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



DIVISION ONE
FILED: 10/1/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In Re the Matter of:) 1 CA-CV 12-0602
)
WILLIAM G. LLEWELLYN,) DEPARTMENT D
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
LEISA A. GUMBINER,)
)
Respondent/Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2011-000178

The Honorable James T. Blomo, Judge

AFFIRMED

William G. Llewellyn
Petitioner/Appellant in *Propria Persona*

Phoenix

Viles Law Offices, LLC
By James E. Viles
Attorneys for Respondent/Appellee

Phoenix

G O U L D, Judge

¶1 Appellant William Llewellyn ("Father") appeals the family court's judgment regarding parenting time, child support,

and its award of attorneys' fees and costs in favor of Appellee Leisa Gumbiner ("Mother"). For the following reasons, we affirm.

Facts and Procedural Background

¶2 Father and Mother lived together from 1998 until 2005 in Montana. Although Father and Mother never married, their relationship produced two children: A.E.G., who was born in 2002, and J.M.G., who was born in 2004 (the "Children"). In approximately 2005 or 2006, Father and Mother separated.

¶3 Despite their efforts to reconcile, Father and Mother were unable to do so. Nonetheless, when Mother advised Father that she was moving to Phoenix, Father decided to move to Phoenix to be near the Children. Father moved to Phoenix in 2007, and Mother moved to Phoenix in the summer of 2008.

¶4 When Mother and Father first moved to Phoenix, they lived close to each other. As a result, Father had parenting time of the Children approximately 2-3 days a week, typically Monday through Wednesday. However, this arrangement ended in the summer of 2009, primarily because Mother moved to Sun City. The distance between Father's home and the Children's new school was considerable, making it difficult for Father to get the Children to school on time. As a result, the Children were tardy for school several times. Given this situation, the parties agreed to change Father's parenting time from 2-3 days during the week to every weekend.

¶15 In spring of 2011, Mother changed Father's parenting time schedule from every weekend to every other weekend. Mother made this change because her parenting time of the Children, which was limited to weekdays when she was working and the Children were attending school, left her with no "fun time" to enjoy with the Children on the weekends.

¶16 In response to Mother's further limitation on his parenting time with the Children, Father filed a petition to establish custody, parenting time, and child support on April 15, 2011. Father's original petition sought both sole custody and joint custody over the Children.¹ Father amended his petition on April 29, 2011, seeking "50 percent" shared custody with Mother.

¶17 On December 23, 2011, the family court ordered Mother and Father to attend a parenting conference to resolve their custody and parenting time disputes. At the conference, Mother and Father agreed to share joint legal custody of the Children, and they also agreed to a summer and holiday parenting time schedule. However, the parties were not able to agree on a parenting time schedule for the academic year. The family court adopted the custody and partial parenting time agreement on March 14, 2012.

¹ Perhaps in error, Father checked both the box requesting sole custody and the box requesting joint custody on the standard petition form that he originally filed with the court.

¶18 On April 4, 2012, the family court held an evidentiary hearing to resolve the outstanding issues concerning parenting time and child support. On April 19, 2012, the family court issued its ruling, ordering that during the academic year Father be afforded parenting time with the Children every other weekend, as well as two nights a week after school until 7:30 p.m. The family court also ordered Father to pay Mother current child support in the amount of \$360.38 per month, and retroactive child support in the amount of \$15,298.24. Finally, the court granted Mother's request for attorney fees and costs pursuant to Arizona Revised Statutes ("A.R.S.") § 25-324. In support of this award, the court found that Father had acted unreasonably in the litigation.

¶19 After the family court issued its order, Father filed a motion to stay proceedings, a motion for new trial and/or motion for reconsideration, and an objection to Mother's application for fees and costs. The family court entered judgment against Father on May 3, 2012, entered judgment on attorney's fees on June 4, 2012, and denied Father's motions on June 29, 2012. Father filed a timely notice of appeal on July 25, 2012. We have jurisdiction pursuant to A.R.S. §12-2101(A)(1).

Discussion

¶10 On appeal, Father asserts the evidence does not support the family court's rulings on parenting time, child support, and

the award of attorney's fees to Mother. We review a court's factual determinations regarding parenting time, child support, and an award of attorneys' fees pursuant to A.R.S. § 25-324 for an abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6, 33 P.3d 506, 509, (App. 2001) (visitation/parenting time); *In re Marriage of Robinson & Thiel*, 201 Ariz. 328, 331, 335, ¶¶ 5, 20, 35 P.3d 89, 92, 96 (App. 2001) (child support and attorneys' fees); *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8, 200 P.3d 1043, 1045 (App. 2008) (attorneys' fees).

I. Parenting Time Analysis

¶11 Father argues that the family court abused its discretion because the evidence supported his request for 50/50 parenting time. In support of his claim, Father asserts the evidence showed Mother moved residences frequently, both Children wished to spend more time with him, and Mother made inconsistent statements during her testimony. However, based on our review of the record, we conclude there was sufficient evidence to support the judgment of the family court.

¶12 The record shows that since the time of the parties' separation in 2005, Mother has been the primary custodial parent for the Children. Mother has also been primarily responsible for choosing the Children's schools and making provisions for their dental and medical care. Moreover, the record also shows that 50/50 parenting time was not practical given the distance between

Mother's home² and Father's home. As the parenting time coordinator observed in her report, sharing 50/50 custody of the Children was unrealistic, because it would take Father almost an hour to get the Children to school in the morning.³

II. Child Support

¶13 The record also supports the family court's orders regarding child support. The family court ordered Father to pay Mother current child support in the amount of \$360.38 a month based on (1) Father's testimony that he was making approximately \$2,200.00 a month before his recent raise and (2) Mother's testimony as to the number of parenting days exercised by Father. In addition, the family court determined that Father owed Mother \$15,298.24 in past child support based on Mother's testimony regarding past support paid by Father and Father's testimony regarding his prior income.

¶14 Father also claims that Mother waived any claims she may have had for past child support by not making her claim until after Father brought an action to establish his parental rights. In his reply brief, Father cites to *Cordova v. Lucero*, 129 Ariz. 184, 629 P.2d 1020 (App. 1981) to claim that Mother had waived

² The Children go to school in a district near Mother's home in Sun City, while Father lives near Scottsdale.

³ The parenting time coordinator also noted that since Father went to work at 4:00 a.m., he would not be able to take the Children to school in the morning.

her claim to past child support by not requesting past child support earlier. However, *Cordova* does not support Father's position. In *Cordova*, the mother abandoned her claim for child support by writing a letter advising the father that she did not want his support and that she was going to have the children adopted by her new husband. *Cordova*, 129 Ariz. at 186, 629 P.2d at 1022. Here, Mother made no such express waiver of child support.

III. Father's Unreasonableness And Attorney Fee Consequences

¶15 Finally, Father asserts the family court erred in awarding attorneys' fees to Mother. In support of the fee award, the family court found Father acted unreasonably in the litigation by: (1) demanding sole custody, (2) requesting the Children live with him full time and go to school in his district, and (3) asking for 50/50 parenting time and only agreeing to joint custody after a parenting conference.⁴

¶16 Based on the record before us, we are unable to conclude the family court abused its discretion in awarding fees to Mother. In particular, the family court could have reasonably

⁴ The family court's finding that Father only agreed to joint custody after the parenting conference is not supported by the record. Father originally filed a petition for full and joint custody over his children on April 15, 2011, but amended his petition two weeks later and requested joint custody with 50/50 parenting time split between him and Mother. The parenting conference took place on December 27, 2011, nearly eight months after Father had already agreed to joint custody.

concluded that Father's efforts to obtain 50/50 parenting time and have the Children go to school in his school district were unrealistic given the distance between the parties' homes, and that Father's efforts served only to unnecessarily prolong the litigation.

ATTORNEYS' FEES AND COSTS

¶17 We deny Mother's request for attorneys' fees on appeal pursuant to A.R.S. § 25-324. As the prevailing party on appeal we award Mother her reasonable costs.

CONCLUSION

¶18 For the reasons stated above, we affirm the family court's judgment regarding parenting time, child support and attorneys' fees.

/S/_____
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Judge

/S/_____
DONN KESSLER, Judge