IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

JUSTIN TAIT MITTON, *Petitioner/Appellant*,

v.

CANDICE H. MITTON, *Respondent/Appellee*.

No. 1 CA-CV 15-0769 FC
FILED 4-11-2017

Appeal from the Superior Court in Maricopa County
No. FC2012-000532
The Honorable Pamela Hearn Svoboda, Judge

AFFIRMED

COUNSEL

Ellsworth Family Law P.C., Mesa
By Glenn D. Halterman
Counsel for Petitioner/Appellant

Bowman and Brooke LLP, Phoenix
By Travis M. Wheeler, Amanda E. Heitz
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Randall M. Howe and Judge Patricia A. Orozco[1] joined.

T H U M M A, Judge:

¶1 Justin Mitton (Father) appeals from the superior court's post-decree order modifying parenting time. Because Father has shown no reversible error, the order is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Candice Mitton (Mother) and Father divorced by consent decree entered in 2013 and, as applicable here, share parenting time with their two minor children.[2] The decree provided equal parenting time, with the children spending three days with Mother and then three days with Father (a 3/3 schedule).

¶3 By 2015, Mother wanted, and a June 2015 parenting coordinator (PC) report mentioned, a parenting time schedule where the children would spend five days with Father, two days with Mother, two days with Father, and then five days with Mother (a 5/2/2/5 schedule). This schedule would allow the children to spend longer periods in each home. Father, however, is a firefighter who works 48 hours straight, and then is off 96 hours straight. Father opposed the 5/2/2/5 schedule, stating the 3/3 schedule worked better given his work schedule. After receiving the PC's report, on July 21, 2015, the superior court set a hearing on the parenting time schedule in conjunction with a previously-scheduled August 6, 2015 hearing addressing child support. In a joint pretrial statement filed a week before the hearing, counsel for the parties wrote they were "unsure" whether parenting time would be addressed at the hearing.

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[1] The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] A third minor child lives with Mother and parenting time for that child is not at issue here.

Both parties, however, then listed their positions on parenting time, with Father objecting and stating the PC exceeded her authority by making a "recommendation affecting . . . a substantial change in parenting time" contrary to Ariz. R. Fam. Law P. 74(E) (2015).[3]

¶4 At the beginning of the August 6, 2015 hearing, after being asked about parenting time, the court stated it preferred to "address all issues with you today so we don't have to do another setting." Father's counsel responded he "just kind of fe[lt] compelled to make a record," and repeated the objection in the pretrial statement, adding there was not enough notice. The court responded, "[i]f you want to reset that portion, we can give you a trial date in November." Father's counsel did not accept that offer, replying instead that if the court wanted to "overrule that and go forward today, that's fine," adding he "just need[ed] to make the record." Father's counsel then called Father as the first witness.

¶5 Father testified that his parenting time with the children would effectively be decreased under a 5/2/2/5 schedule. Mother testified that she initially agreed to a 3/3 schedule because Father's home had no other adults to watch the children, which had now changed, and she wanted consistency for the children.

¶6 After hearing testimony, receiving 30 exhibits and hearing argument, the court asked Father's counsel to clarify his objection regarding parenting time. Father's counsel stated the PC exceeded her authority, no petition addressing parenting time had been filed and proceeding with the hearing denied Father due process. Mother's counsel responded that requiring a petition would cause substantial delay and the PC had authority to "change the nature of the 50/50 schedule."

¶7 After taking the matter under advisement, the court changed the parenting time schedule to 5/2/2/5. Father unsuccessfully moved to amend the ruling. This court has jurisdiction over Father's timely appeal

[3] Rule 74 has since been changed and, accordingly, the text of the rule in place at the time of the August 2015 hearing is referenced here. Absent material revisions after the relevant dates, unless otherwise noted, statutes and rules cited refer to the current version unless otherwise indicated.

pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) and -2101(A)(1).[4]

DISCUSSION

¶8 Father relies on several arguments why he "was not afforded a proper and meaningful opportunity to be heard on the parenting time modification issue."

¶9 Father first argues Mother failed to file a petition seeking to modify parenting time. *See* A.R.S. § 25-411(L); Ariz. R. Fam. Law P. 91(F). It is true that Mother made no such filing. That said, the superior court, upon receipt of a PC's report, was authorized to set a hearing to address recommendations made in such a report. Ariz. R. Fam. Law P. 74(J)(4) (2015). That is what occurred here.

¶10 Father next argues the PC's report recommended a "substantial change in parenting time," which exceeded the PC's authority. Ariz. R. Fam. Law P. 74(E) (2015). The PC's report, however, states the court should "consider" that "[t]he parties continue to enjoy equal parenting time, but the Court consider[] extending the time at each parent[']s home." The 5/2/2/5 schedule was one of three "options" the PC then listed for "the Court to consider," noting any recommendations "are not legally binding until the court rules on them." On this record, Father has not shown the PC recommended "a substantial change in parenting time" in excess of her authority.[5] Even if she did, Father has not shown any resulting prejudice by that recommendation alone. *Cf. In re Marriage of Dorman*, 198 Ariz. 298, 303 ¶12 (App. 2000) ("In most cases of custody modification, an appellant will have great difficulty showing prejudice from an error in the preliminary verification or screening procedures under § 25-411 after a hearing has occurred.").

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[4] In a separate opinion, *Mitton v. Mitton*, 1 CA-CV 15-0769 FC (Ariz. App. April 11, 2017), filed simultaneously with this memorandum decision, this court addresses Father's challenge to a post-decree order modifying child support.

[5] In the pretrial statement, Father appeared to concede the point, stating the PC apparently "recognized that to simply recommend one of the alternative parenting time plans would have exceeded the scope of her appointment. Therefore, she instead recommended that the Court consider the alternative parenting schedules."

¶11 Father next argues the parenting time issue was added "just 16 days" before the hearing, after discovery and disclosure deadlines had passed; that "it was not clear" whether parenting time would be addressed at the hearing and the court's "intent to" do so "was not known until" the hearing and that "it appeared unlikely that the trial court intended to also take evidence" on parenting time at the hearing. The superior court added the parenting time issue to the August 6, 2015 hearing in a July 21, 2015 order. That July 21, 2015 order made plain that the recommendations in the PC's report were added to the hearing. And the sole issue addressed in the PC's report was parenting time. Thus, the court's order setting the hearing on the PC's report was clear. Indeed, although stating counsel was "unsure" about whether the issue was a part of "the upcoming hearing," in the pretrial statement, Father made various objections to the PC's report. On this record, Father's claim that he did not know parenting time would be addressed until the hearing is not supported.

¶12 Nor has Father shown how the notice that parenting time would be addressed at the hearing was improper. Father knew of the PC's report since June 2015. And he admits receiving the order adding parenting time to the hearing more than two weeks in advance. Father also offered evidence regarding parenting time at the hearing. Although now claiming "he did not have an adequate opportunity prior to the hearing to more fully develop his case, prepare additional exhibits, and obtain additional witnesses," including "procuring an expert witness," Father "has not shown what additional discovery he would have conducted, what additional evidence he would have presented, or how it would have affected the trial court's decision." *In re Marriage of Dorman*, 198 Ariz. at 303 ¶13. Father has shown no denial of due process. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¶13 Father argues he "raised the issues of the procedural irregularities and due process implications at the August 6, 2015 hearing. Nevertheless, the superior court proceeded with the hearing and ultimately entered orders modifying Father's parenting time." The court, however, offered "to reset that portion" of the hearing dealing with parenting time to "a trial date in November," an offer Father's counsel did not accept. "The purpose of an objection is to permit the trial court to rectify possible error, and to enable the opposition to obviate the objection if possible." *State v. Rutledge*, 205 Ariz. 7, 13 ¶ 30 (2003) (citation omitted). By declining the offer to reset, Father's counsel deprived the court of "the opportunity to correct any asserted defect," *Shawanee S. v. Arizona Dept. of Econ. Sec.*, 234 Ariz. 174,

177 ¶ 10 (App. 2014) (citation omitted), or prevent entirely the claimed error he now presses on appeal. Waiver does not properly allow a party to benefit from such a "wait and see" approach to an objection. S*ee Geronimo Hotel & Lodge v. Putzi*, 151 Ariz. 477, 479 (1986) ("The concept of waiver is based on two factors: fair notice and judicial efficiency.")

¶14 Finally, Father has not shown how, even if there was error, he was prejudiced. *See In re Marriage of Dorman*, 198 Ariz. at 303 ¶ 12. Father has not alleged that the superior court's conclusions are not supported by the evidence. And Father has not challenged the best interest finding. *Id.* at 303 ¶ 13 (noting appellant's argument "regarding discovery related to the best interest of the child, a finding he does not challenge on appeal. [Appellant], therefore, has failed to demonstrate any prejudice from the trial court's procedure") (citation omitted). Father has shown no reversible error.

¶15 Father requests attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324(A) and Mother seeks her costs on appeal. After considering the financial resources of both parties and the reasonableness of their positions, Father's request for attorneys' fees is denied and his request for taxable costs on appeal, given the relief reflected in the separate opinion, is granted contingent upon his compliance with Arizona Rule of Civil Appellate Procedure 21. Mother's request for taxable costs on appeal is denied.

CONCLUSION

¶16 The order modifying parenting time is affirmed.

AMY M. WOOD • Clerk of the Court
FILED: AA