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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

REBECCA L. JOHNSON, *Petitioner/Appellant*,

v.

JAMES PROVOYEUR, *Respondent/Appellee*.

No. 1 CA-CV 16-0403 FC
FILED 4-27-2017

Appeal from the Superior Court in Maricopa County
No. FC2013-000701
The Honorable Michael J. Herrod, Judge

AFFIRMED IN PART; REMANDED IN PART

COUNSEL

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JOHNSON v. PROVOYEUR
Decision of the Court

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Patricia K. Norris joined.

M c M U R D I E, Judge:

¶1 Rebecca L. Johnson (“Mother”) appeals the superior court’s order amending its findings and affirming its prior order that respondent/appellee James Provoyeur (“Father”) serve as the primary residential parent for the parties’ three minor children. For the following reasons, we affirm the court’s order appointing Father the primary residential parent but remand for the superior court to consider Mother’s petition to modify the children’s primary physical residence.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Father married and lived in Rhode Island with their children. Throughout the marriage, Mother told Father she wanted to move to Arizona where she grew up and her family continued to live. Father wished to remain in Rhode Island for financial reasons.

¶3 In October 2012, Mother took a new position with her employer and moved to Arizona with the parties’ two children. Father testified that he agreed to the move to allow Mother to try living in Arizona, but expected she would “come to her senses” and return to Rhode Island. Mother testified that she expected Father would eventually move to Arizona. After Mother arrived in Arizona, she learned she was pregnant with the parties’ third child. Mother gave birth to the child in Arizona in June 2013, and filed for dissolution later that month.

¶4 The parties agreed to a neutral parenting plan under which the children would live with the primary residential parent during the school year and with the other parent during summer and school breaks. Mother and Father each sought appointment as the primary residential parent. After an evidentiary hearing, the superior court found that it was in the children’s best interests for Father to be the primary residential parent in Rhode Island. In support of its ruling, the court made findings pursuant

JOHNSON v. PROVOYEUR
Decision of the Court

to the factors in Arizona Revised Statutes (“A.R.S.”) section 25-403(A).¹ With regard to the second factor (the interaction and interrelationship of the child with the child’s parent or parents, the child’s siblings, and any other person who may significantly affect the child’s best interests), the court found:

Both parents will allow interaction and interrelationship of the children with the children’s parents, and other persons who significantly affect the children’s interests. However the Court finds that Father will be more likely to encourage relationships with Mother’s extended family than Mother will with Father’s extended family. *The Court finds that Mother’s actions in moving to Arizona were to further her interests and not the best interests of the children.*

(Emphasis added).

¶5 On appeal, this court held that the superior court’s finding that Mother was motivated by personal interest was supported by the evidence. However, the superior court did not make a particular finding regarding how Mother’s decision affected the Children’s best interests. This court found Mother’s motivation to be irrelevant without reference to its implication for the Children’s best interests. This court remanded for further proceedings due to the superior court’s improper consideration of Mother’s motivation, and lack of clarity as to whether the error affected the superior court’s conclusion. Our decision directed the superior court on remand to “make a finding as to the relevance (if any) of Mother’s motivation in moving the children to the children’s physical and emotional well-being, . . . conduct any further proceedings necessary to aid this determination, and . . . reweigh all relevant findings in accordance with § 25-403.”

¶6 On remand, the superior court amended its findings regarding the second factor under § 25-403(A) to read:

Both parents will allow interaction and interrelationship of the children with the children’s parents, and other persons who significantly affect the children’s interests. However the Court finds that Father will be more likely to encourage relationships with Mother’s extended family than Mother will

¹ Absent material revision after the relevant date, we cite a statute’s or rule’s current version.

JOHNSON v. PROVOYEUR
Decision of the Court

with Father's extended family. The Court finds that Mother's actions in moving to Arizona were to further her interests and not the best interests of the children. *Specifically, Mother's actions in moving to Arizona were not in the best interests of the children because the children were removed from a stable home environment with multiple physical moves in short succession. Mother's multiple moves have not been in the best interests of the children, and ultimately resulted in the children living with Mother and her male friend who provided child care for the children while Mother worked. Father has continued to live in the same home in the same neighborhood where the children were raised and living in stability. Father has maintained the same job, and the same circle of family and friends.*

(Emphasis added). The court affirmed its prior legal decision-making and parenting time order. Mother timely appealed and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

ISSUES

¶7 Mother argues the superior court did not follow the law of the case on remand and violated the mandate by making new findings. She also argues the court's additional findings are contrary to this court's decision in the first appeal.²

DISCUSSION

¶8 When the mandate of an appellate decision provides specific instructions, a trial court must "strictly follow" them. *Bogard v. Cannon & Wendt Elec. Co., Inc.*, 221 Ariz. 325, 334 (App. 2009). We review *de novo* whether the superior court violated the mandate. *Id.*

A. The Superior Court Did Not Err by Refusing to Hold an Evidentiary Hearing.

¶9 Mother first argues the superior court erred by failing to conduct an additional evidentiary hearing on remand. Immediately after this court issued the mandate, Mother filed a notice of change of judge, citing Arizona Rule of Civil Procedure 42.1(e)(1), which provides that the

² See *Johnson v. Provoyeur*, 1 CA-CV 15-0086 FC, 2016 WL 359444 (Ariz. App. Jan. 28, 2016) (mem. decision).

JOHNSON v. PROVOYEUR
Decision of the Court

right to a change of judge is renewed after remand when the appellate court orders a new trial.³ The superior court denied Mother's request as it was not authorized under the applicable rules because the appellate court's remand did not require a new trial. It stated its denial would be without prejudice in the event it decided a new trial was necessary.

¶10 Mother then asked for an evidentiary hearing to allow her to present evidence of events that had occurred since the initial parenting time determination.⁴ The superior court properly denied that request because the remand did not concern events after the initial parenting time determination. Although the mandate authorized the court to hold a hearing if it believed one was necessary to aid its determination, it did not require a new hearing, and the court evidently decided one was not necessary. *See Anderson v. Contes*, 212 Ariz. 122, 126, ¶ 14 (App. 2006) (because remand was based on the insufficiency of the trial court's explanations, and not on the insufficiency of the evidence, the trial court was not required to conduct an entirely new trial when it reexamined the remanded issue). Moreover, Mother did not proffer any evidence regarding the remanded issue (the effect of her decision to move to Arizona on the children's best interests) and does not argue on appeal she had additional evidence to present on that issue.

¶11 Further, we reject Mother's assertion that the denial of her request for a hearing was simply an attempt by the superior court to protect its original ruling. We presume the court acted impartially and the record contains no evidence of judicial bias or wrongdoing. *See Stagecoach Trails MHC, L.L.C. v. City of Benson*, 232 Ariz. 562, 568, ¶ 21 (App. 2013) ("Judicial rulings alone do not support a finding of bias or partiality without a showing of an extrajudicial source of bias or a deep-seated favoritism."); *see also Anderson*, 212 Ariz. at 126, ¶ 15, n.4 ("[T]he specter of judicial resentment is virtually nonexistent when a case is remanded . . . for clarification.").

³ Prior to January 1, 2017, the Rule was numbered 42(f)(1)(A), but was substantively identical to the current rule. We cite the current version.

⁴ Mother asked, in the alternative, that the court consider her petition to modify custody based on changed circumstances from the time after the original decision. We discuss this alternative pleading in Section C, *infra* at ¶ 19.

JOHNSON v. PROVOYEUR
Decision of the Court

B. The Superior Court Complied with the Remand.

1. The Superior Court's Ruling Was Not Beyond the Scope of the Remand.

¶12 The decision in the first appeal directed the superior court to make a finding as to the relevance, if any, of Mother's motivation in moving the children, conduct any proceedings necessary to aid that determination, and reweigh all relevant findings in accordance with A.R.S. § 25-403. On remand, the superior court considered the evidence that had been presented at the prior evidentiary hearing and found that Mother had acted in her own interests by moving with the children to Arizona and the move did not serve the children's best interests because it caused them to be removed from a stable home environment, subjected them to several moves within a short period of time, and resulted in the children living with Mother's friend who provided child care while Mother worked.⁵ Mother argues the court's additional findings address her actions, not her motivation, and therefore violate the mandate.

¶13 To clarify, our decision in the 2016 appeal did not suggest the superior court could not consider Mother's motivation, which is a statutory factor relevant to a relocation analysis. A.R.S. § 25-408(I)(7); *Gutierrez v. Fox*, ___ Ariz. ___, 2017 WL 1364871, at *9, ¶ 44 (App. April 13, 2017), *Buencamino v. Noftsinger*, 223 Ariz. 162, 163, ¶ 10, n.3 (App. 2009) (the superior court may, in its discretion, consider some or all of the statutory relocation factors in A.R.S. § 25-408(I) even when it is not required to make specific findings regarding those factors). Rather, we held only that the court could not do so in the abstract, without considering the effect of Mother's choice on the children. The superior court remedied this error by making additional findings regarding the effect of Mother's decision to move to Arizona on the children's interests. We therefore reject Mother's argument that the court erred and exceeded the scope of the remand by considering the effects of Mother's actions on the children.

⁵ While Mother is correct that these findings do not apply to the parties' youngest child, who was born in Arizona, the court's analysis is relevant to its overall assessment of the children's best interests.

JOHNSON v. PROVOYEUR
Decision of the Court

2. The Superior Court's Ruling Was Not Contrary to the Decision in the First Appeal.

¶14 Mother next argues that because Father agreed she could move with the children to Arizona, any negative impact from the move on the children's best interests must be attributed to him as well. She contends the superior court's failure to do so violates this court's decision in the first appeal, which reads in relevant part: "Father's acquiescence to the move . . . would be relevant only to the extent his decision affected the children's well-being."

¶15 There was no evidence, and the superior court did not find, that Father agreed the children could permanently relocate to Arizona. As we previously decided, "Father acquiesced to the move because he believed that it was temporary." Although Father could have taken legal measures to oppose even a temporary move, his failure to do so does not suggest he was acting in his own self-interest and contrary to the children's well-being. Moreover, even if we were to regard this as a neutral factor under § 25-403, the court's findings still weigh in favor of its decision to award primary physical custody to Father, as it found he would be more likely to encourage relationships with Mother's extended family than Mother would with Father's extended family, and that Father's family and friends would be available more readily to assist the children with the adjustment to home, school, and community.

3. The Superior Court Implicitly Reweighed the § 25-403 Factors.

¶16 Finally, Mother argues the superior court erred by failing to reweigh all the § 25-403(A) factors as this court directed and simply entered improper additional findings to support its original ruling.⁶ Although the court did not explicitly state it had reweighed the factors in light of its additional findings, it implicitly did so by incorporating and amending its earlier ruling regarding § 25-403(A)(2) and affirming its previous decision.

¶17 Accordingly, we reject Mother's argument that the superior court violated the mandate and erred by appointing Father the children's primary residential parent.

⁶ As discussed, *supra*, ¶ 12, we reject Mother's assertion the court acted improperly or was motivated by bias.

JOHNSON v. PROVOYEUR
Decision of the Court

C. Mother's Petition to Modify.

¶18 We do, however, find reversible error with respect to the superior court's treatment of Mother's petition to modify. Mother's request that the court hold an evidentiary hearing on remand was alternatively titled a Petition for Modification of Primary Physical Residence. She asserted a modification was warranted because Father had failed to fulfill his responsibility as the primary residential parent. The court implicitly dismissed the petition to modify, but did not give any basis for that ruling. The court should have considered whether there were changed circumstances that warranted a modification. *See* A.R.S. § 25-411(J) (court may modify a parenting time order "whenever modification would serve the best interest of the child"); *Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 17 (App. 2015) ("To change a previous custody order, the family court must determine that there has been a 'material change in circumstances affecting the welfare of the child.'"). Accordingly, we remand the court's dismissal of Mother's petition for modification to allow the court to consider the petition.

CONCLUSION

¶19 For the foregoing reasons, we affirm the order appointing Father the primary residential parent but remand for the superior court to consider Mother's petition to modify the children's primary physical residence.

¶20 Father requests an award of attorney's fees and costs on appeal pursuant to A.R.S. § 25-324, which requires this court to examine the parties' respective financial resources and the reasonableness of their positions on appeal. We deny Father's request, but award him costs upon his compliance with Arizona Rule of Civil Appellate Procedure 21.



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