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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JON SUTTON, Petitioner/Appellee, v. BEATRICE FLORES, Respondent/Appellant.	2 CA-CV 2009-0028 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. SP-20010623

Honorable Richard C. Henry, Judge Pro Tempore

AFFIRMED

Robert L. Barrasso — Tucson
Attorney for Petitioner/Appellee

J.L. Machado, P.C.
By Joe L. Machado — Tucson
Attorney for Respondent/Appellant

E S P I N O S A, Presiding Judge.

¶1 Beatrice Flores appeals from the trial court's custody ruling in this paternity action awarding sole legal and physical custody of her son, J., to his father, Jon Sutton,

and granting her supervised parenting time. She raises numerous issues, including a challenge to the court's jurisdiction and its finding that this arrangement is in J.'s best interest. Finding no reversible error, we affirm.

Facts and Procedural History

¶2 We view the facts in the light most favorable to upholding the trial court's custody decree and will not disturb its ruling absent an abuse of discretion. *See Maher v. Maher*, 17 Ariz. App. 22, 22, 495 P.2d 147, 147 (1972). J. was born in Tucson in December 2000. Sutton did not acknowledge paternity on J.'s birth certificate even though he and Flores had been living together and were aware he was J.'s father. After a dispute in late March 2001, Flores, a Mexican citizen, filed a restraining order against Sutton and returned to Mexico with J. In April 2001, Sutton filed a paternity action in Pima County Superior Court, alleging he was J.'s father and seeking joint custody of J. Later in 2001, the trial court authorized service by publication on Flores and, when she failed to respond, entered a default judgment declaring Sutton J.'s legal parent and awarding him custody. For the next five years, Sutton had no contact with J., who continued to live in Mexico with his mother.

¶3 In early 2006, however, Flores contacted Sutton and allowed him to visit J. in Mexico. Sutton and Flores attempted to reconcile and Flores returned to Tucson with J. in April 2006. When their attempt at reconciliation failed, Flores was unable to return to Mexico with J. because of the default paternity and custody order. She then challenged that order on the basis of insufficient service of process, ultimately prevailing

on appeal. *See Sutton v. Flores*, No. 2 CA-CV 2006-0204 (memorandum decision filed Apr. 27, 2007).

¶4 After we vacated the prior paternity and custody order, Sutton effected personal service on Flores in 2007, returning the issue of J.'s custody and paternity to the family court. Pursuant to a temporary order spanning over a year of custody proceedings, Sutton retained custody of J. and Flores was granted supervised parenting time with him. In July 2008, the trial court entered an order finding it was in J.'s best interest to have a relationship with both parents. The court further found, however, that both parents presented a risk of fleeing with J. and it awarded temporary custody to Sutton, finding him the parent whose travel with the child the court could most control, and awarded Flores supervised parenting time.[1] It then finalized these temporary rulings in December 2008 and Flores appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

Temporary Orders

¶5 At the outset, we dismiss several of the issues Flores raises because she is challenging nonappealable orders relating to the family court's temporarily granting custody of J. to Sutton. "'[A]n order that is merely "preparatory" to a later proceeding

[1]The trial court expressed concern that either parent could deny the other access to the child through international travel. Testimony indicated Flores could take J. back to Mexico without a passport because J. has dual citizenship; and Sutton, who has significant ties to Australia, previously had taken J. there for extended periods of time. The court confiscated J.'s passport and required Sutton to obtain the court's permission to travel with J.

that might affect the judgment or its enforcement is not appealable.'" *Villares v. Pineda*, 217 Ariz. 623, ¶¶ 10-11, 177 P.3d 1195, 1196-97 (App. 2008), *quoting Arvizu v. Fernandez*, 183 Ariz. 224, 227, 902 P.2d 830, 833 (App.1995) (finding temporary order regarding child custody merely preparatory and made in anticipation of resolution at trial).; *see also* Ariz. R. Fam. Law P. 47(M) (temporary order becomes ineffective and unenforceable following entry of final judgment or order). Flores's only means of obtaining appellate review of the temporary order was to file a petition for special action relief in this court. *See Villares*, 217 Ariz. 623, ¶ 11, 177 P.3d at 1197 (accepting special action jurisdiction to review temporary order); *see also DePasquale v. Superior Court*, 181 Ariz. 333, 336-37, 890 P.2d 628, 631-32 (App. 1995) (finding no available remedy for erroneous transfer of temporary custody when parent failed to file for special action relief).

Jurisdiction

¶6 We next turn to Flores's contention that the family court lacked personal jurisdiction over her as well as subject matter jurisdiction. Whether a court has jurisdiction is a question of law that we review de novo. *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 7, 207 P.3d 754, 756 (App. 2009). When a trial court lacks jurisdiction, its orders are null and void and we have no choice but to vacate them. *Id.* n.9.

Home State

¶7 Flores first maintains the trial court "should have made a determination whether Arizona was [J.'s] 'home state' under the [Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)] as of the time Flores first entered an appearance

challenging the trial court's jurisdiction . . . on June 23, 2006."[2] She asserts that had it done so, it would have determined that Sonora, Mexico, and not Arizona, was J.'s home state and would not have asserted jurisdiction. Section 25-1031(A)(1), A.R.S., specifies that a trial court has jurisdiction over a child custody case only when Arizona is the child's "home state" on the date proceedings were commenced or Arizona was his or her home state within six months before the commencement and "the child is absent . . . but a parent or person acting as a parent continues to live in this state." *See also Welch-Doden v. Roberts*, 202 Ariz. 201, ¶ 15, 42 P.3d 1166, 1169-70 (App. 2002) (child custody jurisdiction may only be asserted in compliance with § 25-1031). A child's home state is further defined as "[t]he state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding" or "[i]f the child is less than six months of age, the state in which the child lived from birth with a parent or person acting as a parent." A.R.S. § 15-1002(7)(a), (b).

¶8 Although Flores correctly notes that the result of our previous appellate mandate was to place the parties in the same position they had been in prior to the trial court's erroneous 2001 orders, in her opening brief she does not address the fact that

[2]Flores concedes she did not raise precisely this issue below, but because subject matter jurisdiction can be raised at any time, we address it. *See Thomas v. Thomas*, 220 Ariz. 290, ¶ 6, 205 P.3d 1137, 1138 (App. 2009). And the trial court's failure to expressly rule on this issue does not, in itself, constitute reversible error. *See Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986) (we will uphold trial court's decision if correct for any reason, even if reason not considered by trial court).

Arizona was J.'s home state "on the date of the *commencement* of the proceeding." § 25-1031(A)(1) (emphasis added). Contrary to her suggestion, a proceeding does not commence on the date a party responds to the initial pleading; it commences on the date the petition, or in this case the paternity complaint, is filed.[3] *See* A.R.S. § 25-401(B)(1); *see also Finck v. O'Toole*, 179 Ariz. 404, 406, 880 P.2d 624, 626 (1994) (child custody proceeding commences with filing of petition). It is undisputed that Sutton first commenced this proceeding by filing a paternity complaint in April 2001. At that time, J. was an infant under six months of age and had lived in Tucson with both parents until Flores left the country in late March of 2001. Accordingly, Arizona was J.'s home state at the commencement of the custody proceedings. *See* § 25-1002(7)(b).[4]

[3]In her reply brief, Flores maintains that because Sutton did not properly serve the April 2001 complaint, we cannot view it as the date of commencement. But she has not cited any authority to support her position that when a party who, pursuant to a valid, albeit erroneous, court order improperly serves that party's opponent, the case should be dismissed on remand for failing to comply with the 120-day time limit prescribed by Rule 4(i), Ariz. R. Civ. P. Moreover, the time limit set forth in Rule 4(i) would not apply to service in a foreign country in any event. *Id*.; Ariz. R. Civ. P. 4.2(i).

[4]Flores also contends the trial court erroneously disregarded cases she had cited in a post-trial memorandum that predated Arizona's adoption of the UCCJEA, apparently arguing these cases support the conclusion Arizona is not J.'s home state. With the exception of *Garay Uppen v. Superior Court*, 116 Ariz. 81, 567 P.2d 1210 (App. 1977), which offers limited, if any, value as precedent given that it involved in loco parentis status and an actual finding of abandonment, she does not cite any other cases that she had cited below, explain how they were relevant, or articulate what effect, if any, the holdings of cases interpreting an outdated law would have on a trial court's interpretation of a current law. Accordingly, we disregard this argument. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate briefs must contain meaningful arguments supported by authority); *AMERCO v. Shoen*, 184 Ariz. 150, 154 n.4, 907 P.2d 536, 540 n.4 (App. 1995) (party who fails to present argument or authority waives issue).

A.R.S. § 25-401

¶9 Flores next contends the trial court erred in determining Sutton had "standing" under § 25-401 to assert custody over J., describing the trial court's analysis as a "legal gymnastic" and "desperate attempt[]" to avoid the requirements of the statute, which identifies the persons who may commence an action for child custody. Flores's argument fails because she ignores § 25-401(B)(3). This subsection provides the trial court may exercise jurisdiction "[a]t the request of any person who is a party to a maternity or paternity proceeding." In the same complaint in which he sought custody of J., Sutton also sought to establish paternity, making himself "a party to a . . . paternity proceeding." *Id*. Clearly, he was a proper party pursuant to § 25-401(B)(3) and the trial court did not err in determining he was a proper person to bring this action.[5]

Inconvenient Forum

¶10 Flores also asserts the trial court should have declined jurisdiction because Arizona is an inconvenient forum under A.R.S. § 25-1037. But she does not support this claim with any meaningful analysis, merely asserting that had the trial court "properly consider[ed] and appl[ied] all of the provisions" of this statute, it would have found Arizona was an inconvenient forum. Accordingly, this issue is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate briefs must contain meaningful arguments supported by

[5]Because Sutton was a proper party pursuant to § 25-401(B)(3) and we will uphold a trial court if it is correct for any reason, *see Glaze*, 151 Ariz. at 540, 729 P.2d at 344, we need not address Flores's related argument that the court incorrectly applied A.R.S. § 25-415, which governs asserting custody in loco parentis.

authority); *AMERCO v. Shoen*, 184 Ariz. 150, 154 n.4, 907 P.2d 536, 540 n.4 (App. 1995) (party who fails to present argument or authority waives issue).

"Reprehensible" Conduct

¶11 Similarly, Flores has waived any consideration of her argument that the trial court should have declined jurisdiction pursuant to A.R.S. § 25-1038 based on Sutton's allegedly "reprehensible" conduct. Although she testified before the trial court regarding acts and behavior a court readily could find reprehensible, she has not supported this claim on appeal with meaningful argument or citations to authority (aside from her citation to the statute, which she quotes in its entirety in a footnote). She has also provided no citations to the record, does not recite a standard of review, and does not even indicate when and if she raised this argument in the trial court. Accordingly, we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6); *AMERCO*, 184 Ariz. at 154 n.4, 907 P.2d at 540 n.4.

Immunity from Service

¶12 Flores also contends the trial court could not exercise personal jurisdiction over her because she was immune from service under A.R.S. § 25-1009. But this statute provides no support for her claim. Section 25-1009(A) simply states that a party to a child custody proceeding is not subject to personal jurisdiction on an unrelated matter when he or she is present solely for the purposes of participating in the custody litigation. Flores has failed to explain how this would provide immunity from service in a child

custody proceeding effected while she was in the state.[6] Consequently, this argument fails.

Sufficient Minimum Contacts

¶13 Citing no authority, Flores additionally contends the trial court erred in determining she had sufficient "minimum contacts" with Arizona to subject her to the jurisdiction of this state's courts. Not only has Flores failed to meaningfully argue this point on appeal, it appears she did not make this argument in the trial court.[7] Accordingly, it is waived. *See* Ariz. R. Civ. App. P. 13(a)(6); *AMERCO*, 184 Ariz. at 154 n.4, 907 P.2d at 540 n.4. Moreover, even if it were not waived, it is meritless because a court need not conduct a minimal contacts analysis to exercise jurisdiction over a party who, like Flores, was served with process within the state. *See Kline v. Kline*, 221 Ariz. 564, ¶ 19, 212 P.3d 902, 907-08 (App. 2009) (personal jurisdiction established by service of complaint and summons).

Best Interest Custody Determination

¶14 Finally, Flores contends the trial court abused its discretion in determining it would be in J.'s best interest for Sutton to retain custody. She cites no authority to support this contention, but instead recites various factors she believes make Sutton an inappropriate parent. But our purpose on appeal is not to reweigh the evidence. *See*

[6]Although Flores cites a number of cases, they appear to be irrelevant and she does not explain how any of them support her contention that she is immune from service.

[7]This issue appears to be derived from the trial court's comments when addressing § 25-1009. It first noted that Flores seemed to have misread the statute and then added that, in any event, "there [we]re ample indicia of [her] minimum contacts with Arizona warranting a finding of personal jurisdiction."

Hurd v. Hurd, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). And Flores ignores any evidence that would portray her as the less desirable custodian, including her stated intention to return to Mexico with J. and the attendant difficulty in enforcing an Arizona custody order in Mexico. She similarly disregards evidence of Sutton's close relationship with J. and the positive involvement and impact he has had on J.'s schooling.

¶15 We review a family court's child custody decisions for an abuse of discretion. *Hurd*, 223 Ariz. 48, ¶ 11, 219 P.3d at 261. And to constitute an abuse of discretion, "'the record must be devoid of competent evidence to support'" its decision. *Borg v. Borg*, 3 Ariz. App. 274, 277, 413 P.2d 784, 787 (1966), *quoting Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963).

¶16 The record reflects the trial court weighed the statutory factors set forth in A.R.S. § 25-403(A) and concluded both parents were equally capable of adequately and properly caring for J. based on evidence of their relationships with him. *See Hurd*, 223 Ariz. 48, ¶ 11, 219 P.3d at 261 (trial court must weigh statutory factors and make findings on the record). It concluded that, all things being equal, "any decision on custody and parenting time would not be a wrong or poor decision." It then used the parents' respective risks of traveling internationally to deny the other parent's access to J. as the deciding factors. Concluding a relationship with both parents is in J.'s best interest, the trial court crafted a custody order to promote that objective. Its decision ultimately was based on its belief that "it c[ould] more effectively prevent [Sutton] from taking the child out of the country than it c[ould Flores]." *See id*. (court must provide reasons for its custody decision); *Abouzahr v. Matera-Abouzahr*, 824 A.2d 268, 281-82

(N.J. Super. Ct. App. Div. 2003) (in determining child's best interests, court may consider lack of remedy should parent retain child in foreign country).[8] Based on the extensive record that was before the trial court, we cannot say it abused its discretion here.

Conclusion

¶17 For the foregoing reasons, the family court's custody order is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[8]Flores's suggestions that the trial court was biased against her due to her status as a Mexican citizen are not supported by the record and not well taken. *See G.K. Techs. v. Indus. Comm'n of Ariz.*, 155 Ariz. 599, 604, 749 P.2d 389, 394 (App. 1988) (court's adverse rulings do not in and of themselves constitute bias).