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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/24/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LETICIA E., FRANCISCO E.,) 1 CA-JV 13-0091
)
Appellants,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv.
SECURITY, M.E.,) Ct.; Rule 28 ARCAP)
)
Appellees.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD20010

The Honorable Jay R. Adleman, *Judge Pro Tempore*

**JURISDICTION ACCEPTED IN PART AND DECLINED IN PART,
RELIEF DENIED**

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T H U M M A, Judge

¶1 Maternal grandparents Leticia and Francisco E.
(collectively Grandparents) challenge the superior court's

denial of their motion to reconsider a change in custody of M.E.¹ This court accepts special action jurisdiction over Grandmother's challenge but denies relief because the superior court did not err.

FACTS AND PROCEDURAL HISTORY

¶2 M.E. was born on February 12, 2009, to Arlim E. (Mother) and Kevin M. (Father). On February 15, 2011, Grandmother filed a verified private dependency petition alleging Mother "[m]ay be under the influence of narcotics. Leaves home for days, forgetting about her responsibilities [to M.E.], therefore neglecting her. [L]ives in domestic violent environment." Without objection, the Arizona Department of Economic Security (ADES) substituted in as petitioner, was awarded legal custody of M.E. and placed her in Grandmother's physical custody. After M.E. was found dependent, the parental rights of Mother and Father were terminated after they failed to comply with services provided and did not contest termination.

¶3 For months, M.E. was in the physical care of Grandmother, who was considered a potential adoptive placement. While placed with Grandmother, any contact between M.E. and Mother had to be supervised, a condition ADES and the court repeatedly discussed with Grandmother.

¹ The caption has been amended to safeguard the identity of the juvenile pursuant to Administrative Order 2013-0001.

¶14 On November 27, 2012, ADES received a "status communication" that Grandmother had allowed Mother to take M.E. in a car with two other children and a male driver and, when stopped by the police, "[a]mphetamines and cocaine were found in the front seat of the car." Although Mother was not arrested or charged, the driver was arrested and police "paid for a room . . . for [M]other and the children to stay one night." According to the status communication, M.E. was "placed in danger. Grandmother knew she was not to leave the child with the biological mother and has failed to protect this child." The next day, ADES removed M.E. from Grandmother's physical custody. On December 3, 2012, ADES filed a motion to change physical custody (noting M.E.'s guardian ad litem "supports the motion" and attaching a report of the incident), which the superior court granted without a hearing on December 5, 2012.

¶15 Grandmother then filed motions (1) to intervene and (2) to return M.E. to her care or to other kinship placement. Grandmother did not request a hearing or oral argument. After numerous other filings by Grandmother and ADES, on February 1, 2013, in a five-page minute entry, the superior court granted the motion to intervene "for the limited purpose of addressing the custodial issues pertaining to the child" but denied the motion to return. In addressing the motion to return, the court was

troubled to learn that the maternal grandmother - in spite of specific instructions from ADES - allowed the child to be placed in a dangerous situation with a drug-addicted mother who had recently lost her parental rights. Both ADES and this Court warned the maternal grandmother about this precise situation. The maternal grandmother's failure to follow those instructions is extremely disconcerting, especially given the fact that the mother had not remedied the circumstances which caused the child to come into care, i.e., to address her serious drug problems or other related issues.

ADES further noted additional reasons to justify the removal of this child from the maternal grandmother's care. In the aftermath of the removal, the child was taken for medical and dental examinations. She was suffering from poor nutrition and tooth decay. Although she is only 3 years old, the child had two teeth extracted, and she needed silver caps on several other teeth. She also needed medical attention for a rash and a yeast infection. ADES was required to set up eye appointments for her as well.

It is considerably interesting to note that - in spite of all the [filings] that have been filed on behalf of the maternal grandmother - the factual allegations from ADES have gone entirely undisputed. In other words, maternal grandmother has not contested the fact that (1) she allowed the child to be unsupervised without the consent of ADES or this Court; (2) the child was placed in danger at the time of the traffic stop in November 2012; and (3) the child needed significant medical attention in the days following her removal from the maternal grandmother.

Noting the focus was M.E.'s best interests, the court denied Grandmother's motion to return M.E. to her care.

¶16 Grandparents (represented by new counsel) filed a verified motion for change of custody and for visitation/contact on February 22, 2013. This February 22 motion attached pictures of M.E. as well as some dental records (to "refute[] the allegation that [M.E.'s] dental needs were not being met") and requested an evidentiary hearing. Although seeking to explain that Grandmother left M.E. with Mother because of the sudden death of a family member, the motion admitted that Grandmother "left the child [M.E.] with her mother in Phoenix while Grandmother went to Tucson." The motion also admitted that Mother took M.E. in a car with others and that when the driver was pulled over, drug paraphernalia and apparent drug residue were found in the car. ADES opposed this motion.

¶17 In a minute entry dated March 13, 2013, the superior court noted the prior motion practice, adding it was "unaware of any authority that might support the maternal grandparents' repeated requests for the same relief." Recognizing the February 22 motion contained facts not previously provided, however, the court construed the motion as seeking reconsideration and allowed the parties "to supplement the record with any further documents, including but not limited to medical records, dental records, police reports, etc." no later than March 29; "the Court will issue further orders after that date." In a signed minute entry dated April 2, 2013, the court noted that it had

"not received any supplemental filings" and denied the motion for reconsideration. Grandparents filed a notice of appeal from that minute entry on April 10, 2013.

DISCUSSION

I. Jurisdiction.

¶8 ADES argues this court lacks jurisdiction because the April 2 order is not appealable. ADES argues that, having failed to appeal from the February 1 order, Grandparents have no right of appeal from the denial of their motion to reconsider. ADES asserts that this appeal seeks to raise the same issues that would have been presented in an appeal from the February 1 order. ADES' argument assumes that the February 1 order was a final and appealable order. See Ariz. R.P. Juv. Ct. 103(A); Arizona Revised Statutes (A.R.S.) section 8-235(A) (2013).² Whether the February 1 order was appealable, however, is the subject of decisions that at least facially appear difficult to reconcile. See *Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, 45, ¶ 7, 127 P.3d 59, 61 (App. 2006) (citing cases).

¶9 This court need not attempt to finally reconcile that issue here. Even if jurisdiction by appeal is lacking, this court has the "discretion to consider the matter as a special action." *State v. Perez*, 172 Ariz. 290, 292, 836 P.2d 1000, 1002

² Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

(App. 1992); see also *Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35, 36 P.3d 749, 759 (App. 2001) (*sua sponte* accepting special action jurisdiction). Accordingly, the court in its discretion will entertain Grandmother's challenge to the April 2 order by accepting special action jurisdiction. See A.R.S. § 12-120.21(A)(4); Ariz. R.P. Spec. Act. 1(a).³

II. Analysis.

¶10 Grandmother argues the superior court erred by: (1) failing to hold an evidentiary hearing on her February 22 motion and (2) denying that motion. The interpretation of statutes and rules is reviewed *de novo*. *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 211 Ariz. 224, 227, ¶ 13, 119 P.3d 1027, 1030 (2005). The denial of a motion to reconsider is reviewed for an abuse of discretion. See *Bob H. v. Ariz. Dep't of Econ. Sec.*, 225 Ariz. 279, 282, ¶ 12, 237 P.3d 632, 635 (App. 2010). "[A]n abuse of discretion 'is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 83, ¶ 19, 107 P.3d 923, 929 (App. 2005) (quoting *Quigly v. Tucson City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (1982)).

³ Grandfather Francisco E. never filed a motion to intervene and, from the file, was never joined as a party. Accordingly, the court declines special action jurisdiction to the extent Grandfather seeks to challenge the April 2 order.

A. Grandmother Has Shown No Right To An Evidentiary Hearing.

¶11 Grandmother cites A.R.S. § 8-845 in claiming a right to an evidentiary hearing on her February 22 motion. That statute, however, governs dependency disposition hearings (not motions for change in physical custody or motions to reconsider). Moreover, although that statute directs the court to "consider[] the evidence on the proper disposition of the case," it does not require that the court hold an evidentiary hearing. A.R.S. § 8-845(A). Thus, even if applicable here, Grandmother has not shown how A.R.S. § 8-845 would mandate an evidentiary hearing on her February 22 motion.

¶12 A juvenile court is allowed to "change the placement of a child made pursuant to [A.R.S.] § 8-514.02 if the change is necessary for the child's best interests and welfare." A.R.S. § 8-517. This appears to be precisely what the court did in removing M.E. from Grandmother's care. Nothing contained in A.R.S. § 8-517, or in any case construing that statute, requires the court hold an evidentiary hearing in every case.

¶13 Apart from these statutes, more practically, Grandmother had an opportunity to present evidence to the superior court and did so in her February 22 motion. In addition, in construing the February 22 motion as seeking reconsideration of a prior order, the superior court gave

Grandmother until March 29 -- more than two additional weeks -- "to supplement the record with any further documents, including but not limited to medical records, dental records, police reports, etc." Accordingly, the court clearly informed Grandmother she could supplement the record with additional evidence by a date certain and the court would then consider that evidence in ruling on her motion. Grandmother, however, submitted no additional evidence. Having failed to submit evidence when she had an opportunity to do so, Grandmother has failed to show how she was prejudiced by the superior court denying her request for an evidentiary hearing.

B. The Court Did Not Err In Denying Grandmother's Motions.

¶14 Grandmother argues the superior court's order denying a change of placement "does not fulfill placement preferences" under A.R.S. § 8-514 and that A.R.S. § 8-845 "essentially creates almost a presumption for a grandparent or other family member with a significant relationship" to be given custody of a child. The list of possible placements in A.R.S. § 8-514, however, "is a preference, not a mandate." *Antonio P v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, 405, ¶ 12, 187 P.3d 1115, 1118 (App. 2008). When making a custody determination, the touchstone is always the best interests of the child. *Andro v. Andro*, 97 Ariz. 302, 305, 400 P.2d 105, 107 (1965).

¶15 In her motions leading up to the February 1 order, Grandmother submitted no evidence (as opposed to argument) and did not request an evidentiary hearing. The court's February 1 order acknowledged the preferences in A.R.S. §§ 8-815 and -845, but affirmed the removal of M.E. from Grandmother's care by ADES because it was "troubled to learn that the maternal grandmother - in spite of specific instructions from ADES - allowed the child to be placed in a dangerous situation with a drug-addicted mother." The court also noted concerns about M.E.'s care while in Grandmother's physical custody. Given these findings based on the evidence before the court at that time, and given that Grandmother submitted no controverting evidence, the February 1 order was not an abuse of discretion.

¶16 In her February 22 motion, Grandmother provided evidence regarding M.E.'s dental care.⁴ Even if that evidence fully resolved the dental concerns to the court's satisfaction, Grandmother provided no additional evidence addressing the other concerns raised by the evidence ADES submitted and noted by the court. While attempting to explain the circumstances, the

⁴ Grandmother states her February 22 motion also included a request for visitation "and no one - including the Court - addressed that issue." Both in her motion and on appeal, Grandmother cites no authority for her claimed visitation rights. Moreover, to the extent she relies on A.R.S. § 25-409, given the record before the superior court and the substance of Grandmother's February 22 motion, the court would have had no basis to grant her visitation request.

February 22 motion confirms that Grandmother left M.E. with Mother unsupervised and did not dispute the presence of drugs in the car, or police involvement in the child's life, as a result. Finally, although given more than two weeks to submit additional evidence in support of her February 22 motion, Grandmother failed to do so. In short, while some factual details may have been disputed, based on the evidence presented to the superior court and Grandmother's failure to present any contradictory evidence (other than on dental care), the court did not abuse its discretion in denying the February 22 motion.

CONCLUSION

¶17 Special action jurisdiction is accepted in part (as to Grandmother) and declined in part (as to Grandfather) and relief is denied.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
RANDALL M. HOWE, Presiding Judge

/S/_____
DIANE M. JOHNSEN, Judge