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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

S.P., DEPARTMENT OF CHILD SAFETY, *Appellants,*

v.

JUAN P., *Appellee.*

JUAN P., *Petitioner,*

v.

THE HONORABLE SALLY DUNCAN, Judge of the SUPERIOR COURT
OF THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge,

DEPARTMENT OF CHILD SAFETY, *Real Party in Interest.*

No. 1 CA-JV 16-0446
No. 1 CA-SA 17-0114
(consolidated)
FILED 5-16-17

Appeal from the Superior Court in Maricopa County
No. JD29446
The Honorable Sally Schneider Duncan, Judge

**ORDERS VACATED; SPECIAL ACTION JURISDICTION ACCEPTED,
RELIEF DENIED AS MOOT**

COUNSEL

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MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Kenton D. Jones joined.

K E S S L E R, Judge:

¶1 Appellants Department of Child Safety (“DCS”) and SP appeal the juvenile court’s order directing DCS to return SP to the custody of Appellee Juan P. (“Father”). Father has also sought special action relief to have this Court order the juvenile court to enforce its order requiring SP to be returned to his custody or to place SP, a now six-year-old United States citizen, in the hands of Mexican authorities. However, the juvenile court erred in ordering SP to be returned to Father’s custody or to visit Father in Mexico pending either a more complete evidentiary hearing on the motion to change custody to Father or the trial on the severance petition. We therefore vacate that order as well as the order denying DCS’s motion for reconsideration. We also accept jurisdiction of Father’s petition for special action, but deny the relief sought as moot.

FACTUAL AND PROCEDURAL HISTORY

¶2 Father and Guadalupe A. (“Mother”) are the biological parents of SP, born in the United States in May 2011.¹ Father was convicted of possession of drugs for sale and was deported after a probation violation in 2012. Because of this felony conviction, Father is unable to return to the United States.²

¶3 After being deported, Father had SP with him in Mexico until May 2013, when he returned SP to Mother. Father remained in communication with Mother and SP for approximately a month, but then lost contact. Father called Mother’s sister to attempt to locate SP, but was unsuccessful. Father made no further attempts to find SP for almost two years and did not report this to the police.

¶4 In November 2014, DCS took SP into custody and began dependency proceedings on grounds of neglect as to Father and neglect, substance abuse, and mental illness as to Mother. Father learned that SP was in DCS custody in Arizona in April 2015. Father first contacted DCS regarding SP in June 2015 and did not contact DCS again until September 2015. Father testified that even though he knew SP’s address, he did not send any letters.

¶5 In April 2016, Father filed a motion under Arizona Rule of Procedure for the Juvenile Court (“Rule”) 59 to return SP to his custody in Mexico. By that point, the case plan was severance and adoption and DCS had moved for severance. Both at an evidentiary hearing on the Rule 59 motion and in its September 9 minute entry, the juvenile court denied the motion, finding that “there would be substantial risk of harm to [SP’s] mental or emotional health.” The court based its findings largely on Father’s testimony and on the bonding assessment, observing that Father has not seen SP for almost four years, they do not speak the same language,

¹ Mother is not a party to this appeal. DCS has moved to sever Mother’s rights to SP on grounds of abandonment, as she has had no contact with either DCS or SP since November 2014. She is currently believed to be in Atlanta. Based on the latest transcripts this Court has received, DCS is attempting to locate Mother.

² Although Father informed the Mexican counterpart to DCS he had no criminal history at all and testified he had no criminal history in Mexico, a DCS investigator uncovered a possible February 2013 drug conviction in Mexico.

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SP is very closely bonded to his placement, and SP would likely struggle during the transition to a foreign country with a near stranger. Indeed, Father conceded while testifying that “it would be emotionally harmful to [SP] to be removed from the . . . place where he considers his home, and return him to [Father’s] physical custody.” Other evidence indicated that Father had at least one, if not two, drug convictions. Additionally, Father introduced evidence from the Mexican equivalent of DCS (“DIF”) that it had done a home study, a psychological evaluation of Father, and drug screening. The DIF report showed Father was drug free, was living in a stable home with relatives and siblings of SP, and had a business.

¶6 While the juvenile court denied the Rule 59 motion, it also stated it thought DCS had not met its burden regarding the grounds of abandonment. The court ordered the parties to brief the grounds for abandonment in preparation for the next court date.

¶7 In addition to briefing the abandonment issue, Father renewed his Rule 59 motion, asking for visitation in Mexico. After reviewing the briefing, the juvenile court reversed its previous ruling and granted Father’s Rule 59 motion.³ The court found that DCS had not established a prima facie showing of abandonment and that Father had done “everything in his power to try to find [SP].” The court also explained that Father had done all the things requested of him, including having DIF do a psychological evaluation, home study, and drug testing in Mexico. The court thus found that there was no substantial risk of harm to SP’s wellbeing in returning him to Father and, as the court put it, it might as well “tear[] off a Band-Aid,” which we interpret as a comment on returning SP to Father now because SP would be returned permanently after a severance trial. The court confirmed its order granting the Rule 59 motion in an October 6, 2016 minute entry (“October 6 order”). In an order entered October 14, 2016 (“October 14 order”), the court denied DCS’s motion for reconsideration. It also denied repeated requests by DCS and the guardian ad litem for SP to stay its order on custody and visitation in Mexico.

³ Although the minute entry grants visitation and affirms that an out-of-home placement is necessary to protect SP’s welfare, the transcripts indicate the court’s intention was to award Father custody of SP by granting his Rule 59 motion. We interpret the court’s order and its later orders to encompass both returning SP to Father’s custody in Mexico and at a minimum to authorize visitation with Father in Mexico.

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¶8 DCS and SP timely appealed from both the October 6 and 14 orders. We have jurisdiction under Rule 103(A) and Arizona Revised Statutes (“A.R.S.”) sections 8-235(A) (Supp. 2016) and 12-120.21(A)(1) (2016).⁴ See *Lindsey M. v. Ariz. Dep’t of Econ. Sec.*, 212 Ariz. 43, 45, ¶ 9 (App. 2006) (finding an order awarding custody of a dependent child is an appealable order).

¶9 While the appeal was pending, the juvenile court had continued hearings on the status of its orders to have DCS arrange for Spanish lessons for SP, get SP a passport, and arrange either a change of custody to Father in Mexico or place SP in temporary custody of the Mexican consulate to bring him to Mexico. Ultimately, however, the court agreed with DCS that because its order changing custody and/or visitation in Mexico was on appeal, it could not act to enforce the orders moving SP to Mexico. The court also refused to rule on transferring SP to Mexican authorities and denied Father’s motion for an evidentiary hearing on an order to show cause as to why DCS was not in contempt for not returning SP to Father. Father filed a petition for special action asking this Court to order the juvenile court to enforce its order requiring SP to be returned to him in Mexico or to Mexican authorities.⁵

¶10 On its own motion, this Court consolidated the appeal and the special action. We also stayed all orders that would require DCS to provide Spanish lessons for SP, work with any agent of the Mexican government to arrange for visitation between Father and SP or place SP in Father’s custody in Mexico, or take any steps to move SP out of Arizona to Mexico or place him in the control of Mexican authorities until further order of this Court. We did not stay the order to have DCS obtain a passport for SP, but ordered that DCS shall retain possession of that passport and take all steps necessary to preclude a duplicate or replacement passport being issued for SP.

⁴ We cite to the current version of statutes unless changes material to this decision have occurred.

⁵ The juvenile court did, however, repeat its directions to DCS to arrange Spanish lessons and a passport for SP and to work with Spanish authorities to have Skype visitations between Father in Mexico and SP in Arizona.

DISCUSSION

¶11 As indicated above, DCS and the guardian ad litem for SP ask us to vacate the order granting the Rule 59 motion and the order denying DCS's motion for reconsideration. They contend that the juvenile court failed to make required findings of fact, denied them the right to be adequately heard on the reversal of its denial of the motion, disregarded the evidence, and disregarded the statutory standard for granting a Rule 59 motion. Father asks us to order the court to enforce its earlier orders requiring DCS to return SP to Father either for visitation or custody or to place SP in temporary custody of the Mexican government for bringing him to Mexico.

¶12 The juvenile court has substantial discretion when placing a dependent child because the court's primary consideration is the child's best interest. *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, 404, ¶ 8 (App. 2008) (citations omitted). We therefore review the juvenile court's placement order for an abuse of discretion. *Id.* (citation omitted). We do not reweigh evidence, but only look to determine if there is evidence to sustain the ruling. *Maricopa Cty. Juv. Action No. JV-132905*, 186 Ariz. 607, 609 (App. 1996) (citation omitted). A court abuses its discretion if it makes a legal error in reaching its decision. *In re Commitment of Jaramillo*, 217 Ariz. 460, 462, ¶ 5 (App. 2008) (citation and quotation omitted).

¶13 Rule 59 requires the juvenile court to return the child to the parent "if the court finds, by a preponderance of the evidence, that return of the child would not create a substantial risk of harm to the child's physical, mental or emotional health or safety." Ariz. R.P. Juv. Ct. 59(E)(1); see A.R.S. § 8-861 (2014). The court shall consider the failure of the parent to comply with the terms of the case plan as evidence that return of the child would create a substantial risk of harm. Ariz. R.P. Juv. Ct. 59(D).

¶14 The juvenile court erred in reversing its denial of the Rule 59 motion. When denying Father's motion, the court made specific findings that SP would be at a substantial risk of harm if returned to Father. The court based its findings on factors such as the lack of bond or common language between Father and SP and SP's close bond with his placement. Substantial evidence supports this ruling. Moreover, Father conceded during the hearing that "it would be emotionally harmful to [SP] to be removed from the . . . place where he considers his home, and return him to [Father's] physical custody." DCS also had presented evidence of Father's criminal convictions in both California and Mexico relating to drug dealing and deportation. The court stated that "Father's not met his

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burden.” Although we recognize that Father introduced documents from the Mexican government showing he was drug free and living in a stable environment with family, DCS had no way to contradict or confirm those reports. Additionally, there appear to be discrepancies within the reports, not the least of which is the report’s conclusion that Father had no criminal convictions.

¶15 No new evidence was presented to the juvenile court that would merit the reversal of these findings. The only submissions between the two hearings were briefs addressing abandonment, not the risk of harm to SP. To grant a Rule 59 motion, the court must find that “return of the child would not create a substantial risk of harm to the child’s physical, mental or emotional health or safety.” Ariz. R.P. Juv. Ct. 59(E)(1). The factors used in this analysis are not those used to determine the statutory grounds of abandonment. *See* A.R.S. § 8-533(B)(1) (2014); *Anonymous v. Anonymous*, 25 Ariz. App. 10, 12 (1975) (citation omitted) (defining abandonment as “conduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship”). While we appreciate the juvenile court’s candor in stating its view that the case for abandonment was weak and it should prepare SP for an eventual move to Mexico, in the same fashion as “tearing off a Band-Aid,” the court erred by basing its October 6 and 14 orders on its perceived weakness of DCS’s case for abandonment.⁶

¶16 Furthermore, in granting the motion, the court made findings on the record that Father was in compliance with the case plan. However, Rule 59 does not consider compliance with the case plan to be evidence there is no risk of harm. Rather, the Rule requires the court to consider noncompliance as evidence of a substantial risk of harm. Ariz. R.P. Juv. Ct. 59(D). “[T]he child’s best interests are paramount and, for that reason, that the juvenile court should not treat child custody as a penalty or reward for

⁶ The court stated that it had reviewed the briefing on abandonment and did not agree that there was a prima facie showing of abandonment. We note that during the hearing in which it granted the Rule 59 motion, the court also stated that it had reconsidered all the evidence and testimony and that Father did not pose a substantial risk to SP if the child was returned to him. But there was no evidence to support that conclusion other than the unverified reports from the Mexican government.

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[a parent's] conduct." *Don L. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 556, 559, ¶ 7 (App. 1998) (citation and quotations omitted).

¶17 Accordingly, we vacate the juvenile court's orders of October 6 and 14, ordering DCS to return SP to Father in Mexico, either for visitation or as a change of custody. To the extent the juvenile court later reiterated those orders to ensure DCS was taking steps to have SP sent out of the United States and into Mexico and to the extent those orders would require DCS to return SP to Father for custody or visitation or to give SP to Mexican authorities, those orders now are moot because the order granting the Rule 59 motion is vacated.⁷ Given that later portions of the record provided to this Court indicate DCS is arranging to have its own psychological evaluation and bonding assessment of Father done in Mexico, as well as further drug testing, any move of SP out of Arizona to be with Father or placing him with Mexican authorities shall await either another evidentiary hearing pursuant to Rule 59 after DCS has completed those studies or the severance trial, which is currently scheduled for July 2017.

¶18 Father's special action asks us to order the juvenile court to enforce its orders requiring DCS to return SP to him in Mexico for either visitation or custody purposes and to order temporary custody to the Mexican consulate for international change of custody. We accept jurisdiction of the special action but deny relief. The juvenile court correctly determined that it could not order SP moved out of Arizona for a return to Father while this appeal was pending. Since those orders to move SP out of Arizona are now vacated, we deny any relief to Father as the special action petition is moot.

¶19 Given this result, we vacate our earlier stay of any of the juvenile court's orders except as otherwise provided herein.

⁷ The juvenile court's orders requiring DCS to obtain a passport for SP are not affected by our decision today provided that DCS retains possession of the passport and takes all steps necessary to preclude a duplicate or replacement passport being issued for SP pending any further evidentiary hearing and ruling on the Rule 59 motion or a final determination on severance. Furthermore, our decision does not affect any order requiring DCS to arrange for Spanish lessons for SP or for Skype visits between Father and SP provided that such communications do not require that SP have to be with Mexican consular officials for such visits to take place.

CONCLUSION

¶20 For the reasons stated above, we vacate the juvenile court's October 6 and 14 orders and related orders requiring DCS to return SP to Father for visitation or custody or to grant Mexican authorities custody of SP. The juvenile court shall not order SP to be moved out of Arizona or placed in the hands of Mexican authorities until the completion of either a new evidentiary hearing on a Rule 59 motion after DCS has been able to complete its discovery and studies or the severance trial. We accept jurisdiction but deny relief on Father's special action petition.⁸



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

⁸ Given this decision, we need not and do not address DCS and the guardian ad litem's other arguments on appeal.