IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

S.R.M.[1]

DARA RABIN, *Petitioner/Appellant*,

v.

JOSEPH MCGHEE, *Respondent/Appellee*.

No. 1 CA-CV 22-0616 FC
FILED 5-30-2023

Appeal from the Superior Court in Coconino County
No. S0300CV202200375
The Honorable Brent Davidson Harris, Judge *Pro Tempore*

VACATED AND REMANDED

APPEARANCES

DNA People's Legal Services, Flagstaff
By A.J. Rogers, Adam Cirzan
Counsel for Petitioner/Appellant

Joseph McGhee, Flagstaff
Respondent/Appellee

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[1] The caption in this matter has been modified to protect the identity of the minor child.

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Acting Presiding Judge Jennifer B. Campbell and Chief Judge Kent E. Cattani joined.

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

¶1 Dara Rabin ("Mother") appeals the superior court's denial of her petition to change her child's last name. Because the court erred, we vacate and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Joseph McGhee ("Father") were married from September 2010 to February 2018, and share one child ("Child") born in February 2015. After an evidentiary hearing in April 2022, the superior court awarded Mother sole legal decision-making and most of the parenting time.

¶3 Four months later, Mother filed a name-change application ("Petition") with the superior court to add her surname to her son's name. She used a form provided by the Coconino County Law Library titled "Petition for Minor Name Change," which asked for Child's current and proposed names, along with the reason for the proposed change. Mother completed the entire form and signed it under oath, explaining she was requesting the name change because she and Father had divorced, she had sole legal decision-making and most parenting time, and the proposed name would "help reduce confusion in registering [Child] for school, setting doctor appointments, signing him up for extracurricular activities, [and] traveling." She also avowed she was "asking for this name change only because it's in the [child]'s best interest[s]."

¶4 Father moved to dismiss the Petition under Arizona Rule of Civil Procedure 12(b)(6). Just six days later, the superior court denied Mother's Petition, writing by hand: "denied, no legal/factual basis." The court held no hearing and ruled before Mother had a chance to respond.

¶5 Mother moved to reconsider. In denying Mother's motion, the court elaborated on its ruling, adding that Mother's Petition was "fatally insufficient, as a matter of law, pursuant to ARCP Rule 12(b)(6)," because:

> [Mother] alleged no facts pursuant to ARS § 12-601, beyond the conclusory statement that such a name change would be in the 7-year-old child's best interest, because hyphenating the child's last name would somehow reduce confusion in registering him for things. The pleading is facially insufficient. . . . The Court does not see how [the proposed name] enhances convenience or efficiency, or reduces confusion, for any party, specifically including the child, [whose] best interests are of paramount concern to this Court.

¶6 The superior court also explained why Mother received no chance to respond to Father's motion:

> The Court did not 'allow' response time to [Father's] Motion to Dismiss because [Mother's] Petition was facially insufficient for the Court to render a ruling in [Mother's] favor. The Court did not set a hearing on the matter for the same reason.

¶7 Mother timely appealed. We have jurisdiction. *See* A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶8 Mother raises two arguments on appeal.

I. Procedural Error

¶9 Mother first argues the superior court prematurely granted Father's motion before she had a chance to respond. We review the court's interpretation of court rules de novo. *State v. Whitman*, 234 Ariz. 565, 566, ¶ 5 (2014).

¶10 The non-movant has 10 days to respond to a motion to dismiss after the motion and supporting memorandum are served, excluding "intermediate Saturdays, Sundays, and legal holidays." Ariz. R. Civ. P. 7.1(a)(3), 6(a)(2). The superior court may summarily grant a motion to dismiss when "the non-movant does not file a responsive memorandum" before the deadline, or when "counsel for any moving or opposing party fails to appear at the time and place designated for oral argument." Ariz. R. Civ. P. 7.1(b).

¶11 The superior court erred when it summarily dismissed Mother's Petition before her response was due. *See Acker v. CSO Chevira*,

188 Ariz. 252, 256 (App. 1997) (a court may dismiss an action on its own motion for failure to state a claim "but only after the court takes the proper procedural steps") (citations omitted). Father moved to dismiss the Petition on August 16, so Mother's response was due on August 30, but the superior court granted the motion on August 22. The court did not cite any of the exceptions under Rule 7.1(b), and none apply on this record.

II. Merits

¶12 Mother also challenges the superior court's decision on the merits. We review de novo the superior court's order granting a Rule 12(b)(6) motion to dismiss. *Conklin v. Medtronic, Inc.*, 245 Ariz. 501, 504, ¶ 7 (2018). A motion to dismiss should be granted "only if as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Id.* (citations omitted).

¶13 Parents may petition to change the name of their children under A.R.S. § 12-601, which requires the parent to file an application "in the county of the minor's residence," and directs the court to consider whether the name change is in the child's best interests. A.R.S. § 12-601(B), (C)(4). The question of a child's best interests is a question of fact, not a question of law. *Pizziconi v. Yarbrough*, 177 Ariz. 422, 425 (App. 1993).

¶14 Section 12-601 does not specify what courts must consider when conducting the best-interest analysis, but Arizona courts have identified several factual elements, including: "the child's preference; the effect of the change on the preservation and development of the child's relationship with each parent; the length of time the child has borne a given name; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed name; the motive of the parents and the possibility that the use of a different name will cause insecurity or a lack of identity." *Id.*

¶15 The superior court erred here because it denied the Petition as a matter of law. The court heard no evidence and allowed no discovery, and instead denied the Petition as "facially insufficient." Even in *Laks v. Laks*, 25 Ariz. App. 58 (1975), which the superior court cited, the trial court heard the evidence before denying the petition. *See J.F. v. Como in & for Cnty. of Maricopa*, 253 Ariz. 400, 403, ¶ 16 (App. 2022) ("courts must strive to marshal, inspect and analyze the relevant and admissible evidence needed" to reach a well-informed decision on a child's best interests) (citations omitted).

CONCLUSION

¶16 We vacate the superior court's order denying the Petition and remand for the court to hear and consider evidence about the Child's best interests. Mother may recover her taxable costs incurred on appeal once she complies with ARCAP 21.

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