IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

LAWRENCE KNAUER,
Petitioner,

v.

HON. GILBERT ROSALES, JR., JUDGE PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

JILL R. LITTLE,
Real Party in Interest.

No. 2 CA-SA 2022-0017
Filed June 3, 2022

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NOT FOR PUBLICATION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);
Ariz. R. P. Spec. Act. 7(g), (i).

Special Action Proceeding
Pima County Cause No. D20092210

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Berkshire Law Office PLLC, Tempe
By Keith Berkshire and Kristi Reardon
Counsel for Petitioner

Gilbert Law Firm, Tucson
By Thea M. Gilbert
Counsel for Real Party in Interest

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Vice Chief Judge Staring and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 In this special action, petitioner Lawrence Knauer challenges the respondent judge's orders in the underlying post-decree proceeding, denying his Petition for Modification of Parenting Time and Legal Decision-Making, granting real party in interest Jill Little's cross-petition, and preventing him from having any parenting time with the parties' minor child. For the reasons stated below, we accept special-action jurisdiction and grant Knauer relief.

Factual and Procedural Background

¶2 The parties' marriage was dissolved in 2011. They entered into a "Joint Parenting Plan," and Little was given primary physical custody of J., born in 2009. The trial court subsequently entered orders in post-decree proceedings commenced in 2015, 2017, and 2018. In April 2020, less than a year after the prior order, which was entered in September 2019 and gave the parents joint legal decision-making and provided an equal-time residential schedule, Knauer filed a Petition for Modification of Parenting Time and Legal Decision-Making. Knauer alleged that, based on Little's substance abuse and erratic behavior, the parenting plan should be modified and Little's time with J. should be contingent on her sobriety or should be supervised. Knauer also filed a petition for temporary orders without notice, both parties filed various other motions, and Little filed a response and cross-petition for modification. The court granted Knauer's motion for temporary orders without notice and suspended Little's parenting time, finding there was a likelihood of irreparable injury to J. because she had failed to maintain sobriety, resulting in unpredictable and violent conduct. But the respondent judge subsequently found, after a hearing, that Knauer had not sustained his burden to justify suspension of

Little's parenting time. Nevertheless, given his concerns about J.'s health and safety, the judge required Little to undergo drug and alcohol testing and permitted supervised parenting time.

¶3 In September 2021, following a trial on the parties' petitions, the respondent judge entered an under-advisement order. He made express best-interests findings required by A.R.S. § 25-403(A) for a determination of legal decision-making and parenting time. He made additional findings related solely to legal decision-making. The judge acknowledged Little's drug and alcohol problems and "volatile behaviors toward Father and child." But he also cited Knauer's "inappropriate influence" of J. and "attempts to prejudice the child and his school against Mother." The judge found "the most pernicious aspects of the parental maladjustment . . . to be Father's pattern of disparaging Mother; the improper and undue influence he exerts on the child; and his steadfast refusal or incapacity to recognize that his alienating behaviors are inappropriate and potentially harmful to [J.]." The judge added that Knauer "diminishes" Little's role as a co-parent and sabotaged her effort "to achieve parity in parenting," all of which was "potentially harmful to [J.]." The judge observed that both parents would benefit from the recommended therapies and that Little was amenable to therapy whereas Knauer had not been, refusing to acknowledge and take responsibility for his role in creating the damaged relationships.

¶4 The respondent judge appointed Little as sole legal decision-maker "until further order of this Court." He found the parties needed to address "their co-parenting deficiencies to advance [J.'s] best interests," and that J.'s best interests would be served "by the parties engaging in and completing all therapies recommended to address the issues within the family." The judge denied Knauer's April 2020 petition and granted Little's cross-petition, as noted, appointing her as sole legal decision-maker; authorized Little to go to California with J. for alienation therapy with Dr. Lynn Steinberg; made Little primary residential parent; ordered Knauer was to have no contact with [J.] for "the therapeutically recommended interval" of ninety days after completion of the alienation therapy; and, required the parties to "meaningfully engage with all therapies recommended by Dr. Steinberg and disclose documented proof of their progress for review by the Court and counsel."

¶5 The respondent judge directed the parties to propose a parenting plan if they could not agree on one not less than ten days before the next review hearing to be held under A.R.S. § 25-403.02, which was to

be set as soon as possible after the ninety-day period of no contact. He explained that, at that review hearing, he would discuss with the parties resumption of the "50/50 parenting time schedule" and any remaining issue of child support. He added, "[T]he Court will waive the one-year requirement under A.R.S. § 25-411(A) regarding modification of legal decision-making." Finding "no just reason for delay," he entered the "judgment as a final order under" Rule 78(b), Ariz. R. Fam. Law P.

¶6 In November 2021, the respondent judge entered an order entitled "Current Parenting Plan," confirming Little was the sole legal decision-maker and primary residential parent and that Knauer had no parenting time "[a]t this time." After the review hearing in January 2022, the judge affirmed his prior orders regarding parenting time and legal decision-making, including the September 2021 order. He stated during the hearing that his goal was to reinstate parenting time once Knauer "successfully engaged in therapy and seemed to be making a change." Commenting that he did not want Knauer to have to wait a year before he could apply for resumption of parenting time, he stated that he "kind of left it open," assuring Knauer he wanted, "as quickly as possible . . . [to] get . . . parenting time established in some fashion," and would enter orders "in the future based on therapeutic recommendations." The judge discussed with Knauer directly his participation in therapy and what he had gained so far, and set the matter for a review hearing on March 30, adding, "I need to hear from these therapists and have recommendations from them as to what would be appropriate in terms of initiating parenting time."

¶7 Knauer filed a special-action petition on March 18. On March 28, Little filed a motion in the trial court, seeking a stay of the proceedings, including the March 30 hearing, pursuant to Rule 87(b)(2), Ariz. R. Fam. Law P. She urged the respondent judge not to waive § 25-411(A), which prohibits a party from seeking modification of a prior legal-decision making or parenting time order for twelve months after the order was entered except under specified circumstances. The judge granted that motion. She also filed a motion for final orders pursuant to Rule 78(c), which remains pending, asserting no final order has been entered in this post-decree proceeding, again urging the judge not to waive the twelve-month restriction.

Special-Action Jurisdiction

¶8 To determine whether it is appropriate for this court to exercise its discretion and accept special-action jurisdiction, we first address whether Knauer had or has an equally plain, speedy, and adequate remedy

by appeal. *See* Ariz. R. P. Spec. Act. 1(a). Knauer is challenging the September 2021 under-advisement order, the November 2021 parenting-plan order, and the January 2022 order. The January order confirmed Knauer was to continue to have no parenting time with J., and essentially deferred indefinitely, but possibly another ninety days, the decision whether to reinstate Knauer's parenting time. As we noted above, the respondent judge certified the September order as final pursuant to Rule 78(b), reflecting he regarded that order as final with respect to legal decision-making and J.'s primary residence, but left unresolved the issues of parenting time and child support.

¶9 Although an order certified under Rule 78(b) is final and appealable, finality certification under Rule 78(b) or (c) only applies to an initial decree and related claims, not to post-decree orders. *Choy Lan Yee v. Yee*, 251 Ariz. 71, ¶¶ 1, 12-14 (App. 2021). In *Yee*, this court concluded that a court's order resolving a post-decree motion or petition is immediately appealable pursuant to A.R.S. § 12-2101(A)(2) as a special order made after final judgment. *Id*. And, based on *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, ¶ 15 (App. 2016), such an order does not require finality language of Rule 78. *Yee*, 251 Ariz. 71, ¶ 12; *see also Blos v. Blos*, Nos. 1 CA-CV 21-0639 FC, 1 CA-CV 21-0682 FC, ¶¶ 1, 8-15, 2022 WL 969571 (Ariz. App. Mar. 31, 2022) (consol.) (dismissing appeal for lack of jurisdiction after finding post-decree orders are not certifiable as final and appealable under Rule 78, post-judgment motion to alter or amend may not be filed as to such an order, and post-judgment motions filed in that case did not extend time for filing a notice of appeal). Although finality language is neither required nor appropriate for a special order made after judgment, to be final and appealable under § 12-2101(A)(2) the order must resolve all matters raised in the post-decree motion or petition. *Yee*, 251 Ariz. 71, ¶¶ 1, 12-14. Thus, the respondent judge's certification of the September 2021 ruling as final under Rule 78(b) was a nullity, and that order was not immediately appealable.[1]

[1]Primarily in response to *Yee*, two of this court's judges filed a petition to amend Rules 78, 85, and 91, Ariz. R. Fam. Law P., which would, among other things, clarify this area by requiring a trial court to make a determination that a ruling in a post-decree proceeding is final under Rule 78(b) or 78(c) and permit the filing of certain post-judgment motions as to a ruling on a post-decree petition. "Revised Petition to Amend Arizona Rules of Family Law Procedure 78, 85 and 91" (Mar. 25, 2022) (No. R-22-0005),

¶10 Nor have all remaining matters been resolved since the respondent judge entered the September 2021 order. The issue of Knauer's parenting time and possibly child support are yet to be determined.[2] The challenged orders are therefore temporary and interlocutory and Knauer neither had nor does he have at this juncture, a remedy by appeal. *See Gutierrez v. Fox*, 242 Ariz. 259, ¶¶ 12, 14 (App. 2017) (acknowledging special-action jurisdiction appropriate when there is no remedy by appeal and finding temporary orders regarding legal decision-making and parenting time under A.R.S. § 25-404 are preparatory and not directly appealable).[3]

¶11 Additionally, Knauer has had no parenting time with J. since September 2021. That has persisted even though the respondent judge does not appear to have applied § 25-411(J), which, as discussed below, is an

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https://www.azcourts.gov/Rules-Forum/aft/1288 (last visited May 27, 2022). The petition and amended petition are pending. *See id.*

[2]Responding to Little's claim in her response to the special-action petition that Knauer waived his claims by not challenging the September and November orders, Knauer correctly asserts in his reply that it would have been inappropriate for him to do so in a post-judgment motion based on *Yee* and *Blos*. But he also states that "this," apparently referring to the September 2021 order, "is a post-decree order in which all matters were resolved" and was appealable as a special order made after judgment, and that the November parenting plan was similarly a special order, independently appealable. This assertion is not only unhelpful to Knauer, it is inaccurate. As we stated, no order resolving all claims and issues in this post-degree proceeding has been entered yet. These were not appealable orders.

[3]Little's position is consistent with our assessment of the procedural posture of this case. In the motion she filed in the trial court, she requested that the judge resolve the remaining claim of parenting time and enter a final judgment pursuant to Rule 78(c). Although she is mistaken because such a certification is not appropriate based on *Yee* and *Blos*, she correctly acknowledges that a final order resolving all issues in this post-decree proceeding has not been entered. Similarly, she asserts in her response to Knauer's special-action petition that, "on careful review," the parenting-time order "seems to in fact be a temporary order, as the court suggested it planned to reinstate at least equal parenting time schedule after the 90 day period of suspension."

error of law and, consequently, an abuse of discretion. *See* Ariz. R. P. Spec. Act. 3(b), (c) (questions raised in special action include whether respondent judge proceeded or is threatening to proceed without or in excess of legal authority, or abused discretion); *State v. Bernini*, 230 Ariz. 223, ¶ 6 (App. 2012) (special-action appropriate to correct error of law, which is an abuse of discretion). We find persuasive Knauer's argument that, particularly after the judge granted Little's motion for a stay of all proceedings and vacated the March 30, 2022 hearing, "[t]here is no light at the end of the proverbial tunnel," and he has no plain, speedy, and adequate remedy for the indefinite suspension of his parenting time other than by special action. Although Little argues that special-action relief would not be necessary if Knauer would simply comply with the judge's orders, even she concedes that "'[j]ustice' in this instance would be for the parents to resume at least an equal parenting time schedule and some shared legal decision-making." Under these circumstances, in the exercise of our discretion we accept jurisdiction of this special action.

Application of § 25-411

¶12 Section 25-411 pertains to modification of legal decision-making or parenting-time orders. Section 25-411(A) states that no petition to modify a legal decision-making or parenting-time decree shall be filed earlier than one year after the date of the prior order "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," or there is child or spousal abuse or domestic violence. Section 25-411(J) provides that a court may "modify an order granting or denying parenting time rights whenever modification would serve the best interest of the child," but "the court shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger seriously the child's physical, mental, moral or emotional health."

¶13 Knauer argues the respondent judge only considered the best-interest factors under § 25-403, not § 25-411(J). He concedes there is no statutory requirement that a trial court issue specific oral or written findings under § 25-411(J), and that in *Hart v. Hart*, 220 Ariz. 183, ¶ 17 (App. 2009), this court refused "to judicially engraft" such a requirement onto the statute. But he correctly asserts that a party may rely on the record as a whole, including findings the court makes in its written rulings or on the record, to support the claim that a court applied an incorrect legal standard. *See id.* ¶¶ 17-19 (stating lack of express findings under § 25-411(D), former

§ 25-411(J), *see* 2011 Ariz. Sess. Laws, ch. 346, § 1, does not "end our inquiry" and concluding language in court's order reflected it considered best interests but not endangerment to child). Knauer contends the record demonstrates the judge failed to consider whether granting Knauer parenting time would seriously endanger J.'s physical, mental, moral or emotional health.

¶14 Little argues that Knauer waived this argument by failing to bring it to the respondent judge's attention after the judge issued the September under-advisement ruling and before or during the January 2022 hearing. She claims he could have requested additional findings or clarification of the orders on the issue of serious endangerment by filing a motion for clarification under Rule 84, Ariz. R. Fam. Law P., or a motion for reconsideration. She also asserts Knauer could have sought "appellate review during the 90[-day] suspension period," insisting Knauer waived the claim by failing to do so.

¶15 Insofar as Little is suggesting Knauer could have directly appealed the September Rule 78(b) order, she is wrong; as we have already determined, an appeal from that order was not available to Knauer. Additionally, even assuming he could have filed a motion for clarification under Rule 84, which may be filed from any "ruling," Ariz. R. Fam. Law P. 84(a), and not just a final judgment, *see Blos*, 2022 WL 969571, ¶ 11, or that Knauer could have filed a motion for reconsideration, *see* Ariz. R. Fam. Law P. 35.1, or sought special-action review of the September and November orders, in our discretion we will not find this claim waived under the circumstances of this case.

¶16 That Knauer acquiesced to the ninety-day suspension of his parenting-time rights consistent with and to facilitate therapy the respondent judge found reasonable and necessary, does not mean he waived the argument when the judge extended that suspension in January 2022. Knauer promptly sought special-action relief after the judge entered that order. Little argues again that Knauer could have avoided having to file the special action simply by complying with the judge's orders. She insists he "failed to address the behavior that caused significant harm to his child, and refused to even disclose the name of his selected therapist." But although the judge found that prior to September 2021 he had resisted therapy, the record does not show he refused to obtain therapy after the judge entered that order, nor does it establish he failed to provide the judge

and counsel with the relevant information, as Little asserts.[4] In any event, we will not hold against Knauer his cooperation, even if only partial, or his initial silence on this issue. The posture of this case changed dramatically when the judge refused to reinstate Knauer's parenting-time rights in January 2022. As Little herself points out, by the time of the January review hearing, J. had completed the alienation therapy. The ninety-day period following the end of the program had passed. Even if Knauer's failure to challenge the judge's ruling in September waived the claim for purposes of that initial ninety-day period, we will not view it as a waiver of his claim that in January 2022 the judge committed the same error and compounded it, when he extended the suspension of Knauer's parenting-time rights. We therefore address this issue on the merits.

¶17 We review an order modifying parenting time for an abuse of discretion, *DeLuna v. Petitto*, 247 Ariz. 420, ¶ 9 (App. 2019), but we review de novo the interpretation and application of statutes, *Thomas v. Thomas*, 203 Ariz. 34, ¶ 7 (App. 2002). Section 25-411(J) "does not apply to a diminution in parenting *time*," *Gonzalez-Gunter v. Gunter*, 249 Ariz. 489, ¶ 13 (App. 2020), but it does apply when a court has placed significant conditions on the manner in which a parent may exercise parenting-time rights, such as by imposing geographical restrictions on parenting time or requiring supervision. *See Hart*, 220 Ariz. 183, ¶¶ 6-7, 16-18. It is axiomatic that if placing significant limitations on how a parent may exercise parenting-time rights may be a restriction under the statute, then total suspension of parenting time, which is what occurred here, must be as well. Indeed, Little does not appear to be disputing that Knauer's rights have been restricted as

[4]At the January 2022 hearing, Knauer's counsel began by reporting to the judge that Knauer had begun therapy in accordance with the judge's September order. Counsel explained that Knauer had not provided documentation to Steinberg, the judge, or opposing counsel, because of the delay in finding a therapist. As counsel explained, Knauer had recommended that the family therapist, Beth Winters, serve as his individual therapist but Little rejected that suggestion. Counsel explained it had taken time to find another therapist, and that the first session had been on December 16, 2021, providing the name of the therapist, and admitting it had been his fault the information had not been disclosed until the review hearing. Thereafter, during a direct conversation between Knauer and the judge, Knauer described the insight he had gained in the two sessions and other efforts he was making to show he was accepting responsibility for his actions, for which the judge commended him.

contemplated by § 25-411(J).[5] Rather, she asserts the respondent judge was not required to issue findings on the record, and the findings he did make satisfied both § 25-403 and § 25-411(J).

¶18 Unquestionably, the respondent judge's comments during the hearings and in his rulings reflect his concern for J.'s best interests, which he made paramount. He entered specific findings under § 25-403 and referred to J.'s best interests repeatedly in his September 2021 ruling and during the January 2022 hearing. But the record here, as in *Hart*, demonstrates the judge did not consider § 25-411(J), either initially or again in January 2022 when he suspended Knauer's parenting-time rights indefinitely. Initially, the primary if not sole purpose for the no-contact order was to ensure compliance with Steinberg's recommendations and facilitate the alienation therapy. But the judge subsequently appears to have conditioned Knauer's contact with J. on Knauer's participating in and benefitting from therapy, conditions the judge found in J.'s best interests.

[5]Although Little does not disagree that Knauer's parenting time has been restricted as that term is used in § 25-411(J), she does question whether § 25-411 applies at all. Little asserts in her response to the special-action petition that the statute is "confusing" because it is unclear what is meant by a parenting-time order. She states, "It would seem" the September 2021 order was a parenting-time order for purposes of the statute. Although her argument is unclear, she seems to be asserting that based on § 25-411(A), Knauer could not seek to modify the September order less than a year later unless "there is reason to believe the child's present environment may seriously endanger the child's physical, mental, moral or emotional health." *Id.* But it is the petition filed in April 2020, less than a year after the September 2019 order, that was subject to the limitation of § 25-411(A). The September 2021 order was not a final order, therefore Knauer is not prohibited from asking the judge to reinstate his parenting time as measured from that order. By permitting this matter to proceed and entering temporary orders, the judge impliedly made the requisite finding under § 25-411(A). And in May 2020, when he found insufficient ground to suspend Little's parenting time completely and modified the temporary order instead, the judge found "there are concerns in respect to the health and safety of" J., permitting this matter to proceed. The propriety of that decision and compliance with § 25-411(A) has not been an issue in this special action and we do not address it further.

That the therapy was in J.'s best interests did not obviate required consideration under § 25-411(J).

¶19 Nor do we agree with Little that the respondent judge made findings under § 25-403 and other findings that are "just as applicable to the 'serious endangerment' standard required by § 25-411." The September 2021 ruling included best-interests findings under § 25-403 as well as other findings related to legal decision-making. Addressing Knauer's alienation of J. from Little, the judge referred to the risk to J.'s mental health and his relationship with his mother. The judge found Knauer's conduct "pernicious," and that he had "sabotaged" Little without recognizing his conduct was "inappropriate," all of which is "potentially harmful to [J.]." The judge also found that "[t]he burden of essentially being forced to choose one parent over the other does not serve [J.]'s best interests and poses a substantial risk of mental and emotional harm to him." After the January 2022 hearing, the judge said he would continue restricting Knauer's access to J. because "[t]here is a potential to have a real serious negative impact on [J.] that can be long-lasting." None of these findings of potential harm is tantamount to a finding that permitting Knauer to have parenting time with J. "would endanger [him] seriously." *See* § 25-411(J). That finding, even if only implicit rather than express and on the record, must be made before a court can restrict parenting time as the respondent did here.

Remaining Claims

¶20 Knauer raises two additional claims: (1) the respondent judge erroneously delegated his decision-making authority to a third-party, Steinberg and other therapists; and (2) the judge exceeded his authority by ordering him to participate in therapeutic services and barring him from seeking a modification of the existing order regarding legal decision-making authority or exercising parenting time until he complies with the therapist's treatment recommendations. We find these arguments waived. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300-01 (1994) (generally, when party fails to raise issue before trial court, issue is waived).

¶21 Knauer never objected below that the respondent judge erred by imposing the initial ninety-day period of no-contact based solely on Steinberg's therapeutic recommendation, thereby "abdicat[ing] [his] decision-making authority." Moreover, that period of time has passed and the claim is moot. Knauer adds summarily that the judge repeated this error in January 2022 when he stated he would enter "orders in the future based on therapeutic recommendations," setting a hearing at which the coordinator of the program is expected to testify and Knauer's own

therapist is to provide information. Even assuming this purported error was not waived and is not moot, we reject the claim. First, the judge has not entered the final order yet, therefore, the issue is not ripe. Second, on its face the judge's statement reflects that he will base his decision on "recommendations" from therapists. This does not mean the judge failed or will fail to independently determine whether to resume Knauer's parenting time after weighing the evidence. A court does not improperly delegate its authority by considering expert opinions. *See DePasquale v. Superior Court*, 181 Ariz. 333, 336 (App. 1995) (court can consider expert opinion in making best-interest determination but must independently weigh the evidence in making decision); *see also Nold v. Nold*, 232 Ariz. 270, ¶ 13 (App. 2013).

¶22 Similarly, Knauer has waived any claim that the respondent judge lacked the authority to require him to obtain counseling. At no time did Knauer raise this argument, rather, he agreed to participate in therapy. At the last day of the trial, in July 2021, for example, he urged the judge to reject Steinberg's evaluation and testimony on various grounds. Likewise, in his written closing argument, he again urged the judge to reject the alienation therapy and not to credit Steinberg's testimony and recommendations, repeating his prior accusation that she was a "hired gun" whose report was full of errors. But he did not argue the judge lacked the authority to require him to participate in therapy. Indeed, at the January 2022 hearing, Knauer's counsel began by reporting on the therapy Knauer had begun, providing the name of the therapist. What he did object to was Steinberg's letter and the fact that she initially prescribed a ninety-day period of no parenting time and was now recommending another ninety-day period. Counsel argued vigorously that Steinberg's program had not worked, pointing to the family therapist's assessment of other reasons J. had been alienated from Little. When the judge complimented Knauer on his efforts and the insight he appeared to have gained, urging him to continue to cooperate with and benefit from therapy, Knauer never argued the judge lacked the authority to require him to do so. We address this argument no further.

Disposition

¶23 For the reasons stated, we accept jurisdiction of this special action and find the respondent judge abused his discretion by failing to apply § 25-411(J) in restricting Knauer's parenting-time rights. We therefore grant relief and direct the judge to conduct further proceedings and enter additional orders consistent with this decision. Both parties have

requested attorney fees and costs incurred in this special-action, citing A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P. In our discretion, we deny the requests for attorney fees but as the prevailing party, Knauer is entitled to taxable costs upon compliance with Rule 21. *See also* Ariz. R. P. Spec. Act. 4(g).