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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

STACY KRISTINE YACULLO,
Petitioner/Appellant,

v.

MICHAEL GAVAN CUNNIFFE,
Respondent/Appellee.

No. 1 CA-CV 21-0712 FC
FILED 11-1-2022

Appeal from the Superior Court in Maricopa County
No. FC2011-000715
The Honorable Monica Edelstein, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

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By Ronald L. Kossack
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MEMORANDUM DECISION

Judge D. Steven Williams delivered the decision of the court, in which Presiding Judge Randall M. Howe and Chief Judge Kent E. Cattani joined.

WILLIAMS, Judge:

¶1 Stacy Yacullo (“Mother”) appeals the superior court’s award of attorney’s fees for Michael Cunniffe (“Father”) and dismissal of her petition to enforce parenting-time. In the exercise of our discretion, we treat the appeal as a petition for special action, accept jurisdiction, but deny relief.

FACTUAL AND PROCEDURAL HISTORY

¶2 Since their divorce in 2012, Mother and Father have extensively litigated legal decision-making and parenting-time issues regarding their two minor children, including enforcement of related orders. Most recently, Mother (1) petitioned the superior court to find Father in contempt for failing to pay her previously awarded attorney’s fees, and in a separate pleading, (2) petitioned the court to enforce a summer vacation parenting-time schedule. As to the latter, Mother alleged that Father provided her notice of the children’s summer vacation plans one day late, that he failed to provide the children’s travel itinerary, and that she was owed two make-up days with the children from the previous summer. Mother asked the court to, among other things, preclude Father from taking the children outside of Arizona for summer vacation in 2021 and to impose additional requirements regarding the timing and details to be provided for future vacations.

¶3 In April 2021, Mother and Father reached an Arizona Rule of Family Law Procedure 69 agreement that resolved Mother’s contempt allegation. The superior court accepted the oral agreement, but when the parties could not agree on a written order to submit for the court’s endorsement, the court withdrew the agreement. Father objected, but to no avail.

¶4 In June 2021, Father requested that Mother’s petition to enforce parenting-time be dismissed, arguing it was an improperly pled motion to modify. The court agreed and dismissed Mother’s petition. As to

YACULLO v. CUNNIFFE
Decision of the Court

the outstanding contempt allegation, however, the court stated that “Mother can present whatever she wants [at trial].”

¶5 The following month, Mother filed a motion seeking permission to supplement her contempt petition (raising issues “relative to summer vacation; unreimbursed medical expenses; and issues related to the children’s passports”) and asked the court to make findings of fact and conclusions of law. The court denied Mother’s request for findings of fact and conclusions of law stating it was “not a valid petition or motion,” and informed it would address her request to supplement the contempt petition at trial. Mother unsuccessfully moved the court to reconsider. The day before trial, Mother moved *in limine* to preclude “certain exhibits and testimony by Father” for untimely disclosure. Father responded with his own motion *in limine* arguing Mother’s disclosure was untimely too and that Mother had not provided him with her “actual exhibits.” The court declined to address either motion.

¶6 Following trial, the superior court found Father in contempt for failing to timely pay in full Mother’s previous awards of attorney’s fees, fined him as a sanction, and awarded Mother additional attorney’s fees related to Father’s contempt.

¶7 The court denied Mother’s request to supplement her contempt petition finding that it was “not properly pled as issues of contempt/enforcement but rather [as] Mother asking the Court to reconsider or modify orders related to the exercise of Parenting Time or other related orders.” The court stated it found Mother’s request to supplement “to be absurd, fails to state a claim to support a contempt finding under any circumstance, and frankly resulted in an unconscionable waste of [Father’s] and the Court’s (limited) time.” The court admonished the parties moving forward to read the court’s orders “carefully to ensure good faith compliance with the spirit of **ALL** issued orders” and with “common sense.”

¶8 The superior court found that both parties “have acted unreasonably throughout the history of the case,” but that “currently, it is [Mother] who has both taken an unreasonable position and deliberately and without justification drove up the cost of litigation.” The court further found that the “avalanche of pleadings” filed by Mother leading up to trial included motions that were “not grounded in fact or based in law.” The court awarded Father attorney’s fees from the time of withdrawal of the Rule 69 agreement forward under A.R.S. § 25-324(B).

YACULLO v. CUNNIFFE
Decision of the Court

¶9 Mother appeals.

DISCUSSION

¶10 Mother contends the superior court erred by (1) dismissing her petition to enforce parenting-time; (2) “limiting [her] future recourse to the family court” by issuing an admonition to the parties, *supra* ¶ 7, and (3) awarding attorney’s fees to Father.

¶11 Though the dismissal of a petition to enforce may appropriately be challenged through an appeal, challenges arising from the superior court’s contempt orders can only be raised through a special action petition. *Berry v. Superior Court*, 163 Ariz. 507, 508 (App. 1989). In the exercise of our discretion, we treat Mother’s appeal as a petition for special action and accept jurisdiction. *State v. Perez*, 172 Ariz. 290, 292 (App. 1992).

I. *Dismissal of Petition to Enforce Parenting-Time*

¶12 Mother contends the superior court erred by construing her petition to enforce parenting-time as one seeking modification. She argues that the petition’s caption, contents, and requested relief all indicated that her goal was to address violations of past orders.

¶13 Though Mother’s petition asked the court to ensure Father strictly comply with prior orders, it also asked the court to grant additional relief. For example, Mother asked the court to impose new deadline restrictions for exchanging travel itineraries and to prohibit Father from taking the children outside of Arizona. Neither request had previously been ordered. Because “it is the substance and not the name of a pleading which . . . determine[s] its character,” *White v. Davidson*, 46 Ariz. 1, 4 (1935), we cannot say the court erred in treating the petition as one for modification and dismissing it where it failed to allege any substantial change in circumstance warranting the requested additional parenting-time terms. *See Canty v. Canty*, 178 Ariz. 443, 448 (App. 1994) (“To change a previous custody order, the court must determine whether there has been a material change in circumstances affecting the welfare of the child.”).

II. *Mother’s Future Recourse in the Superior Court*

¶14 Mother also contends the superior court’s orders effectively prevent her from seeking future judicial recourse. We disagree.

¶15 Frustrated with the parties’ “excessive litigation,” the court sought to curb further needless litigation by admonishing the parties to

YACULLO v. CUNNIFFE
Decision of the Court

read each order “carefully” and with “common sense.” The court’s requirement that any future request to modify legal decision-making and/or parenting first be mediated “before the Court will hold an evidentiary hearing” is consistent with Rule 91(d). Ariz. R. Fam. Law P. Though the court’s tone was unmistakably direct, nothing in the court’s admonition to the parties precludes Mother from seeking future redress in the courts.

III. The Superior Court’s Award of Attorney’s Fees

¶16 Mother’s final contention is that the superior court abused its discretion in awarding Father attorney’s fees under A.R.S. § 25-324(B) after the Rule 69 agreement was withdrawn. We review an award of attorney’s fees for an abuse of discretion. *Myrick v. Maloney*, 235 Ariz. 491, 494, ¶ 6 (App. 2014).

¶17 Section 25-324(B) provides that the court “shall award reasonable costs and attorney fees” where a “petition was not grounded in fact or based on law.”

¶18 After the superior court dismissed Mother’s petition to enforce parenting-time, Mother moved to supplement her prior contempt petition to include the same alleged violations. In her supplement, she again requested extra days of vacation time, as well as an order seeking the children’s passports. As with her first petition, her supplement requested relief that no prior order provided. When the court told Mother it would hear her allegations at trial, Mother reargued her contentions in a subsequent motion. On this record, Mother has not shown that the court abused its discretion by finding that her filings and contentions were unnecessary and warranted a limited award of fees to Father.

IV. Request for Attorney’s Fees

¶19 Both parties request attorney’s fees under § 25-324. Record evidence shows that Father has greater financial resources than Mother. Having considered each party’s financial resources and the reasonableness of positions taken, in the exercise of our discretion we decline to award either party its fees. As the successful party on appeal, Father is awarded his costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. *See* Ariz. R.P. Spec. Act. 4(g).

YACULLO v. CUNNIFFE
Decision of the Court

CONCLUSION

¶20 For the foregoing reasons, we treat the appeal as a petition for special action, accept jurisdiction, but deny relief.



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