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



DIVISION ONE
FILED: 10/23/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANK C.,) No. 1 CA-JV 12-0078
)
Appellant,)
) DEPARTMENT E
v.)
) **MEMORANDUM DECISION**
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY, K.C.,) (Not for Publication -
) Ariz. R.P. Juv. Ct. 103(G);
Appellees.) ARCAP 28)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD509783

The Honorable Mark F. Aceto, Judge

AFFIRMED

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By Eric Devaney, Assistant Attorney General
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By Scott J. McWilliams
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Attorneys for Appellant

J O H N S E N, Judge

¶1 Frank C. appeals from the superior court's order finding his daughter dependent as to him because of sexual

abuse. Frank argues the Arizona Department of Economic Security ("ADES") is collaterally estopped from relitigating allegations of sexual abuse previously raised in his dissolution proceeding. He also argues insufficient evidence supports the dependency finding. For the reasons that follow, we affirm the court's order.

FACTS AND PROCEDURAL BACKGROUND

A. Dissolution Proceedings.

¶12 Frank's wife Christine filed for dissolution in January 2010. The following month, Christine obtained an order of protection based on her allegation that Frank behaved inappropriately toward their four-year-old daughter. After the order of protection expired, Christine sought a second order of protection, alleging Frank sexually abused their daughter. After a hearing on June 21, 2010, the superior court concluded Christine had "presented no credible, corroborating objective evidence in support of her efforts to avoid contact between Father and daughter" and ordered that Frank could have supervised visitation with the daughter.

¶13 The dissolution trial took place over two days in May 2011. In the final decree, filed July 6, 2011, the court ordered that Frank and Christine would share joint custody of their daughter with equal parenting time. The court addressed the factors set out in Arizona Revised Statutes ("A.R.S.")

section 25-403(A) (West 2012) for determining custody, including “[w]hether either parent was convicted of an act of false reporting of child abuse or neglect under § 13-2907.02” and “[w]hether there has been domestic violence or child abuse as defined in § 25-403.03.” A.R.S. § 25-403(A)(10), (11) (West 2012).¹ In discussing the false-reporting factor, the court concluded:

The Court finds [the timing of Christine’s sexual abuse allegations] to be suspicious. Child Protective Services has concluded that these charges were unsubstantiated. Mother’s numerous allegations never resulted in any final substantiation of charges by CPS, never resulted in a law enforcement to submit any charges, never resulted in any prosecuting agency filing charges, and never resulted in Father being convicted of any felony abuse charges.

In discussing whether domestic violence or child abuse had occurred, pursuant to § 25-403(A)(11), the court found Christine’s “allegations of domestic violence to be unfounded,” but made no specific finding concerning child abuse.

¶4 On July 12, 2011, Christine obtained yet another order of protection after a court-appointed therapist reported the daughter had said in a June 6, 2011, therapy session that her father had sexually abused her. The superior court, however,

¹ Absent material revisions after the relevant date, we cite a statute’s current version.

quashed the order two days later and further affirmed all of its prior orders.

¶15 From what we can discern from the record, ADES first began investigating allegations of sexual abuse against Frank in May 2010, after Christine reported various alleged instances of sexual abuse. While the record is unclear, it appears that some of the reports compiled by Child Protective Services ("CPS") after that time were offered in evidence in the dissolution proceedings.

¶16 In July 2011, ADES removed the child from Frank and Christine's care after the court-appointed therapist reported the June 2011 allegations of sexual abuse. After investigating the claims, ADES returned the child to her parents. In late 2011, ADES filed an "addendum report" in the dissolution action concerning a psychosexual evaluation and treatment plan dated August 12, 2010, which had recommended that Frank "not have unsupervised contact with the child until he completed two polygraphs without deception and made substantial progress with treatment recommended in the report." The ADES report asserted that Frank "has not followed through with the recommendations outlined" by the psychotherapist and recommended that Frank's visits with the daughter be "supervised until he has opportunity to complete services which have been recommended." So far as we have been able to discern from the record, the court presiding

over the dissolution matter took no action after receiving the ADES report.

B. Dependency Proceedings.

¶7 On December 13, 2011, ADES filed a petition alleging the child was dependent as to both parents. The petition alleged Frank was "unable to parent the child due to sexual abuse" and that Christine was "unable to parent the child due to mental health issues." ADES filed the petition based on its determination that neither Frank nor Christine was complying with agreed-upon case plans and that Frank was not complying with the recommendations in the August 2010 psychosexual report.

¶8 Frank moved to dismiss the dependency action, arguing that because allegations of sexual abuse had been extensively litigated in the dissolution proceeding, ADES was collaterally estopped from filing a dependency action on that ground. After a half-day hearing, the court granted the petition, holding ADES had proven by a preponderance of evidence that Frank sexually abused the daughter.² The court later denied Frank's motion to dismiss the dependency petition.

¶9 This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (West 2012), 12-120.21(A)(1) (West 2012) and 12-2101(A)(1) (West 2012).

² Christine submitted the issue of dependency to the court, which found the child dependent as to her. She is not party to this appeal.

DISCUSSION

A. Collateral Estoppel Does Not Bar the Dependency Order.

¶10 Frank argues collateral estoppel bars ADES's dependency petition. He contends the allegation of sexual abuse on which the dependency petition is based was proven untrue in the dissolution proceeding. "Whether collateral estoppel applies is a question of law that we review *de novo*." *Tripati v. Forwith*, 223 Ariz. 81, 86, ¶ 23, 219 P.3d 291, 296 (App. 2009).

¶11 "Traditionally, collateral estoppel precludes the relitigation of a fact or issue previously determined in a prior suit between the same parties or their privies." *Wetzel v. Ariz. State Real Estate Dep't*, 151 Ariz. 330, 333, 727 P.2d 825, 828 (App. 1986). Collateral estoppel applies when (1) the parties actually litigated the issue in the prior proceeding, (2) the parties had a full and fair opportunity to litigate the issue, (3) the issue's resolution was essential to the decision, (4) the court entered a valid and final decision on the merits, and (5) there is a common identity of parties in the two proceedings. *Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 244, 249, ¶ 25, 211 P.3d 1228, 1233 (App. 2009).

¶12 We need not address the first four elements of the doctrine because the fifth element, a common identity between

the parties in the two proceedings, is not present here. ADES was not party to the dissolution action, and we cannot accept Frank's contention that the agency was either a third party to or in privity with Christine in the dissolution.

¶13 Frank has provided us with only portions of the record in the dissolution, but it is clear that ADES was not party to that proceeding. "A 'party' is one who is directly interested in the subject matter of the suit . . . who has a right to make defenses, control proceedings and examine and cross-examine the witnesses. It means a person who has a right to appear and contest any litigated issue in court." *Helge v. Druke*, 136 Ariz. 434, 437, 666 P.2d 534, 537 (App. 1983).

¶14 Frank argues that copies of unspecified ADES reports were in evidence in the dissolution, but does not tell us what they were or how they came to be admitted. Although he suggests ADES had an active role in the dissolution, he cites nothing other than the ADES "addendum report" to support that contention. Based on our review, nothing in the record demonstrates that the agency had parity with Frank and Christine to control the dissolution proceeding or examine and cross-examine witnesses. See *Berger v. Berger*, 788 So. 2d 407 (Fla. Dist. App. 2001) (wife was not collaterally estopped in dissolution action from presenting evidence of abuse offered in dependency because she was not entitled to manage the dependency

litigation or present evidence in that action). Indeed, Frank argues that "the allegations of sexual abuse against the minor child by Father were extensively litigated in the Family Court during the dissolution matter between Mother and Father," thereby impliedly conceding CPS was not a party in the dissolution.

¶15 Nor was ADES in privity with Christine in the dissolution. As to that principle, our supreme court has explained:

Finding privity between a party and a non-party requires both a "substantial identity of interests" and a "working or functional relationship" . . . in which the interests of the non-party are presented and protected by the party in the litigation. . . . Privity, however, is not a result of parties having similar objectives in an action but of the *relationship* of the parties to the action and the *commonality* of their interests.

Hall v. Lalli, 194 Ariz. 54, 57-58, ¶¶ 8, 12, 977 P.2d 776, 779-80 (1999). Under this rule, ADES was not in privity with Christine because the two have fundamentally discrete interests concerning the daughter. In *Pima County Juvenile Action No. J-77188*, 139 Ariz. 389, 390-91, 678 P.2d 970, 971-72 (App. 1983), ADES filed a dependency petition against a father notwithstanding entry of an order in a dissolution proceeding that granted visitation to the father. Although the issue on appeal was the sufficiency of the dependency allegations, we

noted that the state's interest in a dependency is different from a parent's interest in a dissolution. *Id.* at 392, 678 P.2d at 973 ("state's interest lies in the future well-being of the minor children residing in this state, and is separate and distinct from the interest of the parents in preserving their respective rights to custody and control of their children"); see generally *In re M.A.*, 152 Ill. App. 3d 1033 (1987) (state was not collaterally estopped by resolution of alleged abuse issue in dissolution proceeding because state was not a party or in privity with spouse); *In re B.P.*, 35 P.3d 291 (Mont. 2001) (state was not in privity with appellant's ex-spouse in dissolution).

¶16 We also reject Frank's contention that even if ADES was not a party or in privity with Christine, its involvement in the dissolution was substantial enough that it should be bound by the outcome of the prior proceeding. While Frank cites no relevant authority for his argument, the Restatement recognizes that a non-party "may be precluded by the judgment in an action when he is involved with it in a way that falls short of becoming a party but which justly should result in his being denied opportunity to relitigate the matters previously in issue." Restatement (Second) of Judgments § 62 cmt. a (1982). This principle does not apply here, however, because none of the

circumstances cited in the Restatement as justifying application of collateral estoppel is present.

¶17 Additionally, we note collateral estoppel also does not apply because Frank has not shown that the facts supporting the dependency order are the same facts litigated in the dissolution proceedings. "The United States Supreme Court has stated that collateral estoppel may not apply . . . when 'controlling facts or legal principles have changed significantly since the [prior] judgment.'" *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, 626, ¶ 24, 146 P.3d 1027, 1035 (App. 2006) (quoting *Montana v. United States*, 440 U.S. 147, 155 (1979)).

¶18 The court in this case heard evidence that even after the dependency petition was filed, Frank was not participating in Family Preservation Services, a keystone of his ADES treatment plan, and had not complied with all of the recommendations in a psychosexual report that assessed his sexually deviant behavior. Those facts were not before the court prior to issuance of the dissolution decree.³

³ See generally *In re Desiree B. v. Philip B.*, 10 Cal. Rptr. 2d 254, 258 (App. 1992) ("[T]he 'issues' before the family law court and juvenile court can never, in fact, be 'identical,' even if some or all of the facts of abuse or neglect adduced in the two proceedings are the same, because of the important differences between the purposes and operations of the two courts, and that the state's overriding concern for the protection of the children.").

B. Reasonable Evidence Supported the Court's Determination that Frank's Daughter Is Dependent Due to Sexual Abuse.

¶19 Frank also argues the court abused its discretion in finding that ADES proved by a preponderance of evidence that he had sexually abused his daughter. See A.R.S. § 8-844(C)(1) (West 2012). "On review of an adjudication of dependency, we view the evidence in the light most favorable to sustaining the juvenile court's findings. We generally will not disturb a dependency adjudication unless no reasonable evidence supports it." *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 235, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). We do not reweigh the evidence presented at the dependency hearing because, as the trier of fact, the superior court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004).

¶20 The court heard testimony from Frank, his mother and sister, the psychologist who performed the psychosexual evaluation of Frank, and a court-appointed therapist who interviewed the child multiple times throughout the dissolution proceeding and after entry of the final dissolution decree. Although the evidence was conflicting, the record contained

substantial evidence to support the superior court's factual findings.

¶121 The psychologist testified he recommended Frank have no unsupervised time with his daughter because Frank had engaged in a "number of paraphiliac behaviors" throughout his life, including masochism, exhibitionism, frottage and bestiality, that could "crossover" into child molestation. The psychologist also testified that Frank's responses suggested "that he is satisfied with himself as he is, is not experiencing marked distress, and sees little need for changes in his behavior." The court-appointed therapist testified Frank's daughter repeatedly had stated her father had sexually abused her and that she engaged in behaviors consistent with being sexually abused.

¶122 In addition to this testimony, the court also considered numerous reports offered by ADES including the psychosexual report that indicated Frank had a proclivity for engaging in sexually inappropriate behaviors, numerous police reports of the alleged child abuse over a period of years, and Frank's previous (albeit dated) convictions for engaging in sexually inappropriate acts.

¶123 Because "the primary consideration in a dependency case is always the best interest of the child, . . . the juvenile court is vested with a great deal of discretion."

Willie G., 211 Ariz. at 235, ¶ 21, 119 P.3d at 1038 (quotation omitted). We cannot conclude the superior court's finding that Frank sexually abused his daughter lacked the support of any reasonable evidence. As a result, the court did not abuse its discretion in finding ADES proved the allegations in its petition by a preponderance of evidence.

CONCLUSION

¶24 For the reasons set forth above, we affirm the dependency order.⁴

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
JON W. THOMPSON, Judge

⁴ We amend the caption to refer to the child by her initials.