127.21 which states as follows:

(A) A court of this state that has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more convenient forum. The issue of inconvenient forum may be raised upon motion of a party, the court’s own motion, or at the request of another court.

(B) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including the following:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) The length of time the child has resided outside this state;

- (3) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;
- (5) Any agreement of the parties as to which state should assume jurisdiction;
- (6) The nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence;
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(C) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(D) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

{¶ 37} According to R.C. 3127.21(B), before determining whether it is an inconvenient forum, it is mandatory for a trial court to consider whether it is appropriate for a court of another state to exercise jurisdiction. A trial court shall allow the parties to submit information and shall consider all relevant factors, including the eight specific factors set forth in the statute.

{¶ 38} Here, the trial court did allow the parties to submit information; and the parties did

submit information and file documents from which the trial court could possibly glean the information relative to the eight specific factors set forth in the statute. However, the record is unclear whether the trial court considered the factors before finding that it was appropriate that Pennsylvania exercise jurisdiction. By reviewing the trial court's judgment entry and the magistrate's order, we cannot discern that the trial court considered the required factors.

{¶ 39} The record reflects that the trial court recommended the complaint for legal separation be dismissed so that both parties could pursue his or her chosen cause of action. As the appellant correctly argued, Pennsylvania law does not provide for a legal separation. *Riggle v. Riggle*, 3 Pa. D. & C. 4th 358 (Pa.Com.Pl. July 13, 1989). The record also shows that the trial court dismissed the legal separation so that the issue of parental rights and responsibilities could be addressed by what it considered to be the home state of the children -- Pennsylvania. Furthermore, the trial court opined that it was most logical and more judicially efficient and economical that the case be prosecuted in Pennsylvania. The record is sparse with respect to any discussion pertaining to the eight enumerated factors in R.C. 3127.21(B).

{¶ 40} With respect to appellant's assertion in her third assignment of error that the trial court erred by failing to hold a hearing on the jurisdictional issues before dismissing her action, we note that it is not mandatory that an evidentiary hearing be held to determine whether Ohio is an inconvenient forum under the UCCJEA if sufficient undisputed facts are in the record for a reviewing court to determine the particular question. *See Esaw v. Esaw*, 7th Dist. Belmont No. 02BA6, 2003-Ohio-3485, ¶¶ 19-21; *Kemp v. Kemp*, 5th Dist. Stark No. 2010-CA-00179, 2011-Ohio-177, ¶¶ 25-29 (the UCCJEA did not require an evidentiary hearing, but only that the court allow the parties to submit information).

{¶ 41} Likewise, as appellant concedes, it is not mandatory that a conference be held

with the Pennsylvania court. R.C. 3127.09(A)-(C) state as follows:

(A) A court of this state *may* communicate with a court in another state concerning a proceeding arising under sections 3127.01 to 3127.53 of the Revised Code.

(B) The court *may* give the parties the opportunity to participate in the communication. If the parties are not able to participate in the communication, they shall be given the opportunity to present facts and legal arguments before a decision concerning jurisdiction is made.

(C) Communication between courts concerning scheduling, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

* * *.

(Emphasis added).

{¶ 42} Yet, R.C. 3127.21(B) does require a trial court to consider certain factors before determining whether Ohio is an inconvenient forum. In addition R.C. 3127.21(C) also requires that a trial court stay the proceedings if it determines that it is an inconvenient forum and that a court of another state is a more appropriate forum. The stay shall be conditioned upon the fact that a child custody proceeding be promptly commenced in another designated state. In addition, the trial court may impose any other condition the court considers just and proper. Therefore, appellant's third assignment of error has merit with respect to the claim that the trial court failed to consider the factors provided for determining whether the court is an inconvenient forum. The trial court abused its discretion in dismissing the complaint for legal separation based on forum non conveniens concerns without considering the required statutory factors. We are not making a

comment on whether Ohio is the proper forum. This is best left for the trial court to determine. Instead, this decision is based on the fact that the trial court must comply with the requirements of the UCCJEA. We sustain a portion of the appellant's third assignment of error regarding the trial court's failure to consider the factors provided for determining whether the trial court is an inconvenient forum pursuant to R.C. 3127.21.

IV. Conclusion

{¶ 43} In conclusion, we find merit in and sustain the portion of appellant's third assignment of error regarding the trial court's failure to consider the factors provided for determining whether the trial court is an inconvenient forum. The remaining portions of appellant's third assignment of error and all other assignments of error are deemed moot. As a result, we reverse the judgment of the trial court and remand this matter to the trial court for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and THE CAUSE IS REMANDED. Appellee shall pay the costs herein taxed.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court, Domestic Relations Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.

McFarland, J.: Concurs in Judgment Only.

For the Court

By: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.