IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

STACY BUTLER,
Appellee,

and

JAMES BUTLER,
Appellee,

I.B., A MINOR,
Proposed Intervenor/Appellant.

No. 2 CA-CV 2023-0034-FC
Filed August 23, 2023

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NOT FOR PUBLICATION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. D20210147
The Honorable Danielle J.K. Constant, Judge

AFFIRMED

COUNSEL

Berkshire Law Office PLLC, Tempe
By Keith Berkshire and Kristi Reardon
Counsel for Appellee James Butler

Ann Nicholson Haralambie, Attorneys P.C., Tucson
By Ann M. Haralambie
Counsel for Proposed Intervenor/Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Gard concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this domestic-relations action, minor I.B., born in 2006, appeals from the superior court's order denying her request to intervene in her parents' post-decree proceeding. She argues the court abused its discretion by denying her request and doing so without a hearing. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the superior court's order. *See Smith v. Smith*, 253 Ariz. 43, ¶ 9 (App. 2022). Stacy Butler ("Mother") and James Butler ("Father") were married in 2002 and share two minor children, I.B. and A.B. In May 2021, the superior court entered a consent decree dissolving the marriage and adopting the parties' joint legal decision-making agreement and parenting plan. Shortly after entry of the decree, a dispute arose regarding Mother's desire to have the children receive COVID-19 and flu vaccinations, which Father opposed. Before the evidentiary hearing on this issue, I.B. sought to intervene in the proceedings through privately retained counsel, and Father objected.[1] The court denied I.B.'s motion without prejudice.

¶3 Following a two-day trial, the superior court awarded Mother "final say as to the vaccination issues related to I.B." and Father "final say as to the vaccination issues related to A.B." After I.B. received her first COVID vaccination, the court granted Father's motion to stay the order "as

[1]Mother filed a notice stating she had no objection.

to [I.B.'s] second COVID vaccination in the series . . . and the flu vaccination."

¶4 Father thereafter filed contemporaneous petitions to modify and enforce the parenting plan, in part, on the basis that Mother had failed to facilitate Father's parenting time with the children. I.B. renewed her motion to intervene and for recognition of counsel, stating she wanted to be heard on the matters of her vaccination status and Father's petitions. Mother supported I.B.'s motion, and Father opposed it. The superior court later denied Father's motion to modify the parenting plan and denied I.B.'s related intervention motion as moot and because I.B. had offered insufficient grounds to intervene. I.B. appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(3).[2] *See J.A.R. v. Superior Court*, 179 Ariz. 267, 272 (App. 1994); *Bechtel v. Rose*, 150 Ariz. 68, 71 (1986).

Discussion

¶5 I.B. argues the superior court erred by summarily denying her motion to intervene. In support of her motion, I.B. cited A.R.S. § 25-321 and Rule 10, Ariz. R. Fam. Law P. We review an order denying a request to intervene for an abuse of discretion. *J.A.R.*, 179 Ariz. at 275.

¶6 Section 25-321 provides,

> The court *may* appoint an attorney to represent the interests of a minor or dependent child with respect to the child's support, custody and parenting time. The court may enter an order for costs, fees and disbursements in favor of the child's attorney. The order may be made against either or both parents. (Emphasis added.)

[2]The superior court separately ordered the vaccination stay to expire the following week and denied I.B.'s intervention motion related to the vaccination issue as moot. Because I.B.'s notice of appeal did not designate that order, and to the extent her arguments relate to it, we lack jurisdiction to consider them. *See* Ariz. R. Civ. App. P. 8(c)(3) (notice of appeal must designate judgment from which party is appealing); *Lee v. Lee*, 133 Ariz. 118, 124 (App. 1982) ("The court of appeals acquires no jurisdiction to review matters not contained in the notice of appeal.").

And Rule 10(b) states, "The court *may* appoint an attorney to represent a child in a family law case under A.R.S. § 25-321 for any reason the court deems appropriate." (Emphasis added.) Because they are discretionary, neither the statute nor rule required the superior court to grant I.B.'s motion to intervene. *See Ball v. Ball*, 250 Ariz. 273, ¶ 11 (App. 2020) ("The use of the word 'may' generally indicates permissive intent, while 'shall' and 'will' denote a mandatory provision.").

¶7 Notably, I.B. has not addressed all of the superior court's underlying reasons for denying her motion to intervene. The court denied the motion both because I.B. had not established sufficient grounds to intervene, and because the motion was moot in light of its denial of Father's petition to modify the parenting plan.[3] We may affirm the superior court if it was correct for any reason, *see KCI Rest. Mgmt. LLC v. Holm Wright Hyde & Hays PLC*, 236 Ariz. 485, n.2 (App. 2014), and an appellant's failure to present significant arguments regarding a claim "usually constitutes abandonment and waiver of that claim," *State v. Carver*, 160 Ariz. 167, 175 (1989). The trial court's mootness finding alone, which I.B. does not challenge, is sufficient to warrant affirming its decision. Notwithstanding waiver, however, we conclude the court did not abuse its discretion.

¶8 Relying on *Bechtel*, I.B. contends the superior court was required to make an "individualized determination" and hold a hearing with arguments on her motion before denying it. We disagree for several reasons. First, *Bechtel* is distinguishable. It involved the intervention of grandparents in a "parentless" juvenile dependency proceeding where placement was the central issue. *Bechtel*, 150 Ariz. at 70, 72. It did not concern, as here, a child's requested intervention in her parents' post-dissolution proceeding. And while the superior court is required to make decisions according to the child's best interests in a parenting-time dispute, A.R.S. § 25-403(A), there is nothing in the record to suggest the court failed to do so here.

¶9 Second, I.B. provides no authority for her assertion that the superior court was required to hold a hearing on her motion. Indeed, the Arizona Rules of Family Law Procedure undercut her argument. Rule

[3]Specifically, the superior court denied Father's motion on the grounds that there had not been a material change in circumstances warranting review of the parenting plan and the parties' parenting plan required them to participate in mediation before filing a request to modify with the court.

35(c), Ariz. R. Fam. Law P., provides that the court may "decide motions without oral argument even if requested." Similarly, Rule 82(a)(2), Ariz. R. Fam. Law P., states that unless the rules require otherwise, the court need not "state findings or conclusions in a ruling on any motion."

¶10 Although I.B. acknowledges that Arizona law lacks "an explicit provision for privately retained counsel to be recognized pursuant to . . . statute and/or rule," she nevertheless requests that we "adopt a clear framework . . . for children to be represented by retained counsel in appropriate family law cases." We decline to do so here because the legislature has already provided for the representation of children in § 25-321 and this court's opinion in *J.A.R.* provides an adequate framework for applying the statute.

¶11 In *J.A.R.*, a seven-year-old child sought intervention through retained counsel in his parents' prolonged and "hostile" custody modification proceeding. 179 Ariz. at 269-70. We rejected the minor's argument that he had a statutory right to intervene, noting that § 25-321 allows the discretionary appointment of counsel for children in domestic relations actions. *Id.* at 273. We recognized that children have a mandatory right to counsel in juvenile proceedings under title 8. *Id.* at 273-74. But we stated that extending the right to all proceedings involving child custody would "eviscerate the explicit discretion given in A.R.S. § 25-321 . . . and would require all children in divorce cases to have a court-appointed attorney," a result "obviously not intended by the legislature in enacting A.R.S. § 25-321." *Id.* at 273.

¶12 While we acknowledged that children have an interest in proceedings regarding their custody, we found intervention of right under Rule 24(a), Ariz. R. Civ. P., "inapplicable to the child in the current proceeding because the domestic relations court is otherwise statutorily vested with discretionary alternative methods to protect the child's rights and interest in the outcome." *Id.* at 274. Those methods include the court's requirements to base its determinations on the best interests of the children and to consider the wishes of the children of a sufficient age and maturity, the ability to interview children to ascertain their wishes, and the discretion to appoint an independent attorney to represent the children. *Id.*

¶13 We nevertheless identified several non-exclusive factors relevant in ruling on a child's request for independent counsel under § 25-321, including whether: (1) the parents have each alleged the other has placed the child's welfare in danger by abuse or neglect, thereby placing the interests of the parents in potential conflict with the best interests of the

child; (2) the child's maturity and ability to communicate his circumstances and wishes would enable an independent attorney to serve as an effective advocate for the child; and (3) an independent attorney could help ensure the record is more accurate and complete. *Id.* at 276. And we found "under the specific facts of th[e] case" that the court erred by failing to appoint an independent attorney for the child under § 25-321 based on the "hostile contentions of each parent toward the other, both alleging the child's endangerment, creat[ing] a strong possibility that their interests will conflict" with the child's. *Id.* at 275. In so concluding, however, we "emphasize[d] that a trial court has discretion, on a case-by-case basis, to make independent counsel determinations based on the specific facts before it." *Id.* at 277.

¶14 Applying those factors to the facts of this case, we disagree that they support I.B.'s request for independent counsel. Although the superior court acknowledged I.B.'s age and level of maturity allowed her wishes to "come into play," neither parent has alleged the other has abused or neglected I.B. Although I.B.'s interests may not align with her father's position, they do align with her mother's. Thus, there is no apparent danger that I.B.'s wishes will not be communicated or taken into account. I.B. contends she is "the only person with first-hand knowledge of some of the allegations Father made in his motion for enforcement and petition to modify." But she has not explained why the alternate methods for protecting her best interests set forth in *J.A.R.* are not sufficient to protect the accuracy and completeness of the record. The court did not abuse its discretion in denying I.B.'s motion to intervene. *See id.* at 275, 277.

Disposition

¶15 We affirm the superior court's order denying I.B.'s motion to intervene.