IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Matter of:

BERTHA YANEZ, *Petitioner/Appellee*

v.

EVERK SANCHEZ, *Respondent/Appellant*.

No. 1 CA-CV 23-0385 FC
FILED 4-9-2024

Appeal from the Superior Court in Maricopa County
No. FC2014-009720
The Honorable Aryeh D. Schwartz, Judge

REVERSED AND REMANDED IN PART; AFFIRMED INPART

COUNSEL

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By Florence M. Bruemmer
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By Kristina L. Cervone
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OPINION

Judge David D. Weinzweig delivered the opinion of the Court, in which Presiding Judge Andrew M. Jacobs and Judge Jennifer M. Perkins joined.

W E I N Z W E I G , Judge:

¶1 This case presents a clash between a parent's right to free speech on social media and the superior court's duty to protect a child's best interest. At issue in this custody dispute is the prior restraint of a parent's right to post images and details of his child's life on social media, which was entered after that parent posted a distasteful video of the child. The court granted the prior restraint because it did not believe the parent's altruistic excuse for the post. But the court's gaze should have been elsewhere—namely, on the compelling government interest required to justify a prior restraint. On remand, the court must determine whether the record has specific evidence that the social media post has or will cause actual or threatened psychological or physical harm to the child.

¶2 Everk Sanchez ("Father") challenges the superior court's prior restraint on speech, along with its legal decision-making and parenting time orders. On this record, the court's restriction of Father's right to free speech is unconstitutional because the record has no evidence of harm to the child and the restraint is overly broad. We reverse and remand the prior restraint on speech, but we affirm the orders modifying legal decision-making authority and parenting time.

FACTS AND PROCEDURAL BACKGROUND

¶3 Father married Bertha Yanez ("Mother") in 2005 and the couple share two children, born in 2007 and 2012. The older child has epilepsy and suffers frequent seizures.

¶4 Mother petitioned to dissolve the marriage in 2014. She and Father agreed to joint legal decision-making authority. Father had final say over education decisions and Mother had final say over medical decisions. They also stipulated to a 5-2-2-5 parenting plan schedule.

¶5 From 2020 through 2022, Mother petitioned the court three separate times to modify legal decision-making. In 2020, she requested more parenting time and final say on both educational and medical

decisions. Mother and Father resolved the issue with a settlement agreement, which ordered joint legal decision-making and largely kept the 2015 parenting time agreement.

¶6 Then, in 2021, Mother petitioned for sole medical decision-making authority after Father arranged for the older child to have eye surgery without her knowledge. Although the superior court was concerned about Father's conduct, it denied the petition for lack of a substantial and continuing change in circumstances.

¶7 And last, in 2022, Mother petitioned to modify legal decision-making authority and the parenting plan. She requested more parenting time during the school year and final say on both educational and medical decisions. Father countered with his own petition to modify in which he sought sole legal decision-making authority and a change to the parenting plan. Father simultaneously requested an ex parte temporary order for sole legal decision-making authority, fearing Mother would cancel the older child's upcoming medical appointment.

¶8 The superior court denied Father's request for ex parte temporary orders and instead held an evidentiary hearing in June 2022. Mother and Father both testified. Mother testified that Father posted a video of the older child having a seizure on social media, and she argued his actions violated the child's "rights for medical privacy."

¶9 After the evidentiary hearing, the court temporarily granted Father final decision-making authority over medical issues related to treatment and testing of the older child's seizures. The court also prohibited both parents from posting on social media or publishing anything about "the children's medical, physical, mental, behavioral, educational, or related issues without written consent of the other party or order of the [c]ourt." The court later ordered Father to delete any existing social media posts on these issues.

¶10 A second evidentiary hearing was set for March 2023 on the dueling petitions for legal decision-making. Both parents testified. Mother alleged that Father was posting a "video of [their older child] having a seizure . . . on all different platforms, just her having a seizure without receiving any type of help." Father offered his own narrative. He is the director of a non-profit organization that supports parents of medically challenged children, and he claimed to have posted the video to find help for the child's condition, not for any financial gain.

¶11 A screenshot of Father's social media post was introduced into evidence:

¶12 After the second evidentiary hearing, the superior court granted Father presumptive final decision-making authority over medical issues, granted Mother presumptive final decision-making authority over educational issues, and amended the parenting time order to a week-on week-off basis. The court also reaffirmed its order that neither parent can "post on social media, publish, or otherwise publicize any information, including pictures[] of the children's medical, physical, mental, behavioral, educational, or related issues without written consent of the other party [or] order of the [c]ourt."

¶13 Father timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(2).

DISCUSSION

I. Prior Restraint of Speech

¶14 Father argues the superior court's order violated his right to free speech. We review that issue de novo. *State v. McGill*, 213 Ariz. 147, 159, ¶ 53 (2006).

¶15 Our state and federal constitutions offer robust protection of free speech. The First Amendment to the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Arizona Constitution ensures that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. 2, § 6.

¶16 Prior restraints of speech "are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). A judicial order is a prior restraint when it forbids "certain communications . . . issued in advance of the time that such

communications are to occur." *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (internal citation omitted).

¶17 A prior restraint of speech is subject to strict scrutiny review. *Nash v. Nash*, 232 Ariz. 473, 482, ¶ 32 (App. 2013). Arizona courts recognize a heavy presumption that prior restraints are unconstitutional. *Phx. Newspapers, Inc. v. Otis*, 243 Ariz. 491, 495–96, ¶ 14 (App. 2018). That presumption can only "be overcome if the restriction serves a compelling governmental interest, is necessary to serve the asserted compelling interest, is precisely tailored to serve that interest, and is the least restrictive means readily available for that purpose." *Nash*, 232 Ariz. at 482, ¶ 32 (internal citation omitted) (cleaned up).

¶18 The order here restricts future speech and is thus a prior restraint. *Alexander*, 509 U.S. at 550. That order is presumptively unconstitutional. *Otis*, 243 Ariz. at 495–96, ¶ 14. We turn to whether the record supports the entry of the presumptively unconstitutional prior restraint. *Neb. Press Ass'n*, 427 U.S. at 562.

A. Compelling Interest

¶19 A child's well-being is a compelling interest under the First Amendment. *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982); *see also Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."). Indeed, a child's physical and psychological well-being is paramount in custody proceedings. *Kelly v. Kelly*, 252 Ariz. 371, 375, ¶ 19 (App. 2021).

¶20 Arizona's courts have not articulated what sort of proof is needed to demonstrate a compelling interest and overcome the presumption of unconstitutionality, but nearly every state to have tackled the issue requires proof of actual or threatened physical or emotional harm to a child. *See, e.g.*, *Shak v. Shak*, 144 N.E.3d 274, 279–80 (Mass. 2020) ("[A]s important as it is to protect a child from the emotional and psychological harm that might follow from one parent's use of vulgar or disparaging words about the other, merely reciting that interest is not enough to satisfy the heavy burden of justifying a prior restraint."); *Harden v. Scarborough*, 240 So.3d 1246, 1257–58, ¶¶ 34–35 (Miss. Ct. App. 2018) (reversing lower court's order enjoining parents from posting on social media about child because "there is no evidence that [child] was ever harmed or threatened with harm"); *In re Marriage of Newell*, 192 P.3d 529, 536 (Colo. App. 2008) (reversing lower court's order enjoining parents right to free speech

because there was no evidence of "actual or threatened physical or emotional harm to a child"); *cf. Tinsley v. Tinsley*, 211 So.3d 405, 419–20 (La. Ct. App. 2017) (upholding the trial court's denial of injunction to prevent father from posting on social media because there was "no irreparable injury, loss, or damage that could result" to the child).

¶21 We adopt that standard. To prove a compelling government interest for a prior restraint on a parent's right to free speech, the record must offer evidence of actual or threatened physical or emotional harm to the child. Here it did not.

¶22 Mother and Father disagreed over Father's motivation for posting the material on social media. Mother argued that Father was motivated by pecuniary benefit. Father denied that. He claimed the material was posted to find help for his child and not for any financial gain. In the end, the superior court granted the prior restraint because it found Father's explanation to be "flatly unacceptable" and "not credible." But the record has no evidence of harm to the older child. By way of example, that evidence might include testimony from the parents, teachers, counselors, acquaintances or a child psychologist. We vacate the prior restraint.

B. Least Restrictive Means

¶23 We remand for the superior court to determine whether the child suffered any specific harm from Father's speech, but Mother must also prove the prior restraint was narrowly tailored on remand. And so, we address the constitutional requirement that prior restraints be narrowly tailored. To survive strict scrutiny, a prior restraint must use the least restrictive means available. *Nash*, 232 Ariz. at 482, ¶ 32.

¶24 The present order is overbroad and cannot withstand strict scrutiny because it restricts more speech than necessary. The concern was about Father's distasteful post of his child having a seizure. And yet, the order extends to all social media posts about the "children's medical, physical, mental, behavioral, educational, or related issues." On remand, if actual or threatened harm is proven, the court must then craft an order narrowly tailored to prevent future harm.

¶25 We appreciate the superior court's thoughtful desire to protect unrepresented children caught in the middle of warring parents, but specific evidence of harm is required to overcome a parent's right to free speech. To ensure the child's interests are adequately represented on remand, the superior court might appoint counsel for the child. *See* Ariz. R. Fam. Law P. 10(b) ("The court may appoint an attorney to represent a

child in a family law case under A.R.S. § 25-321 for any reason the court deems appropriate.”).

II. Parenting Time and Legal Decision-Making.

¶26 Father next argues the superior court erroneously modified its prior parenting time and legal decision-making order. We review that issue for an abuse of discretion, *DeLuna v. Petitto*, 247 Ariz. 420, 423, ¶ 9 (App. 2019), which occurs “when the record is devoid of competent evidence to support the decision,” *Engstrom v. McCarthy*, 243 Ariz. 469, 471, ¶ 4 (App. 2018) (internal citation omitted).

¶27 On a petition to modify legal decision-making or parenting time, the superior court must first “ascertain whether there has been a change of circumstances materially affecting the welfare of the child.” *Backstrand v. Backstrand*, 250 Ariz. 339, 343, ¶ 14 (App. 2020) (internal citation omitted). If so, the court must then determine whether the proposed modification is in the child’s best interests, A.R.S. § 25-403(A), considering “all factors that are relevant to the child’s physical and emotional well-being,” *id.*, including the non-exhaustive list of factors enumerated in A.R.S. §§ 25-403(A) and -403.01(B). So too, the court must recite “specific findings on the record” about how its “decision is in the best interests of the child,” A.R.S. § 25-403(B), and consider the past, present and future abilities of the parents to cooperate in decision-making, A.R.S. § 25-403.01(B)(3).

¶28 Here, the court found a material change in circumstances based on the parties’ failure to adhere to the requirements of the joint legal decision-making order and the children’s evolving educational needs. The record has substantial evidence to support those findings. Mother and Father were making decisions for the children without including the other parent and both children were frequently late to school, among other educational issues.

¶29 Turning to the children’s best interests, Father contends the court abused its discretion by modifying the parenting time plan without explaining how or why it was in the children’s best interests. Not so. The record contains substantial evidence to support the superior court’s order and it includes all required findings under A.R.S. §§ 25-403(A) and-403.01(B). The court pointed to Mother’s testimony that a proposed new schedule would reduce the children’s stress, allow Mother to help the children with their schoolwork, and allow the younger child to better participate in gymnastics.

¶30 Father last argues the superior court abused its discretion by granting Mother final say on educational decisions. We disagree. The record has substantial evidence to support the court's order. The court heard, among other evidence, that the children were late to school roughly 45 times during the relevant period—all on Father's watch. It also heard testimony that Mother is more engaged in the children's education. *See Estate of Page v. Litzenburg*, 177 Ariz. 84, 92 (App. 1993) (holding a party's testimony constituted substantial evidence to support findings). We do not reweigh the evidence on appeal, but instead defer to the court's "determinations of witness credibility and the weight given to conflicting evidence." *Lehn v. Al-Thanayyan*, 246 Ariz. 277, 284, ¶ 20 (App. 2019). The superior court did not abuse its discretion when it modified the orders for parenting time and legal decision-making.

ATTORNEY FEES ON APPEAL

¶31 Both parties request an award of attorney fees and costs on appeal under A.R.S. § 25-324. The parties do not seek fees based on a financial disparity, and we find that neither party took unreasonable positions. So each party shall bear his or her attorney fees and costs on appeal.

CONCLUSION

¶32 We vacate the superior court's prior restraint on speech and remand for proceedings consistent with this opinion. We affirm all other orders.

AMY M. WOOD • Clerk of the Court
FILED: AA