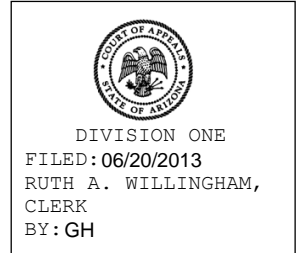


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



YESSENIA STORING,) No. 1 CA-SA 13-0104
)
Petitioner,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE HONORABLE RICHARD WEISS,) Rule 28, Arizona Rules of
Judge of the SUPERIOR COURT OF) Civil Appellate Procedure)
THE STATE OF ARIZONA, in and for)
the County of MOHAVE,)
)
Respondent Judge,)
)
MYRON STORING,)
)
Real Party in Interest.)
_____)

Petition for Special Action
from the Superior Court in Mohave County

Cause No. DO-2011-04406

The Honorable Richard Weiss, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED IN PART

Law Office of Michele Holden, PLLC
By Michele Holden
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Kingman

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Bullhead City

B R O W N, Judge

¶1 Yessenia Storing ("Mother") seeks special action relief from the trial court's temporary and final orders granting Myron Storing's ("Father") petition for modification of child custody¹ and parenting time.² For the following reasons, we conclude the court abused its discretion in treating Father's "emergency petition" as a request for modification on a permanent basis. We therefore accept jurisdiction and grant relief in part.

BACKGROUND

¶2 Father and Mother divorced in April 2012. The decree of dissolution provided that Mother and Father would have joint custody (with equal parenting time) of their two children, ages 7 and 11.

¶3 On January 10, 2013, Father filed an "Emergency Petition for Order to Appear to Modify [Mother's] Parenting Time; In the Alternative, Petition for Expedited Hearing to

¹ As of January 1, 2013, the legislature changed all references to "legal custody" in Arizona Revised Statutes ("A.R.S.") title 25, chapter four to "legal decision-making." See 2012 Ariz. Sess. Laws, ch. 309, § 4 (2d Reg. Sess.); A.R.S. § 25-401(3). The revised statute applies to these proceedings. Court rules, however, still use the term "custody" and thus we use the terms interchangeably here.

² Mother also challenges the trial court's order requiring that she appear for an evidentiary hearing. Because the hearing has already taken place and Mother appeared for it, the issue is moot and we do not consider it. See *Stop Exploiting Taxpayers v. Jones*, 211 Ariz. 576, 578, ¶ 6, 125 P.3d 396, 398 (App. 2005) ("Generally, a court will not consider moot questions.").

Modify [Mother's] Parenting Time and Order to Appear." Pursuant to Arizona Rule of Family Law Procedure ("ARFLP") 91(D) and A.R.S. § 25-414,³ Father requested that Mother's parenting time be modified immediately, subject to a later hearing to be set by the court. In support of his petition, Father cited several incidents, including Mother's arrest for extreme DUI on December 5, 2012, and statements Mother allegedly made to the children impugning Father's character. Father argued those instances demonstrated that it was necessary for the health, safety, and welfare of the children that parenting time be "immediately modified." Father also petitioned the court to modify "parenting time" to provide that "Father shall be the exclusive and sole legal decision maker for the minor children and further shall have sole and exclusive parenting time with the minor children, subject only to restricted and supervised parenting time" by Mother. Father also requested that Mother be ordered to pay child support after any modification of parenting time.

¶14 On January 14, the trial court signed Father's proposed order, which modified parenting time "on an emergency basis." The order also modified the decree such that Father became the "exclusive and sole decision maker for the minor

³ Section 25-414 appears to have no relevance in these proceedings because Father did not assert that Mother had "refused without good cause to comply with a visitation or parenting time order[.]"

children." Father was also granted primary parenting time, subject only to supervised visitation with Mother during two four-hour periods each week. The order was to remain in effect until February 4, when the court would hold a 90-minute evidentiary hearing "to determine whether or not the modified parenting time orders shall continue in effect as a permanent parenting time order of the Court."

¶15 On January 24, Mother moved to quash the temporary custody order and to dismiss Father's petition. In her motion, Mother argued that Father's petition failed to meet the requirements set forth in ARFLP 48 and A.R.S. § 25-411(L). According to Mother, Father's petition did not comply with those requirements because the factual basis for the petition was insufficient to warrant the court's temporary custody order. On the same day, Mother filed a response to Father's emergency petition, denying the majority of Father's allegations.

¶16 The court used the majority of the time allocated for the February 4 hearing to conduct *in camera* interviews with the children. Because only twenty minutes remained available for presentation of evidence, the court discussed various options with counsel. Mother's counsel expressed her client's desire to move forward with presentation of at least some evidence, explaining that "first of all[,] that this hearing is being held outside the time frame of an emergency ex parte order. So

something needs to be done. We need to have it. And it can't be delayed significantly given that my client hasn't even had a chance to put on her evidence." The court declined to rule on Mother's pending motion to quash/motion to dismiss, indicating that Father still had additional time to file a response. After approximately twenty minutes of testimony from Father's witnesses, the court agreed to give the parties an additional 50-60 minutes on February 13. Counsel for Mother asked the court if it had given "any thought" to changing the temporary orders. In response, Father's counsel urged the court to leave the "current emergency orders" in place pending the continued hearing, which the court agreed with.

¶17 At the continued hearing on February 13, the parties presented additional testimony. During closing arguments, Mother indicated she understood the proceedings were being conducted according to ARFLP 48 and were not for a permanent change in custody. Mother argued it was not clear to her that "a real petition has been filed to modify custody on a permanent basis." Father countered that his motion was brought pursuant to Rule 91(D) and therefore was intended to be one for permanent changes to the custody plan. Near the close of proceedings, Mother requested that the court set a trial date regarding permanent changes in custody.

¶18 On the record at the conclusion of the hearing, and after considering the evidence, the court ordered that the temporary orders remain in place. Mother again raised the issue whether Father's original petition was brought pursuant to Rule 91(D) and, if so, whether the procedural rules were followed. After hearing Mother's arguments, the court expressed some uncertainty as to which rules applied and stated it would independently review the rules and determine the proper course of action.

¶19 On February 27, the court filed a minute entry granting Father's petition, awarding him sole decision-making and primary parenting time for the children. The court determined that Father's petition did not seek temporary relief under Rule 48, but rather "sought emergency relief post decree contending his children's physical, mental, moral or emotional health was seriously endangered." The court then made findings supporting its modification of legal decision-making and parenting time. The court issued a signed "Order Granting Parenting Time Legal Decision Making to Father" on April 19. Mother then filed this special action.

DISCUSSION

¶10 Acceptance of special action jurisdiction is highly discretionary. See *Snyder v. Donato*, 211 Ariz. 117, 119, ¶ 6, 118 P.3d 632, 634 (App. 2005). Because this matter affects

young children, see *J.A.R. v. Superior Court*, 179 Ariz. 267, 273, 877 P.2d 1323, 1329 (App. 1994), and Mother lacks a plain and adequate remedy by appeal for the procedural irregularities she alleges, see *In re Marriage of Dorman*, 198 Ariz. 298, 303, ¶ 11, 9 P.3d 329, 334 (App. 2000), in our discretion we accept jurisdiction of this special action.

¶11 Mother challenges the court's temporary and permanent orders modifying legal decision-making and parenting time. Under Rule 3 of the Arizona Rules of Procedure for Special Actions, three questions may be raised on special action, including "whether a determination was arbitrary and capricious or an abuse of discretion." *State ex rel. Romley v. Superior Court*, 184 Ariz. 409, 410, 909 P.2d 476, 477 (App. 1995). "A court abuses its discretion if a decision is manifestly unreasonable or is based on untenable grounds or if its discretion is exercised for untenable reasons." *Schwartz v. Superior Court*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996).

¶12 A party seeking to modify child custody arrangements following a valid decree or judgment may do so by filing a petition under ARFLP 91(D). In its opening sentence, Rule 91(D) states that "[n]o hearing for modification of a child custody order or decree shall be set unless there is compliance with [Arizona Revised Statutes] § 25-411 and the requirements set

forth in this paragraph." As relevant here, under A.R.S. § 25-411(A),

[a] person shall not make a motion to modify a legal decision-making or parenting time decree earlier than one year after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may seriously endanger the child's physical, mental, moral, or emotional health.

A Rule 91(D) petition that alleges facts sufficient to support a modification under A.R.S. § 25-411 must be served on all persons entitled to notice, and an opposing parent has 20 days to respond if he or she is served in Arizona and 30 days otherwise. ARFLP 91(D)(3), (4). Upon filing of the petition, the court must determine whether a hearing is necessary to resolve the petition, and if so, may set a Resolution Management Conference or evidentiary hearing. ARFLP 91(D)(6).

¶13 Rule 91(D), by itself, does not provide a trial court with authority to enter temporary custody orders. Indeed, Rule 91(I) specifically states that "[a] request for post-decree or post-judgment temporary orders, if any, shall be filed in accordance with Rules 47 and 48." Thus, when a parent who has filed a Rule 91(D) petition also seeks a temporary custody order, the parent must comply with Rule 47 or 48.

¶14 As applicable here, Rule 48 addresses "Temporary Orders without Notice." Under that rule, "[a] party seeking a

temporary order without notice shall do so by filing a motion, verified or supported by affidavit, together with a proposed form of order, and a notice of hearing on the motion." ARFLP 48(A). The rule further requires that a Rule 48 motion "shall be filed after or concurrently with an initial pre-decree, post-decree or post-judgment petition authorized by statute." A trial court may grant a Rule 48 motion only if:

1. it clearly appears from the specific facts shown by affidavit or by the verified motion that irreparable injury will result to the moving party or minor child of the party . . . if no order is issued before the other party can be heard in opposition; and

2. the moving party or the party's attorney certifies to the court, in writing, the efforts, if any, that have been made to give the notice to the other party or the reasons supporting the claim that notice should not be required.

ARFLP 48(A). If the court grants a Rule 48 motion, it must set a hearing within 10 days of entering its order. ARFLP 48(B).

¶15 In this case, Father's petition appears to have requested both temporary and permanent modifications to the child custody arrangement. The opening sentence of Father's petition requested that "pursuant to [Rule] 91(D) . . . the Court [] modify the parenting time schedule of [Mother] on an Emergency basis or [schedule] an expedited hearing to modify the parenting time orders previously issued in this matter[.]" Father further asserted that "the health, safety and welfare of

the parties' minor children are immediately threatened by the conduct and behavior of [Mother]." After reviewing the relevant rules and applicable case law, we conclude that the trial court's treatment of Father's petition failed to provide Mother adequate notice and clarification of which requested form of relief (temporary or permanent changes to custody arrangement) would be adjudicated at the February 4 and February 13 evidentiary hearing.

¶16 The record reflects that Mother understood and treated Father's petition as requesting temporary custody modification. For example, in her closing argument, Mother stated, "[a]nd no matter what we're doing here, I just want to emphasize that they are temporary orders. And it's not even clear to me that a real petition has been filed to modify custody on a permanent basis[.]" Mother also questioned when the trial court would set the matter for a permanent custody determination. Moreover, at the close of the evidentiary hearing, the court itself indicated it was not entirely certain whether Father's petition was brought under Rule 91 or 48. Thus, the uncertainty of the procedure in this case deprived Mother of a meaningful opportunity to be heard on any matters beyond a request for temporary changes in legal decision-making and parenting time. See *Marco v. Superior Court*, 17 Ariz. App. 210, 212, 496 P.2d 636, 638 (1972) (noting that "no citizen shall be deprived of

his life, or his liberty, or his property, without reasonable notice and reasonable opportunity to be heard according to the regular and established rules of procedure.").

¶17 In sum, we conclude the procedural irregularities and lack of clarity throughout these proceedings deprived Mother of due process as it pertained to any permanent alteration of the custody arrangement. We therefore vacate the trial court's ruling that purported to modify the decree based on a Rule 91 petition. Nonetheless, because Mother clearly treated the petition as one for temporary orders and because we have no basis to think that the best interests of the children would be served by altering the temporary orders at this point, we decline to vacate the court's temporary orders. However, the trial court shall promptly convene a hearing to permit both parties to present additional evidence on the issue of whether legal decision-making and parenting time should be modified under A.R.S. § 25-411(A) and Rule 91. *Cf. DePasquale v. Superior Court*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995) (explaining that a temporary custody order improperly granted "is particularly troublesome in an interim change of custody because it subjects the child to a custodial disruption that may be unfounded and creates the risk that interim custody will solidify into a fait accompli by the time a delayed hearing is convened").

CONCLUSION

¶18 For the foregoing reasons, we accept jurisdiction of this special action. We vacate the trial court's order filed on April 19, 2013, and remand for further proceedings consistent with this decision.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge