



CASTRO v. CARTTER

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NOTICE: NOT FOR OFFICIAL PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE ARIZONA COURT OF APPEALS DIVISION ONE

In re the Matter of:

CODY G. CASTRO, Petitioner/Appellee,

v.

EMILY G. CARTTER, Respondent/Appellant.

No. 1 CA-CV 22-0400 FC

Appeal from the Superior Court in Coconino County No. S0300PO202100065 The Honorable Fanny G. Steinlage, Judge Pro Tempore

AFFIRMED

COUNSEL

Aspey, Watkins & Diesel, PLLC, Flagstaff By Michael J. Wozniak Counsel for Respondent/Appellant

Flagstaff Law Group, Flagstaff By Rose Winkeler Counsel for Petitioner/Appellee MEMORANDUM
DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Cynthia J. Bailey and Vice Chief Judge David B. Gass joined.

T H U M M A, Judge:

¶1 Emily Cartter (Mother) appeals from an order of protection, entered after an evidentiary hearing, prohibiting her from having contact with Cody Castro (Father) and severely restricting her contact



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with their two-year old child. Because Mother has shown no error, the order is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Father are involved in custody proceedings in family court, with Father filing a petition for an order of protection in November 2021. The petition, verified by Father under penalty of perjury, identified numerous instances in 2021 where Mother allegedly had attempted to harm Father, and that implicated the safety of their child. The petition acknowledged conversation earlier in November 2021 with Archie Pacheco -

boyfriend. The petition requested an order of protection prohibiting Mother from having contact with Father and with the child as a protected person.

¶3 After an ex parte hearing, the superior court issued the requested order of protection. Finding reasonable cause to believe that Mother had committed an act of domestic violence within the past year, the order prohibited Mother from having any contact with Father or the child, except through attorneys, legal process and court hearings, and that she may communicate with Father electronically regarding legal decision making for the child. Mother was also workplace or residence. ¶4 Mother, through counsel, timely requested a contested evidentiary hearing. See Ariz. R. Prot. Order P. 38(a) (2023). 1 At the evidentiary hearing spanning parts of three days and ending in February 2022, the court received exhibits, heard testimony from Pacheco, Father and Mother, and heard argument.

¶5 After weighing and assessing credibility and conflicting evidence, the court found Father proved by a preponderance of the evidence that Mother committed an act of domestic violence. In detailed findings made from the bench, the court found Father proved that Mother placed nails in her driveway and that, on August 11, 2021, those nails go flat when he was returning the child to Mother. The court found Mother committed two types of criminal damage (domestic violence), A.R.S. § 13-1602(A)(1) & (2); endangerment (domestic violence), A.R.S. § 13-1201(A), and conspiracy (with her mother) to commit those offenses, A.R.S. § 13-1003(A).

¶6 The evidence showed that it takes Father about 30 minutes to drive from his home to where Mother lives, including interstate travel at up to 75 miles per hour. As a result, the court found, Mother created a substantial risk of imminent death or physical injury when she damaged tires. Given that the travel involved parenting time exchanges, the

¶7 The court then addressed whether the child may be harmed if Mother was permitted to maintain contact with the child and whether the child may be endangered if Mother had contact outside the presence of Father. See Ariz. R. Prot. Order P. (Rule) 35(b). The court found the child harmed if Mother was permitted to maintain contact, given her actions causing a danger of harm to both Father and the child and For similar reasons, the court found



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that the child may be endangered if Mother had contact with the child

¶8 Although finding that Father had not proven other misconduct alleged in the petition, the court upheld the order of protection. The court, however, modified the prohibitions to allow Mother to have video conference visits with the child, three times a week for no more than

1 Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated. 10 minutes each, and deleting workplace.

¶9 This court has ju the order of protection under A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(5)(b) and Ariz. R. Protective Order P. 42(a)(2).

DISCUSSION

¶10 Mother does not challenge the order of protection to the extent that it prohibits her from having contact with Father. Accordingly, that portion of the order remains in place. See , 214 Ariz. 489, 491 ¶ 6 n.2 (App. 2007). Mother does, however, challenge the restriction of her contact with the child, claiming the court erred in (1) finding that the child may be harmed if Mother is permitted to have contact with child and that the child may be endangered if Mother has contact outside the presence of Father and (2) child to three 10 minute video calls per week when less restrictive options

were available under A.R.S. § 25-403.03(F). The grant of an order of protection is reviewed for an abuse of discretion. See Savord v. Morton, 235 Ariz. 256, 259 ¶ 10 (App. 2014). A trial court abuses its discretion when the record is Michaelson v. Garr, 234 Ariz. 542, 544 ¶ 5 (App. 2014) (citation omitted).

I. Mother Has Failed to Show the Court Abused Its Discretion in Addressing Harm to the Child.

¶11 Mother argues that the superior court failed to find that there Ariz. R. Prot. Order P. 5(b)(1). The court, however, concluded that

Mother tires, in a vehicle used to transport the young child, Because the evidence supports that conclusion, Mother has shown no abuse of discretion. See Michaelson, 234 Ariz. at 544 ¶ 5.

¶12 As Mother also correctly notes, the superior court must Mother is permitted to er the child may be endangered if there is contact outside the presence of See Ariz. R. Prot. Order P. 35(b). In addressing these inquiries, the superior court found:

When someone has engaged in this level of reckless disregard for the safety of a child who would be traveling at that rate of speed in preponderance of the evidence the child may be



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harm if permitted to maintain contact with the [Mother].

The court found these same facts showed and supported endangered if

Because the evidence supports these conclusions, Mother has shown no abuse of discretion. See Michaelson, 234 Ariz. at 544 ¶ 5.

¶13 In arguing to the contrary, Mother relies on three unpublished decisions, none of which are binding and all of which are distinguishable. Amrhein v. McClellan, does not, as Mother asserts findings regarding Rule 5(b)(1) factors vacated a protective order were subject to physical harm or that the acts of domestic violence . . .

2 CA-CV 2019-0128, 2020 WL 4931690, at *3 ¶ 15 (Ariz. App. Aug. 21, 2020). As noted above, the evidence presented in this case did show the domestic violence involved the child. Savoca v. Savoca vacated a protective order 1 CA-CV 18-0366 FC, 2019

WL 664479, at *2 ¶ 11 (Ariz. App. Feb. 19, 2019). In this case, by contrast, the superior court discussed the Rule 35(b) factors in detail. And Aragon v. Eulate vacated an order of protection precluding contact with a child, where there was no finding of domestic violence against the child or any determination that there was reasonable cause to believe that the child was at risk. 1 CA-CV 18-0742 FC, 2019 WL 4794623, at *2 ¶ 6 (Ariz. App. Oct. 1, 2019). Here, unlike in Aragon, the court found violence provided reasonable cause to believe the child was at risk and

showed her

¶14 remaining argument is based on the thought that the superior court could have assessed credibility differently or could have construed conflicting evidence differently. Contrary to on appeal. We Andrews v. Andrews, 252 Ariz. 415, 417 ¶ 7 (App. 2021) (citing Hurd v. Hurd,

223 Ariz. 48, 52 ¶ 16 (App. 2009)). ¶15 Finally, Mother argues the order of protection was improper because, on August 11, 2021, Father was returning the child to home, rather than violence offenses Under

Arizona law, intent is a question of fact for the finder of fact to resolve. See Eng v. Stein, 123 Ariz. 343, 347 (1979); State v. Quatsling, 24 Ariz. App. 105, 108 (1975) (The existence of intent is one of the questions of fact for the jury's determination. . Here, the superior court properly could find that the evidence showed the requisite intent.

II. Mother Has Failed to Show the Court Erred in Restricting Her Contact with the Child.

¶16 Citing a Comment to Rule 35 and distinguishable unpublished decisions, Mother argues the



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superior court erred in restricting her contact with the child to three 10 minute video calls per week when less restrictive options were available under A.R.S. § 25-403.03(F). Although the restrictions in the order of protection are significant, Mother has not shown that the court erred in A.R.S. § 25-403.03(F).

¶17 As nt has committed an act of domestic violence, that parent has the burden of child or significantly impair 25-403.03(F). The record reveals no showing by Mother that she met her

burden on this point. In fact, Mother never mentioned Section 25-403.03(F), or the factors included in that statute, in argument to the superior court. Accordingly, Mother waived any argument that the court failed to properly apply that statute. See *Foor v. Smith*, 243 Ariz. 594, 597 ¶ 11 (App. 2018).

¶18 Apart from waiver, the superior court expressly found that the child may be harmed if Mother continued to have contact and that the child may be endangered by contact with Mother outside of the presence of Father. These findings, which are supported by the evidence, negate any suggestion that Mother discharged her burden under A.R.S. § 25-403.03(F).

Accordingly, the court had no occasion to consider ¶19 The two unpublished decisions Mother cites are distinguishable. In vacating an order of protection that did not address the two Rule 35(b) factors, *Savoca v. Savoca* stated not directly implicated in this appeal, the options and considerations under

A.R.S. § 25- 2019 WL 664479, at *3 ¶ 14 n.1. That suggestion does not, somehow, show that the order of protection in this case was error. *Aragon v. Eulate* involved no finding of domestic violence against the child or any determination that there was reasonable cause to believe that the child was at risk, where the options in Section 25-403.03(F) might provide guidance. 2019 WL 4794623, at *2 ¶¶ 6- 7. In this case, by contrast, the court found reasonable cause to believe the On this record, Mother failed to show the

court erred in restricting her contact with the child.

CONCLUSION

¶20 The order of protection is affirmed. On the record presented and i under A.R.S. § 13-3602(T) is denied. See also Ariz. R. Prot. Order P. 39. Father

is, however, awarded his taxable costs on appeal contingent upon his compliance with ARCAP 21.

