IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 5/28/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

In re the Matter of:	)	1 CA-CV 12-0186
	)	
LYNDA S. LUDWIG,	)	DEPARTMENT B
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
STEPHEN D. GLACY,	)	
	)	
Respondent/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-007187

The Honorable Julie P. Newell, Judge *Pro Tempore*

AFFIRMED

Rader Lucero, PLLC — Phoenix
By Diana I. Rader
Attorneys for Petitioner/Appellee

Kutak Rock LLP — Scottsdale
By Andrew J. Russell
Franci G. Fealk
Attorneys for Respondent/Appellant

K E S S L E R, Judge

¶1 Stephen D. Glacy ("Father") challenges an order of protection entered against him on October 12, 2011, and in favor of his minor children, A. and J., and their mother, Lynda S. Ludwig ("Mother"), which was upheld by the superior court. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In proceedings in the family court division of the Maricopa County Superior Court, the parties agreed to share joint legal custody of their children, A. and J., and to designate Mother as the primary residential parent. Father then married his current wife, who has a son, A.B., from a prior relationship.

¶3 On October 12, 2011, Mother successfully petitioned the superior court for an order of protection against Father alleging thirteen-year-old A.B. had molested A., Father had witnessed one of the acts, and Father had responded inappropriately. Pursuant to Father's request, the superior court scheduled a hearing on the order of protection for January 10, 2012.

¶4 The parties came to the hearing with an oral agreement, which the superior court rejected because it permitted Father unsupervised visitation. The court also rejected an offer to revise the settlement to address that

concern, finding the agreement as modified was not in the children's best interests.

¶5 Having rejected the settlement efforts, the court turned to the merits. During the discussions with the court, counsel for both parties agreed that Child Protective Services ("CPS") did not have anything else pending with respect to Father. The court stated that either Father "gets a hearing, we do a hearing or he withdraws his request for a hearing. Then it goes back to" the family court division. Father's counsel told the court that "we can't go forward without" the CPS witnesses, then proposed to withdraw the hearing request if Father could have supervised visitation. The court refused.

¶6 Mother then avowed to the court under oath that the allegations in an affidavit she submitted were true and accurate. When asked by the court whether Father would like to submit evidence, Father's counsel answered "Nothing further."

¶7 The superior court affirmed the order of protection. Father timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1), (A)(5)(b) (Supp. 2012), and 12-120.21(A)(1) (2003), and Rule 9(B)(2) of the Arizona Rules of Protective Order Procedure.

DISCUSSION

I. Father's appeal is not moot.

¶8 On December 21, 2012, while this appeal was pending, the family court conducted an evidentiary hearing on an additional order of protection Mother had obtained on October 11, 2012. The family court found that Mother "has failed to demonstrate by a preponderance of the evidence that [Father] has committed acts of domestic violence that warrant the continuation of the Order of Protection that was entered against him." Accordingly, the family court dismissed and quashed that order of protection. Mother then moved to dismiss this appeal based on mootness over Father's opposition.

¶9 "A decision becomes moot for purposes of appeal where as a result of a change of circumstances before the appellate decision, action by the reviewing court would have no effect on the parties." *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988). Although no constitutional bar exists to our consideration of moot issues, this Court has the discretion not to address such issues as a matter of judicial restraint. *Big D. Constr. Corp. v. Ariz. Ct. of Appeals*, 163 Ariz. 560, 563, 789 P.2d 1061, 1064 (1990).

¶10 Relying on *Cardoso v. Soldo*, 230 Ariz. 614, 618, ¶ 12, 277 P.3d 811, 815 (App. 2012), Father contends that the order of protection decision is not moot. In *Cardoso*, Maria Cardoso

appealed from an order of protection entered in favor of her former husband, Paul Soldo. *Id.* at 616, ¶ 1, 277 P.3d at 813. Notwithstanding the order's expiration on appeal, we reached the merits based upon the collateral consequences exception to the mootness doctrine. *Id*. at 619, ¶ 14, 277 P.3d at 816. We recognized that even an expired order of protection has ongoing legal consequences, *id.*, including in a subsequent order of protection and child custody proceedings, *id.* at 618, ¶¶ 10-11, 277 P.3d at 815.

¶11 Although this case is in a somewhat different procedural posture, the *Cardoso* concerns still apply. As the superior court stated, each order of protection is a separate order that stands on its own merit and is not contingent upon prior orders. A superior court may issue an order of protection based upon reasonable cause to believe that a defendant may commit or has committed an act of domestic violence. A.R.S. § 13-3602(E) (Supp. 2012). The order creates a rebuttable presumption against granting legal custody to the parent committing the act. A.R.S. § 25-403.03(D) (Supp. 2012). Another collateral consequence is that a court must be advised about the order of protection if future orders of protection are sought. A.R.S. § 13-3602(C)(5). Evidence of that order's issuance is a matter of public record, A.R.S. § 13-3602(L), and may have consequences beyond the underlying proceeding for

Father's reputation as well as his legal rights. *See Cardoso*, 230 Ariz. at 618, ¶¶ 10-12, 277 P.3d at 815. In light of these consequences, we deny Mother's motion to dismiss on mootness grounds and reach the merits of Father's appeal.

II. The superior court did not deprive Father of due process.

¶12 Father argues that the superior court deprived him of due process by: (1) misconstruing the burden of proof and focusing on improper factors; (2) forcing him to proceed with a hearing for which he was not fully prepared or withdraw his hearing request; and (3) reaching a decision before Father had presented a case. He accordingly requests that we dismiss the prior order of protection upheld at the January 10, 2012 hearing.[1] We review due process claims *de novo*. *See State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004).

A. The superior court applied the appropriate burden of proof and applicable standards.

¶13 Father argues the superior court misapplied the burden of proof and applicable standards. We disagree.

¶14 According to Rule 8(F) of the Arizona Rules of Protective Order Procedure: "The plaintiff shall prove the case by a preponderance of the evidence, in order for a protective order to remain in effect as originally issued or as modified

[1] In his opening brief, Father had alternatively requested a remand for an evidentiary hearing, but has since received such a hearing on December 21, 2012.

after the hearing." The superior court expressly recognized this burden at the outset, and instructed Mother that "you're the one that asked for the order of protection. So the burden is on you to prove by a preponderance of the evidence that reasonable cause still exists to keep this order in place. Okay. So we'll start with your side of the story."

¶15 Father claims that the superior court did not focus on the statutory requirements for an order of protection, which are: reasonable cause to believe that a defendant may commit an act of domestic violence or has committed an act of domestic violence within the past year, or for a longer period if good cause permits. A.R.S. § 13-3602(E). When the order is directed at prohibiting contact with a child with whom the defendant has a legal relationship, the court must also consider whether the child may be: (a) "harmed if the defendant is permitted to maintain contact with the child;" and (b) "endangered if there is contact outside the presence of the plaintiff." Ariz. R. Prot. Ord. P. 4(B)(4).

¶16 During the hearing, the superior court stated that it needed "to step outside the boundaries of you folks and look at the best interests of the children." There is no record evidence that the court did not consider the relevant factors when it ultimately chose to affirm the order of protection. Nor is there any evidence that the court used the best interests to

shift the burden of proof to Father. Rather, the court referred to the best interest standard when rejecting the parties' proposed settlement agreement, which included parenting time terms.

¶17 In any event, Father correctly concedes that the children's best interests are not irrelevant to the order of protection. As explained previously, the court is required to consider whether a child may be harmed by contact with the defendant or endangered through such contact outside the plaintiff's presence. *See* Ariz. R. Prot. Ord. P. 4(B)(4).

B. The superior court did not deprive Father of a hearing.

¶18 Due process, under both the Fifth and Fourteen Amendments to the United States Constitution and Article 2, Section 4 of the Arizona Constitution, guarantees Father a meaningful opportunity to be heard. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Wallace v. Shields*, 175 Ariz. 166, 174, 854 P.2d 1152, 1160 (App. 1992). Likewise, Rule 8(D) of the Arizona Rules of Protective Order Procedure provides that, at a contested hearing on an order for protection: "The judicial officer shall ensure that both parties have an opportunity to be heard, to present evidence and to call and examine and cross-examine witnesses."

¶19 Contrary to Father's allegation, the superior court did not prevent him from presenting evidence or force him to

proceed without adequate time for preparation. The superior court stated that Father had a right to a hearing and repeatedly inquired whether Father wished to have a hearing or withdraw his request for a hearing. The record also reflects that Father's counsel had arrived at court prepared for trial, as evidenced by her "stack of exhibits" and the subpoenas she had issued to two CPS witnesses.

¶20 Father claims that the court violated his due process rights by insisting that he proceed without the absent CPS witnesses. But the failure of Father's subpoenaed witnesses to appear did not preclude Father from testifying, cross-examining Mother, or making a formal offer of proof as to what the absent witnesses would state. Father chose not to participate in the hearing. On this record, we reject Father's claim of a due process violation.

C. The superior court did not reach a decision before hearing the evidence.

¶21 Finally, Father claims that the superior court made its decision prior to hearing the evidence. The transcript fails to support this claim.

¶22 The superior court was not new to the case, having reviewed Mother's petition during the initial *ex parte* hearing, and again in preparation for the January 10, 2012 hearing. The court attempted to start the evidentiary hearing by stating the

burden of proof and calling on Mother to present evidence, but the parties diverted the discussion to their proposed settlement and other issues.

¶23 The superior court then heard from both parties' counsel that no CPS investigation was pending against Father, and Father's counsel avowed that the police detective was "extremely squeamish about testifying [at] this early stage." After a discussion about allowing Father professionally supervised parenting time, an issue not justiciable in this order of protection proceeding, *see* Ariz. R. Prot. Ord. P. 4(B)(1), the court rejected the proposed settlement and expressed an "inclination" to affirm the order and then let the family court division "really delve into this." After more exchanges with counsel, the superior court stated: "I'm affirming the order the way it is. So that you can get to [the family court division] as quickly as possible. I'm more than happy to take testimony. But that's up to you."

¶24 In this context, we find neither impropriety in the court's informing the parties of its inclination nor any indication that the court reached a decision without considering evidence. We find it unnecessary to reach the parties' arguments concerning Mother's choice of forum. Nor do we address the merits of the superior court's decision, an issue

Father first raised in his reply brief. *See State v. Guytan*, 192 Ariz. 514, 520, ¶ 15, 968 P.2d 587, 593 (App. 1998).

CONCLUSION

¶25 Father's appeal from the initial order of protection is not moot. We hold that Father received due process at the hearing on that order and therefore affirm.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
SAMUEL A. THUMMA, Judge