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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Matter of: ) No. 1 CA-CV 09-0110  
)  
KENNETH SCOTT RANKIN, ) DEPARTMENT C  
)  
Petitioner/Appellant, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules  
) of Civil Appellate  
MELISSA ANN MICHAELS, ) Procedure)  
)  
Respondent/Appellee. )  
\_\_\_\_\_)  
)

Appeal from the Superior Court in Maricopa County

Cause No. No. FC2003-000570

The Honorable Robert A. Colosi, Commissioner

**VACATED AND REMANDED IN PART**

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Sacks Tierney P.A.  
By Diana I. Rader  
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Scottsdale

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By James L. Leather  
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Phoenix

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S W A N N, Judge

¶1 Kenneth Scott Rankin appeals from the superior court's order affirming an order of protection prohibiting him from being within one mile of Melissa Ann Michaels or her residence, work, or vehicle, except for the purpose of exchanging their minor child. He also appeals the superior court's order awarding attorneys' fees and costs to Ms. Michaels. For the reasons set forth below, we vacate the order of protection.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Litigation in this family court case began in 2003 and was ongoing during the events underlying this appeal. Ms. Michaels obtained the order of protection on June 19, 2008, and it was served on Mr. Rankin on August 6, 2008. Thereafter, Mr. Rankin requested a hearing on the order. That request was granted, and a hearing was held on October 23, 2008.

¶3 At the outset of the hearing, the court advised the parties that each side would be limited to twenty minutes of presentation, explaining: "The reason it's limited to that is because while my calendar only shows five matters on it, I actually have to take care of any people that come in for their new orders of protection and so that typically starts - they start rolling in around this time. And so we need to keep time for them." Neither party objected to the time limit, and Ms. Michaels proceeded to testify on her own behalf, describing the

June 17, 2008 encounter with Mr. Rankin at her workplace that gave rise to her petition for the order of protection.

¶14 Mr. Rankin's counsel, Diana Rader, cross-examined Ms. Michaels. During the cross-examination, the court stated that it would allow each side an additional five minutes. At the conclusion of the cross-examination, the court apprised Ms. Rader that she had used all but nine minutes of her time. Ms. Michaels's counsel, James Leather, called two more witnesses, co-workers of Ms. Michaels who had witnessed the parties' June 17, 2008 encounter, and Ms. Rader conducted cross-examination of both witnesses.

¶15 At the conclusion of Ms. Michaels's presentation of evidence, the court apprised both parties of the time they had remaining, stating: "Mr. Leather, you've used almost 19 minutes. And Ms. Rader, you've used 24 and a half minutes of your time. Thirty seconds; do you want to do anything with it?" Ms. Rader requested that Mr. Rankin be given "at least a couple of minutes to testify as to what happened." The court denied the request, explaining: "I indicated what the time was at the beginning and I extended it for five minutes and everyone was put on notice."

¶16 Ms. Rader called Mr. Rankin to testify, asking two questions before the court advised her that her time had expired. Ms. Michaels's counsel then cross-examined Mr. Rankin.

At the conclusion of the cross-examination, Ms. Rader asked whether there would be time for closing arguments. The court replied that there would not, and proceeded to state its findings on the record: "Based upon the evidence presented, Ms. Michaels has shown by a preponderance of the evidence that an act of domestic violence has occurred within the past 12 months or is likely to occur, specifically harassment, and threatening, and disorderly conduct."

¶17 The court affirmed the order of protection and also issued a Notice to Sheriff of Positive Brady Indicator, disqualifying Mr. Rankin from purchasing or possessing firearms or ammunition based on the finding that Mr. Rankin "represents a credible threat to the physical safety" of Ms. Michaels. The court ordered that attorneys' fees would be awarded to Ms. Michaels. Ms. Michaels later submitted an affidavit of attorneys' fees and costs and was awarded \$2,866.80 in fees and costs.

¶18 Mr. Rankin's motion for a new trial was denied, and he timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(B) and (F)(1) (2003), and Ariz. R. Protective Order P. 9.

#### **DISCUSSION**

¶19 As an initial matter, we note that the order of protection had already expired by the time the appeal came

before this panel in December 2009.<sup>1</sup> See A.R.S. § 13-3602(L) (Supp. 2009) (an order of protection expires one year after it is served). But despite that fact, Mr. Rankin's appeal is not moot. "A decision becomes moot for purposes of appeal where as a result of a change of circumstances before the appellate decision, action by the reviewing court would have no effect on the parties." *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988) (citation omitted). Orders of protection are filed with the court and are accessible to the public. By virtue of their short duration, orders of protection would frequently evade review if we were to declare appeals from such orders automatically moot upon their natural expiration. Because our decision will affect the validity of a publicly-accessible adverse ruling that may have consequences in subsequent proceedings, and because there remains an outstanding fee award, we do not dismiss Mr. Rankin's appeal as moot.

¶10 Mr. Rankin raises multiple issues on appeal. First, he argues that the trial court's imposition and enforcement of time limits at the hearing on the order of protection constituted reversible error. As an initial matter, we find that Ms. Rader's request that Mr. Rankin be given "at least a couple of minutes" to testify - instead of only thirty seconds -

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<sup>1</sup> Mr. Rankin did not seek accelerated review pursuant to ARCAP 29.

was sufficient to constitute an objection to the court's rigid enforcement of the predetermined time limit. We therefore review the court's enforcement of the time limit for an abuse of discretion, and will not reverse unless Mr. Rankin also demonstrates that he suffered prejudice as a result of the time limits. *Brown v. U.S. Fidelity & Guar. Co.*, 194 Ariz. 85, 91, ¶ 30, 977 P.2d 807, 813 (App. 1998). We review constitutional issues de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶11 A trial court generally has broad discretion over the management of its own docket. *Findlay v. Lewis*, 172 Ariz. 343, 346, 837 P.2d 145, 148 (1992). Ariz. R. Evid. 611(a) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. The court may impose reasonable time limits on the trial proceedings or portions thereof."

¶12 The applicable procedural rules provide a similar standard. In order of protection cases, the Arizona Rules of Protective Order Procedure ("ARPOP") govern. ARPOP 1(A)(1). But because those rules do not address the court's authority to impose time limits on a contested order of protection hearing,

the Arizona Rules of Family Law Procedure ("ARFLP") apply here. See ARPOP 1(A)(2) (providing that to the extent not inconsistent with the ARPOP, the ARFLP apply to protective order matters heard in conjunction with pending family law cases).

¶13 ARFLP 22(1) provides, in relevant part: "The court may impose reasonable time limits on all proceedings or portions thereof and limit the time to the scheduled time." ARFLP 77(B)(1) expressly provides that the standard applies to trial proceedings. Because no published opinion interprets either ARFLP 22(1) or ARFLP 77(B)(1), we look to case law interpreting other statewide rules with substantially similar language. ARFLP 1 cmt. One such rule is Ariz. R. Civ. P. 16(h). Compare Ariz. R. Civ. P. 16(h) with ARFLP 22(1), and 77(B)(1). In *Brown v. United States Fidelity and Guaranty Company*, this court held that although Ariz. R. Civ. P. 16(h) gives trial courts discretion to impose reasonable time limits on trial proceedings, "rigid time limits are disfavored." 194 Ariz. at 90-91, ¶ 29, 977 P.2d at 812-13 (citation omitted). The court held that "[t]rial time limits should be sufficiently flexible to allow [for] adjustment[s] during trial." *Id.* at 91, ¶ 29, 977 P.2d at 813 (omissions in original).

¶14 It is clear, therefore, that although trial courts have considerable discretion to impose and enforce time limits on proceedings, that discretion is not without limits and cannot

be exercised unreasonably. When a time limit deprives a litigant of due process, it is unreasonable. Due process, guaranteed under the Fourteenth Amendment of the United States Constitution and Article 2, Section 4 of the Arizona Constitution, includes the meaningful opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Consistent with that guarantee, ARPOP 8(D) provides that at a contested order of protection hearing, "[t]he judicial officer shall ensure that both parties have an opportunity to be heard, to present evidence and to call and examine and cross-examine witnesses."

¶15 Here, the court's rigid adherence to time limits deprived Mr. Rankin of due process - not because the time limits were facially unreasonable, but because they were not managed internally to ensure that Mr. Rankin was given a reasonable opportunity to present evidence. Ms. Michaels's presentation of evidence took nineteen of the twenty-five minutes that she was allotted.<sup>2</sup> It was not unreasonable for Mr. Rankin to require a similar amount of time to conduct meaningful cross-examinations of Ms. Michaels's witnesses. By denying Mr. Rankin's request for additional time in which to testify, with no inquiry

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<sup>2</sup> As is often the case in evidentiary proceedings, it is difficult to predict to the second the time that cross-examination will require. Here, Ms. Michaels's testimony was somewhat hostile and involved more objections than the ideal case would have required.



regarding what evidence he planned to present, the court forced Mr. Rankin to forfeit any meaningful opportunity to present his own evidence because he elected to conduct a reasonable cross-examination. That constituted a denial of due process. The court's adherence to the time limits in this manner, even with the addition of five minutes, was an abuse of discretion. The court could properly have limited the entire proceeding to forty minutes by taking measure to prevent one side's evidence from consuming all of the allotted time. Because the court did not do so, Ms. Michaels, as the first party to present evidence, was given an unfair advantage.

¶16 We also conclude that Mr. Rankin has sufficiently demonstrated prejudice. In his opening brief, he asserts that had he been granted additional time, he would have presented evidence that his June 17, 2008 encounter with Ms. Michaels occurred differently than she and her witnesses described. He asserts that he would have presented his own testimony; the testimony of his wife, an attorney who was a telephonic witness to the encounter; and physical evidence such as clothing, a telephone, a camera, and tape recordings of conversations. To some degree, Mr. Rankin was able to present his version of the encounter through his testimony on cross-examination. But crucially, he was denied the opportunity to corroborate his story with the independent testimony of his wife, who had

already been sworn and stood ready to testify. We therefore conclude that Mr. Rankin was prejudiced when he was denied the opportunity to present evidence, and vacate the order of protection. Because the order has expired, we do not remand for further proceedings concerning its merits.

¶17 The superior court also entered a substantial fee award against Mr. Rankin, which he has appealed. In support of his challenge to the fee award, Mr. Rankin relies on perceived defects in the award under the ARFLP. Those rules do not govern here. This appeal concerns an order of protection, which is governed by A.R.S. § 13-3602 and the ARPOP.

¶18 Because we vacate the order of protection, Ms. Michaels is no longer the prevailing party. This fact, however, is not dispositive of the attorneys' fee issue. A.R.S. § 13-3602(P) (Supp. 2009) provides: "After a hearing with notice to the affected party, the court may enter an order requiring *any party* to pay the costs of the action, including reasonable attorney fees, if any." (Emphasis added.) To that end, ARPOP 2(c) provides that fees may be awarded to any party (not only the prevailing party) and provides guidance as to the considerations that may affect the court's exercise of its discretion. We therefore remand this case to the superior court for further proceedings to determine the amount of attorneys' fees, if any, that should be awarded to Ms. Michaels.

**CONCLUSION**

¶19 For the reasons set forth above, we vacate the order of protection and remand for further proceedings consistent with this decision.

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PETER B. SWANN, Presiding Judge

CONCURRING:

/S/

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MICHAEL J. BROWN , Judge

/S/

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ANN A. SCOTT TIMMER, Judge