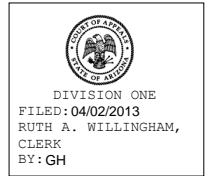


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) No. 1 CA-CV 12-0066
)
ZOE ABIGAIL TIPSWORD,) DEPARTMENT A
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
CHANEL TIPSWORD,)
)
Respondent/Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2011-000102

The Honorable David J. Palmer, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

Steptoe & Johnson LLP
by Shannon E. Trebbe
Attorneys for Petitioner/Appellant

Phoenix

S W A N N, Judge

¶1 Zachary Chet Tipsword, now known as Zoe Abigail
Tipsword ("Father"),¹ appeals from orders granting Chanel

¹ The appellant is a transgender individual. We refer to the appellant as "Father" because he is the children's biological father, and we use the masculine pronoun only to avoid confusion.

Tipsword ("Mother") sole legal custody of the parties' two minor children and awarding Father four hours of supervised parenting time every other week. We conclude that though the custody order was based on appropriate findings and the evidence, the supervised parenting-time order was not. We vacate the parenting-time order, remand for a new parenting-time determination, and otherwise affirm.

FACTS AND PROCEDURAL HISTORY

¶12 Father and Mother married and, in 2006 and 2009, had two children together. In March 2011, Father filed a petition for dissolution of the marriage. The parties reached a partial settlement but disagreed about the issue of child custody: Father sought joint custody and Mother sought sole custody. Father also sought reasonable parenting time. Mother agreed that Father should have reasonable parenting time but requested that it be supervised. Pursuant to the superior court's order, the parties met at a parenting conference, which resulted in a report. The court then held an evidentiary hearing.

¶13 At the hearing, Father testified that because of his work and school schedule he would be able to exercise only one day per week of parenting time, and because of his housing situation he would not be able to accommodate overnight visits. He testified that he had "really good" relationships with the children, but over the past year had been prevented by Mother

from seeing them regularly. He further testified that he had recently obtained a job after almost a year of unemployment, and was planning to move from his month-to-month one-bedroom apartment to a rental house. Finally, he testified that he is a transgender individual and that he was receiving counseling and medical care in connection with a gender transition -- an issue that he acknowledged had caused him emotional difficulties that affected his family in the time leading up to his separation from Mother.

¶4 Mother testified that she lived in a house with the children, her mother, and her grandmother, and that the children had good relationships with all three women. She testified that when she allowed Father to care for the children, they would return "shivering, cold, . . . hungry, exhausted," unhappy, and, in the case of the younger child, with "massive diaper rash." She further testified that Father often ignored the children when they tried to get his attention, and she expressed concern that the children would be confused by Father's gender transition in the future.

¶5 After the hearing, the court entered a decree dissolving the parties' marriage and awarding Mother sole legal custody of the children. The court further ordered that Father would have four hours of supervised parenting time every other week, and appointed a therapeutic interventionist to aid the

children's adjustment to Father's gender transition and address Father's emotional absence from the children's lives.

¶16 Father timely appeals. We have jurisdiction under A.R.S. § 12-2101(A)(2). Mother having failed to file an answering brief, we decide this appeal based on the record and Father's opening brief.

DISCUSSION

¶17 We review custody and parenting-time orders for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003) (custody); *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970) (parenting time). The superior court abuses its discretion if no evidence supports its decision, *Pridgeon v. Superior Court (LaMarca)*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982), or if it commits an error of law in the process of exercising its discretion. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982).

I. CUSTODY²

¶18 Father contends that the superior court improperly considered his transgender status in denying him joint custody of the children, in violation of his equal protection rights and Arizona statute. Father relies on the court's findings

² Since the date of the decree, "custody" has been re-termed "legal decision-making" in Title 25 of the Arizona Revised Statutes. See, e.g., A.R.S. § 25-401(3).

regarding the factor set forth in what is now A.R.S. § 25-403(A)(2)³ -- "[t]he interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest." The court found, in relevant part:

Father has had little interaction with the children in the last several months. Evidence contained in the parenting conference report details concerns about Father's emotional absence from the children during the marriage noted not only by Mother but [sic] by Father's own family members. Such absence may have been the by-product of Father's emotional issues which also led to his current transgender transformation from being Zachary to Zoe. Mother also expressed concerns about the children's relationships with Father and the confusion that is just starting to surface as the person they know as "daddy" now dresses and presents herself as a woman and wishes to be called "mommy." Father is certainly free to be who he or she wishes to be and as the Court commented on at trial, the goal is for the parents to have a meaningful relationship at some point with the children. But the consequences of and confusion caused by his choices in the lives of 4 and 2 year old children simply cannot be ignored.

¶19 The primary consideration in a child custody proceeding is the child's best interests and welfare. *Clifford v. Woodford*, 83 Ariz. 257, 262, 320 P.2d 452, 455 (1957). The bare fact that a parent is transgender is not relevant to his or her ability to parent effectively. See, e.g., *Christian v. Randall*, 516 P.2d 132, 133-34 (Colo. App. 1973) (mother's sex

³ At the time of the decree, the statutory factor currently set forth in subsection (A)(2) was numbered (A)(3). See 2012 Ariz. Sess. Laws, ch. 309, § 5 (2d Reg. Sess.).

change, name change, and marriage to a woman did not provide grounds for changing custody from mother to father where there was no evidence the children were adversely affected). Nor does any societal prejudice that his or her transgender status may occasion warrant consideration in the determination of custody. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."); ALI Principles of the Law of Family Dissolution § 2.12 cmt. e (2002) ("[S]ocietal prejudice . . . can be a source of distress for the child . . . [, but] [t]he degree of any stress . . . does not appear to depend upon the amount of custodial responsibility the parent is assigned[, and] it has not been shown that less contact with a homosexual parent makes coming to terms with that parent's sexual identity any easier. . . . In any event, societal prejudice is generally not a legitimate basis for making custody decisions."). But when a parent's conduct attendant to his or her gender transition harms the parent-child relationship, that conduct and resulting harm is a legitimate consideration in determining the child's best interests -- just as all parental conduct is relevant. See *M.B. v. D.W.*, 236 S.W.3d 31, 38 (Ky. App. 2007) ("[W]e do not believe that a parent is exempt from having his rights terminated, or

that his neglect or abuse of the child, leading to the termination, should be excused because that neglect or abuse occurred in the process of [the parent] obtaining a gender reassignment.").

¶10 Here, the court reasonably found, based on Father's own testimony, that Father was "emotional[ly] absen[t] from the children during the marriage," perhaps due to his own "emotional issues" concerning his gender transition, and "had little interaction with the children in the last several months." Such conduct was a proper consideration relevant to Father's relationship with the children and the children's best interests, regardless of whether it was attendant to Father's gender transition. We disagree with Father's contention that the findings improperly focused on his transgender status and Mother's concerns about the children's potential confusion regarding his transition. The court plainly stated that "Father is certainly free to be who he or she wishes to be" and emphasized that "the goal is for the parents to have a meaningful relationship with the children at some point." To accomplish this, the court appointed a therapeutic interventionist "to assist the parties and the children with the children's transition and adjustment to Father's new sexual identity with the goal of the children having and/or maintaining a meaningful relationship with Father." Placed in context, we

read the court's reference to "the consequences of and confusion caused by [Father's] choices in the lives of 4 and 2 year old children" to refer not to the fact of Father's transgender identity, but to the effect of his choices in absenting himself from the children's lives.

¶11 The court's findings regarding Father's relationship with his children violated neither Father's equal protection rights nor Arizona statute. Consistent with A.R.S. § 25-403, the court made specific and detailed findings about all relevant factors and the reasons for which its custody determination was in the children's best interests, and the findings were reasonably supported by the evidence. The court did not abuse its discretion by awarding sole legal custody of the children to Mother.

II. PARENTING TIME

¶12 Father next contends that the superior court abused its discretion by restricting his parenting time to supervised visits of four hours once every other week. He contends that he was not allotted reasonable parenting time and that the evidence was insufficient to support a supervision order.

¶13 A noncustodial parent is entitled to "reasonable parenting time . . . unless the court finds, after a hearing, that parenting time would endanger the child's physical, mental,

moral or emotional health.” A.R.S. § 25-403.01(D)⁴; see also A.R.S. § 25-411(J) (on petition for modification, “the court shall not restrict a parent’s parenting time rights unless it finds that the parenting time would endanger seriously the child’s physical, mental, moral or emotional health”). The parenting time should be supervised if the court finds that “in the absence of [a supervision] order the child’s physical health would be endangered or the child’s emotional development would be significantly impaired, and if the court finds that the best interests of the child would be served [by a supervision order.]” A.R.S. § 25-410(B). The court is not required to make findings on the record to support a supervision order, but the evidence must support the order. *Hart v. Hart*, 220 Ariz. 183, 187-88, ¶¶ 16, 19, 204 P.3d 441, 445-46 (App. 2009); see also *Taliaferro v. Taliaferro*, 188 Ariz. 333, 335-36, 935 P.2d 911, 913-14 (App. 1996) (affirming supervision order where there was evidence that father had abused mother in child’s presence, had verbally abused child, and had driven while intoxicated with child in vehicle).

¶14 Here, the evidence did not support the parenting-time order’s supervision requirement. The only evidence relevant to the inquiry was Mother’s testimony that Father often ignored the

⁴ At the time of the decree, A.R.S. § 25-403.01(D) was numbered A.R.S. § 25-408(A). See 2012 Ariz. Sess. Laws, ch. 309, § 18 (2d Reg. Sess.).

children, and that he had returned them to her from visits cold, hungry, tired, unhappy, and with diaper rash. Even if we accept this testimony as true, it did not establish the physical endangerment and emotional impairment contemplated by the standard for supervision in A.R.S. § 25-410(B). There was no evidence to suggest that Father represents a danger to the children in any way or lacks the skills to properly care for the children without supervision. The superior court therefore abused its discretion by requiring that Father's parenting time be supervised. Noting the possibility that this error influenced the court's determination of parenting-time duration and frequency, we vacate the parenting-time order in its entirety and remand to the superior court for a determination of reasonable unsupervised parenting time consistent with A.R.S. § 25-403.01(D).

CONCLUSION

¶15 For the foregoing reasons, we affirm the child custody order, but vacate the parenting-time order and remand for a new determination of reasonable unsupervised parenting time.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

MARK R. MORAN, Judge*

*The Honorable Mark R. Moran, Judge of the Coconino County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).