In Re the Marriage of Arzate

2012 | Cited 0 times | Court of Appeals of Arizona | February 2, 2012

MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

AFFIRMED

¶1 Appellant Michael Arzate appeals from trial courts order denying his motion for an evidentiary hearing and requiring he pay the fee for his childrens best-interests attorney. Because he has waived his arguments on appeal, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial courts ruling.[1] See In re Marriage of Yuro, 192 Ariz. 568, ¶ 3, 968 P.2d 1053, 1055 (App. 1998). Michael and Gloria Arzate were divorced in February 2004. At that time, the court awarded Gloria physical and legal custody over the parties two minor children, M. and A., awarding Michael specified unsupervised or supervised parenting time dependent on his sobriety. In 2007, Gloria filed a petition to modify Michaels parenting time based in part on Michaels incarceration on a drug-related offense. After a hearing,[2] the court suspended Michaels parenting time and any telephonic communication, but permitted him to communicate with the children in writing through Gloria.

¶3 In 2008, Michael filed a petition to modify parenting time, based in part on his release from incarceration. Gloria filed a motion for the appointment of an attorney to represent the best interests of the children. The trial court appointed a best-interests attorney for the children to be paid for equally by both parties and ordered Gloria make the children available for counseling. After several hearings, including an evidentiary hearing, the court stayed counseling with both children in 2009 based on an experts opinion it would be damaging emotionally to M. and because A. did not want to proceed with family reunification. The court allowed Michael to present the experts reports to another expert at his own expense, permitting him to request reunification with A. if the expert "ha[d] a strong opinion that a psychiatric evaluation should be completed on A[.], that reunification should occur, and [he] c[ould] formulate how the reunification should happen."

¶4 In November 2010, Michael filed a motion to set an evidentiary hearing based on an experts review

of the case. The trial court denied the motion based on a lack of information contained in it. Michael filed another motion for a hearing, including a letter from the expert. After a hearing on the motion, the court denied Michaels motion for an evidentiary hearing and ordered Michael pay the fee for the childrens best-interests attorney. This appeal followed.

Discussion

¶5 We have jurisdiction over an appeal from a "special order made after final judgment." A.R.S. § 12-2101(A)(2). Such an order is appealable if it raises issues different from those in the final judgment, affects the judgment, and is not ""merely preparatory to a later proceeding that might affect the judgment." In re Marriage of Dorman, 198 Ariz. 298, ¶ 3, 9 P.3d 329, 331 (App. 2000), quoting Arvizu v. Fernandez, 183 Ariz. 224, 227, 902 P.2d 830, 833 (App. 1995). Michaels motion for an evidentiary hearing moved to modify the custody arrangement based on a number of post-decree developments; thus, denial of the motion is appealable. See id.

¶6 Michael first argues the trial court erred by denying his motion for an evidentiary hearing. However, much of his argument attacks previous proceedings and court orders curtailing parenting time which were not appealed timely and which are not properly before this court. See Lee v. Lee, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982) (no jurisdiction over order untimely appealed).And Michael makes only one citation to authority in his argument, citing A.R.S. § 25-411(J),[3] which concerns when a court may modify parenting time and provides that a court shall not restrict parenting time unless it finds the parenting time would seriously endanger the child. He cites no authority governing when the court may grant or deny a motion for an evidentiary hearing, the motion at issue here. Therefore, Michael has waived this argument. See Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); Polanco v. Indus. Comm'n, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellants failure to develop and support argument waives the issue on appeal).

¶7 Michael also argues the trial court erred in ordering he pay the fees for his childrens best-interests attorney. He failed to object below when the court asked if he had any questions about the courts ruling, so his argument is waived on that basis. See Ritchie v. Krasner, 221 Ariz. 288, ¶ 51, 211 P.3d 1272, 1287 (App. 2009). And, because he has failed to provide any authority to support this argument, it also is waived for that reason. See Ariz. R. Civ. App. P. 13(a)(6); Polanco, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2.

Attorney Fees and Sanctions

¶8 Gloria requests attorney fees and costs on appeal pursuant to A.R.S. §§ 12-342 and 12-349, because the appeal is "essentially . . . frivolous." The best-interests attorney for the children similarly argues Michael and his attorney should be sanctioned pursuant to Rule 25, Ariz. R. Civ. App. P., for filing a

frivolous appeal.

¶9 When an appeal is frivolous, we may impose "reasonable penalties or damages (including contempt, withholding or imposing of costs, or imposing of attorneys fees) as the circumstances of the case and the discouragement of like conduct in the future may require." Ariz. R. Civ. App. P. 25. An appeal is frivolous if the issues "are unsupported by any reasonable legal theory," and we have held an appeal to be frivolous based upon an appellants "failure to raise any reasonable issue regarding a meritorious claim." Johnson v. Brimlow, 164 Ariz. 218, 222, 791 P.2d 1101, 1105 (App. 1990). Michael has not supported his arguments by any legal theory or raised any issues of merit. Because an attorney has a duty to not file frivolous appeals, we sanction Michaels attorney and require him to pay some or all appellate attorney fees for Gloria and his childrens best-interests attorney, upon their compliance with Rule 21, Ariz. R. Civ. App. P. See Johnson, 164 Ariz. at 222, 791 P.2d at 1105. We also award Gloria and the childrens best-interests attorney costs on appeal as the prevailing party, to be paid by Michael. See § 12-342(A).

Conclusion

¶10 For the foregoing reasons, we affirm.

JOSEPH W. HOWARD, Chief Judge

CONCURRING: /s/ Peter J. Eckerstrom PETER J. ECKERSTROM, Presiding Judge /s/ J. William Brammer, Jr . J. WILLIAM BRAMMER, JR., Judge

1. Michael has failed to provide citation to the record in his statement of facts as required by Rule 13(a)(4), Ariz. R. Civ. App. P., and therefore we disregard it. State Farm Mut. Auto. Ins. Co. v. Arrington, 192 Ariz. 255, n.1, 963 P.2d 334, 336 n.1 (App. 1998); see also Delmastro & Eells v. Taco Bell Corp., 228 Ariz. 134, n.2, 263 P.3d 683, 686 n.2 (App. 2011) (reference to record should inform appellate court "whether the item referred to is, in fact, included in the record on appeal pursuant to Rule 11(a)(1) and (3), Ariz. R. Civ. App. P.," and direct courts attention to item "as it is numbered pursuant to Rule 11(a)(2)").

2. Michael has provided only the transcript from a hearing dated February 14, 2011; we presume the missing transcripts from all other hearings support the trial courts rulings. See Baker v. Baker, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("When a party fails to include necessary items, we assume they would support the courts findings and conclusions.").

3. Although Michael cites alternatively to A.R.S. §§ 25-410(B) and 25-411(D), the language he quotes is now located in § 25-411(J). See 2011 Ariz. Sess. Laws, ch. 346, § 1 (redesignating former § 25-411(D) as § 25-411(J)).