DIVISION ONE
FILED: 05-11-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF MICHAEL MARGOLIES, Petitioner/Appellant v. CYNTHIA MARIE COOPER, Respondent/Appellee.	No. 1 CA-CV 09-0343 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2002-013125

The Honorable Michael R. McVey, Judge

AFFIRMED

Jones, Skelton & Hochuli, P.L.C. Phoenix
By Eileen Dennis GilBride
Attorneys for Petitioner/Appellant

R.J. Peters & Associates, P.C. Phoenix
By Carlie Owsley Walker
Attorney for Respondent/Appellee

B R O W N, Judge

¶1 Michael Margolies ("Father") appeals the family court's rulings modifying his parenting time with his daughter (the "child") and denying his request that the child attend a different school. For the following reasons, we affirm.

BACKGROUND

¶2 Father and Cynthia Marie Cooper ("Mother"), who were never married, are the natural parents of the child, born in December 2002. In February 2004, Father and Mother entered into a joint custody agreement, and the family court adopted their proposed parenting plan. Under the plan, Father would have the child every other weekend, every other Monday evening, and, in the alternate weeks, every other Thursday evening. The plan also set forth a detailed holiday schedule and required that Father and Mother make any major education decisions together. In 2005, the plan was modified to permit Mother and Father to alternate between having the child for seven consecutive days, with Tuesday as the designated exchange day. The holiday and vacation schedule remained the same.

¶3 In 2007, the family court appointed a parenting coordinator in response to the parties' request for assistance in resolving a dispute over which school the child should attend. In February 2008, Mother filed a petition to modify custody, parenting time, and child support, alleging that Father had stopped attending sessions with the parenting coordinator.

Mother requested she be granted sole legal custody of the child. Also in February 2008, the parenting coordinator submitted a report which recommended the following: (1) Father receive a psychiatric evaluation; (2) Father have only supervised visitation with the child until he completes the evaluation and complies with all recommendations; and (3) the child continue to participate in therapy.

¶4 Father responded by filing a counter-petition to modify custody, parenting time, and support, asserting the child's best interests would be served if Father was the primary residential parent for purposes of child's enrollment in school. Father also requested a custody evaluation; and in June 2008, the court appointed Dr. Lavit to conduct the evaluation.

¶5 In October 2008, Mother submitted a first amended petition to modify custody, parenting time, and support. She stated that her husband received a military assignment to move to Japan for three years, beginning in April 2009. Mother "hoped" she and her children, including the child, could follow her husband to Japan at the end of the school year in May 2009. She dropped her request for sole custody, but asked she be designated as the primary residential parent. Mother proposed that Father be awarded parenting time for the duration of the child's summer break from school and every other Christmas break and Spring break. Mother also requested all transportation

costs be split between the two parties, and the child continue her current therapy sessions by webcam or telephone. Father filed a motion to strike Mother's first amended petition, arguing the petition failed to comply with the "before service" requirement of Family Law Procedure Rule 34(A)(1).[1] Father also argued Mother's first amended petition deviated from her initial petition because it requested joint custody and permission to relocate the child to Japan. Mother then filed a motion to amend, which the court granted.

¶6 Dr. Lavit completed his custody evaluation report in November 2008, and he recommended the child remain in Arizona and reside primarily with Father. Dr. Lavit also recommended the child visit Mother in Japan for eight weeks in the summer and during the child's Christmas break.

¶7 At a hearing in February 2009, the parties presented evidence in support of their respective petitions. By order dated March 3, 2009, the family court denied Mother's request for relocation. The court ordered that the parties keep their joint legal custody arrangement, continue parenting time on an alternating week basis, and the child should continue to attend school in Mother's school district. The court further ordered

---

[1] Rule 34(A)(1) states: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served[.] Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party."

that (1) Mother have parenting time with the child during Christmas break and Spring break, with the option of spending such time in the United States or Japan; (2) Father have parenting time with the child for the first two weeks after the last day of school; and (3) Mother have the option of taking the child to Japan for the remainder of the child's summer vacation except the child must return to Arizona at least five days before the first day of school.

¶8 Father moved for reconsideration/clarification of the court's order regarding parenting time and school enrollment and Mother later filed a motion asking for clarification regarding holidays. By minute entry filed on March 14, 2009, the court denied Father's motion without comment. As to Mother's motion, the court ordered that (1) Father continue to have one day of parenting time on Rosh Hashanah, Yom Kippur, and Hannukah; one day of parenting time on Passover and one day for Purim; and (2) Mother spend Christmas Eve, Christmas Day, and Easter Sunday with the child. Father timely appealed.

DISCUSSION

¶9 Father argues the family court denied Father due process by: (1) unilaterally devising a parenting plan that decreased Father's parenting time; and (2) ordering that the child attend school in Mother's school district without giving him an opportunity to demonstrate that the child should attend a

school located in his district. "Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979). Because due process claims are issues of law, our review is de novo. *Mack v. Cruikshank*, 196 Ariz. 541, 544, ¶ 6, 2 P.3d 100, 103 (App. 1999).

A. Parenting Time and School Attendance

¶10 As an initial matter, Father did not raise his due process argument in the family court. In his motion for clarification/reconsideration, Father requested the court clarify its decision regarding the holiday schedule, asserting it was not clear whether Mother would be moving to Japan. He expressed concern that his decreased parenting time would constitute a substantial revision to the equal parenting time plan. As to the school choice matter, Father merely requested the court reconsider its order, arguing his lifestyle and residence were more stable than Mother's and it would be in the child's best interests that she attend school in his school district. Nothing in the motion suggests Father claimed lack of notice or denial of the opportunity to be heard. Generally, we do not consider arguments raised for the first time on appeal and thus Father has waived his due process challenge. *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) ("As a general rule, a party cannot argue on appeal

legal issues not raised below."); *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) (recognizing that this court generally does not consider issues, even constitutional issues, raised for the first time on appeal); *Dugan v. Fujitsu Business Comm. Sys., Inc.*, 188 Ariz. 516, 521 n.4, 937 P.2d 706, 711 n.4 (App. 1997) (finding an argument waived because it was not raised before the trial court).

¶11 Even if Father did preserve this issue for review on appeal, we find that he was not denied due process. First, both the original petition and the amended petition requested the court address the issues of custody and parenting time. Second, more than a year before the evidentiary hearing, the parties filed a joint pretrial statement, which included the following contested issues: (1) legal custody of the child including relocation to Japan; (2) an appropriate parenting time plan; (3) an appropriate child support award; and (4) school enrollment for the child. Regarding parenting time, Father took the position the parenting plan should comport with Dr. Lavit's custody evaluation report. Mother requested Father be awarded summer break and every other Christmas break and Spring break, and that the child reside with Mother at all other times. With regard to school enrollment, Father asserted the child should attend school in his district, but Mother believed the child

should continue to attend school in Mother's district if she was not permitted to relocate to Japan.

¶12 The joint pretrial statement "controls the subsequent course of the litigation" and has the effect of amending the pleadings. *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) (citations omitted). Because the issues of parenting time and school attendance were specifically included in the joint pretrial statement, Father was provided sufficient notice those issues could be addressed by the family court. He was given a full and fair opportunity to present the evidence he deemed appropriate in support of all contested issues.

¶13 Additionally, though Father argues he was not given an opportunity to demonstrate why the child should attend school in his district, he was asked about the school at the hearing. Specifically, Father was asked whether he had researched the elementary school in his school district, the school the child would attend if she resided primarily with Father. He testified he had researched the school including its academic rating. Thus, Father had the opportunity to present evidence to establish that the child should attend school in his district. Moreover, because the child was already attending school in Mother's district, Father had the burden of proving that switching to a different school would be in the child's best

interests. Nothing in the record before us indicates he was denied the opportunity to meet that burden.

¶14 Father cites *Berglass v. Berglass*, 804 A.2d 889 (Conn. App. Ct. 2002) in support of his due process challenge. In *Berglass*, a father asserted the trial court made improper modifications to a parenting agreement, including increasing the mother's evening visitations with the child. *Id*. at 893, 897-98. The court of appeals found the trial court erred in modifying the parenting agreement because it did so without a hearing and without considering the child's best interests. *Id*. at 899. Neither of those circumstances is present here. The family court conducted a hearing to consider the parties' evidence and arguments of counsel relating to the issues identified in the joint pretrial statement. Thus, Father's reliance on *Berglass* is misplaced.

¶15 Here, the parties agreed what issues would be presented to the family court through their joint pretrial statement. Although there was no specific evidence relating to modification of the holiday schedule presented at the hearing, Father did not request that he be given an opportunity to present additional evidence after he received the court's ruling. Thus, we conclude Father was not denied due process. He was provided sufficient notice of the issues to be considered

by the family court and was given the opportunity to be heard in a meaningful manner.

B. Attorneys' Fees

¶16 Both parties have requested an award of attorneys' fees and costs pursuant to A.R.S. § 25-324 (Supp. 2009), which provides that a court may order a party to pay attorneys' fees upon consideration of the reasonableness of each party's positions throughout the proceeding and the financial resources of both parties. In our discretion, we decline to award attorneys' fees to either party. We award costs, however, to Mother upon her compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶17 For the foregoing reasons, we affirm the family court's orders regarding parenting time and school attendance.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge