IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOSHUA M. COFFEE, *Petitioner*,

v.

THE HONORABLE JENNIFER RYAN-TOUHILL, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge*,

JENNIFER LEIGH APPLING, *Real Party in Interest.*

No. 1 CA-SA 18-0217
FILED 10-18-2018

Petition for Special Action from the Superior Court in Maricopa County
No. FC2008-050057
The Honorable Jennifer C. Ryan-Touhill, Judge

JURISDICTION ACCEPTED; RELIEF DENIED; REMANDED

COUNSEL

The Murray Law Offices PC, Scottsdale
By Stanley D. Murray
Counsel for Petitioner

Schill Law Group LLC, Scottsdale
By Melanie G. Gable
Counsel for Real Party in Interest

MEMORANDUM DECISION

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge James B. Morse Jr. joined.

B R O W N, Judge:

¶1 Joshua M. Coffee ("Father") challenges the superior court's order directing his minor son ("G.C.") to move from Arizona, where he resided with Father, to Kansas, where he now resides with his mother, Jennifer Leigh Appling ("Mother"). Father requests that we vacate the ruling and order the immediate return of G.C. to Arizona. For the following reasons, we accept jurisdiction, but deny Father's requested relief. However, because Father was denied due process, we remand and direct the superior court to conduct an evidentiary hearing that complies with applicable rules and statutes.

BACKGROUND

¶2 Mother and Father divorced in 2008, resulting in joint legal decision-making authority with Father serving as the primary residential parent and Mother receiving specified parenting time with G.C. Mother moved to Kansas in 2010, and the parties stipulated to a long-distance parenting plan. In 2011, the parties agreed to a new plan after court intervention.

¶3 On July 31, 2018, Mother filed a petition to modify parenting time and child support. She alleged that G.C. had been engaging in high risk and unsafe behaviors since October 2017 and requested that the court "[r]everse the roles of the parties in their current parenting time plan, and allow the child to reside with Mother in Kansas." A week later, Mother filed an emergency motion to modify parenting time and child support. Father filed a response that addressed both motions and counter-petitioned to modify legal decision-making. Father alleged he had been actively working with Mother to address G.C.'s recent mental and emotional health issues and there was no basis for an emergency motion. In his counter-petition, Father alleged Mother refused to return G.C. at the end of the summer and "inappropriately discusses the parenting time schedule, court order, and court process[es] with the child" despite G.C.'s therapist in Kansas "admonish[ing] both parents from discussing" the issues with G.C.

¶4 In a subsequent minute entry, the superior court treated Mother's emergency motion as a motion for temporary orders without notice under Rule of Family Law Procedure ("Rule") 48. The court denied the motion because it did not find that Mother had demonstrated "irreparable injury, loss or damage," but it set a "Return Hearing" for August 16, 2018. The court's order to appear did not specify what type of hearing would be held but informed the parties that the court would hear testimony only from the parties; no witnesses or exhibits would be permitted.

¶5 Despite the court's prehearing directive, at the August 16 hearing, the court read and relied on therapy notes from G.C.'s summer therapist in Kansas, which Mother provided. These notes had not been disclosed to Father or his counsel before the hearing, and it appears that only Father's counsel was briefly allowed to review them before they were provided to the court. The record further reveals that the court proceeded to question Father about the contents of the therapy notes and relied on Father's answers regarding the information in the therapy notes as well as the court's interpretation of the notes' contents.

¶6 In making its ruling that G.C. would move to Kansas to reside with Mother, the court did not make any specific finding as to parenting time, other than stating that if Father travels to Kansas, "he shall have parenting time with the child."[1] The court then scheduled a telephonic follow-up hearing for November 6, 2018. Father filed this special action on September 20, 2018.

JURISDICTION

¶7 Special action jurisdiction is appropriate when no "equally plain, speedy, and adequate remedy by appeal" exists. Ariz. R.P. Spec. Act. 1(a). Temporary orders under Arizona Revised Statutes ("A.R.S.") section 25-404 are not directly appealable because they are "'merely preparatory to a later proceeding' that might affect the judgment or its enforcement." *Gutierrez v. Fox*, 242 Ariz. 259, 264, ¶ 12 (App. 2017) (citation omitted). Because temporary orders do not provide parties an adequate remedy by

[1] The superior court did not address Mother's request to modify child support or Father's counter-petition to modify legal decision-making. The court shall address those matters, as well as Mother's request to change parenting time, on remand.

appeal, we have discretion to accept special action jurisdiction over them. *Id.* Given the interests at stake in this matter, we accept jurisdiction pursuant to A.R.S. § 12-120.21(A)(4) and Arizona Rule of Procedure for Special Action 1(a).

DISCUSSION

¶8 As an initial matter, neither party has provided us with any information as to when G.C. moved to Kansas in accordance with the superior court's order. Regardless, Father has provided no explanation for why he waited more than a month to file his petition for special action. Nor is there any indication that Father sought a stay from the superior court to permit him to challenge the order by promptly filing a special action. Thus, under these circumstances we are unable to provide Father the specific relief he seeks, which is the immediate return of G.C. to Arizona. *See DesPasquale v. Superior Court*, 181 Ariz. 333, 336 (App. 1995) (explaining that by the time the petitioner "approached this court for relief, it was too late to restore the parties to their status" as of when the superior court issued its ruling changing custody). In consideration of the important interests at stake here, however, we conclude that a new hearing is required.

¶9 Father argues that the court abused its discretion and violated his due process rights because he was denied the "opportunity to discover and confront adverse evidence." We review orders modifying legal decision-making or parenting time for an abuse of discretion. *Cruz v. Garcia*, 240 Ariz. 233, 236, ¶ 9 (App. 2016). A court abuses its discretion when it "commits an error of law in the process of reaching a discretionary conclusion." *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8 (App. 2008).

¶10 Mother asserts that Father waived his due process claim because he did not object on this basis below. Generally, we do not consider issues raised for the first time on appeal; however, this rule is "jurisprudential, not substantive." *Cruz*, 240 Ariz. at 236, ¶ 10. Assuming, without deciding, that this same principle applies in special action proceedings, we do not "mechanically apply[] waiver principles" in certain family law matters because the focus there is often the best interests of the child. *See Reid v. Reid*, 222 Ariz. 204, 209, ¶ 19 (App. 2009) (addressing waiver in a non-temporary order hearing). We decline to apply waiver here because even though Father's counsel did not say "I object," counsel did attempt to raise an issue about the lack of disclosure of the therapy notes, but was told by the judge, "I don't want to hear anything about . . . disclosure issues."

¶11 Parents are entitled to "due process whenever [their] custodial rights will be determined in a proceeding." *Smart v. Cantor*, 117 Ariz. 539, 542 (1977). Parents are afforded due process when they receive "'notice and an opportunity to be heard at a meaningful time and in a meaningful manner,' as well as a chance to offer evidence and confront adverse witnesses." *Cruz*, 240 Ariz. at 236, ¶ 11 (citations omitted).

¶12 These due process requirements are especially pertinent in matters affecting children "[b]ecause determinations of legal decision-making and parenting time rest upon the best interests of the child, [so] it is 'necessary that the parties have time to prepare and present all relevant evidence to the court' before such orders are modified." *Id.* (quoting *Evans v. Evans*, 116 Ariz. 302, 306–07 (App. 1977)). The procedural guidelines established by Rule 47 and A.R.S. § 25-404 protect parties' due process rights while ensuring that the outcome is in the best interests of the child.

¶13 Rule 47 provides that "upon receiving a post-decree or post-judgment motion for temporary legal decision-making, parenting time, or visitation orders, . . . the court shall schedule a pretrial conference, a Resolution Management Conference pursuant to Rule 76(A), or an evidentiary hearing, which shall be set not later than thirty . . . days after receiving the motion." *See* Ariz. R. Fam. Law P. 47 (B), (D)(1). Rule 47 also (1) establishes that if the court does not first schedule an evidentiary hearing, it must do so within thirty days of the relevant proceeding; and (2) prohibits the court from resolving disputed issues of fact at any hearing other than an evidentiary hearing, absent the parties' consent. *Id.*

¶14 Here, it is not clear from the record before us whether Mother's motion for emergency modification of parenting time was a proper motion for temporary orders because she did not cite Rule 47 or § 25-404; nor did she request that the court issue any temporary orders. *See* Ariz. R. Fam. Law P. 47 (B); *Gutierrez*, 242 Ariz. at 267, ¶ 32 ("[Section] 25-404 only applies to temporary orders, and is triggered only after a party to an 'originally' filed petition files a *motion* for a temporary order."). Furthermore, Mother's motion for emergency modification is almost an exact replica of the petition for modification and the relief requested is not for a temporary order, but for the court to "reverse the roles of the parties in their current parenting time plan, and allow the child to reside with Mother in Kansas." *See* Ariz. R. Fam. Law P. 47 (B) (detailing the pleading requirements for a motion for temporary orders).

¶15 Assuming arguendo that the motion was valid, the superior court did not comply with Rule 47's procedural requirements. Ariz. R. Fam.

Law P. 47 (B), (D). It is clear from the language of the order to appear that the August 16th hearing was not intended to be an evidentiary hearing within the meaning of Rule 47; but, the court nonetheless decided disputed issues of fact and failed to set an evidentiary hearing within 30 days of the motion, both of which are contrary to Rule 47's directives. *Id.*

¶16 Section 25-404 provides that the "court may award temporary legal decision-making and parenting time under the standards of § 25-403 after a hearing, or, if there is no objection, solely on the basis of the pleadings." A.R.S. § 25-404; *see also DesPasquale*, 181 Ariz. at 336 (finding the trial court abused its discretion by failing to conduct an evidentiary hearing and that "[s]uch an error 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").

¶17 Section 25-403 lists the factors relevant to a court's determination of what is in the best interests of the child. A.R.S. § 25-403 (A). In contested matters, the statute requires the court to "make specific findings on the record about all the relevant factors and the reasons for which the decision is in the best interests of the child." *See* A.R.S. § 25-403 (B); *see also, e.g.*, *In re Marriage of Diezsi*, 201 Ariz. 524, 526, ¶ 5 (App. 2002) (remanding the case to the superior court because neither the order nor the transcript on the hearing of the motion demonstrated that the court made specific findings concerning each factor).

¶18 Granted, if Mother's motion could properly be treated as a motion for a temporary order, the superior court was not required to make the specific factual findings required by § 25-403 (A), (B). *Gutierrez*, 242 Ariz. at 268, ¶ 34 (declining to mandate that § 25-403 findings be made in every temporary order because of the "extraordinary number of motions for temporary orders" and the "minimal utility of detailed findings in such orders"). However, *Gutierrez* did not abrogate the superior court's responsibility to consider the § 25-403 factors. After reviewing the record provided to us, it is not apparent that the court considered the factors before ordering G.C. to immediately move to Kansas to reside with Mother.

¶19 "Due process requires that when there are disputed issues of fact as to a child's best interests, 'the court must allow the parties to present evidence before making its findings.'" *Cruz*, 240 Ariz. at 237, ¶ 16 (quoting *Murray v. Murray*, 239 Ariz. 174, 179, ¶ 18 (App. 2016)). It is clear from the transcript that there were disputed issues of fact as to G.C.'s best interests; therefore, the court abused its discretion when it did not provide Father the

opportunity to present evidence demonstrating that it was in G.C.'s best interests for Father to remain the primary residential parent. *See id.* The court further disregarded Father's due process rights to the extent it based its decision on therapy notes that were not disclosed to Father before the hearing, were not admitted as evidence (and thus not reviewable by this court), and whose contents were not subject to cross-examination. *See id.* at ¶ 17 (concluding that the court's reliance on documents that were not admitted as evidence or subjected to adversary testing was a violation of due process). The superior court is allowed broad discretion in making decisions based on consideration of § 25-403's factors, but it must be clear that those factors form the basis for the court's order.

¶20 As noted, the record lacks support for the superior court's decision to treat Mother's filings as a request for temporary orders, but even temporary orders that are decided without providing the parties due process cannot stand. By failing to follow the procedural requirements of Rule 47 and §§ 25-404, -403, the court denied Father an opportunity to defend the "fundamental liberty interest" he has in his G.C.'s "care, custody, and management." *See Cruz*, 240 Ariz. at 236, ¶ 11 (quoting *Ruben M. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 236, 238, ¶ 12 (App. 2012)).[2]

¶21 Finally, Father and Mother argue that the other has taken an unreasonable position in this special action, and they each request an award of attorneys' fees pursuant to A.R.S. § 25-324(A), which gives a court discretion to award fees after consideration of the "financial resources of both parties and the reasonableness of the positions" taken in the proceedings. Neither party, however, has provided us with any evidence of financial resources, or even alleged that a financial disparity exists. We therefore deny both requests.

[2] Given our decision to remand based on lack of due process, we need not address Father's argument that the superior court judge relied on her personal beliefs to decide the outcome.

CONCLUSION

¶22 We accept jurisdiction but deny Father's requested relief. For the reasons explained above, we remand for the superior court to conduct an appropriate evidentiary hearing within 60 days of this decision. The court must address the relevant factors of § 25-403(A), as well as other pertinent statutes, and explain how these factors support its decision regarding the pending requests to modify legal decision-making, parenting time, and child support.

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