DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HEATHER CHANDLER, Petitioner, v. THE HONORABLE CAREY SNYDER HYATT, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, BRIAN BARTOLINI, Real Party in Interest.	)	1 CA-SA 10-0028 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Petition for Special Action
from the Maricopa County Superior Court

Cause No. FC 2008-053121

The Honorable Carey Snyder Hyatt, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

Mueller & Drury, P.C. — Scottsdale
By James P. Mueller
Attorney for Petitioner

The Harrian Law Firm, P.L.C. — Glendale
By Julius Harms
Attorney for Respondent

B A R K E R, Judge

¶1 Heather Chandler ("Mother") filed this special action seeking relief from the family court's order granting (1) the motion to vacate a relocation provision in a default decree and (2) the alternative petition to modify custody. For the following reasons, we accept jurisdiction and grant the relief requested by Mother.

Facts and Procedural History

¶2 Mother and Brian Bartolini ("Father") are the parents of two minor children. Mother filed a petition for dissolution of marriage on October 3, 2008. After Father failed to respond to the petition for dissolution of marriage, the court entered a default decree dissolving the marriage on January 21, 2009. Pursuant to the default decree, Mother was awarded sole custody of the children.

¶3 Prior to the divorce, Mother, Father, and the children lived in Arizona, and the children attended school in Arizona. In August 2009, Mother and the children moved from Arizona to New York, and Mother subsequently remarried. In the fall of 2009, the children began attending a new school in New York. Father did not consent to Mother's relocation of the children.

¶4 After Mother moved to New York with the children, Father, for the first time, read the petition for dissolution of marriage and the default decree. In the petition for dissolution of marriage, Mother requested sole custody and

reasonable parenting time for Father, but the petition was silent on relocation terms. The custody and parenting time provision in the default decree provided:

> Petitioner/Mother shall have sole legal custody of the two (2) minor children. Respondent/Father shall have flexible parenting time as negotiated by the two parties and as determined in the best interests of the minor children. The children shall be in Mother's physical custody at all other times. During Father's parenting time, he may not travel outside the State of Arizona without Mother's written permission. *Pursuant to ARS § 25-408, Mother may relocate the minor children out of the State of Arizona or more than 100 miles, without Father's written permission or Court order.* The receiving parent will provide the transportation at the beginning and end of parenting time periods for Father.

(Emphasis added).

¶5 On August 27, 2009, Father filed a motion to vacate the relocation provision contained in the default decree because, he argued, this term in the default decree exceeded the scope of custody requested in the petition for dissolution of marriage. One week later, Father filed a petition for order to show cause to prevent relocation of the children and an alternative petition to modify custody. On December 2, 2009, the family court granted Father's motion to vacate, removed the relocation provision from the default decree, and ordered Mother to bring the children to Arizona by December 26, 2009. Mother

returned to Arizona with the children and filed a motion for new trial challenging this ruling.

¶6 After an evidentiary hearing regarding the relocation of the children to New York and Father's petition to modify custody, the family court entered an order on January 25, 2010, (1) denying Mother's request to relocate the children, (2) modifying custody from sole custody to joint custody, and (3) denying Mother's motion for a new trial. Mother filed this petition for special action relief on February 18, 2010.

Discussion

1. Jurisdiction

¶7 "Special action jurisdiction is highly discretionary," *Blake v. Schwartz*, 202 Ariz. 120, 122, ¶ 7, 42 P.3d 6, 8 (App. 2002), and is proper when there is not "an equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). Special action jurisdiction is especially appropriate to resolve pure issues of law. *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 165–66, 83 P.3d 1103, 1106–07 (App. 2004). This case deals with the relocation of children and their placement in school. We accept special action jurisdiction because there is no adequately prompt remedy by appeal; an appeal would interfere with another semester of the children's schooling. *See Jordan v. Rea*, 221 Ariz. 581, 586, ¶ 9, 212 P.3d 919, 924 (App. 2009)

(accepting special action jurisdiction over case involving placement of child in a private religious school).

2. Relocation Provision

¶8 Mother argues the family court improperly modified the default decree by striking the relocation provision. Father does not address the merit of Mother's argument in his response to her petition for special action; however, Father contended before the family court that the relocation provision in the default decree was void because it exceeded the scope of relief sought in Mother's petition for dissolution of marriage. We review an order regarding relocation and child custody for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003).

¶9 For good cause and in accordance with Arizona Rule of Family Law Procedure 85, the court can set aside a default judgment. Ariz. R. Fam. L.P. 44(C). Rule 85 allows a party to file a motion to correct mistakes or challenge a court order. *Id.* 85(C). Rule 85 states:

> 1. On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:
>
> a. Mistake, inadvertence, surprise or excusable neglect;
>
> . . . .

> c. Fraud, misrepresentation, or other misconduct of an adverse party;
>
> d. The judgment is void; [or]
>
> . . . .
>
> f. Any other reason justifying relief from the operation of the judgment.

Id. 85(C)(1). The motion must "be filed within a reasonable time, and for reasons 1(a) . . . and (1(c) not more than six (6) months after the judgment or order was entered or proceeding was taken." *Id.* 85(C)(2).

¶10 "A judgment or order is void if the court entering it lacked jurisdiction: (1) over the subject matter, (2) over the person involved, or (3) to render the particular judgment or order entered." *State v. Cramer*, 192 Ariz. 150, 153–54, ¶ 16, 962 P.2d 224, 227–28 (App. 1998) (holding license revocation order was voidable because Arizona Department of Transportation had jurisdiction over the subject matter, the parties, and revocation orders). A judgment or order is voidable when the court has jurisdiction over the parties and subject matter but enters an erroneous and reversible judgment or order. *Id.* Voidable judgments "are subject to reversal on timely appeal." *Auman v. Auman*, 134 Ariz. 40, 42, 653 P.2d 688, 690 (1982) (finding trial court's decree of dissolution giving wife

"exclusive use and occupancy" of jointly owned property was voidable).

¶11 Here, the relocation provision in the default decree was not a void judgment because the family court had jurisdiction over the dissolution action and over Mother and Father. Assuming the relocation provision exceeded the scope of the petition for dissolution and was voidable, Father had grounds to file the motion to vacate term pursuant to Rule 85(C)(1)(a) for surprise or Rule 85(C)(1)(c) for misrepresentation. Father, however, filed the motion to vacate on August 27, 2009, which was more than six months after entry of the default decree. Thus, Father's motion was untimely, and the family court erred in granting the motion.

¶12 Father also pointed to the catch-all provision under Rule 85(C)(1)(f) and asserted the six-month time limit did not apply to his motion. We disagree. Father filed the motion to vacate because it exceeded the scope of the petition for dissolution, which could constitute surprise under Rule 85(C)(1)(a) or misrepresentation under Rule 85(C)(1)(c). The general catch-all provision cannot include already enumerated provisions; otherwise there would be no need for the specific provisions. *See In re Maricopa County, Juv. Action No. JA 33794*, 171 Ariz. 90, 93, 828 P.2d 1231, 1234 (App. 1991) ("Specific statutory provisions control over those that are

general."); *see also* Ariz. R. Civ. P. 60(c) (the civil rule counterpart to Rule 85(C)(1)); *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, ¶ 6, 999 P.2d 198, 201 (2000) (requiring a party demonstrate the reason for setting aside a judgment under the catch-all provision is not enumerated in the more specific provisions of Rule 60(c)).

¶13 In his deposition prior to the evidentiary hearing, Father admitted that he chose not to participate in the dissolution proceedings and did not inform himself of the terms of the default decree until Mother relocated to New York. Father had six months to challenge the relocation provision under Rule 85 but failed to do so in a timely manner.

¶14 Despite a parent's failure to timely file a Rule 85 motion, our statutes allow a parent to file "a motion to modify a custody decree earlier than one year after its date . . . on the basis of affidavits that there is reason to believe the child's present environment may seriously endanger the child's physical, mental, moral or emotional health." Ariz. Rev. Stat. ("A.R.S.") § 25-411(A) (Supp. 2009). In the motion to vacate, Father made no allegations that the relocation to New York "seriously endanger[ed]" the children. Consequently, the family court erroneously granted Father's motion to vacate.

¶15 Father also filed a petition for order to show cause to prevent relocation of minor children on September 4, 2009,

alleging relocation was inappropriate under A.R.S. § 25-408. In particular, Father challenged the relocation because Mother did not relocate the children in accordance with the notice provisions of A.R.S. § 25-408(B). Subsection (B) and the related provisions allowing a parent to challenge relocation do "not apply if a provision for relocation of a child has been made by a court order or a written agreement of the parties that is dated within one year of the proposed relocation of the child." A.R.S. § 25-408(E) (Supp. 2009). Here, there was such an order.

¶16 Moreover, even if A.R.S. § 25-411 was the asserted basis for Father's petition, Father argued relocation to New York would cause the children to change schools and interfere with their relationship with Father, their relatives, and their school teachers in Arizona. General detriment to children inherent in any move to a new state does not rise to the "seriously endanger" standard required to modify a custody agreement under A.R.S. § 25-411(A). Thus, neither the motion to vacate nor the September 4 petition provided a basis for the trial court to strike the relocation provision from the default decree or otherwise prevent relocation to New York.

3. Modification of Custody

¶17 On January 25, 2010, the family court modified the custody agreement from sole custody to joint custody. Father

requested a modification of custody as an alternative in his September 4 petition for order to show cause to prevent relocation of minor children. As stated above, under A.R.S. § 25-411,

> [a] person shall not make a motion to modify a custody decree earlier than one year after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may seriously endanger the child's physical, mental, moral or emotional health.

A.R.S. § 25-411(A). Here, Father requested a modification of custody less than one year from the entry of the default decree. Father did not identify A.R.S. § 25-411 as the basis for his modification request, and nothing in Father's petition demonstrated the children's environment in New York "seriously endanger[ed]" their well-being. Consequently, the family court improperly modified the custody agreement.[1]

¶18 We note that after one year, a court may modify a custody agreement if there has been a "change of circumstances materially affecting the welfare of the child." *Hendricks v. Mortensen*, 153 Ariz. 241, 243, 735 P.2d 851, 853 (App. 1987);

[1] Because custody should not have been modified, the family court's modification of child support and award of attorneys' fees was also erroneous. In addition, Mother seeks relief from the family court's failure to consider evidence at the evidentiary hearing. We do not address the evidentiary issue because the motion to vacate and petition to modify custody should not have been granted.

see also A.R.S. § 25-411(F). The one year period has now passed, and Father can file a petition to modify the custody agreement because Mother's relocation to New York is a substantial change materially affecting the welfare of the children. Immediately upon the issuance of this decision, either party may file a motion for a temporary order if a request to change custody is made. A.R.S. § 25-404 (2007).

Conclusion

¶19 For the foregoing reasons, we vacate the family court's December 2 order granting the motion to vacate and January 25 order modifying custody.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge