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



DIVISION ONE
FILED: 11/29/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) No. 1 CA-CV 12-0092
)
SAMIA E. ABDELKARIM,) DEPARTMENT C
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
ABDALLA ABDELRAHMAN,) Civil Appellate Procedure)
)
Respondent/Appellant,)
)
and)
)
LAYLA ELEMAM and)
ELSAEED ELSAEED,)
)
Third Parties/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2009-091964

The Honorable M. Jean Hoag, Judge (Ret.)
The Honorable Shellie Smith, Judge

AFFIRMED

Gillespie, Shields & Durant
By Mark A. Shields
Attorneys for Petitioner/Appellee
and Third Parties/Appellees

Mesa

Scott L. Patterson
Attorney for Respondent/Appellant

Tempe

H A L L, Judge

¶1 Appellant Abdalla Abdelrahman (Father) appeals the family court's post-decree order modifying custody by restricting Father's ability to travel outside Arizona with his children. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In June 2009, Appellee Samia E. Abdelkarim (Mother), petitioned for legal separation from Father. Because Mother is comatose and cannot care for the children, a court-appointed guardian petitioned on behalf of Mother and represented her throughout the proceedings. Mother and Father have two biological children together, Zeinab, born in March 2002, and Mohamed, born in June 2008 (collectively, the children). Mother and Father are both from Sudan, although Father has obtained his United States citizenship. Father resided in Sudan from 2006 through mid-2009 due to work obligations. Concurrently with the filing of the petition for legal separation, maternal grandmother Layla Elemam and maternal grandfather Elsaeed Elsaeed (collectively, Maternal Grandparents)¹ petitioned the family court for custody of the children pursuant to Arizona

¹ Our reference to Maternal Grandparents may also include Mother. We have modified the caption of the case on appeal to reflect the status of the Maternal Grandparents as Third Parties. This caption shall be used for all further proceedings in this case.

Revised Statutes (A.R.S.) section 25-415 (Supp. 2012), contending that Maternal Grandparents stood *in loco parentis* to the children, and that it would be "significantly detrimental" to the children to be placed in Father's custody because Father was currently being prosecuted for a violent crime in Sudan and because he intended to return both children to Sudan where he was planning to have his daughter undergo genital mutilation. Based on these allegations, the court ordered the children's passports be surrendered to the court, and Father complied with the order.

¶13 The family court held a temporary orders hearing on June 30, 2009, and directed Father to surrender his United States passport and ordered that Father "shall not" apply for or obtain a Sudanese passport pending further order of the court. Father reported at the hearing that he did not have a Sudanese passport, but ultimately intended to relocate with the children to Sudan.

¶14 In October 2009, Father, Mother, and Maternal Grandparents stipulated to a consent decree of dissolution of the marriage and order regarding Maternal Grandparents' visitation.² Pursuant to that stipulation, the court found it

² The parties agreed that although Mother had initially petitioned for legal separation, that they would proceed with the matter as a dissolution of marriage action.

would not be significantly detrimental to the children for them to be placed in Father's custody, awarded Father the sole legal care, custody, and control of the children, and permitted Father to relocate the children from Arizona to Sudan as of August 1, 2010. The children were ordered to remain in Maternal Grandparents' custody until July 31, 2010, and Maternal Grandparents were awarded five weeks of summer vacation a year with the children. Father agreed in the decree not to "subject his daughter to any form of female circumcision or allow this procedure to be performed on her."

¶15 In June 2010, Maternal Grandparents petitioned for a modification of the custody and parenting order, in which they claimed that they had previously been determined to stand *in loco parentis* for the children and requesting that they be granted custody of the children because "a substantial and continuing change of circumstance ha[d] occurred"-Father had been "convicted of the equivalent of felony aggravated assault in Sudan and [was] subject to incarceration in that country"-and it was therefore "significantly detrimental" to the children to be placed in Father's custody. Maternal Grandparents attached the Sudan's criminal court ruling to their petition. In his response opposing the motion, Father asserted that Maternal Grandparents had not been found to be *in loco parentis*. Maternal Grandparents subsequently filed a petition to establish

child custody pursuant to A.R.S. § 25-415, asking that the court determine that they stood *in loco parentis* to the children.

¶16 The court held a status conference to address Maternal Grandparents' motions and ordered that an evidentiary hearing was necessary to determine the validity of the document alleged to be a judgment of conviction from the Sudanese judiciary.

¶17 Father was repeatedly dishonest with the court at the evidentiary hearing held July 14, 2010. For example, Father stated more than once to the court that the only passport he possessed was one issued by the United States. However, at the conclusion of the hearing, Maternal Grandparents' counsel saw what appeared to be another passport protruding from a file on the table where Father and his counsel were sitting. The court subsequently found that it was Father's Sudanese passport, which included the children. As another example, in discussing the criminal charge in Sudan, Father stated to the court that he had not been convicted of the crime and that the name on the Sudanese court document was not him, but his brother. Father's counsel, however, later stated on the record at the same hearing that the named person was indeed Father, but asserted that it involved a civil, and not a criminal, matter. Based on exhibits that had been submitted in evidence, the court found that the Sudanese matter involved Father and was criminal, not civil.

¶18 The court also denied Father's oral motion to dismiss Maternal Grandparents' motion for failure to comply with A.R.S. § 25-415. In denying the motion, the court found that Maternal Grandparents stood as *in loco parentis* for the children; that it would be "significantly detrimental" for the children to be in Father's custody because Father had been convicted of causing bodily harm to another person in Sudan and Father denied to the court that he committed the act or was named as committing the act;³ and that the children's legal parents were not married to one another at the time the petition was filed. Moreover, the court found that although the petition to modify custody was filed within one year of the existing custody order, there was "reason to believe that the child[ren]'s present environment may seriously endanger the child[ren]'s physical, mental, moral or emotional health." See A.R.S. § 25-411(A) (Supp. 2012).

¶19 Accordingly, the court suspended its previous order that the children be returned to Father's care as of August 1, 2010, and ordered that: the children remain in Maternal Grandparents' care, Father could not travel outside of Maricopa County without the court's permission, and the children could

³ Father has continued his lack of candor on appeal, as evidenced by the following statement in his reply brief, "[t]here is absolutely no evidence that Father has failed to address [his criminal conviction] in a forthright manner." The record on appeal would lead any reasonable person to conclude otherwise.

not be removed from Maricopa County. The court continued the evidentiary hearing until July 29.

¶10 At the scheduled time for the continuation of the evidentiary hearing, the parties announced that they had agreed to extend the terms of the October 2009 stipulated order regarding the Maternal Grandparents' visitation. The court denied Father permission to take the children outside of Arizona explaining that he failed on multiple occasions to tell the truth to the court and stated "if a father comes into the courtroom and doesn't tell [the court] the truth, [the court does] not think that's in the children's best interest. Period." The court also stated its concerns about the potential for Father to subject his daughter to genital mutilation, affirmed that the children could not be removed from Maricopa County unless counsel agreed otherwise, and stated that "Father SHALL NOT take the children to Sudan." The court then continued the evidentiary hearing to provide Father with the opportunity to present evidence that he intended to remain in the United States, such as bringing his new wife to the United States from Sudan, signing a long-term apartment lease or purchasing a home, and becoming employed.

¶11 The court held the continued hearing over two days, ending in March 2011. In its ruling, the court noted that it previously found "Father HAS NOT been truthful with this Court

on a number of critical, litigated issues including but not limited to his felony conviction and his possession of a Sudanese passport. With that in mind, Father has stated his commitment not to physically abuse his daughter by authorizing a mutilation procedure" on her. The court noted conflicting testimony about the children's mental state--Father said the children were doing well and Maternal Grandparents stated they were "distressed." The court further found that Maternal Grandparents:

have not rebutted the presumption that it is in the children's best interests to remain with their Father as sole custodian. Grandparents have not met their burden of proof by clear and convincing evidence that the Court should award them custody of the children and deprive Father of his presumptive custodial rights.

The Court agrees with counsel of Father that the felony of assault, alone, does not sufficiently show Father is not an adequate parent. Father's "story" about this event (according to him, a "civil" event, not criminal or, conversely, not involving him at all) and the various contradictory documents regarding this event gave and give this Court great pause. The Court simply did not find Father credible regarding this event and had great concerns the children would be left without a parent should Father be incarcerated.

Additionally, the Court does place great weight on the allegation of physical abuse of the minor child, Zeinab, consistent with the cultural dictates of Sudan. Were this to occur in the United States, it would be considered illegal child abuse. Therefore, if it had been proven that Father were intending to return to Sudan with the children, the Court WOULD find it significantly detrimental to the children to remain with Father and would have granted *in loco parentis* custody to the grandparents. Father,

however, if believed, states he WILL NOT leave Arizona to reside in Sudan and WILL NOT perform the mutilation procedure on his daughter.

In support of this statement, Father testified he has now established a residence here in Arizona with his wife. He testified he has hired a lawyer for his wife to establish residency. He and his wife are expecting a child. He testified he is starting a business.

. . . .

THE CHILDREN SHALL REMAIN IN ARIZONA ABSENT A COURT ORDER AUTHORIZING OTHERWISE. THIS ORDER IS IN PLACE REGARDLESS IF ANY INTENDED TRAVEL IS A VACATION OR OTHERWISE. FATHER SHALL NOT THWART GRANDPARENT VISITATION. FATHER SHALL TURN OVER THE CHILDREN'S PASSPORTS TO THE COURT WITHIN FOURTEEN (14) DAYS FROM THE FILING DATE OF THIS MINUTE ENTRY AND SHALL NOT REAPPLY FOR PASSPORTS FOR THE CHILDREN ABSENT A COURT ORDER.^[4] (Emphasis in original).

¶12 Father appealed the family court's ruling to this court, but we dismissed it for lack of jurisdiction because Maternal Grandparents' motion to amend the order regarding visitation was pending. After the court resolved that motion on December 7, 2011 by a signed order, Father filed a timely appeal.

¶13 We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶14 We interpret Father's opening brief as raising the following issues: the family court lacked statutory authority to

⁴ The court later clarified that the children's passports were in Mother's counsel's possession.

modify a custody decree in the course of awarding Maternal Grandparents *in loco parentis* visitation by restricting Father's ability to travel with the children outside of Arizona; alternatively, the family court erred in prohibiting Father from removing the children from Arizona because: (a) there was no change of circumstance that would allow the court to modify the custody decree; and (b) the order prohibiting Father from removing the children from Arizona infringed on his constitutional rights to make parenting decisions and to travel.

¶15 We review a family court's custody order for an abuse of discretion. See *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003); see also *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982) (court's decision regarding whether there should be a modification of custody will not be disturbed absent a clear abuse of discretion).

¶16 Father initially maintains that the family court did not have the authority to modify the terms of the October 2009 custody decree when it later awarded Maternal Grandparents *in loco parentis* status but denied their request for custody. Specifically, Father contends that the court exceeded its authority by placing restrictions on Father's travels with the children at the request of the Maternal Grandparents because, as grandparents and not parents, they did not have parental rights.

Although it is true that grandparents do not ordinarily possess the same custody rights as parents, we disagree with Father's assertion that the court lacked authority to entertain Maternal Grandparents' requests and to modify the terms of the 2009 custody decree.

¶17 Pursuant to A.R.S. § 25-411(A), any person may move to modify a custody decree earlier than one year after its issuance if there "is reason to believe the child[ren's] present environment may seriously endanger the child[ren's] physical, mental, moral or emotional health." The court found that this requirement had been established under the circumstances of this case and impliedly found that "adequate cause" existed to hear the Maternal Grandparents' motions. See A.R.S. § 25-411(L) ("The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the pleadings, in which case it shall set a date for the hearing on why the requested modification should not be granted.").

¶18 At the conclusion of the evidentiary hearing, the court found (1) that it would not be significantly detrimental to the children to remain in Father's custody and (2) that the Maternal Grandparents had not proven by clear and convincing evidence that awarding custody to Father was not in the children's best interests. Thus, the court found that the Maternal Grandparents were not entitled to custody pursuant to

A.R.S. § 25-415, but awarded them visitation rights. Importantly, however, the court stressed that custody would not have been awarded to Father absent his stated intention to keep the children in the United States. At the same time, the court expressed concern about Father's credibility. Although the travel restriction undoubtedly enhances the ability of Maternal Grandparents to exercise their visitation rights, it is evident that the court placed the travel restriction on the children (and not Father) in an effort to discourage any attempt by Father to disobey the court's order that he not take the children to Sudan, which the court concluded would be clearly contrary to the children's best interests. The court had ample justification for its concerns for the children's well-being based on Father's failure to tell the truth to the court, his criminal conviction, and the potential for Father to have his daughter subjected to physical abuse through genital mutilation. Such concerns led the court to conclude that it would be "significantly detrimental" for Father to take the children to Sudan. Given that the court would not have awarded custody to Father absent the travel restriction, and its overriding concern with the harm that could befall the children should they be returned to Sudan, we cannot say that the court exceeded its authority to act in the best interests of the children by imposing this limitation on Father's custodial rights. See

A.R.S. § 25-403(A) (Supp. 2012) ("The court shall determine custody, either originally or on petition for modification, in accordance with the best interests of the child.").

¶19 Father next contends that the family court erred in prohibiting him from taking the children outside of Arizona because there was not a change of circumstance that would have permitted the court to modify the custody decree. In making this argument, Father is conflating the standard of adequate cause to hold a hearing with the court's discretion to modify a custody decree once a change of circumstance has been established. When considering a motion for change or modification of custody, the court first determines whether a change of circumstances has occurred that establishes adequate cause for the hearing as required by A.R.S. § 25-411(L), and, if so, whether a change of custody is in the children's best interests and other relevant factors. See A.R.S. § 25-403(A); see also *Pridgeon*, 134 Ariz. at 179, 655 P.2d at 3. We will not overturn the trial court's decision absent a clear abuse of discretion. *Pridgeon*, 134 Ariz. at 179, 655 P.2d at 3.

¶20 Based on the parties' stipulation, the court originally awarded Father sole legal care, custody, and control of the children, and permitted Father to relocate the children from Arizona as of August 1, 2010. However, Maternal Grandparents petitioned for a modification of that custody order

after obtaining documentation that showed Father had been convicted of the equivalent criminal act of felony aggravated assault in Sudan and could potentially be incarcerated in Sudan. The evidence that Father had been convicted (as opposed to merely charged) of the criminal act of bodily harm was a change of circumstance that constituted the adequate cause necessary to hold a hearing on Maternal Grandparents' motion to modify custody. The conviction could result in Father's incarceration in Sudan, potentially leaving the children parentless in Sudan, should Father take them there. Further, the conviction, coupled with the court's findings that Father failed to tell the truth on several matters, and the court's concerns about Father potentially subjecting his daughter to genital mutilation supported the court's conclusion that it was in the children's best interests to modify the order. We therefore conclude that the family court did not abuse its discretion by modifying the custody order.

¶21 Father additionally argues that the family court erred by prohibiting him from taking the children outside of Arizona because it violated his constitutional rights to parent and travel.⁵ As to his parenting rights, Father's reliance on

⁵ Father also contends that "[t]he practical limitations of the order at issue go far beyond any legitimate concern about the safety of the children" and "[t]he result of this order is that the children are imprisoned in Arizona and will be prevented

Graville v. Dodge, 195 Ariz. 119, 985 P.2d 604 (App. 1999), for this proposition is misplaced. Although we acknowledged in *Graville* that “a parent’s right to custody and control is constitutionally protected,” we further recognized that the right “is not without limit or beyond regulation” and that “[u]nder their constitutional powers, states may regulate the well-being of children.” *Id.* at 124, ¶ 20, 985 P.2d at 609 (citation omitted). Moreover, the issues in *Graville* involved the constitutionality of A.R.S. § 25-409 (Supp. 2012), the grandparent visitation statute, including whether the trial court exceeded its authority by applying the statute in an unconstitutional manner, and whether grandparent visitation was in the best interests of the children. *See id.* at 123, 127, 128-29, ¶¶ 15, 35, 985 P.2d at 608, 612, 613-14. Here, the restriction on travel imposed by the family court was to protect the children from harm and enhance their well-being, and its authority to do so was not constrained by A.R.S. § 25-409. Thus, we conclude that, under the unusual circumstances of this case, the restriction on the children’s travels outside Arizona was not unconstitutional. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (although “custody, care and nurture of the

from having a normal life involving travel and adventure.” We disagree. The children are permitted to travel within the state of Arizona and may travel outside of Arizona with a court order.

child reside first in the parents[,]" the state may limit parental freedom and restrict a parent's control).

¶22 Father also maintains that the court's order "infringes upon his constitutionally protected right to travel." We agree with Father that the right of a United States citizen to interstate travel is protected by the constitution. See *Jones v. Helms*, 452 U.S. 412, 418 (1981). The Due Process Clauses in the United States and Arizona constitutions preclude the state from "infring[ing] on a fundamental liberty interest 'unless the infringement is narrowly tailored to serve a compelling state interest.'" *Standhardt v. Superior Court*, 206 Ariz. 276, 279, ¶ 8, 77 P.3d 451, 454 (App. 2003) (citation omitted). The family court did not, however, restrict Father's right to travel outside of Arizona; it only restricted Father's right to travel outside of Arizona with the children, unless he first obtained a court order.⁶ Thus, Father's constitutionally protected right to travel was not compromised. The family court's restriction of Father's right to travel outside of Arizona with the children stemmed directly from his deception to the court. The court had ample and justifiable concerns about the physical health of Father's daughter and the physical well-

⁶ Father alleges that the court should not have confiscated his Sudanese passport. The court did, however, permit Father to have his United States passport, and therefore did not restrict his travel if he was traveling without the children.

being of the children. We therefore discern no error or violation of Father's constitutional rights.⁷

¶123 Both parties requested their attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2012). Both requests are denied on this basis. Father also requested attorneys' fees pursuant to A.R.S. § 25-411(M), which states that a court shall assess fees against a party seeking modification if "the modification action is vexatious and constitutes harassment." Because Maternal Grandparents' action was not vexatious, nor did it constitute harassment, Father's request is denied under A.R.S. § 25-411(M). Finally, Father requests fees under Arizona Rules of Civil Appellate Procedure (ARCAP) 21(c). Because ARCAP 21(c) does not provide a substantive basis for an award of attorneys' fees, we deny Father's request. See *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 341, 909 P.2d 399, 408 (App. 1995).

⁷ Because we are affirming the family court, we need not address Maternal Grandparents' alternative argument that the family court should have required Father to post a bond if he is permitted to take the children outside of Arizona.

CONCLUSION

¶24 For the foregoing reasons, we affirm the family court's order prohibiting Father from removing the children from Arizona without a court order and obtaining passports for the children.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Judge

_____/s/_____
SAMUEL A. THUMMA, Judge