

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

KENT E. SHERLOCK,
Petitioner/Appellee,

and

NICOLE M. SHERLOCK,
Respondent/Appellant.

No. 2 CA-CV 2015-0231
Filed August 31, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20131852
The Honorable James E. Marner, Judge

VACATED AND REMANDED

COUNSEL

Kent E. Sherlock, Hamilton, Ohio
In Propria Persona

Child and Family Law Clinic, Tucson
By Paul D. Bennett, a clinical professor appearing pursuant to
Rule 38(d), Ariz. R. Sup. Ct.
Counsel for Respondent/Appellant

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Nicole Sherlock appeals orders modifying parenting time and approving Kent Sherlock's relocation of two of the parties' minor children to Ohio. Nicole argues the trial court denied her notice and an opportunity to be heard in violation of her right to due process, and abused its discretion by making unsupported findings and issuing a parenting plan that effectively terminated her parental rights. For the reasons discussed below, we vacate the court's orders and remand for further proceedings.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the family court's decision. *Vincent v. Nelson*, 238 Ariz. 150, ¶ 17, 357 P.3d 834, 839 (App. 2015). Orders concerning relocation and modifying parenting time are reviewed for an abuse of discretion. *Baker v. Meyer*, 237 Ariz. 112, ¶ 10, 346 P.3d 998, 1002 (App. 2015); *see also Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003). Claims of violations of due process are reviewed de novo. *Savord v. Martin*, 235 Ariz. 256, ¶ 16, 330 P.3d 1013, 1017 (App. 2014).

¶3 The parties are former spouses who have three minor children. In June 2013, the parties entered into a family mediation agreement providing for legal decision-making and parenting time for their minor children. Under the agreement, the children would reside primarily with Kent, and Nicole was initially entitled to weekly supervised parenting time. Supervised parenting time continued despite Nicole's completion of the steps required under the agreement to entitle her to unsupervised time.

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¶4 In March 2015, Kent obtained an order of protection against Nicole, alleging she slapped him during a visit with the children. The trial court dismissed the order in June after Nicole requested a hearing and Kent failed to appear.

¶5 Four days after receiving notice of the hearing on the order of protection, Kent moved with the parties' two youngest children to Ohio. Kent informed Nicole of the move by telephone after it had taken place. Nicole filed a motion to enforce parenting time, and the trial court held a hearing in September. Kent appeared by telephone, but did not file a response or any motions concerning the relocation or parenting time.

¶6 The trial court thereafter issued a ruling purporting to grant Kent's "motion to relocate" and "motion to modify parenting time," decreasing Nicole's parenting time to three fifteen-minute telephone or video calls per week and supervised parenting time in Ohio. The court made Nicole responsible for travel expenses despite the fact she currently worked less than half-time at a local cafe.

¶7 This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2); *see also Cone v. Righetti*, 73 Ariz. 271, 274-75, 240 P.2d 541, 543 (1952) (post-decree custody modification appealable as "special order made after final judgment").

Discussion

¶8 Kent has failed to file an answering brief despite requesting and receiving a thirty-day extension of time to do so. "[W]hen an appellant raises a debatable issue, the court, in its discretion, may find that an appellee's failure to file an answering brief constitutes a confession of error." *State ex rel. McDougall v. Superior Court (Blendu)*, 174 Ariz. 450, 452, 850 P.2d 688, 690 (App.1993). As discussed below, Nicole has raised a debatable due-process issue, and, in our discretion, we treat Kent's silence as a confession of error necessitating remand.

¶9 Ordinarily, a custodial parent must provide "at least forty-five days' advance written notice" before relocating a child out

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of state.¹ A.R.S. § 25-408(A). There is no dispute Kent failed to provide notice of relocation as required by § 25-408(A), and the parties' mediation agreement. Moreover, at the September hearing, Kent presented arguments and factual assertions concerning the relocation and his request to limit Nicole to telephone contact with the children without notice to Nicole.

¶10 By granting Kent's "motion to relocate" and "motion to modify parenting time," the trial court arguably has denied Nicole a fair opportunity to investigate and respond to Kent's arguments and assertions first raised at the hearing, and it expanded the scope of the hearing beyond enforcement of the existing parenting plan. *See Cruz v. Garcia*, No. 2 CA-CV 2015-0174, ¶¶ 14-18, 2016 WL 3390235 (Ariz. Ct. App. June 17, 2016) (due process violated by expanding scope of hearing or ruling on matters without notice); *see also Curtis v. Richardson*, 212 Ariz. 308, ¶ 16, 131 P.3d 480, 484 (App. 2006) ("Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner."). On this record, which includes Kent's confession of error, remand is required.²

Disposition

¶11 We vacate the trial court's September 2015 ruling and remand for further proceedings.

¹Relocation without providing notice as required by § 25-408(A) "is a serious infraction." *Woodworth v. Woodworth*, 202 Ariz. 179, ¶ 2, 42 P.3d 610, 611 (App. 2002).

²This decision should not be read as reflecting any opinion concerning the appropriate outcome of the matter on remand.