IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TANASE PETRENCO, *Petitioner*,

v.

THE HONORABLE JOHN R. HANNAH, JR., Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, *Respondent Judge*,

FELECIA E. PETRENCO, *Real Party in Interest.*

No. 1 CA-SA 13-0313
FILED 12-19-2013

Petition for Special Action from the Superior Court in Maricopa County
No. FC 2003-090182
The Honorable John R. Hannah, Jr., Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

The Murray Law Offices, P.C., Scottsdale
By Stanley David Murray

Counsel for Petitioner

Felicia Petrenco, Chandler

Real Party in Interest in propria persona

DECISION ORDER

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Michael J. Brown joined.

K E S S L E R, Judge:

¶1 The Court, Presiding Judge Andrew W. Gould and Judges Donn Kessler and Michael J. Brown, participating, has considered the special action petition and appendices filed by Petitioner Tanase Petrenco ("Father"), the objection filed by Real Party in Interest Felecia E. Petrenco ("Mother"), and the reply filed by Father. We accept jurisdiction and grant relief to Father. The superior court's order entered on October 28, 2013 ("October Order") is vacated and this matter is remanded to the superior court to hold an evidentiary hearing as soon as possible on Father's second petition to modify legal decision-making, parenting time and child support, at least on the issues of domestic violence.

¶2 We accept special action jurisdiction. Special actions from child custody orders, even if appealable, should be the subject of special action relief when the issue concerns the safety and health of the child for which an appeal cannot offer equally plain, speedy and adequate relief. *See Bechtel v. Rose*, 150 Ariz. 68, 71, 722 P.2d 236, 239 (1986). Given the allegations of Father's petition in the superior court and the supporting report of the court-appointed coordinator, an appeal would not be an adequate remedy. Accepting jurisdiction is also appropriate because Father presents a pure issue of law—whether he met the pre-hearing procedural requirements of Arizona Revised Statutes ("A.R.S.") section 25-411 (Supp. 2013) to qualify for a hearing on his custody and support petition. *See Whillock v. Bee*, 232 Ariz. 139, 140, ¶ 4, 302 P.3d 664, 65 (App. 2013) (stating that accepting special action jurisdiction is appropriate when the petition largely involves issues of law); *In re Marriage of Dorman*, 198 Ariz. 298, 302-03, ¶¶ 11, 14, 9 P.3d 329, 333-34 (App. 2000) (stating that question of compliance with A.R.S. § 25-411's procedural requirements should be raised by special action).

¶3 In July 2012, the superior court entered a stipulated order modifying Father and Mother's custody of their children, CP and SP. Mother was now to have sole legal and primary physical custody of CP, and Father was to have sole legal and primary physical custody of SP.

Each parent would have both children on alternating weekends. In May 2013, less than one year later, the parent coordinator issued a report that CP was not adjusting well to the change and both children had been exposed to domestic violence from Mother's live-in boyfriend. Although she found that the boyfriend was no longer living at Mother's home, she found he did stay overnight when CP was there. She strongly recommended the court consider modifying the custody and parenting order to give CP more time with Father and SP, and found that CP's mental health was at risk if the current order remained unchanged.

¶4 In June and within one year of the July 2012 order, Father filed his first petition to modify custody, basing it mainly on the coordinator's report. He included an allegation of changed circumstances, the most serious of which was the domestic violence issues. He requested that he be given joint decision-making for CP, that the parents have equal parenting time with CP, and that Mother's boyfriend be ordered to stay away from the boys unless he obtained appropriate counseling. Mother filed a response conclusorily denying some of the allegations and claimed that a therapeutic interventionist and the best interest attorney had found the coordinator's statements unfounded. Mother did not attach any supporting documents**.**

¶5 The court denied the petition without holding an evidentiary hearing. It held that the petition was filed less than a year after the July 2012 order and Father had not shown there was reason to believe CP's environment might seriously endanger the child's physical, mental, moral or emotional health as required by A.R.S. § 25-411(A). Although the court stated it was concerned about the coordinator's findings and conclusions, including the domestic violence, it noted the boyfriend was no longer living with Mother and that there was a power struggle between the two parents. It concluded that modifying the custody order might not be in the best interests of CP.

¶6 In September 2013, four months after the coordinator's report and now more than one year after the July 2012 custody order, Father filed a second petition to modify that order. Father explained that he had now remarried and his home was stable, repeated the allegations in the earlier petition but added that the boyfriend is still living at Mother's home and that the boyfriend had poured beer on CP's head, which Mother had defended. Mother's response denied most of the new allegations and contended that the boyfriend, who never lived with her, got along fine with CP and CP was adjusting well.

¶7 The superior court entered its October Order denying the petition without holding an evidentiary hearing. It acknowledged that a year had passed since the July 2012 order but that its concerns in the order denying the first petition still applied and that there was inadequate cause for an evidentiary hearing.

¶8 Father argues, in part, that to the extent the October Order was based on the lack of evidence showing CP's environment might seriously endanger the child's physical, mental, or emotional health, that factor no longer applies because the second petition was filed more than one year after the July 2012 order. Father also argues that the conflicting verified petitions show a factual dispute, and because his second verified petition shows a sufficient change of circumstances from the July 2012 order, the court had to hold an evidentiary hearing and not decide the factual dispute on conflicting affidavits. Mother argues that she has suffered from domestic violence by Father and that this special action petition is simply another effort to intimidate her. She also argues that the court correctly denied the petition because, after the first petition was denied, it had ordered that before any party can file a petition regarding parenting time, the party had to first consult with the coordinator and file a certification to that effect, which Father failed to do.

¶9 We agree with Father. By its own terms, A.R.S. § 25-411(A) does not apply to the second petition because that petition was filed more than one year after the July 2012 order and would not apply in any event if, as here, there are allegations of child abuse. To the extent the October Order impliedly relies on the provisions of that statute, it is erroneous.

¶10 To the extent the October Order is based on the adequacy of the petition, it is also erroneous. The petition, based primarily on the parental coordinator's detailed report, showed a change of circumstances since July 2012 that CP and SP were both exposed to domestic violence at Mother's home, and that CP was extremely unhappy with the custody arrangement. These were not conclusory allegations, but detailed facts sufficient to require an evidentiary hearing on the petition. *See* A.R.S. § 25-411(L) (providing that modification petition shall set forth detailed facts in support of the request); *Pridgeon v. Superior Court*, 134 Ariz. 177, 182, 655 P.2d 1, 6 (1982) (holding that conclusory allegations under A.R.S. § 25-411 are insufficient to trigger the need for a hearing). Because the court was faced with a sufficient verified petition and a rebutting verified response, it could not hold a trial by affidavit, but "must hold" an evidentiary hearing. *Id*. at 181, 655 P.2d at 5. Although the superior court might have been justifiably concerned that the petitions to modify might

be a tug of war between the parents, the solution was to hold an evidentiary hearing given the allegation of domestic violence and the coordinator's report supporting that allegation. If the court ultimately determines after such a hearing that Father's petition was unfounded, it can take appropriate action. *See, e.g.*, A.R.S. § 25-411(M) ("The court shall assess attorney fees and costs against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.").

¶11 Mother contends the superior court properly dismissed the petition because Father had not certified that he had brought the dispute to the coordinator again. We disagree. The court's August 2013 order provided that before either party can file any petition regarding parenting time, the parties "shall first consult with the Parenting Coordinator, *unless there is an emergency related to the child's health, safety and welfare*." (Emphasis added.) The detailed allegations of domestic violence coming on the heels of the coordinator's report that CP and SP were witnesses to and victims of domestic violence in Mother's home are an emergency and were sufficient to order an evidentiary hearing despite the consultation order. Moreover, the court did not deny the second petition based on the certification issue, but because it did not think the petition was sufficient to order a hearing.

¶12 We recognize the superior court's concern that some of the disputes over custody and parenting time should be considered and resolved first by the coordinator if possible. However, given the allegations and the coordinator's findings of domestic violence, an evidentiary hearing at least on those allegations is necessary. Nothing in this order precludes the court from referring the non-domestic violence allegations to the coordinator for her recommendations and possible resolution.

¶13 Father has asked for an award of his attorneys' fees pursuant to A.R.S. § 25-324 (Supp. 2013). We are not in a position to determine whether such fees are awardable based either on a disparity of the parties' income or the reasonableness of the parties' positions. On remand, the superior court may make a decision on attorneys' fees, including fees incurred by Father on this special action, after holding an evidentiary hearing. We do, however, award Father's taxable costs incurred in this special action upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.

¶14 **IT IS HEREBY ORDERED** accepting jurisdiction of the petition for special action and granting Father relief. The superior court's order filed on October 28, 2013 is vacated and this matter remanded to the superior court for further proceedings consistent with this decision, including without limitation, the holding of an evidentiary hearing as soon as possible on Father's second petition to the extent it alleges domestic violence in Mother's home, which affects CP.