IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JAMES HOWARD CARPENTER, *Petitioner/Appellant*,

v.

TARA LYNN DALLEY, *Respondent/Appellee*.

No. 1 CA-CV 15-0443 FC A
FILED 5-3-2016

Appeal from the Superior Court in Maricopa County
No. FC2013-092782
The Honorable Bethany G. Hicks, Judge (Retired)

VACATED AND REMANDED

COUNSEL

Davis Miles McGuire Gardner, Tempe
By Douglas C. Gardner
Counsel for Petitioner/Appellant

Michael J. Shew, Ltd., Phoenix
By Michael J. Shew
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Maurice Portley and Judge John C. Gemmill joined.

T H U M M A, Judge:

¶1 James Howard Carpenter (Father) appeals the superior court's order modifying a pre-existing parenting plan, granting Tara Lynn Dalley (Mother) joint legal decision-making authority for their two children and increasing Mother's parenting time. This is an accelerated appeal pursuant to Arizona Rule of Civil Appellate Procedure (ARCAP) 29 (2016).[1] Father argues the court erred by modifying the parenting plan without making specific statutory findings and without notice to Father, and by delegating its responsibility to a therapeutic interventionist. Because the record provided does not include the required findings, the order is vacated and this matter is remanded for further consideration consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Mother have two children, and were divorced by a decree entered in May 2014, which included a stipulated parenting plan. The stipulated plan grants Father sole legal decision-making authority, allows Mother supervised time with the children and contemplates a gradual transition into more time with the children as Mother completes stipulated requirements, including remaining sober. The plan required the appointment of a therapeutic interventionist who, with Mother's therapist, would make recommendations to the court concerning her time with the children. From the record, and to her credit, it appears Mother has remained sober and participated in therapy.

¶3 On May 27, 2015, Mother filed a motion for an expedited order regarding care of the children during Father's 5-day honeymoon, set to begin on May 29, 2015. The motion was filed just after the therapeutic interventionist re-filed a May 18 report, adding a two-page May 27, 2015 report that recommended Mother "provide parenting time for the children

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[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

from 5/29 through 6/2/2015." The May 18 report included 40 numbered recommendations that the therapeutic interventionist "respectfully requested . . . be made into court orders," including permissible babysitters, school choice, phone and text message use, vacation scheduling, passport possession and a recommendation that joint legal decision-making and equal parenting time be ordered. The court held a brief status conference on May 29, where Mother, her counsel and the therapeutic interventionist were present telephonically, but "Father is neither present nor represented by counsel," even though, as the court noted, attempts had been made to contact Father. Later that day, Mother filed a petition to modify legal decision-making authority, parenting time and child support.

¶4 On May 29, after the status conference, the court entered a signed order stating in pertinent part:

> IT IS ORDERED,
>
> 1. The Therapeutic Interventionist's Report dated May 18, 2015 is adopted as an order of the court.

An unsigned minute entry filed on June 3, 2015 references the Therapeutic Interventionist's May 18 report and then states "IT IS ORDERED adopting the recommendations of the therapeutic interventionist as a temporary order, to become a final order without further notice on June 8, 2015, unless prior thereto a written objection is filed." On June 9, 2015, Father filed a notice of appeal challenging the signed May 29 order.

¶5 Father then filed a motion to stay the May 29 order pending appeal, which this court granted. This court also granted Mother's motion for acceleration pursuant to ARCAP 29 and has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

I. The May 29 Order Failed To Make Specific Best Interests Findings.

¶6 Father argues the May 29 order fails to properly include specific best interests findings. As applicable here, in determining legal decision-making and parenting time on a petition for modification, the court "shall consider all factors that are relevant to the child's physical and emotional well-being, including" 11 enumerated factors. A.R.S. § 25-403(A). The resulting order must include specific findings for each relevant factor,

and a failure to do so is error. *Nold v. Nold*, 232 Ariz. 270, 273 ¶ 11 (App. 2013). "A court may consider expert opinion in making such decisions, but a court can neither delegate a judicial decision to an expert witness nor abdicate its responsibility to exercise independent judgment. The best interests of the child . . . are for the court alone to decide." *DePasquale v. Superior Court*, 181 Ariz. 333, 336 (App. 1995).

¶7 The May 29 order does not address or make any findings regarding the A.R.S. § 25-403(A) factors. Instead, the order adopted the recommendations of the therapeutic interventionist with no further explanation. Doing so was error; an independent finding for each relevant factor was required and adopting the recommendations of the therapeutic interventionist was not sufficient. *See Nold*, 232 Ariz. at 273-74 ¶¶ 11-14.

¶8 Mother claims findings were not required because the modifications stem from a stipulated parenting plan, and Father did not timely object within the five days provided in the June 3 minute entry, meaning the issues were not contested. *See* A.R.S. § 25-403(B). Mother provides no supporting authority for her claims. Additionally, had the stipulated parenting plan created an uncontested modification of legal decision-making authority and parenting time, Mother would not have needed to file a petition. Mother, however, did file a petition, stating "Father has advised Mother and the Therapeutic Interventionist that he does not agree with Mother's proposed legal decision-making and parenting time orders, or the recommendations of the Therapeutic Interventionist." In short, Mother has not shown the modification of legal decision-making authority and parenting time was not contested. Accordingly, best interests findings were required under A.R.S. § 25-403. *See Nold*, 232 Ariz. at 273 ¶ 11.

¶9 Mother also argues Father waived any objection to the lack of findings by not objecting to the therapeutic interventionist report or the order in the five days provided by the court. In doing so, Mother cites *Banales v. Smith*, 200 Ariz. 419, 420 ¶ 7 (App. 2001), but concedes that the more recent case of *Reid v. Reid*, 222 Ariz. 204, 209 ¶¶ 18-19 (App. 2009) rejects her argument. *Reid* refused to apply the waiver rule adopted in *Banales* because "the most important issue in custody disputes is the best interests of the child or children" and "[t]he lack of findings . . . was error as a matter of law, which deprived this court of a meaningful opportunity to assess the family court's best interests finding, and Father did not waive this issue in this limited circumstance by failing to raise it" with the superior court. 222 Ariz. at 209-10 ¶ 20 (citation omitted). The Arizona Supreme Court underscored this focus on best interests after *Banales* but before *Reid*.

See Hays v. Gama, 205 Ariz. 99, 102 ¶ 18 (2003) ("We have repeatedly stressed that the child's best interest is paramount in custody determinations."). Finding *Reid* controls here, there was no waiver. Accordingly, the May 29 order was error because it adopted the therapeutic interventionist's report without making the statutorily-required best interest findings.[2]

II. Attorneys' Fees.

¶10 Both parties request attorneys' fees and costs incurred on appeal pursuant to A.R.S. § 25-324. Because this court does not have updated financial information from either party, the requests are denied without prejudice to the superior court considering such requests if made on remand.

CONCLUSION

¶11 The May 29, 2015 order is vacated and this matter is remanded for further proceedings consistent with this decision.

[2] Given this conclusion, this court need not address Father's argument that the superior court acted without giving Father an opportunity to respond.