IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MIKEL JOHNSON, *Petitioner*,

v.

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

ANDRE D. DANIELS; MAQUISHA DENNIS, *Real Parties in Interest*.

No. 1 CA-SA 21-0072
FILED 10-26-2021

Petition for Special Action from the Superior Court in Maricopa County
No. FC2019-010461
The Honorable Monica Edelstein, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

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OPINION

Chief Judge Kent E. Cattani delivered the opinion of the Court, in which Judge Samuel A. Thumma and Judge Brian Y. Furuya joined.

C A T T A N I, Chief Judge:

¶1 In December 2017, Mikel Johnson signed and filed a voluntary acknowledgment of paternity of A.D., thereby creating a judgment of paternity. Almost two years later, Andre Daniels filed a paternity action as to A.D. When DNA results proved that Daniels is A.D.'s genetic father, the superior court entered a paternity judgment in Daniels's favor. Johnson intervened, moved to set aside the judgment, and also petitioned to establish parenting time, legal decision-making, and child support. Denying Johnson's requests for relief, the superior court also set aside Johnson's voluntary-acknowledgment-based paternity judgment and affirmed Daniels's paternity. Johnson petitioned for special action relief. We previously accepted jurisdiction and granted relief by order, with a decision to follow. This is that decision.

¶2 The superior court properly recognized that Johnson's voluntary acknowledgment constituted a judgment of paternity and that Daniels's paternity judgment could not stand unless Johnson's paternity judgment was set aside. The court erred, however, by setting aside Johnson's paternity judgment without a cognizable basis under A.R.S. § 25-812(E). Under that provision, a paternity judgment based on a voluntary acknowledgment can be challenged "only on the basis of fraud, duress or material mistake of fact," and only for a period of six months; after that time, it can be attacked only in exceptional circumstances, such as fraud on the court. A.R.S. § 25-812(E); Ariz. R. Fam. Law P. 85(c)(1), (d). Applying the plain language of A.R.S. § 25-812(E) and Rule 85 (which is expressly incorporated into the statute), we hold that these time limitations apply

even to a genetic father's paternity petition challenging a voluntary acknowledgment signed by someone else. Accordingly, and because Daniels offered no timely, cognizable ground under § 25-812(E) to set aside Johnson's paternity judgment, we accept jurisdiction and grant relief by vacating Daniels's paternity judgment and reinstating Johnson's paternity judgment. We similarly reinstate Johnson's petition to establish parenting time, legal decision-making, and child support, which the superior court has not yet addressed on the merits.

FACTS AND PROCEDURAL BACKGROUND

¶3 A.D. was born to Maquisha Dennis ("Mother") in October 2017. Both Johnson and Daniels had a sexual relationship with Mother around the time of A.D.'s conception, but neither was aware of the other's relationship with Mother.

¶4 Johnson and Daniels both thought they were A.D.'s father, and because Mother was uncertain, she told both men that they were the father. In November 2017, Daniels took a DNA paternity test that confirmed he is A.D.'s genetic father—but Daniels did not inform Mother of the test results. Unbeknownst to Daniels, in December 2017, Johnson and Mother signed and submitted a voluntary acknowledgment of paternity affirming that Johnson was A.D.'s father. As a result of the voluntary acknowledgment, a birth certificate naming Johnson as A.D.'s father was issued.

¶5 Mother and Johnson lived together with A.D. for several months, and after they stopped living together, they shared informal parenting time on a week on/week off schedule. Daniels, meanwhile, had informal parenting time with A.D. approximately every other weekend, during Mother's parenting time. Neither Johnson nor Daniels knew about the other's parenting time.

¶6 In March 2018, after Mother had been inconsistent in permitting Daniels parenting time with A.D., Daniels filed a paternity action. His petition was dismissed, however, when he failed to serve Mother. Daniels did not pursue the matter further, apparently because Mother allowed him to resume parenting time.

¶7 In November 2019, Daniels filed and served Mother with a petition to establish paternity, as well as legal decision-making and parenting time. The superior court ordered DNA testing, which confirmed that Daniels is A.D.'s genetic father. Based on the DNA test results, and

notwithstanding the 2017 birth certificate listing Johnson as the father**,** the court entered a paternity judgment declaring Daniels to be A.D.'s father.

¶8 Johnson intervened, moved to set aside Daniels's paternity judgment, and separately petitioned to establish parenting time, legal decision-making, and child support. Johnson asserted that the December 2017 voluntary acknowledgment of paternity was a pre-existing paternity judgment naming him as father and that Daniels had not (and had no grounds to) set aside that judgment.

¶9 After an evidentiary hearing, the superior court ruled in favor of Daniels. After acknowledging that it could not affirm Daniels's paternity judgment without setting aside Johnson's paternity judgment, the court found that (1) Daniels could have timely and successfully challenged paternity in his March 2018 paternity action had Mother not avoided service and (2) Mother's failure to tell Johnson about the possibility Daniels could be A.D.'s father rendered Johnson's acknowledgment of paternity involuntary and invalid. The court also dismissed Johnson's petition to establish parenting time, legal decision-making, and child support.

¶10 Johnson then promptly filed this special action challenging the superior court's order.

DISCUSSION

I. Special Action Jurisdiction.

¶11 This dispute involves a legal question relating to the best interests of a child. *See Dep't of Child Safety v. Beene*, 235 Ariz. 300, 303, ¶¶ 6–7 (App. 2014). Moreover, the superior court has already rendered a decision allocating legal decision-making and parenting time between Mother and Daniels, excluding Johnson. Although Johnson also filed a notice of appeal from the superior court's denial of relief from Daniels's paternity judgment, given the unique circumstances of this case that implicate the best interests of a child, resolution of these issues in a special action is preferable to an appeal. *See* Ariz. R.P. Spec. Act. 1(a); *see also Bechtel v. Rose*, 150 Ariz. 68, 71 (1986). Accordingly, we exercise our discretion to accept special action jurisdiction.

II. Paternity Judgment.

¶12 We generally review the denial of a motion for relief from judgment under Rule 85 for an abuse of discretion, giving deference to the superior court's factual findings, but we consider de novo matters of

statutory interpretation as well as the court's conclusions of law. *Alvarado v. Thomson*, 240 Ariz. 12, 14, ¶ 11 (App. 2016); *see also McQuillen v. Hufford*, 249 Ariz. 69, 71, ¶ 6 (App. 2020).

¶13 Arizona law provides several paths for establishing paternity, two of which are at issue here. *See* A.R.S. §§ 25-801 to -818. First, certain individuals (or the state) may commence a formal paternity action under § 25-803. Alternatively, "the parent of a child born out of wedlock may establish the paternity of a child" by filing a signed, witnessed (or notarized) voluntary acknowledgment of paternity with the court or with specified state agencies. A.R.S. § 25-812(A)(1). "Once signed, [the] voluntary acknowledgement of paternity is presumed valid and binding until proven otherwise." *Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, 457, ¶ 17 (App. 2010). And once properly filed with the state, the voluntary acknowledgment of paternity "is a determination of paternity and has the same force and effect as a superior court judgment." A.R.S. § 25-812(D); *see also* A.R.S. § 25-812(B)–(C) (same effect if filed with the court).

¶14 Under A.R.S. § 25-812(H), individuals signing a voluntary acknowledgment of paternity can rescind the acknowledgment for any reason until the earlier of "[t]he date of a proceeding relating to the child" or 60 days after the date of the last signature to the acknowledgment. After that, a determination of paternity based on a voluntary acknowledgment can be challenged only on limited grounds and for a limited time:

> Pursuant to rule 85(c) of the Arizona rules of family law procedure, the mother, father or child, or a party to the proceeding on a rule 85(c) motion, may challenge a voluntary acknowledgment of paternity established in this state at any time after the sixty day period [under § 25-812(H)(1)] only on the basis of fraud, duress or material mistake of fact, with the burden of proof on the challenger . . . .

A.R.S. § 25-812(E). The statute thus allows an avenue for relief under Rule 85 after the recessionary period, but limits the available grounds to *only* "fraud, duress or material mistake of fact." A.R.S. § 25-812(E); *see also Roger S. v. James S.*, 1 CA-JV 20-0273, 2021 WL 2659431, at *3, ¶¶ 16–17 (Ariz. App. June 29, 2021). And under Rule 85(c)(1), such a challenge can be brought only for up to six months. *See Andrew R.*, 223 Ariz. at 458, 460, ¶¶ 19, 23; *Alvarado*, 240 Ariz. at 15, ¶ 14. After that, a paternity judgment established by a voluntary acknowledgment of paternity can be attacked only in exceptional circumstances, such as fraud on the court. *Alvarado*, 240 Ariz. at 15, ¶¶ 15–16.

¶15 The parties here do not dispute that Johnson and Mother signed and filed a voluntary acknowledgment of paternity pursuant to § 25-812(A) in December 2017. Under § 25-812(D), that acknowledgment "is a determination of paternity and has the same force and effect as a superior court judgment," establishing Johnson as A.D.'s father. Daniels did not bring this paternity action (in effect challenging Johnson's existing, albeit unknown to Daniels, paternity judgment) until November 2019, well outside the six-month limit specified in § 25-812(E) and Rule 85(c)(1).

¶16 Citing *Brummond v. Lucio*, 243 Ariz. 360 (App. 2017), Daniels argues that the restrictions imposed by § 25-812(E) do not apply to his § 25-803 paternity action. He asserts that, at least for purposes of a paternity action filed by a child's genetic father, another man's voluntary acknowledgment under § 25-812(A) only creates a presumption of paternity (not a paternity judgment) and thus is subject to balancing against other presumptions (like genetic testing) to establish paternity under § 25-814(C).

¶17 *Brummond* held that "the time limits of § 25-812(E) and Rule 85(C) do not apply" when a biological father effectively challenges a judgment resulting from a voluntary acknowledgment by filing an independent paternity action. 243 Ariz. at 364–65, ¶¶ 18, 21. It is true that a separate paternity action can function as a challenge to a paternity judgment based on voluntary acknowledgment. *See* Ariz. R. Fam. Law P. 24(d) ("Pleadings must be construed so as to do substantial justice."); *see also Roger S.*, 2021 WL 2659431, at *4, ¶¶ 20–22. But such a challenge (whatever its technical form) is not exempt from the requirements imposed by the Legislature through § 25-812(E). In that respect, we reject *Brummond*'s analysis.

¶18 While *Brummond* addresses important concerns, *see* 243 Ariz. at 364, ¶¶ 16–17, its analysis does not account for equally weighty contrary considerations. Most importantly, it fails to give effect to the Legislature's express declaration that a properly executed and filed acknowledgment of paternity carries the force of judgment, and it fails to recognize the importance of such a judgment in providing permanency and stability for a child. *Compare id.* at 364–65, ¶¶ 15, 18 (suggesting that an acknowledgment of paternity creates a presumption of paternity like that arising from marriage or birth certificate, and referring to a voluntary-acknowledgment-based paternity determination as a "judgment" (quotation marks in original)), *with* A.R.S. § 25-812(C)–(D), *McQuillen*, 249 Ariz. at 72–73, ¶¶ 11–12, *and Alvarado*, 240 Ariz. at 15 (noting "the interests in the finality of judgments generally, magnified by 'a strong public intent

to advance a child's best interest by providing that child with permanency'") (citation omitted).

¶19 Notwithstanding § 25-812(D)'s dictates, *Brummond* treats a voluntary acknowledgment of paternity filed pursuant to § 25-812(A) as creating only a *presumption* of paternity under § 25-814(A)(4) to be balanced against other presumptions. 243 Ariz. at 365, ¶ 18. But the Legislature has specified that a properly executed and filed voluntary acknowledgment of paternity does not merely create a presumption of paternity; instead, the voluntary acknowledgment "is a determination of paternity and has the same force and effect as a superior court judgment." A.R.S. § 25-812(D); *see also McQuillen*, 249 Ariz. at 72–73, ¶ 11 ("Indeed, a presumption of paternity has no logical effect when a child has a legal father established through the filing of an acknowledgment of paternity; the child already has a father.").

¶20 Additionally, *Brummond* neither acknowledges nor accounts for the mandates of federal law underpinning Arizona's system for establishing paternity—specifically including the substantive (albeit not the temporal) limitations imposed by § 25-812(E). *See* 42 U.S.C. § 666(a)(5)(D)(iii) (setting forth required procedures for challenging a voluntary acknowledgment of paternity, codified in Arizona in § 25-812(E)); *see also Roger S.*, 2021 WL 2659431, at *2–3, ¶¶ 14–15 (explaining Arizona's enactment of this statutory framework to comply with federal law that conditions certain federal funding on adoption of such procedures for establishing paternity and enforcing child support obligations). Nor does *Brummond* address the ramifications of two conflicting paternity *judgments* or describe how to resolve such a conflict. *See Brummond*, 243 Ariz. at 365, ¶ 21 (suggesting the superior court weigh presumptions of paternity under § 25-814(C), without accounting for differences between a presumption and a judgment of paternity); *see also McQuillen*, 249 Ariz. at 73, ¶ 12 (describing the difference between a judgment created by a properly filed acknowledgment of paternity under § 25-812(A) and the presumption of paternity based on an *unfiled* voluntary acknowledgment under § 25-814(A)(4)).

¶21 But even setting aside those concerns, Daniels's *Brummond*-based argument fails for a simpler reason—it was not the basis for the superior court's ruling. The court did not, as Daniels asserts, balance competing presumptions of paternity (Johnson's voluntary acknowledgment versus Daniels's genetic testing results) and determine that Daniels's position was "based on weightier considerations of policy and logic" under A.R.S. § 25-814(C). Nor could it do so without first setting aside Johnson's pre-existing paternity judgment. *Cf.* A.R.S. § 25-814(C) ("A

court decree establishing paternity of the child by another man rebuts the presumption."). Instead, the superior court considered whether grounds existed under § 25-812(E) and Rule 85 to set aside Johnson's paternity judgment.

¶22 Within that framework, Johnson's paternity judgment could be set aside for fraud, duress, or material mistake of fact only within six months, and thereafter, only for fraud upon the court. *See* A.R.S. § 25-812(E); *Alvarado*, 240 Ariz. at 15, ¶¶ 14–16. Daniels did not file his paternity action within six months, leaving fraud upon the court as his only avenue for relief.

¶23 Daniels does not now assert—and the superior court did not find—that Johnson's acknowledgment of paternity effected a fraud upon the court. While Daniels argued at trial that Mother knew Johnson was not A.D.'s father before completing the acknowledgment of paternity, the superior court credited Mother's contrary testimony that she was not certain and thought either man was a "possibility." Although *Daniels* knew at that time that he was the genetic father based on a home DNA paternity test, he had not disclosed those results to Mother. The court reasonably declined to find fraud upon the court in these circumstances. *Compare Alvarado*, 240 Ariz. at 78, 81–82, ¶¶ 2–3, 19–23 (affirming a finding of fraud upon the court when voluntary father paid mother to list him on the acknowledgment of paternity to circumvent adoption proceedings, even though both definitively knew that another man was the child's genetic father).

¶24 Accordingly, on this record, the superior court lacked a valid basis for setting aside Johnson's paternity judgment. The court reasoned to the contrary that Mother's actions in avoiding service had prevented Daniels from pursuing his March 2018 paternity action, which had been filed within six months after the voluntary acknowledgment and thus would have permitted a challenge to Johnson's paternity judgment based on mistake of fact. But even recognizing that the court accepted Daniels's avoidance-of-service excuse for not following through with his paternity action (despite his ability to locate Mother to resume parenting time with A.D.), this rationale simply attempted to toll § 25-812(E)'s six-month time limit—which is not subject to tolling. *See Andrew R.*, 223 Ariz. at 458, 460–61, ¶¶ 20, 25; *see also Alvarado*, 240 Ariz. at 15, ¶ 14.

¶25 The superior court further reasoned that Mother's failure to tell Johnson about her involvement with Daniels and about the possibility that Daniels might be A.D.'s genetic father rendered Johnson's

acknowledgment of paternity involuntary. But Johnson continues to profess that he signed voluntarily. And in any event, these facts could, at most, establish that Johnson's belief that he was A.D.'s father was based on a mistake of fact. *See Roger S.*, 2021 WL 2659431, at *5, ¶¶ 25–26. Such a claim was barred after expiration of the six-month statutory deadline. *See* A.R.S. § 25-812(E); Ariz. R. Fam. Law P. 85(b)(1), (c)(1).

¶26 We acknowledge the superior court's challenge in attempting to navigate circumstances under which, as the court noted, "it [was] unable to enter orders that fully serve Justice" as between two fathers, both of whom had developed meaningful relationships with A.D. and have been positive influences in the child's life. Nevertheless, the court erred by setting aside Johnson's pre-existing voluntary-acknowledgment-based paternity judgment without a cognizable basis under § 25-812(E) and by affirming Daniels's later-entered paternity judgment. *See McQuillen*, 249 Ariz. at 73, ¶ 13. Accordingly, we reverse the superior court's denial of Johnson's request to set aside Daniels's paternity judgment, vacate Daniels's paternity judgment, and reinstate Johnson's voluntary-acknowledgment-based paternity judgment, as well as his petition to establish parenting time, legal decision-making, and child support in FC2020-097565.

CONCLUSION

¶27 For the foregoing reasons, we accept jurisdiction and grant relief as set forth above. Both Johnson and Daniels request an award of attorney's fees under A.R.S. § 25-324 and/or § 25-809. After considering the statutory factors and in an exercise of our discretion, we deny both requests.

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