

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

MARGARET E. MOSTELLER,
Appellee,

and

CODY E. WHITAKER,
Appellant.

No. 2 CA-CV 2015-0025
Filed September 30, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20024486
The Honorable Deborah Pratte, Judge Pro Tempore

DISMISSED

COUNSEL

Margaret E. Mosteller, Ballston Lake, NY
In Propria Persona

Cody E. Whitaker, Tucson
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 In this dissolution proceeding, Cody Whitaker appeals from the denial of his motion for new trial filed after the trial court denied his motion for an order finding his former wife, Margaret Mosteller, in civil contempt for her conduct pertaining to a court order. For the reasons that follow, we dismiss the appeal for lack of jurisdiction.

Factual and Procedural Background

¶2 Cody and Margaret were married in November 1986, and their marriage was dissolved in October 2003. Margaret received custody of their minor children, and Cody was granted parenting time.¹ In June 2014, Cody filed a “Petition to Prevent Relocation of Minor Child,” stating that Margaret had recently informed him she intended to move to New York with their youngest daughter, who was almost sixteen years old. After a hearing, the trial court found the daughter was old enough for her wishes to be taken into consideration regarding the relocation, and ordered that she be interviewed. The court also ordered the parties not to discuss “the issues of this case, including legal decision-making and parenting time” before her interview.

¶3 After a hearing, the trial court found the daughter wished to move to New York and ordered that Margaret could relocate with her. Cody then filed a “Notice of Petitioner’s Contempt of Order,” stating Margaret had violated the order not to

¹Cody and Margaret have five children. Only one was still a minor in mid-2014, when the underlying issue in this appeal arose.

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discuss the interview with the daughter. After an evidentiary hearing, the court declined to hold Margaret in contempt. Cody then filed a motion for new trial arguing evidence had been improperly excluded at the hearing and the court should have found her in contempt. The court denied the motion, and this appeal followed.

Jurisdiction

¶4 In his opening brief, Cody contends we have jurisdiction over the trial court's denial of his motion for new trial pursuant to A.R.S. § 12-2101. But we have an independent duty to review our jurisdiction, and, if found lacking, to dismiss the appeal. *In re Marriage of Flores & Martinez*, 231 Ariz. 18, ¶ 6, 289 P.3d 946, 948 (App. 2013).

¶5 Cody's notice of appeal states he is appealing from the ruling on his motion for new trial, "as the [ruling is] related to the Respondent's Petition to Prevent Relocation of the Minor Child . . . and the Petitioner's Request for Child Interview . . . and all subsequent orders pertaining to the disputed matters in the above captioned action." His opening brief is based solely on the motion for new trial.

¶6 Generally, an order denying a motion for new trial is appealable, *see* A.R.S. § 12-2101(A)(5)(a), but a party may not appeal such an order when the underlying judgment is not a final, appealable order, *see Santa Maria v. Najera*, 222 Ariz. 306, ¶¶ 10-11, 214 P.3d 394, 396 (App. 2009). Because Cody's motion for new trial contested the trial court's failure to find Margaret in contempt, the contempt ruling must be appealable. *See id.*

¶7 As Margaret argues in her answering brief, civil contempt rulings are not generally appealable. *See Green v. Lisa Frank, Inc.*, 221 Ariz. 138, n.3, 211 P.3d 16, 23 n.3 (App. 2009) (listing state supreme court cases holding contempt order not appealable). Rather, orders challenging a contempt ruling can only be reviewed through a special action petition. *See, e.g., Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 18, 66 P.3d 70, 73 (App. 2003). This general

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rule does not apply, and a contempt order is appealable, only when “the substance or effect of the order” goes beyond finding of contempt and qualifies as appealable pursuant to § 12-2101.² *Green*, 221 Ariz. 138, ¶ 21, 211 P.3d at 26. Here, the ruling did not go beyond the denial of his motion for contempt, and Cody does not argue that it did.

¶8 Cody instead argues that the reasoning behind the prohibition against appeals from contempt orders does not apply here. Citing *Herzog v. Reinhardt*, 2 Ariz. App. 103, 104, 406 P.2d 738, 739 (1965), he maintains that while contempt orders are generally not appealable because appeals delay enforcement of underlying judgments, the order here would not cause any delay. However, in his opening brief, Cody requests that we vacate the ruling on the motion for new trial and “reopen the matters of the instant and prior hearings and consider all of the relevant evidence” that was precluded by the trial court. Such a decision would undoubtedly delay enforcement of the court’s ruling on relocation, as contemplated by *Herzog*.

¶9 Cody also argues jurisdiction is appropriate as a special order after judgment pursuant to § 12-2101(A)(2). He does not cite any cases in which a contempt ruling has been considered a special order after judgment, and we have found none. Further, as stated above, our supreme court has repeatedly held contempt orders are not appealable and must be considered in a petition for special action.³ See *Green*, 221 Ariz. 138, n.3, 211 P.3d at 23 n.3 (listing cases).

²In *Green*, the sanctions order struck appellant’s reply to a counterclaim filed against him, entered default against him, and dismissed his cross-claim with prejudice. 221 Ariz. 138, ¶ 1, 211 P.3d at 21.

³We may elect to assume special-action jurisdiction over a matter improperly brought as a direct appeal. See, e.g., *Burton*, 205 Ariz. 27, ¶ 18, 66 P.3d at 73. However, Cody does not ask us to do so, and “our own review does not demonstrate that this case merits the exercise of our extraordinary jurisdiction.” *Catalina Foothills*

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Disposition

¶10 Because the ruling on the motion for contempt is not an appealable order, we lack jurisdiction over Cody's appeal from the denial of his motion for new trial. *See Santa Maria*, 222 Ariz. 306, ¶ 11, 214 P.3d at 396. Therefore, the appeal is dismissed.

Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass'n, 229 Ariz. 525, ¶ 20, 278 P.3d 303, 309 (App. 2012).