FILED BY CLERK
FEB 13 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	
NAIMA HANA SIMI,	2 CA-CV 2008-0105
Petitioner/Appellee,	DEPARTMENT B
and	MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
STEPHEN M. SIMI,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20010792

Honorable Deborah Ward, Judge Pro Tempore

APPEAL DISMISSED

The Law Offices of Holly E. Wertz, LLC
By Holly E. Wertz
Cortaro
Attorney for Petitioner/Appellee

Stephen M. Simi
Tucson
In Propria Persona

V Á S Q U E Z, Judge.

¶1 This appeal arises from a post-dissolution child custody proceeding. Appellant Stephen Simi appeals from the trial court's order reappointing a parenting coordinator. Because we lack jurisdiction over the claims asserted in the appeal, we dismiss it.

Facts and Procedural Background

¶2 In March 2001, appellee Naima Simi filed a petition for the dissolution of her marriage to Stephen. In December 2001, the trial court issued a decree of dissolution, awarding Naima and Stephen joint legal and physical custody of their two minor children. After several years of post-decree litigation, the court concluded in March 2007 that "the parties [we]re unable to make decisions affecting aspects of custody and parenting time" and appointed John Assini as parenting coordinator for a renewable one-year term, pursuant to Rule 74, Ariz. R. Fam. Law P.[1] Assini filed his "Report and Recommendations" with the court in December 2007, dealing exclusively with financial issues relating to uncovered medical and daycare expenses. The court approved the recommendations and over Stephen's objections adopted them in its order.

¶3 In March and April 2008, Stephen filed motions opposing Assini's reappointment, alleging Assini had "not adher[ed] to [his] defined responsibilities." Specifically, Stephen claimed his right to due process had been violated by Assini's failure

[1]The order appointing Assini cites Pima County Local Rule 8.11, one of the local rules on which Rule 74 was based. *See* Ariz. R. Fam. Law P. 74 cmt. However, Rule 74(L) provides that "in the event a county elects to use Parenting Coordinators, [Rule 74] shall apply."

to submit to the court recommendations Assini had issued to the parties via email in June and September 2007. Those recommendations set out procedures to be followed with respect to Naima's overseas vacation with the children in July and August 2007, allocated Assini's fees "due to the parties[']conduct," and required Stephen and Naima to complete a parenting class. Stephen also noted that Assini had never interviewed the children, accessed any of their school or medical records, or interviewed any of their teachers or school counselors. After considering Stephen's motions and Naima's response, the court reappointed Assini for another one-year term. Stephen timely filed this appeal.

Discussion

¶4 Stephen argues the trial court erred in reappointing Assini as parenting coordinator. He repeats the assertion he made below that Assini's failure to submit the June 2007 and September 2007 recommendations to the court was "inconsistent with Rule 74 and [Assini's] Order of Appointment" and deprived him of the ability to object to these recommendations. Stephen also contends Assini committed "misconduct" by informing him in a February 2008 email that as a sanction for Stephen's failure to pay his fees, Assini would ignore Stephen's input regarding Assini's recommendations and deny Stephen's right to object to those recommendations.

¶5 In every appeal, we have an independent obligation to ensure we have jurisdiction, *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997), and we must dismiss an appeal over which we lack jurisdiction, *Davis v. Cessna*

Aircraft Corp., 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991). Generally, an aggrieved party may only appeal from a "final judgment entered in an action or special proceeding commenced in a superior court." A.R.S. § 12-2101(B); *see also Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 8, 160 P.3d 223, 226 (App. 2007); *Davis*, 168 Ariz. at 304, 812 P.2d at 1122. In addition, an order modifying custody, visitation, and support after such a final judgment may be appealable as a "special order." § 12-2101(B); *see also Cone v. Righetti*, 73 Ariz. 271, 275, 240 P.2d 541, 543 (1952); *Sheehan v. Flower*, 217 Ariz. 39, n.3, 170 P.3d 288, 289 n.3 (App. 2007). But, an order appointing a special master or referee does not fall into either category and thus is not appealable. *Bolon v. Pennington*, 3 Ariz. App. 433, 435, 415 P.2d 148, 150 (App. 1966); *see Chartone, Inc. v. Bernini*, 207 Ariz. 162, ¶ 7, 83 P.3d 1103, 1106 (App. 2004). And a parenting coordinator is a special master appointed to assist the court "in the effective resolution of . . . ongoing conflicts surrounding custody and parenting time issues." Ariz. R. Fam. Law P. 74 cmt.

¶6 Here, although Stephen challenges the propriety of Assini's recommendations and "sanctions," they were never submitted to or adopted by the trial court. Pursuant to Rule 74, the recommendations of a parenting coordinator that are not approved by court order are generally not binding on or enforceable against the parties.[2] *See* Ariz. R. Fam. Law P.

[2]Rule 74(G) permits a parenting coordinator to make a "binding temporary decision" when "a short-term, emerging, and time sensitive situation . . . requires an immediate decision for the welfare of the children and the parties." However, although this section was arguably applicable to some of the recommendations objected to by Stephen, Assini failed to subsequently submit a report "document[ing] all substantive issues addressed and the basis

74(E), (H), (J) (parenting coordinator's authority generally limited to making recommendations to court, which court may reject, modify, or approve and adopt as interim order); *cf. Ariz. Dep't of Econ. Sec. v. Superior Court*, 147 Ariz. 450, 452-53, 711 P.2d 589, 591-92 (1985) (unless entered by judge, referee's recommendation merely recommendation and does not constitute interim or temporary order). Thus, Assini's unsubmitted and unapproved recommendations were not court orders, much less appealable orders.

¶7 Additionally, after he apparently imposed the February 2008 sanctions challenged by Stephen, Assini did not submit any "Report and Recommendations" to the court until July 2008. Thus, any appealable order affected by such sanctions could only have been entered after Stephen filed his notice of appeal in June 2008. We have no jurisdiction over rulings made by a trial court after a notice of appeal has been filed.[3] *Navajo Nation v. MacDonald*, 180 Ariz. 539, 547, 885 P.2d 1104, 1112 (App. 1994). We therefore lack jurisdiction over Stephen's appeal from the trial court's order reappointing Assini as parenting coordinator.

¶8 Although we lack appellate jurisdiction, we may nevertheless consider whether to exercise our discretion to take special action jurisdiction. *See Grand v. Nacchio*, 214 Ariz. 9, ¶ 20, 147 P.3d 763, 771 (App. 2006). This case arguably raises "questions of law, which

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for the decision for review and entry of any appropriate orders at the judge's earliest opportunity" as the section requires. *See id.*

[3]Moreover, it is not clear from the record that Stephen ever raised the sanctions issue in the trial court.

are particularly appropriate for special action review," the questions presented are apparently issues of first impression, *see id.*, and Stephen has "no equally plain, speedy, or adequate remedy by appeal." *See Chartone*, 207 Ariz. 162, ¶¶ 7, 8, 9, 83 P.3d at 1106-07; *see also* Ariz. R. P. Spec. Actions 1. However, the parties have not requested we accept special action jurisdiction and have not fully briefed the issues. *See Chartone*, 207 Ariz. 162, ¶ 6, 83 P.3d at 1106; *Ariz. Dep't of Econ. Sec. v. Powers*, 184 Ariz. 235, 236, 908 P.2d 49, 50 (App. 1995). More importantly, the record before us is incomplete because critical trial court rulings occurred after Stephen filed his notice of appeal. *See Piner v. Superior Court*, 192 Ariz. 182, ¶ 10, 962 P.2d 909, 912 (1998) (special action review appropriate where record sufficient and issues "can properly be decided"). In our discretion, we therefore decline to take special action jurisdiction.

¶9 Finally, Naima asserts Stephen's claim is frivolous and requests an award of attorney fees and costs pursuant to Rule 25, Ariz. R. Civ. App. P. Although we lack jurisdiction, we do not find Stephen's appeal was "brought for an improper purpose or based on issues which are unsupported by any reasonable legal theory." *See Johnson v. Brimlow*, 164 Ariz. 218, 222, 791 P.2d 1101, 1105 (App. 1990). And we note that Naima herself failed to raise the issue of our jurisdiction over this appeal. In our discretion, we therefore deny her request for attorney fees. *See Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446, 937 P.2d 363, 368 (App. 1996) ("The determination to award or decline attorney's fees is within this Court's discretion."). But as the prevailing party, she is entitled

to her costs on appeal upon compliance with Rule 21, Ariz. R. Civ. App. P. *See Application of Perez*, 71 Ariz. 352, 353, 227 P.2d 385, 385 (1951) (appellee entitled to costs as prevailing party where appeal dismissed).

Disposition

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

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge