IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

CHRISTOPHER JAMES WITHROW, et al., *Petitioners/Appellants*,

v.

MALLORY MIZELLE, *Intervenor/Appellee*.

No. 1 CA-CV 18-0090 FC
FILED 12-4-2018

Appeal from the Superior Court in Maricopa County
No. FC2015-002674
The Honorable Katherine M. Cooper, Judge

AFFIRMED IN PART; APPEAL DISMISSED IN PART

COUNSEL

Christopher James Withrow, Littleton, CO
Petitioner/Appellant

David J. Withrow, Story, WY
Petitioner/Appellant

Marilyn N. Withrow, Story, WY
Petitioner/Appellant

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

M c M U R D I E, Judge:

¶1 David and Marilyn Withrow ("Grandparents") appeal the superior court's dismissal of their petition for third-party custody (legal decision-making authority) and grandparent visitation. For the following reasons, we affirm. Christopher Withrow ("Father") also appears as an appellant but, for the following reasons, we dismiss his appeal.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Megan M. ("Mother") are the biological parents of G.W., born in January 2015. At the time of her birth, both parents were incarcerated on drug charges. Mother gave G.W.'s maternal aunt ("Aunt") permission to care for G.W., and she has since lived with Aunt.

¶3 In February 2015, Father filed a paternity petition in the superior court (the "family case"). In April 2015, Aunt filed a petition in the juvenile court to terminate Father's parental rights, explaining she had Mother's consent to adopt G.W. and intended to do so when Father's parental rights were terminated. That same month, Grandparents petitioned the superior court for "third party custody and grandparent visitation" in the family case. *See* Ariz. Rev. Stat. ("A.R.S.") § 25-409. Aunt then moved to intervene and dismiss Grandparents' petition. Upon learning about the severance action, the court entered an order "staying [the family case] proceedings, pending a final determination of all matters in the Juvenile Court." *See* Ariz. R.P. Juv. Ct. 7. The court observed, "It is not in the interests of judicial economy to litigate the Grandparents' petition when there is a pending action to terminate their son's parental rights to that same child."

¶4 In February 2017, after a contested severance hearing, the juvenile court terminated Father's parental rights finding that: (1) Father had been convicted of a felony and would be incarcerated for a length of time that would deprive the child of a normal home for a period of years; and (2) severance was in the child's best interests. Father appealed, and we

affirmed. *See Christopher W. v. Mallory M.*, 1 CA-JV 17-0087, 1 CA-JV 17-0350, 2017 WL 4545960, at *8, ¶ 31 (Ariz. App. Oct. 12, 2017) (mem. decision).

¶5 In July 2017, Father moved for the superior court to "Enforce Petitioner's Right to Direct the Upbringing of Daughter Pursuant to A.R.S. Title 1, Chapter 6, Article 1, et., seq. a.k.a. Parents' Bill of Rights." The superior court summarily dismissed the motion, concluding that because Father's parental rights had been terminated, he "cannot seek any order conferring guardianship of the minor child." Grandparents then moved to lift the stay in the family case and "proceed with third party custody determination."

¶6 In November 2017, Aunt petitioned the juvenile court to adopt G.W., and the court entered an order of adoption on January 3, 2018. After the adoption, Aunt moved to dismiss the family case. The court granted Aunt's motion, dismissing the matter with prejudice.

¶7 Father appealed the court's orders denying his motion to enforce and dismissing the paternity action. On appeal, he argued the superior court erroneously (1) failed to hold a hearing "concerning paternity" under the Parents' Bill of Rights; (2) failed to investigate the dilatory representation of court-appointed counsel; and (3) violated his constitutional rights to due process and access to the courts by allowing the juvenile court proceeding to take priority. We affirmed, concluding that "Father's appeal is merely an attempt to circumvent the juvenile court's order terminating his parental rights." *Withrow v. Mizelle* (*Withrow I*), 1 CA-CV 17-0585FC, 2018 WL 4090572, at *2, ¶ 9 (Ariz. App. Aug. 28, 2018) (mem. decision).

¶8 Grandparents now appeal the superior court's dismissal of their third-party petition. We have jurisdiction over Grandparents' appeal pursuant to A.R.S. § 12-2101(A)(1). We note that Father also appears as an appellant in this appeal. To the extent Father questions the denial of his motion to enforce or the dismissal of the paternity action, those issues were litigated and decided in *Withrow I*. Thus, Father is precluded from relitigating them here. *See Ezell v. Quon*, 224 Ariz. 532, 536, ¶ 14 (App. 2010) (discussing application of law of the case doctrine). To the extent Father questions the denial of Grandparents' petition for third-party legal decision-making authority and grandparent visitation, we conclude he lacks standing to do so. *See Antonio M. v. ADES*, 222 Ariz. 369, 370, ¶ 2 (App. 2009) (once a parent's rights are terminated, the parent no longer has standing to challenge the child's placement or adoption); *see also Christopher*

W., 2017 WL 4545960, at *6, ¶ 25, n.9. Therefore, we dismiss the appeal relating to Father.

DISCUSSION

¶9 Grandparents challenge the dismissal of their petition for third-party legal decision-making authority and grandparent visitation, arguing they were denied due process. Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), but a party asserting a denial of due process must show prejudice, *e.g.*, *Brown v. Ariz. Dep't of Real Estate*, 181 Ariz. 320, 324 (App. 1995). We review a due process claim *de novo*. *Jeff D. v. DCS*, 239 Ariz. 205, 207, ¶ 6 (App. 2016); *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6 (App. 2001).

A. Grandparents Were Not Eligible for Legal Decision-Making Authority.

¶10 Grandparents petitioned for legal decision-making authority over G.W. *See* A.R.S. § 25-409(A). But the court must summarily deny such a petition if (among other things) the petitioner does not allege that he or she "stands *in loco parentis* to the child." *Chapman v. Hopkins,* 243 Ariz. 236, 240, ¶ 16 (App. 2017). "A person stands *in loco parentis* if the child has treated that person as a parent and has formed a meaningful parental relationship with the child for a substantial period of time." *Id.* (citing A.R.S. § 25-401(1)). In this case, Grandparents conceded they did not stand *in loco parentis* to G.W. *Cf. id.* at 242, ¶ 22 (the grandparents' petition, which was supported by a parent's affidavit, established they stood *in loco parentis* to the minor children). Because the petition did not sufficiently establish one of the factors under A.R.S § 25-409(A), Grandparents were not eligible to be awarded legal decision-making authority. *See id.* at 240, ¶ 17 ("Once the family court determines that the petition sufficiently establishes these factors and therefore does not summarily deny the petition, the court then examines the petition's merits."). On this basis, we find no error.

B. Grandparents Were Not Entitled to Visitation.

¶11 Alternatively, Grandparents requested that they be allowed visitation with Child. *See* A.R.S. § 25-409(C); *Sheets v. Mead*, 238 Ariz. 55, 57, ¶ 7 (App. 2015). But any visitation rights the court might have granted under A.R.S. § 25-409(C) would have automatically terminated in January 2017, when G.W. was adopted by Aunt. *See* A.R.S. § 25-409(H). Thus, to the extent Grandparents contend the superior court unreasonably delayed a decision on visitation, that issue is now moot. *See, e.g.*, *Cardoso v. Soldo*, 230

Ariz. 614, 616–17, ¶ 5 (App. 2012) (an issue becomes moot when an event occurs that would cause our decision to have no practical effect). Therefore, we decline to address it further.

C. Issues Surrounding the Child's Adoption Cannot be Raised in This Appeal.

¶12 Finally, to the extent Grandparents raise questions that implicate the juvenile court's order of adoption, we lack jurisdiction to address the propriety of that order. *See Lee v. Lee*, 133 Ariz. 118, 124 (App. 1982) ("The court of appeals acquires no jurisdiction to review matters not contained in the notice of appeal."). We note the issue of Aunt's "unclean hands" vis-à-vis her desire to adopt G.W. was raised in Father's appeal from the juvenile court's order terminating his parental rights, and we rejected these allegations as contrary to the record. *See Christopher W.*, 2017 WL 4545960, at *2, ¶ 10. We concluded the record reflected the following:

> Aunt assumed custody of Child at birth, with Mother's permission, at a time when Mother and the alleged father—whose paternity had not been acknowledged or established—were serving lengthy terms of incarceration in federal prison for drug trafficking offenses; and Aunt has since provided a safe, loving, and appropriate home for Child.

Id. at *3, ¶ 14, n.5 (citation omitted).

CONCLUSION

¶13 For the foregoing reasons, we affirm.

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