

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CARLY M. TANNER, *Petitioner,*

v.

THE HONORABLE SUZANNE MARWIL, Judge of the SUPERIOR
COURT OF THE STATE OF ARIZONA, in and for the County of
MARICOPA, *Respondent Judge,*

MICHAEL J. TANNER, *Real Party in Interest.*

No. 1 CA-SA 20-0145

FILED 10-20-2020

Petition for Special Action from the Superior Court in Maricopa County

No. FC2019-096353

The Honorable Suzanne Scheiner Marwil, Judge

REVERSED AND REMANDED

COUNSEL

Cordell Law LLP, Scottsdale

By Kristina L. Cervone

Counsel for Petitioner

Terry J. Fong Law Group, Gilbert

By Jennifer Summers

Counsel for Real Party in Interest

OPINION

Presiding Judge Randall M. Howe delivered the opinion of the Court, in which Judge Kent E. Cattani and Judge Cynthia J. Bailey joined.

H O W E, Judge:

¶1 In this special action proceeding, Carly Tanner (“Mother”) challenges the family court’s acceptance of subject-matter jurisdiction over Michael Tanner’s (“Father”) petition for dissolution of marriage, including its jurisdiction to determine legal decision-making, parenting time, and child support. She contends that because the court lacked subject-matter jurisdiction over the dissolution petition, it had to dismiss the petition. She further argues that because the court lacked jurisdiction over the dissolution petition, it had no jurisdiction to rule on legal decision-making, parenting time, and child support.

¶2 Special action jurisdiction is appropriate here because Mother has “no equally plain, speedy, and adequate remedy by appeal[.]” Ariz. R. P. Spec. Act. 1(a). This Court may accept special action jurisdiction when the family court otherwise will proceed “without subject matter jurisdiction in excess of its authority.” *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593 ¶ 8 (App. 2009). We therefore accept special action jurisdiction and grant relief. We hold that when a family court has no jurisdiction over a petition for dissolution of marriage, the court is required to dismiss the petition. Any legal decision-making and parenting time orders the court has made are consequently void unless a parent moves to continue the proceeding as one for legal decision-making and parenting time under A.R.S. § 25-404(B).

FACTS AND PROCEDURAL HISTORY

¶3 Mother and Father met while in the military, married in 2013, and had two children together while they lived in California. They moved to Hawaii in August 2016 and had a third child. In September 2018, they purchased a house in Arizona and were planning to move here. The two older children visited their grandparents in Arizona in December 2018 and stayed with them until March 2019. Mother traveled with her youngest child to Arizona in March 2019, picked up the two older children, and took them to visit her family in Washington. They returned to Arizona in April

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2019, and Mother gave birth to a fourth child in July 2019. In August 2019, Mother and all four children moved to Washington without Father's knowledge while he continued to live in Hawaii.

¶4 In October 2019, Father petitioned for dissolution of marriage in Arizona, asserting that both he and Mother were domiciled in Arizona for at least 90 days. In November 2019, Mother moved to determine jurisdiction, arguing that the Arizona family court did not have subject-matter jurisdiction over the dissolution because neither she nor Father were domiciled in Arizona.

¶5 The family court found that neither party had been domiciled in Arizona for at least 90 days when Father petitioned for dissolution. The court nevertheless declined to dismiss the dissolution petition, finding that Father consented to the court's jurisdiction over the dissolution petition and that he planned to change his domicile to Arizona "in a matter of weeks." The court further found that it had jurisdiction under A.R.S. § 25-1031 and A.R.S. § 25-1002 and that the case would proceed "as one to establish legal decision-making, parenting time, and child support."

¶6 Father eventually moved to Arizona in December 2019. That same month, following an evidentiary hearing, the court issued temporary parenting time orders. At the hearing, Mother told the court that she had petitioned for dissolution in Washington. The court determined that because Father had moved to Arizona, it would have jurisdiction over the dissolution of marriage by "mid-March." The court further found that Mother's Washington petition was an improper lateral challenge to the court's initial child custody jurisdiction and awarded Father his reasonable attorneys' fees for appearing at the evidentiary hearing.

¶7 The Arizona family court held a Uniform Child Custody Jurisdiction Enforcement Act hearing with the Washington family court in January 2020. The Washington court stated that it would decline jurisdiction over both Mother's dissolution petition and the child custody issues if the Arizona court retained jurisdiction. The Arizona court reiterated that it had jurisdiction over the children and that it would obtain jurisdiction over the dissolution petition by March 17. Because the Arizona court retained jurisdiction, the Washington court dismissed the case. The Washington court denied Mother's request that it revise the decision.

¶8 In April 2020, Mother moved for summary judgment, asserting again that the Arizona family court lacked subject-matter jurisdiction over the dissolution petition and the underlying issues related

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to the children. She requested her attorneys' fees, contending that Father had falsely claimed that both of them had been both domiciled in Arizona for 90 days. The court denied the motion, stating that Mother was "free to pursue the dissolution of marriage in Washington" but "the Court would exercise jurisdiction over the children for purposes of legal decision-making, parenting time, and child support." This special action followed and we granted a stay pending our decision.

DISCUSSION

¶9 Mother argues that the Arizona family court had no jurisdiction over Father's dissolution petition and was therefore required to dismiss it. She contends that because the court lacked jurisdiction over the dissolution, it also lacked jurisdiction to determine legal decision-making, parenting time, and child support. We review challenges to the court's subject-matter jurisdiction de novo. *Duckstein v. Wolf*, 230 Ariz. 227, 231 ¶ 8 (App. 2012). Subject-matter jurisdiction is "the power to hear and determine cases of the general class to which the particular proceedings belong[.]" *Glover v. Glover*, 231 Ariz. 1, 5 ¶ 18 (App. 2012) (citation omitted). Subject-matter jurisdiction is "conferred by our constitution or statutes" and "cannot be vested in a court solely by waiver or estoppel." *Id.* at 5-6 ¶ 18.

¶10 The court has subject-matter jurisdiction over a marriage dissolution only if, at the time the petition for dissolution is filed, one or both parties have been domiciled in Arizona for at least 90 days. A.R.S. § 25-312(1). When Father petitioned for dissolution in October 2019, he was domiciled in Hawaii and Mother was domiciled in Washington. Because neither party was domiciled in Arizona when Father petitioned for dissolution, the Arizona court lacked jurisdiction over the dissolution petition. *See Clark v. Clark*, 71 Ariz. 194, 197 (1950) ("No general principle in the law of domicil is more firmly established than the basic rule that every person has at all times one domicil, and that no person has more than one domicil at a time.") (citation omitted). The court's finding that Father waived subject-matter jurisdiction did not vest the court with jurisdiction because subject-matter jurisdiction cannot be created solely by waiver. *See Glover*, 231 Ariz. at 5-6 ¶ 18. Therefore, the Arizona court erred by not dismissing Father's petition for dissolution.

¶11 Because the court lacked subject-matter jurisdiction over Father's dissolution petition, and no other dissolution petition was pending in another state, it likewise lacked jurisdiction to issue legal decision-making, parenting time, and child support orders. A family court

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has jurisdiction to determine legal decision-making and parenting time only if a parent requests such a determination in any “proceeding for marital dissolution, legal separation, annulment, paternity or modification of an earlier decree or judgment.” A.R.S. 25-402(B)(1). A family court’s power to conduct parenting time proceedings is provided by A.R.S. § 25-402 and “[a] person seeking legal decision-making or parenting time must do so” by petitioning for dissolution of marriage. *See Chapman v. Hopkins*, 243 Ariz. 236, 240-41 ¶¶ 15, 19 (App. 2017) (finding that a party had to comply with the jurisdictional requirements of A.R.S. § 25-402(B) when seeking legal decision-making or parenting time). Because the Arizona family court had no jurisdiction over the dissolution petition, it had no jurisdiction under A.R.S. § 25-402(B)(1) to determine legal decision-making, parenting time, and child support. As a result, any orders the court issued are void.

¶12 Father contends that the Arizona family court had jurisdiction to decide the underlying issues related to the children because no separate dissolution petition was necessary before the court could determine legal decision-making, parenting time, and child support. His argument, however, contradicts A.R.S. § 25-402(B)(1), which lists the circumstances under which a married person can request legal decision-making and parenting time. A stand-alone petition for legal decision-making and parenting time is not among the listed circumstances. *See* A.R.S. § 25-402(B)(1).

¶13 Father also argues that A.R.S. § 25-404(B) “expressly provides for the continuation of child custody *only* proceedings in the event an underlying dissolution is dismissed.” If a petition for dissolution of marriage is dismissed, any temporary orders are vacated unless a parent moves “that the proceeding continue as a legal decision-making or parenting time proceeding and the court finds, after a hearing, that the circumstances of the parents and the best interests of the child require that a legal decision-making or parenting time plan decree be issued.” A.R.S. § 25-404(B).

¶14 The family court here ordered that “the case shall proceed as one to establish legal decision-making, parenting time, and child support.” But the record does not show that Father moved the court to proceed under A.R.S. § 25-404(B) or that the court, after a hearing, determined that the circumstances of Mother and Father, and the best interests of the children, required that it issue a legal decision-making or parenting-time order. *See* A.R.S. § 25-404(B).

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¶15 Because the court lacked jurisdiction over the dissolution petition, any temporary orders issued by the court are vacated unless Father moves the court to continue the proceeding as a legal decision-making and parenting time proceeding under A.R.S. § 25-404(B). Because the court did not have jurisdiction under § 25-402, and Father has not moved to continue the proceeding under § 25-404(B), reviewing Mother's challenge to the family court's initial child custody jurisdiction under A.R.S. § 25-1031 is premature.

ATTORNEYS' FEES

¶16 Mother argues that the family court erred by awarding Father his attorneys' fees when she petitioned in Washington for dissolution of marriage. We review the award or denial of attorneys' fees for an abuse of discretion. *Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, 547 ¶ 6 (App. 2012). An abuse of discretion exists when the record, viewed in the light most favorable to upholding the court's ruling, is devoid of any evidence to support its ruling. *Hurd v. Hurd*, 223 Ariz. 48, 52 ¶ 19 (App. 2009). A family court may order a party to pay reasonable attorneys' fees if a party took unreasonable positions in the litigation. A.R.S. § 25-324(A).

¶17 The family court abused its discretion by awarding Father attorneys' fees incurred in attending the December 2019 evidentiary hearing. Because the court lacked jurisdiction over the dissolution petition and therefore lacked jurisdiction to issue legal decision-making and parenting-time orders, Mother's petitioning in Washington for dissolution of marriage, legal decision-making, and parenting time was not unreasonable. The court also stated that Mother was "free to pursue the dissolution of marriage in Washington." The court therefore erred by awarding Father his attorneys' fees.

¶18 Mother also argues that the court erred by declining to award her attorneys' fees because Father falsely claimed that they were domiciled in Arizona for at least 90 days when he petitioned for dissolution of marriage. If a party's petition is not grounded in fact or based on law, the court shall award the other party reasonable attorneys' fees and costs. A.R.S. § 25-324(B)(2).

¶19 The court erred by declining to award Mother attorneys' fees and costs for defending the dissolution petition because Father's petition was not grounded in fact; he falsely claimed that he and Mother were both domiciled in Arizona for at least 90 days when he petitioned for dissolution. Father testified that he still lived in Hawaii and that he learned that Mother

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had moved the children to Washington in August 2019, two months before he petitioned for dissolution. Because Father's dissolution petition wrongly asserted that the Arizona family court had jurisdiction over the dissolution of marriage, the family court was required to award Mother reasonable attorneys' fees and costs under A.R.S. § 25-324(B) for responding to Father's petition.

¶20 Mother also seeks an award of her attorneys' fees and costs incurred in this special action. In our discretion, we decline to award Mother her attorneys' fees incurred in this special action proceeding. As the prevailing party, however, she is entitled to her costs incurred in this special action upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶21 For the foregoing reasons, we accept jurisdiction, grant relief, lift our previously ordered stay, and remand for the Arizona family court to dismiss Father's dissolution petition and to consider Mother's request for reasonable attorneys' fees and costs incurred in defending the petition for dissolution. Any legal decision-making and parenting-time orders the Arizona family court issued are vacated unless Father moves the court to continue the proceeding as a legal decision-making and parenting-time proceeding under A.R.S. § 25-404(B) and the court finds after a hearing that the circumstances of the parents and the best interests of the children require the orders remain in force.



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