

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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:

AMY JOANNA GAVIN, *Petitioner/Appellee*,

v.

JAMES DAVID DIXON, *Respondent/Appellant*.

No. 1 CA-CV 15-0701 FC
FILED 6-14-2016

Appeal from the Superior Court in Maricopa County
No. FC2013-092915
The Honorable Justin Beresky, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Gillespie, Shields, Durrant & Goldfarb, Mesa
By Mark A. Shields
Counsel for Petitioner/Appellee

Ber & Associates PLLC, Phoenix
By Hershel Ber
Counsel for Respondent/Appellant

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MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Maurice Portley and Judge John C. Gemmill joined.

T H U M M A, Judge:

¶1 James David Dixon (Father) appeals from an order restricting his parenting time. Because he has shown no error, the order is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 In July 2013, Father and Amy Joanna Gavin (Mother) agreed to, and the superior court entered, a consent decree of dissolution of marriage ordering joint legal decision-making authority, designating Mother as the primary residential parent and providing Father parenting time daily and every other weekend.

¶3 In June 2014, after Mother petitioned for modification, the court awarded her sole legal decision-making authority, but left unchanged the parenting time order. Less than a year later, both Mother and Father petitioned for modification of parenting time. Mother alleged Father had failed to exercise his parenting time and had engaged in belligerent and harassing behavior and asked that his parenting time be supervised until he sought treatment for anger issues.

¶4 After an evidentiary hearing, the superior court found there was no substantial and continuing change existing to grant Father's petition, stating:

Father has largely been absent from the lives of his children for the past year. Father testified to all the efforts he has taken to see his children which included contacting all major media outlets, writing to U.S. and State Senators, filing numerous pleadings with the Court, as well as filing civil suits against the Children's school and Mother. Curiously, while Father expends numerous hours in these other efforts, Father has failed to contact Mother in an effort to participate in parenting time. Logically, Mother

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would be the first person Father should contact if he desires to participate in parenting time. Father testified he tried to pick [up] the children at school in August of 2014 but the school would not let him pick them up because of an order of protection that was in place. Father then testified he was able to get the Order of Protection quashed August 1, 2014. Nonetheless, father made no attempts to pick up the children at their school since August of 2014. Instead, Father has attempted to enforce his rights to parenting time through every avenue other than actually contacting Mother to schedule parenting time. Father presents with a somewhat confusing and irrational thought process. Father continuously interrupted the Court and accused the Court of not listening even though the Court allowed Father wide latitude in his testimony. Father fails to see how his lack of contact with the children has negatively impacted them and that his failure to contact Mother about parenting time [is] the direct reason Father hasn't had parenting time. Father has blamed Mother for his lack of parenting time, claiming she is blocking his efforts at parenting time but admits he attempts to enforce his parenting time by filing pleadings with the Court rather than making an effort to contact Mother to exercise consistent parenting time. Father ultimately became frustrated and voluntarily exited himself from the Courtroom prior to the conclusion of [the] hearing.

¶5

The superior court then stated:

parenting time that ensures Father will have substantial, frequent, meaningful and continuing contact with the Children would endanger the Children's physical, mental, moral or emotional health because Father has abandoned the children over the past year, and prior to that time has engaged in alienating and harassing behaviors. Father also testified he

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refuses to allow Mother [to] know where he lives and where the children would spend parenting time if in his care.

To “protect the children’s physical, mental, moral, or emotional health,” the court ordered that Father have supervised parenting time for two hours every weekend. The ruling permitted the parties to revert to the previous parenting time plan “once Father exercise[d] consistent supervised parenting time with the children, for a period of several months.”

¶6 The court denied Father’s subsequent motion for new trial, stating:

The Court has the power to modify orders sua sponte if it is in the best interests of the children regardless of what has been specifically plead.

In this case, while Father did not intend to abandon his children, he did in fact abandon his children. The reason supervised parenting time is ordered is because Father’s conduct and outbursts in court cause concern, but also because of the extraordinary length of time that has passed since last having a meaningful ongoing relationship with his children. The children and Father will need to be reacquainted and rebuild a relationship where there has not been one in over a year.

This court has jurisdiction over Father’s timely appeal pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(2)(2016).¹

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated. The original order denying Father’s motion for new trial was unsigned and, as a result, not in appealable form. This court then suspended the appeal, revested jurisdiction in the superior court to consider an application for a signed order and after the entry of such an order, this court reinstated the appeal. Accordingly, Father’s notice of appeal is timely. Ariz. R. Civ. App. P. 9(c). Although Father’s notice of appeal references the denial of his motion for new trial, his briefs do not contest that denial. Thus, Father waived any argument as to the denial of his motion for new trial. *See* Ariz. R. Civ. App.

DISCUSSION

I. A.R.S. § 25-411(A).

¶7 Father argues the superior court erred in restricting his parenting time because Mother’s petition to modify was filed less than one year after the most recent parenting time order and failed to allege serious endangerment pursuant to A.R.S. § 25-411(A).

¶8 A.R.S. § 25-411(A) provides a one-year waiting period for seeking modification of an existing parenting time order, unless there is evidence that “the child’s present environment may seriously endanger the child’s physical, mental, moral or emotional health.” A.R.S. § 25-411(A); *Murray v. Murray*, 239 Ariz. 174, 176-77 ¶¶ 7-8 (App. 2016). A party must challenge the failure to comply with § 25-411’s timing limitation via special action “prior to a resolution on the merits.” *In re Marriage of Dorman*, 198 Ariz. 298, 302 ¶ 11 (App. 2000). Where the superior court “conducted an evidentiary hearing, reviewed the merits of the case, and determined there was sufficient cause to modify” parenting time, “[i]t is too late to obtain effective appellate review of alleged noncompliance with the prehearing procedural requirements of § 25-411.” *Dorman*, 198 Ariz. at 303 ¶ 11.

¶9 Father did not challenge Mother’s petition to modify before the evidentiary hearing. Instead, he seeks to do so after an evidentiary hearing, the superior court’s review of the merits and a determination that modification of parenting time was warranted. Thus, it is too late for Father to argue to this court that Mother’s motion was procedurally improper. *Id.*

II. A.R.S. § 25-411(J).

¶10 Father argues the superior court erred in restricting his parenting time pursuant to A.R.S. § 25-411(J) because his parenting time did not seriously endanger the children.

¶11 The superior court may modify a parenting time order “whenever modification would serve the best interest of the child.” A.R.S. 25-411(J). Moreover, the court may restrict parenting time if it finds that

P. 13(a)(6)–(7) (noting opening brief shall include “statement of the issues’ presented for review” and “contentions concerning each issue presented for review”); *MacMillan v. Schwartz*, 226 Ariz. 584, 591 ¶ 33 (App. 2011) (noting failure to argue an issue in opening brief constitutes waiver). Thus, this decision is limited to Father’s argument challenging the order restricting his parenting time.

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parenting time “would endanger seriously the child’s physical, mental, moral or emotional health.” *Id.* A.R.S. § 411(J) permits the court to sua sponte order supervised parenting time if the court finds the children’s physical, mental, moral or emotional health would be endangered in the absence of supervision. *Hart v. Hart*, 220 Ariz. 183, 187 ¶ 16 (App. 2009). This court reviews such a ruling for an abuse of discretion. *Baker v. Meyer*, 237 Ariz. 112, 116 ¶ 10 (App. 2015).

¶12 Father argues in his opening brief that the evidence does not support a finding of endangerment. After Mother’s answering brief pointed out that Father failed to file a transcript of the evidentiary hearing with this court,² Father’s reply states that he does not dispute the superior court’s findings, only that the reasons for restricting parenting time based on abandonment “do not amount to seriously endangering the minor children.”

¶13 The superior court found endangerment based on abandonment, alienating and harassing behavior, Father’s refusal to tell Mother where he lived and where the children would spend parenting time if in his care, and because “Father’s conduct and outbursts in court cause concern.” The superior court is “in the best position” to observe the parties. *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334 ¶ 4 (App. 2004). Moreover, in the absence of a transcript, the evidence at trial is presumed to support the superior court’s conclusions and findings. *Baker v. Baker*, 183 Ariz. 70, 73(App. 1995). On the record before this court, Father has shown no abuse of discretion in restricting his parenting time pursuant to A.R.S. § 25-411(J).

² Father must provide the transcript if arguing that the ruling is unsupported by the evidence. Ariz. R. Civ. App. P. 11(c)(1)(B).

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CONCLUSION

¶14 The superior court's order is affirmed. In the exercise of this court's discretion, Mother's request for attorneys' fees is denied. As the successful party, however, Mother is awarded her taxable costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.



Ruth A. Willingham · Clerk of the Court
FILED : AA