FILED BY CLERK
AUG 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TIMOTHY P., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and MONET P., Appellees.	2 CA-JV 2009-0032 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18875100

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Sanders & Sanders, P.C.
By Ken Sanders
Tucson
Attorneys for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings
Tucson
Attorneys for Appellee Arizona Department of Economic Security

---

H O W A R D, Chief Judge.

¶1 Timothy P. appeals from the juvenile court's order adjudicating his daughter Monet P. a dependent child. He contends the court abused its discretion by denying his motion to dismiss the private dependency petition filed by Monet's mother, Alisa S., which Timothy contends was "an improper attempt to circumvent [a] visitation order of the domestic court." He also contends the court abused its discretion by failing to dismiss the dependency proceeding based on the doctrine of res judicata. Finding no error, we affirm.

¶2 "On review of an adjudication of dependency, we view the evidence in the light most favorable to sustaining the juvenile court's findings." *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). But the following facts are undisputed. Timothy was not married to Alisa when Monet was born in May 2002. The couple separated approximately three months later, and Alisa remained Monet's primary caretaker. Paternity and child support were established in a special paternity action in 2003. In April 2005, Monet told Alisa of an instance or instances of sexual contact by Timothy. Alisa obtained an order of protection for herself and Monet against Timothy and engaged the services of a therapist, Susan Winder, for Monet. Alisa also reported the alleged abuse to the Child Protective Services Division (CPS) of the Arizona Department of Economic Security (ADES). Following an investigation, CPS found the report unsubstantiated; however, it later substantiated a report in 2007, based on the same allegations, after interviewing Monet and considering, among other things, Winder's notes from her therapy sessions with Monet.

¶3 At a 2005 review hearing on the order of protection, the family court ordered that all of Timothy's parenting time with Monet be supervised through the Judicial

Supervision Program (JSP). The supervision requirement remained when the court removed Monet's name from the order of protection in June 2005. In July 2005, Timothy filed a petition in the paternity proceeding to establish custody of and parenting time with Monet. The family court ordered that he undergo a psychological and psychosexual evaluation by Dr. Jill Plevell. In December 2005, based on Plevell's report and recommendations, the court suspended Timothy's parenting time and telephone contact with Monet pending a trial on his petition for custody. Following the trial, the court awarded Alisa sole legal and physical custody of Monet. Finding parenting time with Timothy "would seriously endanger [Monet's] mental and emotional health," it ordered "no parenting time [between Timothy and Monet] until further Court order." It stated it would "continue to monitor the case" regularly and, as Timothy made progress on the court's concerns, would "begin the process of re-integrating [Timothy] into [Monet's] life." The family court held several review hearings over approximately the next twenty-seven months. The case was transferred to Judge Sharon Douglas, who eventually ordered that Timothy be permitted therapeutic contact and supervised visitation with Monet.

¶4 On November 7, 2008, Judge Douglas ordered that Timothy be allowed unsupervised parenting time with Monet and made the following factual findings:

> 1. The reports from the supervisors . . . indicate that there have been no difficulties with the supervised parenting time.
>
> 2. The child seems very comfortable being with her father, and has expressed dismay at the end of the parenting time.
>
> 3. The cost of supervised parenting time is beginning to create a financial hardship for [Timothy].

> 4. It is in the best interests of the minor child that she continue to have consistent and frequent contact with her father.
>
> 5. The parenting time has apparently not been causing difficulties for the minor child as she has not even had any counseling sessions with her therapist since the supervised parenting time sessions between the minor child and her father began.

The court stated it had "considered the testimony and arguments of the parties and the Best Interest Attorney [who had been appointed for Monet]" as well as "the supervised parenting time summaries, and . . . the recommendations of Beth Winters," a reunification therapist assigned by the court.

¶5 Alisa filed the dependency petition at issue on November 14, 2008, alleging that unsupervised contact between Monet and Timothy "present[s] a serious risk of harm to [Monet]," that such contact was "against the opinion" of Winder and Winters, and that Alisa was unable to protect Monet, given the family court's order. Pursuant to A.R.S. § 8-802, the juvenile court ordered ADES to investigate the allegations. Timothy filed a motion to dismiss the petition, requesting the matter be "remanded to the proper forum: the domestic relations division of the Pima County Superior Court and the Hon. Sharon Douglas." Upon its request, ADES was substituted as the petitioner in place of Alisa at the preliminary protective hearing. Thereafter, the juvenile court denied Timothy's motion to dismiss and consolidated the dependency proceeding with the special paternity action. ADES filed a substituted dependency petition in February 2009, alleging essentially the same grounds for dependency as Alisa had alleged in the original petition. Following a contested hearing, the court adjudicated Monet dependent as to both parents.

¶6 Timothy first contends the juvenile court abused its discretion by denying his motion to dismiss the original private dependency petition. In the motion, Timothy contended the petition "fail[ed] to allege the statutory elements of a dependency, as required by A.R.S. § 8-201(13)(a)(i)."[1] We review the court's determination of legal issues de novo. *See Michael M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 230, ¶ 10, 172 P.3d 418, 421 (App. 2007). This court has stated that a juvenile court lacks jurisdiction of a dependency action when the petition fails to set forth facts showing a dependency exists.[2] *In re Pima County Juv. Action No. J-46735*, 25 Ariz. App. 424, 425, 544 P.2d 248, 249 (1976); *see also* A.R.S. § 8-841(B) (dependency petition must include "concise statement of the facts to support the conclusion that the child is dependent"); Ariz. R. P. Juv. Ct. 48(A) (dependency petition "invokes the authority of the court to act on behalf of a child who is alleged to be a

---

[1]Timothy's contention is arguably moot because he did not challenge the sufficiency of the substituted petition; however, because the substituted petition alleged essentially the same grounds for dependency as Alisa's private petition, we address the merits of his argument. We also note that Timothy based his motion to dismiss in part on Rule 12(b)(6), Ariz. R. Civ. P., which provides for dismissal of civil complaints that fail to state a claim upon which relief can be granted. That rule has not expressly been made applicable to dependency proceedings, which are governed by Rules 1 through 8 and 37 through 60, Ariz. R. P. Juv. Ct. Although we may apply the rules of civil procedure "[i]n some instances . . . where the juvenile rules are silent," *S.S. v. Superior Court*, 178 Ariz. 423, 424, 874 P.2d 980, 981 (App. 1994), we find such application inappropriate here.

[2]Arizona courts have used the term "jurisdiction" to mean both "the authority to do a particular thing" and, more precisely, "the power of the court to entertain an action of a particular subject matter." *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996). We need not determine in this case, however, the meaning of the term as used in *In re Pima County Juv. Action No. J-46735*, 25 Ariz. App. 424, 425, 544 P.2d 248, 249 (1976).

dependent child" and shall "contain the information required by law"). For the following reasons, we conclude the court properly denied Timothy's motion.

¶7 A dependent child is one "[i]n need of proper and effective parental care and control and who has . . . no parent or guardian willing to exercise or capable of exercising such care and control." § 8-201(13)(a)(i). Assuming the allegations of the petition here are true, as Timothy concedes we must, the petition alleged a dependency based on substantiated allegations of Timothy's sexual abuse of Monet, expert opinion that he should not be allowed unsupervised contact with her, and Alisa's inability to protect Monet, given the family court order requiring such contact.

¶8 Timothy contends, however, that the petition was legally insufficient because the visitation order was the sole source of Alisa's alleged inability to parent Monet effectively. He relies on *Meryl R. v. Arizona Department of Economic Security*, 196 Ariz. 24, 992 P.2d 616 (App. 1999), as support for that contention, but *Meryl R.* is distinguishable from this case. The mother in *Meryl R.* had been awarded custody of her son David in a dissolution proceeding in Missouri, but David was living voluntarily with his father in Arizona, and the mother was living in Kansas. *Id.* ¶ 10. A dependency proceeding was underway in Kansas regarding David's half-siblings, but it did not involve David. *Id.* ¶ 3. His guardian ad litem filed a dependency petition in Arizona alleging that the mother was unfit to parent him because she had "neglected and abused him in the past" and further alleging that the father, although "both fit and willing to parent" him, "lack[ed] a legal basis for the physical custody" he was exercising. *Id.* ¶ 2. The juvenile court dismissed the

dependency petition, ruling that, if custody of the child were to be modified, "'it must be done either through [Domestic Relations] court or the Kansas court involved in the dependency proceedings.'" *Id*. ¶ 4 (alteration in *Meryl R*.).

¶9 The appellate court in *Meryl R.* understood the juvenile court to have ruled on two bases: (1) "reject[ion], as a matter of law, [of] the assertion that the father's lack of legal custody amounted to a dependency within the meaning of the Arizona statute" and (2) declination of jurisdiction "in deference to other, more suitable, courts." *Id*. The appellate court decided the case on the first ground, finding the father's lack of legal custody did not render him incapable of parenting appropriately. *Id.* ¶ 5. The mother in *Meryl R*. apparently was making no attempt to exercise her custody or visitation rights. Therefore, the father was able to have physical custody without interference from the allegedly unfit mother. *See id.* ¶¶ 7, 10 (observing there "was no present threat to the status quo, . . . the father was free to seek a modification of custody . . . in an appropriate domestic relations court," and "there were no exigent circumstances that required the juvenile court to interpose a dependency before such custody proceedings could take place").

¶10 In making its determination, the court in *Meryl R*. distinguished the holding in *In re Pima County Juvenile Action. No. J-77188*, 139 Ariz. 389, 678 P.2d 970 (App. 1983). *Meryl R*., 196 Ariz. 24, ¶ 7, 992 P.2d at 618. In *Pima County No. J-77188*, ADES had filed a dependency petition alleging sexual abuse by the father and the mother's inability to protect her children due to a visitation order entered in the couple's dissolution proceeding. 139 Ariz. at 390-91, 678 P.2d at 971-72. The juvenile court granted the father's motion to

dismiss the dependency petition, concluding that the petition had failed to sufficiently allege the children were dependent as to the mother and that the "proper remedy was to seek a modification of the visitation order . . . in the dissolution action." *Id*. at 391-92, 678 P.2d at 972-73. But the appellate court reversed, finding the allegations in the dependency petition sufficient. *Id*. at 392, 678 P.2d at 973.

¶11 This case is materially indistinguishable from *Pima County No. J-77188*. As there, and contrary to Timothy's assertion, the petitioner here alleged—with the support of expert opinion—a risk of imminent harm to the child from court-ordered contact with the father and the mother's inability to protect the child against that risk because of the family court's order. Timothy contends *Pima County No. J-77188* is distinguishable because Alisa, rather than ADES, had filed the original petition. Indeed, the court in *Pima County No. J-77188* considered it significant that ADES, rather than the mother, had filed the petition, thus obviating any issue of "'forum shopping' by a parent who is dissatisfied with the determination of custody matters in a dissolution action." 139 Ariz. at 392, 678 P.2d at 973. But ADES was substituted as petitioner in this case at the preliminary protective hearing, before the juvenile court ruled on the motion to dismiss. Therefore, we consider the action's having originated as a private proceeding to be a distinction without a difference. We further note that the court in *Pima County No. J-77188* found the mother's "failure or refusal to seek a modification of the [visitation] order" could not "be held to prevent [A]DES from exercising its responsibilities to the children." *Id*.

¶12 Timothy also contends the precedential value of *Pima County No. J-77188* was severely limited by the narrow reading it was given by the court in *Meryl R.* There, the court noted "good reasons to construe *J-77188* narrowly" and concluded "[t]he circumstances would be rare and exigent . . . that would favor initiating a dependency proceeding in a visitation dispute in preference to petitioning to . . . modify the challenged visitation order." *Meryl R.*, 196 Ariz. 24, ¶ 7, 992 P.2d at 618. However, the main basis on which the *Meryl R.* court distinguished *Pima County No. J-77188* was the alleged risk of imminent harm alleged in that case—the same distinguishing factor present here. *Meryl R.*, 196 Ariz. 24, ¶ 7, 992 P.2d at 618. Based on the facts in this case, we find *Pima County No. J-77188* persuasive, and we conclude the juvenile court did not err as a matter of law in denying Timothy's motion to dismiss based on the alleged inadequacy of the petition's allegations.[3]

¶13 Next, Timothy argues the juvenile court abused its discretion by failing to dismiss the dependency proceeding on the ground of res judicata. At the adjudication hearing, the court voiced concern about whether the evidence to be presented would be identical to that already heard by Judge Douglas in the family court proceeding, asking: "[I]f there is no new evidence other than what [Judge Douglas has] heard, and she's already decided it based on that evidence . . . is it res judicata since it[']s already made on the facts[?]" At the close of the evidence, Timothy's counsel moved "for dismissal based on . . . res judicata," stating his belief that there had been no new evidence presented and that the

[3]We continue to construe *Pima County No. J-77188* narrowly and will closely scrutinize any dependency case that appears to have been filed to subvert the findings of a custody case.

issue of whether Timothy should have unsupervised contact with Monet had already been finally decided. Nonetheless, counsel identified evidence introduced at the adjudication hearing that "may not have been introduced to Judge Douglas," including the expert opinion testimony of Winters, on which the juvenile court eventually relied heavily in adjudicating Monet dependent. Counsel stated, however, that he did not "believe that any of those pieces of information [we]re substantive" or that they "change[d] the body of evidence" that had been presented to and considered by Judge Douglas.

¶14 The juvenile court heard argument on the issue and took the matter under advisement. In its subsequent ruling, it found ADES had "proven the allegations in the Dependency Petition by a preponderance of the evidence" and "[t]he Findings of the Family Division of the Superior Court [were] not res judicata of these allegations." It made the following additional findings:

> The Court was particularly interested in the expert testimony of Beth Winters. Ms. Winters was in the process of conducting a "therapeutic reconciliation" between [Monet] and her Father. She conducted 22 sessions between March 6, 2007 and October 6, 2008. Ms. Winters testified that the process was a step-by-step procedure. Visits had progressed from therapeutic to supervised by J.S.P. At the time of the last session conducted by Ms. Winters, October 6, 2008, it was her opinion that, although progress was being made, she was not ready to recommend unsupervised visits. She did not believe that the Father and the Child were ready for the visits to become unsupervised. Some of this was due to the child's behavior at sessions and visits which occurred in October, 2008.
>
> It is Ms. Winters'[s] uncontroverted expert opinion that additional sessions between the Father and the Child are necessary before she could safely recommend that unsupervised visits between the Child and the Father are safe and appropriate.

¶15 We review de novo the juvenile court's ruling on an issue of res judicata. *See Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 10, 146 P.3d 1027, 1032 (App. 2006). "'Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.'" *Id.* ¶ 13, *quoting Montana v. United States*, 440 U.S. 147, 153 (1979). Res judicata is synonymous with the doctrine of "claim preclusion." *See Howell v. Hodap*, No. 1 CA-CV 08-0027, n.7, 2009 WL 1298922 (Ariz. Ct. App. May 12, 2009). The separate but related doctrine of collateral estoppel, or issue preclusion, prevents a party from relitigating an issue that was essential to a final determination in a previous proceeding under certain circumstances. *See Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, ¶ 9, 990 P.2d 1069, 1073 (App. 1999). Timothy contends that whether his having unsupervised visits with Monet would subject her "to the possibility of abuse or neglect" was an issue necessarily litigated before Judge Douglas because, under A.R.S. § 25-408(A), a parent is entitled to reasonable parenting time "unless the court finds . . . that parenting time would endanger seriously the child's physical, mental, moral or emotional health."

¶16 Assuming for purposes of this decision that res judicata or collateral estoppel can apply to a decision regarding parenting time and could apply in this case following the juvenile court's consolidation of the dependency and special paternity actions, neither doctrine barred the dependency adjudication in this case. "Whether by way of res judicata or collateral estoppel, the preclusive effect of a judgment is limited to parties and persons in privity with parties." *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 157 Ariz. 461, 466, 759 P.2d 607, 612 (1988). "[I]t is axiomatic that a stranger to a litigation may not be bound by

a determination made therein for purposes of subsequent litigation." *Fremont Indem. Co., v. Indus. Comm'n of Ariz.*, 144 Ariz. 339, 342, 697 P.2d 1089, 1092 (1985).

¶17 Timothy contends Alisa was in privity with ADES, but we disagree. "Finding '[p]rivity between a party and a non-party requires both a "substantial identity of interests" and a "working or functional relationship" . . . in which the interests of the non-party are presented and protected by the party in the litigation.'" *Hall v. Lalli*, 194 Ariz. 54, ¶ 8, 977 P.2d 776, 779 (1999), *quoting Phinisee v. Rogers*, 582 N.W.2d 852, 854 (Mich. Ct. App. 1998) (alteration in *Hall*). "Privity, however, is not a result of parties['] having similar objectives in an action but of the *relationship* of the parties to the action and the *commonality* of their interests." *Id.* ¶ 12 (emphasis in *Hall*). As the court in *Pima County No. J-77188* stated:

> In filing a dependency petition, [A]DES is exercising the responsibility conferred upon the state to prevent dependency, abuse and exploitation of children. . . . The state's interest lies in the future well-being of the minor children residing in this state, and is separate and distinct from the interest of the parents in preserving their respective rights to custody and control of their children.

139 Ariz. at 392, 678 P.2d at 973. Therefore, although ADES and Alisa may have had a common interest in protecting Monet, they were not in privity for purposes of the doctrine of res judicata or collateral estoppel. *Cf. Hall*, 194 Ariz. 54, ¶¶ 3, 14, 28, 977 P.2d at 778, 781, 784 (child not barred by doctrine of res judicata from maintaining paternity claim after determination in state's paternity action on behalf of mother that defendant not child's father; neither state and child nor mother and child were in privity for purposes of doctrine). Thus,

even assuming the claim or issue presented in the dependency proceeding was the same claim or issue that had been presented by the custody petition, the dependency action was not barred because ADES had not been party to the family court proceeding.

¶18 For the foregoing reasons, we conclude the juvenile court did not err in failing to dismiss the dependency proceeding, and we affirm the juvenile court's order adjudicating Monet dependent.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

JOHN PELANDER, Judge