IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

ASHLEY JO BOHAC, *Petitioner/Appellee,*

v.

JEREMY T. WIESE, *Respondent/Appellant*.

No. 1 CA-CV 17-0154 FC
FILED 2-1-2018

Appeal from the Superior Court in Maricopa County
No. FC 2015-03888
The Honorable Suzanne E. Cohen, Judge

AFFIRMED

COUNSEL

Jeremy T. Wiese, Tempe
Respondent/Appellant

Schmillen Law Firm PLLC, Scottsdale
By James R. Schmillen
Counsel for Petitioner/Appellee

MEMORANDUM DECISION

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Patricia A. Orozco[1] joined.

C A M P B E L L, Judge:

¶1 Jeremy Wiese ("Father") appeals the family court's order concerning the division of legal decision-making authority, parenting time, and child support between himself and Ashley Bohac ("Mother") over their minor child. For the following reasons, we affirm the court's order.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Mother were married in December 2010. They had one child ("Child") together in April 2012. In June 2013, the parties were divorced in Nebraska. The decree of dissolution of marriage incorporated a parenting plan giving Mother legal and primary physical custody of Child, subject to Father's reasonable rights of parenting time, and outlined the parties' respective child support obligations.

¶3 In December 2013, the Nebraska district court granted Mother's request to modify the decree, authorizing her to move to Arizona with Child. The Nebraska court's modification order also made several changes regarding child support, contribution for childcare expenses, and health insurance for Child, but otherwise maintained the parenting plan and custody arrangement of the original decree.

¶4 In April 2015, Father filed a petition to modify legal decision-making, parenting time, and child support in the Arizona superior court. In his petition, Father requested joint legal decision-making authority and equal parenting time, indicating he was in the process of also moving to Arizona.

¶5 Mother filed her response to Father's petition to modify, denying that she "was awarded legal and physical custody based solely on Father's location" and affirmatively alleging that "Father agreed to and did

---

[1] The Honorable Patricia A. Orozco, retired Judge of the Arizona Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

not contest Mother having legal and physical custody" of Child. Mother noted that she had "concerns with Father's ability to properly care for" Child, including "Father's past issues with anger management and Father's previous failure to cooperate with Mother and adhere to the terms of the parties' parenting plan." She alleged it would be in the best interests of Child to gradually and incrementally increase Father's parenting time with supervision.

¶6 In July 2015, Mother and Father participated in a resolution management conference. The family court set a telephonic status conference for October 2015 and ordered the parties to participate in private mediation before then. Approximately one month later, however, Father's counsel filed an application to withdraw, with Father's consent, which the court granted. At the October status conference, the court granted the parties' request to extend the mediation deadline.

¶7 The parties participated in private mediation in November 2015 but did not reach a resolution. Father's behavior during mediation resulted in Mother obtaining an order of protection against Father, which Father admitted was for disturbing the peace. Soon after, Father hired his second attorney, Michael Albee.

¶8 In a letter dated November 30, 2015, Father—through his new attorney—proposed a settlement offer regarding legal decision-making authority, a graduated parenting time schedule, and child support matters. Albee and Mother's attorney then exchanged a series of emails negotiating the potential terms of a settlement, including the condition that Father obtain professional counseling. The last disputed provision of Mother's final settlement offer was sent by email to Albee on February 26, 2016. Albee replied by email the same day, stating, "My client accepts the terms of the agreement."

¶9 In March 2016, the parties jointly submitted a notice of settlement to the family court and moved to vacate the impending trial. The parties asked the court for a deadline of May 15 for submitting a stipulated order and parenting plan, which the family court granted. In April, Mother's attorney sent Father's attorney Albee the first draft of a stipulated order documenting the terms of their ultimate agreement. Father then sent an email directly to Mother, insisting that the "current parenting plan is still valid until the 'agreed upon' parenting plan is signed and approved."

¶10 In late April 2016, Michael Albee filed his application to withdraw as Father's attorney, which the family court granted in May.

Thereafter, Father corresponded directly with Mother's counsel and repeatedly insisted that no settlement agreement had ever been reached. Father filed a notice of non-settlement and motion to set a hearing, identifying the issues outlined in his April 2015 petition to modify as the issues before the court. In her response, Mother argued that they had already entered into an agreement that was binding under Rule 69 of the Arizona Rules of Family Law Procedure. She requested a one-hour evidentiary hearing on the limited issue of whether the parties were bound by the agreement under Rule 69.

¶11 The family court held an evidentiary hearing on October 19, 2016 to determine the validity of the parties' agreement under Rule 69. At the hearing, Father testified that his former attorney Albee was "inept," unable to "exhibit the professional knowledge to properly domesticate our foreign orders," and that he "fraudulently induced" Mother's counsel and Father into a Rule 69 agreement. The court found, based on Father's allegations, that he had opened the door to his communications with his attorney regarding the settlement agreement. The court allowed testimony from Albee on this limited issue.

¶12 In turn, Albee testified that he had communicated the terms of each settlement offer to Father and received Father's approval for each negotiated provision before responding. Albee further testified that the terms outlined in the order lodged with the family court were consistent with the terms of the parties' settlement agreement.

¶13 The family court found the evidence from the letters and emails exchanged between the parties' counsel made it clear that the parties had reached a binding settlement agreement under Rule 69. The court further found the settlement agreement was in Child's best interests, and entered an order executing its terms. The court also granted Mother's request for attorney fees and costs.

DISCUSSION

¶14 Father appears to present a number of arguments in support of his request that this court vacate the family court's order: (1) he never entered into a binding settlement agreement with Mother; (2) the final order is not in Child's best interests; (3) he did not waive his attorney-client privilege and his former attorney Albee should not have been allowed to testify about their communications regarding the alleged settlement agreement; and (4) he was denied due process when the family court

rejected his request to question Mother's attorney. We do not find the arguments persuasive and therefore affirm the family court's order.

I. Validity of the Settlement Agreement under Rule 69

¶15 In his opening brief, Father repeatedly challenges the validity of the final settlement agreement.

¶16 Rule 69 states that an agreement between the parties "shall be valid and binding if . . . the agreement is in writing."[2] Ariz. R. Fam. Law. P. 69(A), -(A)(1). Any such agreement entered into by the parties "shall be presumed to be valid and binding, and it shall be the burden of the party challenging the validity of the agreement to prove any defect in the agreement." Ariz. R. Fam. Law P. 69(B). Interpretations of procedural rules, including Rule 69, are reviewed de novo. *Ames v. Ames*, 239 Ariz. 246, 249 (App. 2016).

¶17 Here, after a back-and-forth email exchange between the parties' counsel negotiating the particular terms, Albee sent Mother's counsel an email in February 2016 stating that "[m]y client accepts the terms of the agreement." Although Father maintains that he never would have agreed to the specific terms ultimately defined in the family court's order, Albee testified otherwise. At the evidentiary hearing, Mother's counsel elicited the following testimony from Albee:

> Q. . . . After the order of protection hearing, did you author a series of communications to my office in an effort to settle this matter?
>
> A. Yes.
>
> . . .
>
> Q. . . . In the first line of the letter you state, "I have spoken with [Father] and he has authorized me to propose a new settlement offer regarding all contested issues."

---

[2] Rule 69 was adapted from Arizona Rule of Civil Procedure 80(d); in interpreting the Family Rule, Arizona courts may therefore look to cases interpreting the Civil Rule. *See* Ariz. R. Fam. Law P. 69 comm. cmt; Ariz. R. Fam. Law P. 1 comm. cmt ("Wherever the language in these rules is substantially the same as the language in other statewide rules, the case law interpreting that language will apply to these rules.").

> . . .
>
> Q. Was that a true statement?
>
> A. That was a true statement.
>
> Q. Is that still a true statement?
>
> A. That's still a true statement.
>
> . . .
>
> Q. . . . In your practice of law, do you communicate settlement offers to clients to make sure they give approval before sending them out?
>
> A. Every single time.
>
> Q. And you did so in this case?
>
> A. I did.
>
> . . .
>
> Q. . . . Each and every negotiation and all those letters admitted as exhibits, did you discuss with [Father] each and every one of those negotiations?
>
> A. Yes, I did.
>
> Q. And did [Father] agree to the final terms of that Rule 69 agreement?
>
> A. Yes, he did.

As the family court noted, "the evidence is clear from the letters and emails between counsel for both parties that an agreement was reached." The court also determined that "the credible evidence is that Father agreed to the final settlement between the parties" and "Father's statements to the contrary are simply buyer's remorse." An email between the parties' attorneys may serve to satisfy Rule 69's prescription that agreements shall be valid and binding if in writing. *See Robertson v. Alling*, 237 Ariz. 345, 348, ¶ 14 (2015) ("[I]f Rule 80(d) applies, the attorneys' exchange of emails satisfied the rule. Nothing requires clients to separately assent in writing to a written agreement brokered by their attorney. . . . Our courts have long recognized

that attorneys can bind clients who have cloaked them with apparent authority to act on their behalf.") (citations omitted).

¶18 Father's assent to the settlement agreement is further evidenced by Mother and Father's joint submission of a notice of settlement stipulating that the parties "have settled all matters currently before this Honorable Court." We therefore deny Father's request to vacate the family court's order executing the terms of the parties' settlement agreement.

¶19 Father also argues that the settlement agreement was not binding because he did not personally sign it. At a hearing in February 2016, the family court made a note in its minute entry:

> Counsel and the parties are reminded of their obligation to give prompt notice of any settlement to the Court as required by Rule 70, Arizona Rules of Family Law Procedure. Should the parties reach a full agreement prior to the date of the hearing, the Court will consider a motion to vacate the hearing ONLY AFTER A SIGNED STIPULATED AGREEMENT IS PRESENTED TO THE COURT.

Father contends this was an "order" from the family court requiring that any settlement agreement between the parties would need to be signed and submitted to the court in full before it would be considered binding.

¶20 The family court, however, does not have the power to add or subtract to the requirements of Rule 69; the above caution to the parties did not prevent Mother and Father's emailed settlement agreement from becoming binding merely because they had not personally signed it. *See Anderson v. Pickrell*, 115 Ariz. 589, 590 (1977) (the Arizona Supreme Court has the constitutional authority to make procedural rules, and "[t]his power may not be supplemented, annulled or superseded by an inferior court"). Rather, the family court was informing the parties of what the court would prefer to see before it exercised its discretion to vacate the trial—but it was also within the family court's discretion to then elect to vacate the trial even without seeing a signed stipulated agreement. *See Findlay v. Lewis*, 172 Ariz. 343, 346 (1992) (a trial court has "broad discretion over the management of its docket" and appellate courts "do not substitute their judgment for that of the trial court in the day-to-day management of cases") (citation omitted).

II. Child's Best Interests

¶21 Father challenges the family court's finding that the terms of the settlement agreement were in Child's best interests, asserting that reducing his parenting time, increasing his child support obligations, and adding counseling services he cannot afford are not in his Child's best interests.

¶22 "The court shall determine legal decision-making and parenting time, either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all factors that are relevant to the child's physical and emotional well-being . . . ." Ariz. Rev. Stat. ("A.R.S.") § 25-403(A). A family court's determination of whether a Rule 69 agreement is in the best interests of a minor child is reviewed for an abuse of discretion. *See Nold v. Nold*, 232 Ariz. 270, 273, ¶ 11 (App. 2013).

¶23 During the evidentiary hearing, Mother provided the following testimony:

> Q. Do you believe that this agreement is in the best interest of [Child]?
>
> A. Yes. I believe it's in the best interest of [Child.] I feel that I want him to have a relationship with his father, but knowing the past and even going back to when we had the restraining order, I believe moving forward with him getting help would be good for [Child] and his future, but I would like to see the help.
>
> . . .
>
> Q. Did you incorporate by reference, in the interest of time, the analysis of [the A.R.S. § 25-403(A) best-interests] factors as set forth in your pretrial statement?
>
> A. Yes.

¶24 Father presented no evidence concerning the best-interests factors outlined in A.R.S. § 25-403(A); he gave only conclusory testimony that the settlement agreement is "against the best interest of my minor child." Given the ample evidence Mother provided at the hearing, the family court did not abuse its discretion by ruling that the terms of the agreement were in Child's best interests.

III. Waiver of Attorney-Client Privilege Concerning the Settlement Agreement

¶25 Father contends the family court erred by ruling Father had opened the door to his communications with Albee regarding the settlement agreement, arguing Albee should not have been allowed to testify.

¶26 "The attorney-client privilege safeguards the communication between the attorney and client made in the course of the attorney's professional employment." *Burch & Cracchiolo, P.A. v. Myers*, 237 Ariz. 369, 374, ¶ 17 (App. 2015) (citations omitted). The client is the holder of the privilege, *id.*, and "[i]n a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment," A.R.S. § 12-2234(A).

¶27 While a client's waiver of privilege is usually explicit, it may also be implied. *Burch*, 237 Ariz. at 374, ¶ 17. "Implied waiver can occur where a party advances a claim or affirmative defense premised upon otherwise privileged information . . . ." *Id*. at 375, ¶ 20; *see also Accomazzo v. Kemp, ex rel. Cty. of Maricopa*, 234 Ariz. 169, 172, ¶ 9 ("When a party affirmatively places privileged communications at issue, it waives the attorney-client privilege.") (citation omitted). Whether a party has impliedly waived the attorney-client privilege is a mixed question of law and fact that we review de novo. *Burch*, 237 Ariz. at 374, ¶ 14.

¶28 During the evidentiary hearing, Father questioned Albee's "dedication" and testified that Albee was "inept" and "unable to exhibit the professional knowledge" necessary to domesticate foreign orders in the case. Father further testified that Albee had fraudulently induced him to enter into the final agreement. The trial court found, "based on [Father's] testimony and his allegation that his attorney was inept and that he was somehow fraudulently induced into a Rule 69 agreement, that [Father had], in fact, waived [his] attorney-client privilege" regarding the Rule 69 agreement negotiations. The court therefore permitted Mother to call Albee as a witness, and also gave Father the opportunity to cross-examine him.

¶29 By calling his former attorney's conduct into question and claiming to have been fraudulently induced into settling, Father affirmatively placed otherwise privileged information directly at issue. The family court properly found that Father had opened the door to his communications with his former attorney regarding the final settlement

agreement. *See Elia v. Pifer*, 194 Ariz. 74, 81, ¶ 35 (App. 1998) (where the client's theory of the case was partly that he had not agreed to settle his dissolution matter, he was not "entitled to preclude evidence relevant to these matters by asserting the attorney-client privilege").

IV. Father's Alleged Due Process Right to Examine Mother's Counsel

¶30 Father argues that it was a violation of due process for the family court to deny his request to call Mother's attorney as a witness at the evidentiary hearing. Father contends that, because the court allowed his former attorney to testify regarding their communications during the settlement negotiations, Mother's attorney became a vital witness as the only other person able to testify about those communications.

¶31 Due process entitles a party to an opportunity to be heard, to offer evidence, and to confront adverse witnesses. *Curtis v. Richardson*, 212 Ariz. 308, 312, ¶ 16 (App. 2006). Only after the family court determined Father had opened the door to having his former attorney Albee questioned did it allow limited testimony about the settlement negotiations. Father was not entitled to call Mother's attorney as a witness, as Mother had done nothing to waive her own attorney-client privileged communications.

CONCLUSION

¶32 For the foregoing reasons, we affirm. Mother requests an award of attorney fees and costs pursuant to A.R.S. § 25–324. In our discretion, we award Mother an amount of reasonable attorney fees and costs to be determined upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA