

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

AEYIM KIM MCCARTHY,
Petitioner/Appellee,

v.

JAMES MCCARTHY,
Respondent/Appellant.

No. 2 CA-CV 2018-0184
Filed August 20, 2019

Appeal from the Superior Court in Gila County
No. DO201800239
The Honorable Joe A. Albo Jr., Judge Pro Tempore

APPEAL DISMISSED

COUNSEL

Crider Law Firm PLLC, Mesa
By Kay A. Jones and Brad J. Crider
Counsel for Petitioner/Appellee

Collins & Collins LLP, Payson
By Joseph E. Collins
Counsel for Respondent/Appellant

OPINION

Presiding Judge Staring authored the opinion of the Court, in which
Chief Judge Vásquez and Judge Brearcliffe concurred.

STARING, Presiding Judge:

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¶1 James McCarthy appeals the superior court’s order affirming an order of protection in favor of Aeyim McCarthy. For the reasons that follow, we dismiss the appeal for lack of jurisdiction.

Factual and Procedural Background

¶2 In July 2018, Aeyim filed a petition for order of protection against James in the Payson Justice Court. The justice court issued an ex parte order of protection that same day, ordering James to have “no contact whatsoever” with Aeyim. James requested a hearing on the order, but the justice court cancelled the hearing after learning Aeyim had commenced divorce proceedings in Gila County Superior Court. The justice court transferred the order of protection proceedings to the superior court pursuant to Rule 34, Ariz. R. Protective Order P., and A.R.S. § 13-3602(P).

¶3 Once transferred, James again requested a hearing on the order of protection. At the hearing, the superior court noted it was “only handling the Order of Protection this date and nothing will be addressed in the related family law matter.” Afterwards, the court issued an under advisement ruling that kept the order of protection in effect. The court also issued a separate signed order and stated that it was entered pursuant to Rule 54(c), Ariz. R. Civ. P., and that it “resolves all claims in this proceeding and no further matters remain pending.” This appeal followed.

Discussion

¶4 Although neither party has raised the issue of jurisdiction, we have “an independent duty to examine whether we have jurisdiction over matters on appeal.” *Camasura v. Camasura*, 238 Ariz. 179, ¶ 5 (App. 2015).

¶5 Arizona law requires that, if there is a pending family law case in the superior court between the parties to an order of protection matter, the order of protection matter is to be transferred to the superior court and merged into, or “docketed in,” the superior court case. In part, § 13-3602(P) provides:

After issuance of an order of protection, if the municipal court or justice court determines that an action for . . . dissolution of marriage is pending between the parties, [it] shall stop further proceedings in the action and forward all papers, together with a certified copy of docket entries or any other record in the action, to the superior court where they shall be

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docketed in the pending superior court
action

Once such a case is transferred, the Arizona Rules of Family Law Procedure apply to the joined cases. Ariz. R. Protective Order P. 2 (“The *Arizona Rules of Family Law Procedure* apply to protective order matters heard in conjunction with pending family law cases.”). Thus, because the order of protection proceeding was transferred to the superior court in accord with § 13-3602(P), to be heard “in conjunction with” the parties’ pending divorce proceedings, the Arizona Rules of Family Law Procedure applied here. *See id.*; *see also* Ariz. R. Protective Order P. 34(a)(1); *Vera v. Rogers*, 246 Ariz. 30, ¶¶ 13-14 (App. 2018) (applying family rules where request for temporary parenting time and transferred order of protection pending in superior court).

¶6 Generally, “only final judgments are appealable.” *Ghadimi v. Soraya*, 230 Ariz. 621, ¶ 7 (App. 2012). “[A] family court ruling is not final and appealable until all of the claims pending before the court have been resolved” or until the court has issued a “certification of finality” under Rule 78(b), Ariz. R. Fam. Law P. *Natale v. Natale*, 234 Ariz. 507, ¶ 5 (App. 2014). Rule 78(b) provides that a judgment or order that resolves fewer than all claims is not final and appealable unless “the court expressly determines there is no just reason for delay and recites that the judgment is entered under Rule 78(b).” Without such a determination and recital, the ruling “is subject to revision at any time before the entry of a judgment adjudicating all the claims.” Ariz. R. Fam. Law P. 78(b).

¶7 The superior court acknowledged that other claims “in the related family law matter” were still pending when it ruled on the order of protection. Thus, the court could ultimately modify the order of protection in light of its decisions on the remaining family law claims. *See In re Marriage of Kassa*, 231 Ariz. 592, ¶ 6 (App. 2013); *see also Vera*, 246 Ariz. 30, ¶ 4 (order of protection transferred to superior court “for consolidation” with pending family matters, but assigned different case number pursuant to Rule 123, Ariz. R. Sup. Ct., and the Federal Violence Against Women Act). Therefore, the ruling needed to be certified under Rule 78(b) to be final and appealable. Such language was not present.¹

¹We issued an order for James to show cause why this appeal should not be dismissed. He contends Rule 42(a)(2), Ariz. R. Protective Order P., expressly provides that orders of protection are appealable. However, this does not dispense with the Rule 78(b) language requirement when an order of protection is “in conjunction with” pending family law matters. *Cf. Wood*

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¶8 Because divorce proceedings remained outstanding at the time the order was entered, and the order did not contain language pursuant to Rule 78(b), the order was not final and could not be appealed. Accordingly, we must dismiss this appeal for lack of jurisdiction. *See* Ariz. R. Fam. Law P. 1(c) (cases interpreting civil rules apply to substantially similar family rules); *Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, ¶¶ 10-11 (App. 2014) (although appellate court lacks jurisdiction to suspend appeal to allow superior court to enter a Rule 54(b), Ariz. R. Civ. P., judgment, parties may seek appealable judgment); *cf. Ochoa v. Bojorquez*, 245 Ariz. 535, ¶ 5 (App. 2018) (dismissing appeal for lack of Rule 78(b) finality language when petition to modify parenting time remained outstanding).

Disposition

¶9 For the foregoing reasons, we dismiss this appeal.

v. Abril, 244 Ariz. 436, ¶¶ 4-5 (App. 2018) (finality certification not needed for injunctions against harassment because expressly appealable by statute; no such statute exists for orders of protection). He also contends “if the court [were] to wait until all issues are adjudicated . . . then Defendants would not have meaningful review of any order of protection simply because it was transferred to superior court.” But parties do not have to wait until all family law matters are resolved; they must simply obtain a Rule 78(b) compliant judgment.