IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

GEORGIA L. BENSON, FKA GEORGIA L. CURDO,
Petitioner/Appellant,

and

BRIAN D. CURDO,
Respondent/Appellee.

No. 2 CA-CV 2016-0002
Filed October 19, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20122561
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

The Kenney Law Firm, P.L.C., Tucson
By Shaun P. Kenney
Counsel for Petitioner/Appellant

West, Elsberry, Longenbaugh & Zickerman, PLLC, Tucson
By Anne Elsberry
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Georgia Benson appeals the trial court's summary denial of her petition for modification of parenting time. For the following reasons, we affirm.

Procedural History

¶2 Benson and Brian Curdo were divorced in 2012, and have one daughter. In October 2014, Curdo was granted temporary sole legal decision-making authority for one year until Benson had at least one year of demonstrated sobriety. Benson was granted supervised parenting time.

¶3 In June 2015, Curdo filed a petition for modification seeking sole legal decision-making authority, contending that Benson had relapsed and failed to appear at mediation. Soon after, Benson's counsel filed a motion to withdraw "due to a deterioration of the attorney-client relationship and lack of communication between attorney and client." Benson did not appear at the hearing on the motion to withdraw, but after counsel addressed the trial court regarding notice to Benson, it granted the motion. On September 15, the court held a hearing on the petition to modify legal decision-making and parenting time, found that Benson had been advised of the hearing, granted Curdo sole legal decision-making authority, and suspended Benson's parenting time "until such time as [she] has demonstrated sobriety."

¶4 Six weeks later, Benson filed a petition for modification of parenting time. The trial court treated the petition as a motion for reconsideration of the previous order and summarily denied it on December 2, 2015. Benson filed a notice of appeal from the December 2 ruling.

Jurisdiction

¶5 The parties first disagree whether this court has jurisdiction over the appeal. Our jurisdiction is "purely statutory," and is generally limited to appeals from final judgments. *Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, ¶ 3, 338 P.3d 328, 330 (App. 2014), *quoting State v. Bayardi*, 230 Ariz. 195, ¶ 6, 281 P.3d 1063, 1065 (App. 2012). We also have jurisdiction to review special orders made after judgment, including post-decree custody orders. *In re Marriage of Dorman*, 198 Ariz. 298, ¶¶ 3-4, 9 P.3d 329, 331-32 (App. 2000); *see* A.R.S. § 12-2101(A)(2).

¶6 Benson argues the denial of her petition was an appealable post-decree order; Curdo argues the petition was in essence a motion for reconsideration of the September 15 order, therefore the notice of appeal, filed in December, was untimely. We agree with Benson.[1] Although the trial court treated the petition as a belated motion for reconsideration, the petition in form and function was a separate petition to modify, and the court's denial was separately appealable. *Cf. Hegel v. O'Malley Ins. Co., Agents & Brokers*, 117 Ariz. 411, 412-13, 573 P.2d 485, 486-87 (1977) (motion seeking relief with appropriate reference to rule and proper grounds treated as time-extending motion for new trial irrespective of title). We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(2).

Denial of Petition

¶7 Curdo argues in the alternative that the trial court did not err by denying Benson's petition even if it improperly treated it as a motion to reconsider, because it was filed within one year of the previous modification and did not cite any applicable exceptions to the general prohibition on motions for modification within one year. Benson does not respond to this argument, but argues generally that

[1]We ordered Benson to show why the appeal should not be dismissed as having been taken from an unappealable order; she filed a brief in response, and we ordered her to proceed with the filing of an opening brief.

the trial court's September order granting Curdo's petition for modification was improper,[2] and that the December order denied her due process. We may uphold the trial court if it is correct for any reason. *Link v. Pima County*, 193 Ariz. 336, ¶ 12, 972 P.2d 669, 673 (App. 1998).

¶8 Under A.R.S. § 25-411(A),

> [a] person shall not make a motion to modify a legal decision-making or parenting time 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.

The statute also lists other exceptions not applicable here. *Id.* The court shall deny the motion unless it finds adequate cause for a hearing is established by the pleadings. § 25-411(L); *see also Siegert v. Siegert*, 133 Ariz. 31, 33, 648 P.2d 146, 148 (App. 1982) (noting trial court has "wide discretion" in determining whether adequate cause for hearing exists, court of appeals "unable to conclude that no reasonable judge would have denied the petition without a hearing").

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[2]To the extent Benson argues the trial court's September ruling was incorrect, or seeks to combine the December and September rulings into one argument, Benson did not timely appeal the September ruling and we do not have jurisdiction to address it. *Soto v. Sacco*, 239 Ariz. 516, ¶ 8, 372 P.3d 1040, 1042 (App. 2016) ("The timely filing of a valid notice of appeal is a prerequisite to the exercise of appellate jurisdiction."), *quoting Santee v. Mesa Airlines, Inc.*, 229 Ariz. 88, ¶ 3, 270 P.3d 915, 916 (App. 2012); *see also* Ariz. R. Civ. App. P. 9(a) (thirty-day deadline to file notice of appeal after entry of judgment from which appeal taken).

¶9 Benson's petition for modification was filed six weeks after the previous order and made no allegations regarding danger to the child's physical, mental, moral, or emotional health. On appeal, she argues a hearing "should have been granted . . . because of the new and further allegations raised in [her] Petition," but again does not cite any facts allowing an early filing under § 25-411.[3] Accordingly, her petition sought early modification and was properly denied. *Murray v. Murray*, 239 Ariz. 174, ¶ 10, 367 P.3d 78, 81 (App. 2016).

Disposition

¶10 For the foregoing reasons, we affirm the trial court's order. Benson and Curdo both seek attorney fees and costs on appeal pursuant to A.R.S. § 25-324, on the basis that the positions taken by the parties were unreasonable. In our discretion, we decline to award attorney fees; however, as the prevailing party on appeal, Curdo may seek costs pursuant to compliance with Rule 21, Ariz. R. Civ. App. P.

[3]Benson also contends she was denied due process when the trial court summarily denied her petition. Our supreme court has determined that a petitioner is not denied due process when the court denies a hearing request based on a petitioner's failure to show "adequate cause" with factual support for allegations. *Pridgeon v. Superior Court*, 134 Ariz. 177, 181, 655 P.2d 1, 5 (1982). As noted above, Benson did not make any allegations nor cite any facts supporting the early filing of the petition, therefore she was not denied due process.