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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ANGEL J., *Petitioner,*

v.

THE HONORABLE DAVID K. UDALL, Judge of the SUPERIOR COURT
OF THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge,

DEPARTMENT OF CHILD SAFETY, S.G., and CRYSTAL G.,
Real Parties in Interest.

No. 1 CA-SA 19-0150
FILED 9-17-2019

Petition for Special Action from the Superior Court in Maricopa County
No. JD530256
The Honorable David K. Udall, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Czop Law Firm PLLC, Higley
By Steven Czop
Counsel for Petitioner

Arizona Attorney General's Office, Tucson
By Dawn Rachelle Williams
Counsel for Real Party in Interest Department of Child Safety

MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Samuel A. Thumma and Judge Randall M. Howe joined.

S W A N N, Chief Judge:

¶1 In this dependency action, the juvenile court, without holding an evidentiary hearing or otherwise receiving any evidence, denied Petitioner’s motion to change physical custody of his child from a foster placement to a relative placement. That was a denial of due process. We therefore accept jurisdiction and grant relief.

FACTS AND PROCEDURAL HISTORY

¶2 In October 2018, the Department of Child Safety removed ten-month-old S.G. from her mother’s custody and filed a dependency petition. Petitioner, who is incarcerated, was one of two alleged fathers.

¶3 In March 2019, the Department petitioned to terminate the parental rights of S.G.’s mother and both possible fathers. The next month, Petitioner contested the dependency and submitted to genetic testing that established his paternity. Soon thereafter, as reflected in the court’s minute entry for a May 22 hearing, Petitioner’s counsel “request[ed] a hearing on a change of custody motion which he will be filing.” By the same minute entry, the court set a one-hour evidentiary hearing on the anticipated motion for June 27. The minute entry reflects no objection by the Department.

¶4 Petitioner filed the motion on May 28, requesting that S.G. be placed in the physical custody of his sister, S.G.’s paternal aunt. Petitioner contended that S.G. could not have been in her foster placement for more than seven months, there was no information regarding her bond with her co-placed one-month-old maternal half-sister, and it was unclear what bond such young siblings could maintain. Petitioner stated that the paternal aunt had attended the last two hearings, had cleared a Department background check, and was scheduled for a Department home study that his counsel believed she would pass. Petitioner further proposed that if placed with the paternal aunt, S.G. would become like a sibling to the aunt’s

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three children and would benefit from the involvement of other paternal family members.

¶5 The Department filed a response on June 4. Objecting to any change in physical custody, the Department argued that S.G. had been in the same foster home since her removal from her mother's care and was very bonded to the placement. The Department further stated that the paternal aunt had expressed willingness to assume custody of S.G. only, whereas the current placement was willing to adopt both S.G. and her half-sister (assuming that the half-sister's case plan changed to severance and adoption) and was willing to facilitate contact between S.G. and paternal family members.

¶6 On June 11, without the benefit of any documentary evidence and before the scheduled evidentiary hearing, the juvenile court denied Petitioner's motion. The court held:

Paternal Aunt's home could potentially be a good home for the Child. However, the Child, who is one year old, has been with placement for eight months and, as a result, the Child is "... very bonded to placement" (See DCS's Response to Father's Motion, page 1, line 28). The Court finds that it is not in the best interest of the Child to remove her from current placement, whom she has bonded to, and place her with Paternal Aunt at this time.

¶7 Petitioner moved for reconsideration, asserting that a favorable home-study report for the paternal aunt had issued on June 6 and arguing that he was entitled to a hearing as a matter of due process. The court summarily denied Petitioner's motion. Petitioner seeks relief by way of special action.

DISCUSSION

¶8 We exercise special-action jurisdiction because questions involving the custody of children require speedy resolution. *See* Ariz. R.P. Spec. Act. 1(a); *e.g.*, *Stephenson v. Nastro*, 192 Ariz. 475, 479, ¶ 10 (App. 1998).

¶9 "Juvenile courts have substantial discretion when placing dependent children because the court's primary consideration in dependency cases is the best interest of the child." *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, 404, ¶ 8 (App. 2008); A.R.S. §§ 8-514(B), -845(A) (specifying that Department shall place children in least-restrictive placements, consistent with their best interests); *see also Lorenz v. State*, 238

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Ariz. 556, 558, ¶ 14 (App. 2015) (recognizing that Department's primary purpose is to protect dependent children). But due process requires that the court may not deny a parent's request to modify the child's placement without providing the parent the opportunity to be heard at a meaningful time and in a meaningful manner. *See Jeff D. v. Dep't of Child Safety*, 239 Ariz. 205, 207-08, ¶¶ 7-8 (App. 2016).

¶10 The Department points out that Petitioner did not request a hearing under Ariz. R.P. Juv. Ct. ("Rule") 58(D), which provides that a "party seeking an evidentiary hearing on any issue shall file a motion requesting that the matter be set for a contested hearing" and that "[t]he motion shall identify the issues to be litigated, the names and addresses of all witnesses and the estimated time the parties will need to present evidence." We perceive no procedural deficiency. As a preliminary matter, Rule 58(D) "should be interpreted in a manner designed to protect the best interests of the child, giving paramount consideration to the health and safety of the child." Rule 36. In other words, the rule should not be mechanically applied to short-circuit a meaningful inquiry into whether a request for change in physical custody would serve the child's best interests. Here, we ascribe no significance to Petitioner's failure to file a written request for an evidentiary hearing because the court, without any objection by the Department, had set the matter for such a hearing even before he filed the substantive motion requesting a change in custody. Even if Petitioner's failure to identify witnesses under Rule 58 could justify preclusion of the witnesses' testimony, *cf.* Rule 44 (describing disclosure obligations and sanctions in dependency, guardianship, and termination adjudication hearings), the juvenile court did not deny the hearing on that ground.

¶11 To be meaningfully heard, a parent seeking modification of his or her dependent child's placement must be allowed to present evidence. *Cf. Cruz v. Garcia*, 240 Ariz. 233, 237, ¶ 16 (App. 2016) (holding that when child's best interests are at issue in family-law case, due process requires court to permit the parties to present evidence). The presentation of evidence includes the reasonable opportunity to offer testimony when credibility is central to the dispute. *Volk v. Brame*, 235 Ariz. 462, 466, ¶ 14 (App. 2014). *But see Jeff D.*, 239 Ariz. at 208-09, ¶¶ 11, 15-16 (concluding that even if foster placement held due-process rights equivalent to those held by biological parents, such rights were not violated by court's resolution of placement dispute based solely on bonding-assessment and behavioral-therapist reports, because court was not deciding disputed issues of fact about the respective placements but was instead weighing the statutory preference for relative placement against the possibility of

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emotional harm to child based on transfer). Here, the court decided the motion to change physical custody without considering any evidence, testimonial or otherwise. That violated due process.

¶12 We reject the Department's contention that Petitioner is not entitled to relief because he has not identified the evidence he would have presented and how it would have affected the juvenile court's decision. At a minimum, Petitioner identified the favorable home study as information that the court should have considered.

CONCLUSION

¶13 For the reasons set forth above, we accept jurisdiction and grant relief.



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