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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:)
CLINTON T. HAYES,) 1 CA-CV 11-0444
Petitioner/Appellee,)
v.) DEPARTMENT B
REBECCA ANN HAYES,) MEMORANDUM DECISION
Respondent/Appellant.) (Not for Publication -
) Rule 28, Arizona Rules
) of Civil Appellate
) Procedure)
)
)

Appeal from the Superior Court in Yavapai County

Cause No. P1300D020080294

The Honorable Rhonda Repp, Judge *Pro Tempore* (Retired)
The Honorable Joseph P. Goldstein, Judge *Pro Tempore*

AFFIRMED

Ryan Rapp & Underwood PLC
By Terrie S. Rendler
Attorneys for Petitioner/Appellee

Phoenix

Scott L. Patterson PLLC
By Scott L. Patterson
Attorneys for Respondent/Appellant

Tempe

J O H N S E N, Judge

¶1 Rebecca Ann Hayes ("Mother") appeals from superior court orders modifying custody of her three minor sons and

denying her motion for a new trial. For the reasons that follow, we affirm the orders.

FACTS AND PROCEDURAL BACKGROUND

¶12 Mother's marriage to Clinton Hayes ("Father") was dissolved pursuant to a consent decree in 2008. The parties' stipulated parenting plan provided that they would have joint legal custody of the children and would share physical custody by alternating weeks.

¶13 In 2010, Father learned Mother had pled guilty to multiple charges of theft and fraud and was facing incarceration. The charges related to Mother's illicit use of personal identifying information of clients of the tax preparation firm at which she worked. The week before her sentencing, and without Father's permission, Mother had the children taken out of school and spent the next five days with them, refusing to tell Father where they were or to let the children talk to him.

¶14 After Mother was sentenced to one year in prison, Father filed a petition to modify custody, alleging that Mother had lost control over her personal life and was making choices not in the best interests of the children. Prior to trial, Mother filed a Motion for Order to Transport, requesting that the court order the Department of Corrections to transfer her to

court for the hearing on the petition. The court did not expressly rule on Mother's motion but issued an order for her to appear at the trial by telephone. The hearing was scheduled for September 3, 2010, with pretrial statements due no later than ten days prior to trial.

¶15 On August 23, Mother requested a continuance. She asserted that she wanted to be present at the hearing, she had a "firm release date" of September 17, discovery had not been completed and her lawyer had a conflict on September 3. The superior court denied the motion, stating that these proceedings took precedence over counsel's conflicting matter in justice court. On August 30, Father filed a pretrial statement disclosing witnesses and exhibits he planned to use at trial.

¶16 The hearing was conducted on September 3, and Mother appeared telephonically. During the hearing, Mother mentioned several times that she was having trouble hearing what was being said.¹ The superior court attributed this difficulty to the prison phone system, stating "we often have problems."

¶17 The superior court issued an order on December 15 that modified custody, "awarding Father primary physical custody and final decision authority regarding educational placement and

¹ Additionally, at several points during Mother's testimony the transcript of the proceedings recorded portions of her answers as "indiscernible."

medical/dental care." Mother filed a motion for new trial, which the court denied. Mother timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1), (2) and (5)(a) (West 2012).²

DISCUSSION

A. Mother Meaningfully Appeared and Participated in the Hearing by Telephone.

¶18 Mother first argues the superior court violated her due-process rights by not ordering her to be transported from prison to court for the proceedings. When a significant civil proceeding is brought against a prisoner, "there is a presumption that the prisoner is entitled to be personally present at critical proceedings, such as the trial itself, when he has made a timely request to be present." *Strube v. Strube*, 158 Ariz. 602, 606, 764 P.2d 731, 735 (1988). This presumption is rebuttable, and it is within the court's discretion to determine whether to grant such a request "after balancing the interest of the prisoner against the interests of the other parties and the state," *id.* at 605-06, 764 P.2d at 734-35, and taking into consideration factors such as "whether the prisoner is a security risk, the possibility of delay, and the cost of

² Absent material revisions after the relevant date, we cite a statute's current version.

transportation," *Ariz. Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997). After this balancing of interests, the court in its discretion may order the defendant to appear telephonically rather than be transported to appear personally at trial. *Id.*

¶19 Under Arizona Rule of Family Law Procedure 8(B), before allowing a party to testify by telephone, the court must find that "no substantial prejudice will result." In this case, the superior court did not rule on Mother's Motion for Order to Transport, but its order that she appear by telephone effectively operated as a denial. In its ruling, the court made no finding that Mother would not be prejudiced by having to appear by telephone, nor is there any record of what factors the court considered in denying her motion.

¶10 Nevertheless, there is no evidence that Mother was prejudiced by having to appear by telephone. See *Brown v. Ariz. Dep't of Real Estate*, 181 Ariz. 320, 324, 890 P.2d 615, 619 (App. 1995) (due-process violation reversible only if party is prejudiced). Mother testified that she was able to hear most of the proceedings. Her counsel was present physically at the hearing and was readily available to correct or clarify any testimony by Mother that may have been difficult to hear. Counsel properly facilitated the examination of Mother's

witnesses and the introduction of evidence. In the absence of demonstrated prejudice, we conclude that requiring Mother to participate in the proceedings by telephone rather than in person satisfied her due-process rights.

¶11 Mother also asserts the superior court improperly limited her presentation of evidence and was hostile toward her and her counsel. According to Arizona Rule of Family Law Procedure 77(B)(1), "The court may impose reasonable time limits on the trial proceedings or portions thereof, and limit the time for trial to scheduled time." The superior court set the hearing date and scheduled three hours for the proceedings. There is no indication that Mother objected to this time limit or requested more time, nor does she say on appeal how additional time would have altered her presentation of evidence. Finally, contrary to Mother's assertion, although during the trial the court instructed Mother's counsel to move along with his case, there is no indication that the court displayed a "hostile demeanor" such that Mother was prejudiced.

B. The Court Did Not Err by Proceeding Without Rule 49 Disclosures.

¶12 Mother next contends the superior court erred by denying her motion to continue. She argues the superior court should have found good cause for a continuance because discovery

had yet to be completed and a brief continuance would have allowed her to appear in person.

¶13 "When an action has been set for trial, hearing or conference on a specified date by order of the court, no continuance of the trial, hearing or conference shall be granted except upon written motion setting forth sufficient grounds and good cause." Ariz. R. Fam. Law P. 77(C)(1). The superior court has broad discretion to determine whether to grant a motion to continue; absent an abuse of discretion, we will not disturb its decision. See, e.g., *Ornelas v. Fry*, 151 Ariz. 324, 329, 727 P.2d 819, 824 (App. 1986).

¶14 As for Mother's contention that discovery was incomplete, Arizona Rule of Family Law Procedure 49 sets out minimum disclosure requirements for family law cases. It requires each party to file, within 40 days of the response to the petition, a Resolution Statement detailing the specific position the party proposes to resolve all issues. Ariz. R. Fam. Law. P. 49 & (A). It also requires parties in cases with child custody at issue to disclose at the same time:

1. A copy of any past or current protective order and underlying petition involving a party or member of the party's household.
2. The name and address of each treatment provider and period of treatment involving any party for psychiatric or psychological

issues, anger management, substance abuse or domestic violence, for the period beginning five years prior to the filing of the petition.

3. The date, description, location and documentation of any criminal charge against or conviction of any party or member of the party's household occurring within ten years of the filing of the petition.

4. The date, description, location and documentation of any Child Protective Services investigation or proceeding involving any party or member of the party's household occurring within ten years of the filing of the petition.

Ariz. R. Fam. Law P. 49(B). Pursuant to Rule 49(G), each party must disclose his or her witnesses no later than 60 days before trial, unless the court orders otherwise. As noted, after a resolution management conference held on August 2, the court in this case issued an order requiring Mother and Father to disclose their trial exhibits no later than 10 days prior to trial.

¶15 Father did not file his pretrial statement or otherwise disclose his witnesses and trial exhibits until four days before the hearing. Father also failed to disclose, pursuant to Rule 49(B)(3), that some years prior, he had been charged with disorderly conduct and assault. Because of these failures, Mother contends she could not adequately prepare for the hearing and the court should have granted her motion to continue.

¶16 We conclude Mother was not unfairly surprised by Father's untimely pretrial statement or otherwise prejudiced by his failure to disclose his criminal charge. Father's petition for modification alleged a substantial and continuing change in circumstances, primarily Mother's incarceration. Father's petition, his pretrial statement and the issues that A.R.S. § 25-403 (West 2012) required the court to address gave Mother notice of the nature of the evidence Father would present at the hearing. In fact, Mother's counsel stipulated to the admission of all of Father's exhibits at the hearing, and Father's only witnesses were himself and his mother. Although Father failed to disclose his criminal charge under Rule 49(B), Mother clearly was aware of the charge - she herself introduced the police report as evidence at the hearing. No additional discovery was completed, but there is no indication that any further discovery was necessary; Mother does not explain what discovery she sought or what additional discovery would have revealed or how it would have changed the outcome of the proceeding.

¶17 Mother also has not shown she was prejudiced in any other way by the denial of her motion to continue. She argues a continuance would have allowed her to be present at the proceedings rather than appear by telephone. The record, however, shows that Mother was not released from prison until

October 13; even if the court had granted her motion and continued the hearing until shortly after September 17, she would have been incarcerated at the time of the hearing. Accordingly, we conclude the superior court did not abuse its discretion by denying Mother's motion to continue.

C. The Superior Court Made Appropriate Findings Under A.R.S. § 25-403.

¶18 Mother next argues the superior court abused its discretion by failing to make sufficient findings in support of its determination to modify custody. In a child custody matter, the superior court must make its determinations based on the best interests of the child. A.R.S. § 25-403(A). It must make findings based upon all relevant evidence, including specific statutory factors listed in § 25-403(A), and a failure to make findings on each requisite factor constitutes an abuse of discretion. *Hurd v. Hurd*, 223 Ariz. 48, 51, ¶ 11, 219 P.3d 258, 261 (App. 2009).

¶19 Mother argues the superior court erred because it did not make a finding regarding factor number two, "The wishes of the child as to the custodian." A.R.S. § 25-403(A)(2). In its order, the superior court stated, "2. Little information was presented regarding the wishes of the children." At trial, Mother attempted to introduce a letter allegedly written by her oldest child, stating his wishes. Father objected, and the

court sustained the objection because the exhibit lacked foundation, a ruling that Mother does not contest on appeal.

¶120 At the hearing, Father testified he had not discussed his sons' wishes with them, but had tried to "keep things positive" and answer any questions they asked about the situation. Father explained that while he believed the children's wishes were important, he felt the children were too young to be asked to state their wishes to the court. When asked his opinion of having a child write a letter to the court, he replied, "That is my whole reason for, you know, my concerns about their visitation in the first place. I don't feel like that's something that they should do, trying to use the kids, you know, us, whether it be me or their mother."

¶121 In a custody action, "[t]he wishes of the child of a sufficient age to form an intelligent custody preference are persuasive, although not controlling." *J.A.R. v. Superior Court*, 179 Ariz. 267, 274, 877 P.2d 1323, 1330 (App. 1994). The children in this case expressed a general wish that Mother was not in her current situation, but no evidence was introduced regarding their wishes as to their custodian. In its custody order, detailing its determination of the best interests of the children, the superior court focused on Mother's criminal behavior and its impact on her and the children. While more

information about the wishes of the children may have been relevant to its determination, there is no indication that the superior court focused too much attention on any one factor "to the exclusion of other relevant considerations." *Owen v. Blackhawk*, 206 Ariz. 418, 421, ¶ 12, 79 P.3d 667, 670 (App. 2003). The court's finding accurately reflected the evidence offered at trial about the children's wishes. In the absence of any argument that the children's wishes were critical to the merits of the petition to modify custody, we cannot say the court erred.

¶22 Mother also argues generally that the court's findings were not detailed enough to pass muster under A.R.S. § 25-403. We conclude the superior court's findings satisfied the statute. Unlike the findings in *Owen*, 206 Ariz. at 421-22, ¶ 12, 79 P.3d at 670-71, which merely identified relevant enumerated factors and did not explain their significance, the court in this case listed its findings for each of the 11 statutory factors and stated how those factors affected its custody determination. The findings were supported by evidence and were sufficient to satisfy the requirements of A.R.S. § 25-403.

D. The Superior Court Did Not Err by Denying the Motion for New Trial.

¶23 We review the denial of a motion for new trial for an abuse of discretion. *Pullen v. Pullen*, 223 Ariz. 293, 295, ¶

10, 222 P.3d 909, 911 (App. 2009). Under Arizona Rule of Family Law Procedure 83(A), a "judgment may be vacated and a new trial granted" for certain enumerated causes "materially affecting [a] party's rights." These causes include:

1. irregularity in the proceedings of the court or a party, or abuse of discretion, whereby the moving party was deprived of a fair trial;
2. misconduct of a party;
3. accident or surprise which could not have been prevented by ordinary prudence;

* * *

6. that the ruling, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law.

¶24 Reiterating arguments addressed above, Mother contends the superior court abused its discretion by denying her motion for new trial. She argues Father presented evidence that surprised her and to which she did not have a fair opportunity to respond; the superior court made its determination without considering all the relevant statutory factors, depriving her of a fair trial; her due-process rights were violated by her telephonic appearance; and Father's untimely disclosure of witnesses and exhibits precluded her from effectively addressing them at the hearing or presenting rebuttal evidence. For the reasons stated above, we hold the superior court committed no error in denying the motion for new trial.

CONCLUSION

¶25 For the foregoing reasons, we affirm the orders modifying custody and denying the motion for new trial. Father asks for his attorney's fees on appeal pursuant to A.R.S. § 25-324 (West 2012). In our discretion, we deny Father's request for fees. Contingent on his compliance with Civil Appellate Procedure 21, we award Father his costs on appeal.

/s/

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/

DONN KESSLER, Judge

/s/

JON W. THOMPSON, Judge