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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/26/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) No. 1 CA-CV 12-0079
)
CARA ANN BRICKER,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
STEPHEN PHILIP FRANCO,)
)
Respondent/Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-090862

The Honorable James P. Beene, Judge

VACATED

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D O W N I E, Judge

¶1 Cara Ann Bricker ("Mother") appeals the family court's order modifying child custody. Because custody modification was not properly before the family court, we vacate the modification order.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Stephen Philip Franco ("Father") were never married but have a daughter in common ("Child"), who was born in 2004. After a contested hearing in 2007, Mother was awarded sole legal custody of Child. Father received supervised parenting time and was ordered to submit to random drug testing; after eight consecutive negative tests, his parenting time would become unsupervised. As of the time of the evidentiary hearing at issue, Father's parenting time remained supervised.

¶3 In December 2010, pursuant to Arizona Revised Statutes ("A.R.S.") section 25-408, Mother advised Father of her intent to relocate to California with Child. Father filed a petition to prevent the relocation and also filed an "ex-parte emergency petition" to prevent temporary relocation. Father did not ask the court to modify custody, though he stated an intent to "Petition the Court for increased *parenting time* in the very near future." (Emphasis added.) Mother cross-petitioned for permission to relocate both temporarily and permanently.

¶4 The court held an evidentiary hearing regarding temporary relocation and ruled that Mother could move to

California with Child. An evidentiary hearing regarding permanent relocation occurred in October 2011. In the joint pretrial statement prepared for that hearing, the parties listed the following contested issues: Father's drug testing, relocation, parenting time, child support, and attorneys' fees.

¶15 The family court issued its ruling in November 2011. It addressed each contested issue identified by the parties. Additionally, the court modified custody, awarding joint legal custody to the parents. The court also ruled that Child could remain in California with Mother.

¶16 Mother filed a timely appeal, challenging the "[o]rder regarding an award of joint legal custody and all related orders." We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶17 Mother contends the family court erred by modifying custody when that issue was not properly before it. We agree.

¶18 In its ruling, the family court discussed the factors set forth in A.R.S. §§ 25-403(A) and -403.01(B) and stated, in pertinent part:

The wishes of the child's parents as to custody. Mother requested that the Court affirm its prior order awarding her sole legal custody of the minor child. Father requested that the Court award the parties joint legal custody.

* * * *

The agreement or lack of an agreement by the parents regarding joint custody. As previously stated, Mother requested that the Court affirm its prior order granting her sole legal custody of the minor child and Father requested that the Court award the parties joint legal custody of the minor child.

¶9 The record does not support the finding that Father requested custody modification or that Mother asked the court to affirm the sole custody order. The issue was not identified in the joint pretrial statement, no custody modification petition was filed, and neither parent discussed any potential change in custody when testifying.¹ In fact, Father's counsel stated at the outset of the evidentiary hearing: "[A]t this point we're not challenging any custody determination."

¶10 Modifying custody without notice to Mother and without giving her an opportunity to present evidence relevant to that issue violated her due process rights. See *Cook v. Losnegard*, 228 Ariz. 202, 206, ¶ 19, 265 P.3d 384, 388 (App. 2011) (parties are entitled to adequate notice and an opportunity to be heard regarding issues the family court will adjudicate at a hearing).

¹ In her opening brief, Mother apparently relied solely on the court's ruling in stating that the parents had testified regarding their custody desires at the October 2011 hearing. Mother clarified in her reply brief that a review of the transcript did not support that statement. We have carefully reviewed the transcript. Neither parent testified regarding legal custody, and neither lawyer raised the issue.

"Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at

¶ 18. "It also affords a party the opportunity to offer evidence and confront adverse witnesses." *Id.*

¶11 Father does not contend that he in fact requested custody modification. Instead, he argues the family court had the inherent power to address issues not listed in the pretrial statement in order to prevent manifest injustice. See, e.g., *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) ("The pretrial statement controls the subsequent course of the litigation otherwise modified at trial to prevent manifest injustice."). Nothing in this record, though, suggests that custody modification was necessary to prevent manifest injustice. Nor did the court advise the parties it was *sua sponte* considering modifying custody or that they could introduce evidence relating to custody. However, in its ruling, the court noted that the parties *had not* introduced evidence regarding certain statutory custody factors, including whether domestic violence had occurred.²

² The parties agreed in the joint pretrial statement that Mother had obtained an order of protection against Father in 2009 that was upheld after a contested hearing.

CONCLUSION

¶12 We vacate the orders relating to custody modification. The family court shall reinstate the sole custody order that was in place prior to the October 2011 hearing.

¶13 In the exercise of our discretion, we decline both parents' requests for attorneys' fees incurred on appeal. Mother, though, is entitled to recover her appellate costs upon compliance with ARCAP 21.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
PHILIP HALL, Judge