

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

LEE KRIEGER, *Petitioner/Appellee*,

v.

JENNIFER DUICK, *Respondent/Appellant*.

No. 1 CA-CV 17-0084 FC
FILED 1-11-2018

Appeal from the Superior Court in Maricopa County
No. FC2008-003354
The Honorable Katherine M. Cooper, Judge

AFFIRMED

APPEARANCES

Jennifer Duick, Phoenix
Respondent/Appellant

Lee Krieger, Gilbert
Petitioner/Appellee

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which
Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

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HOWE, Judge:

¶1 Jennifer Duick (“Mother”) appeals the family court’s dismissal of her petition to modify legal decision making, parenting time, and child support (“custody”). She also appeals the court’s decision to reappoint the children’s therapeutic interventionist (“TI”) and to require Mother to pay her share of the TI’s fees. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In January 2007, Mother and Lee Krieger (“Father”) dissolved their marriage in California. In April 2013, Mother and Father stipulated to a custody agreement pursuant to Arizona Rule of Family Law Procedure (“ARFLP”) 69, which the family court adopted. The court appointed a parenting coordinator (“PC”) in July 2013 and a TI in August 2014. At a hearing regarding the TI’s fees on February 23, 2016, Mother testified that she was a nurse practitioner, worked 40 hours a week, and made \$49,000 in 2015. The court concluded that Mother had the ability to pay her share of the fees, \$195 per session, which were due at each quarterly session. Father moved to reappoint the TI in August 2016, which the court approved.

¶3 Mother petitioned to modify custody in September 2016, and she also requested a hearing to (1) object to the PC report and recommendations dated August 17, 2016; (2) object to the TI report dated August 17, 2016; (3) object to the TI’s reappointment; and (4) request temporary sole decision making pending trial for modification of custody. On September 23, 2016, the court set a hearing date for October 27, regarding the first three issues and set the deadline for disclosure and discovery 30 days before the hearing. The court further ordered that Mother’s motion for a temporary order would not be addressed because she had not actually moved for a temporary order. Also, Mother’s petition to modify custody would be held in abeyance until completion of the above hearing. Mother subsequently moved for a temporary order for custody.

¶4 At the hearing, the court stated that it planned to allow each parent to argue for 45 minutes. Regarding the TI’s report, Mother stated that she did not disagree with the TI’s recommendation to have monthly rather than quarterly TI visits for the children, but that she objected to making payments for the visits. Mother asked the court if a TI could be obtained through insurance, but the court stated that insurance did not cover court-appointed therapists. Father also testified that Mother had fired

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two previous therapists and that this was why a court-appointed therapist was needed, and the court agreed to keep the court-appointed TI.

¶5 During Father's testimony, Mother objected several times, and the court informed Mother that she would have time to respond later in the hearing. After Father finished testifying, the court gave Mother an opportunity to respond. Mother claimed that she did not work full time or full days while she had the children. She further testified that she worked from 8 a.m. to 1 p.m. four days a week. Thereafter, Mother began to discuss several subjects that did not relate to her working hours or ability to pay the TI's fees. The court then interjected and told Mother that she was "getting off track," and the court stated that it would consider the evidence heard and make a ruling later about Mother's ability to pay. Mother asked to speak more on the subject, but the court declined.

¶6 Although not set for hearing, the court next addressed Mother's motion for a temporary order and petition to modify custody. The court noted that Mother's motion for a temporary order did not state a basis. The court allowed Mother to orally state a basis, and Mother stated that she based the motion on Father's decisions on medical care and education. The court noted that the educational choice was "not an emergency requiring a temporary order," and it also noted that Father had final decision-making authority for both education and medical choices. The court concluded the hearing and stated that it would provide a ruling later.

¶7 Subsequently, the court held that its adoption of the PC's report and recommendations dated August 17 was a final order. As for the TI's report, the court found that Mother did not object to the TI's therapy or her recommendation to have monthly visits for the children, and Mother objected only to paying for every other visit pursuant to court order. The court adopted the TI report and recommendations as a final order, and it also found that Mother had the means to pay for the visits and that her objection was overruled. Specifically, the court noted in its ruling that the children were in school until about 2:30 p.m. five days a week and that Mother could work at least an additional five hours per week, such as a Friday, without reducing her parenting time with the children. The court concluded that the additional hours of work would generate significantly more than \$195 every other month. Furthermore, the court overruled Mother's objection to the TI's reappointment, and it affirmed the order appointing the TI.

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¶8 In addressing Mother’s motion for a temporary order, the court found that Mother’s concerns were insufficient for a temporary order that would have given Mother sole custody. As for Mother’s petition to modify custody, the court noted that Mother’s reasons for modification were that Father was abusing substances, Father was arguing with his wife, and Mother did not agree with Father’s medical and educational decisions for the children. The court found that Mother’s allegations were the same or substantially similar to allegations that she had made throughout the parties’ post-decree, “high conflict relationship.” The court explained that the core issues between the parties were extensively analyzed and addressed with the current custody orders, a PC, and a TI. The court found that Mother’s most recent petition to modify was a continuation of old issues, and it did not establish a substantial and continuing change in circumstances. Thus, the court dismissed Mother’s petition for failure to comply with A.R.S. § 25-411(A). Mother filed a “Motion for New Trial: Motion for Reconsideration,” which the court denied. Mother timely appealed.

DISCUSSION

1. Petition to Modify Custody

¶9 Mother argues that the family court erred by depriving her of a fair trial and due process when the court conducted a trial on her petition to modify custody without notice and violated various ARFLP Rules. Child custody determinations are reviewed for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420 ¶ 7 (App. 2003). In considering a motion to modify custody, the family court “must first determine whether there has been a change in circumstances materially affecting the child’s welfare,” and only if such change exists, then evaluate whether modification “would be in the child’s best interests.” *Christopher K. v. Markaa S.*, 233 Ariz. 297, 300 ¶ 15 (App. 2013). The court’s determination whether a change in circumstances has occurred “will not be reversed absent a clear abuse of discretion, *i.e.*, a clear absence of evidence to support its actions.” *Pridgeon v. Superior Court (LaMarca)*, 134 Ariz. 177, 179 (1982). The party seeking the custody modification has the burden of proving a change in circumstances that materially affects the child’s welfare. *Marley v. Spaulding*, 10 Ariz. App. 213, 215 (1969).

¶10 ARFLP 91(D) requires any petition to modify custody to comply with A.R.S. § 25-411. Under A.R.S. § 25-411(A), six months after the entry of a joint legal decision-making order, a parent may petition to modify an order regarding custody based on the other parent’s failure to follow the

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order's provisions. The family court "shall deny" a petition to modify "unless it finds that adequate cause for hearing the motion is established by the pleadings." A.R.S. § 25-411(L). Adequate cause for modification exists when "the facts alleged to constitute a change in circumstances" materially affect the welfare of the child. *Pridgeon*, 134 Ariz. at 180. The family court has wide discretion in assessing adequate cause. *Siegert v. Siegert*, 133 Ariz. 31, 33 (App. 1982). The family court's decision will be reversed only if "no reasonable judge would have denied the petition without a hearing." *Id.*

¶11 Mother first argues that the court violated her due process rights when it went forward with "trial" on her petition to modify custody without sufficient notice. Here, the record reflects that the evidentiary hearing on October 27, 2016, was intended to only address the issues pertaining to the PC and TI. Mother was not entitled to a hearing on her petition because the court had not yet determined whether the petition to modify custody alleged facts to constitute a substantial and material change in circumstances. After the evidentiary hearing issues were resolved, the court then addressed whether Mother's petition had established adequate cause for a hearing to satisfy A.R.S. § 25-411(L). Because the court was considering only the adequacy of Mother's petition, the court did not violate her due process rights for lack of notice because no hearing occurred concerning the petition. Thus, no notice for a hearing was required, and the court did not violate Mother's due process rights.

¶12 Mother next argues that the court erred by placing "the original issues in abeyance" and then ruling on the "same Motion for Temporary Modification twice in a trial without notice[.]" She claims that the court's action violated ARFLP 47(B) because that subsection states that upon receiving a post-decree motion for a temporary order, the court shall schedule a post-decree management conference or an evidentiary hearing at an appropriate time determined by the court. The record reflects, however, that Mother did not file a sufficient motion for a temporary order because she did not state a basis for her request. The court then allowed her to orally provide a sufficient basis, which the court found inadequate. Mother claims that she did not have adequate time to present her basis because she did not receive sufficient notice. But Mother was not entitled to notice because the court could have denied her motion based on her failure to state a basis in the motion. Therefore, the court did not violate ARFLP 47(B).

¶13 Mother also argues that the court's dismissal of her petition for modification and motion for a temporary order violated ARFLP Rule 91(D)(7), (I), and (N). Mother does not explain, however, how the court's

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dismissal violated ARFLP 91(D)(7), (I), and (N). Those provisions set out the procedure for post-decree petitions seeking to modify custody. The record does not show any violation of these procedural rules, and contrary to Mother's claim, the court followed ARFLP 91(D) by refusing to set a hearing due to Mother's failure to comply with A.R.S. § 25-411(L). Furthermore, subsection (N) only pertains to hearings on petitions, which did not occur here. Thus, this argument also fails.

¶14 Additionally, Mother claims that the court abused its discretion by violating ARFLP 74 when it dismissed her petition for modification and stated that the raised issues were subjects for the PC to resolve, who was no longer appointed at the time. Mother argues that the court violated ARFLP 74 by deferring its authority to a PC who was no longer in place. But the court's decision to deny Mother a hearing on her petition was based on her failure to establish a substantial and material change in circumstances and thereby failing to satisfy A.R.S. § 25-411(L). The court's reference to the PC had no bearing on its decision to dismiss Mother's petition. As such, the court did not violate ARFLP 74.

2. Evidence at Hearing

¶15 Next, Mother argues that the court violated her right to "a fair trial and due process" because it did not allow her to admit evidence at the TI hearing and denied her objections and requests to respond. She also contends that insufficient evidence supported the court's decision to make Mother pay every other month for the TI's services. The evidence is viewed in the light most favorable to sustaining the family court's findings. *Vincent v. Nelson*, 238 Ariz. 150, 155 ¶ 17 (App. 2015). "We will defer to the [family] court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347 ¶ 13 (App. 1998). Because sufficient evidence supported the order requiring Mother to pay the TI's fees, the court did not abuse its discretion.

¶16 Mother objected to paying for the TI's services because she could not afford to pay \$195 every other month. Mother testified to being a nurse practitioner and working four days a week from 8 a.m. to 1 p.m. The court noted that Mother could work at least an additional five hours per week without reducing her parenting time with the children and that the additional hours of work would generate sufficient funds for paying the TI's fees. Thus, sufficient evidence supported the court's decision to overrule Mother's objection to making payments, and it did not abuse its discretion.

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¶17 Mother counters that the court erred by not allowing her to clarify that she had a “long week” in addition to the “short week” that the court used to describe Mother’s work schedule. She also claims that the court’s ruling is inconsistent with its ruling in the February hearing. The record shows that at the October hearing Mother stated that she worked about 20 hours per week. The record also reflects that at the February hearing Mother claimed that she worked 40 hours per week. Assuming that these were Mother’s long and short weeks she wished to discuss with the court, this argument is not persuasive. Mother’s argument suggests that she alternated between short and long weeks at work. Thus, taking both week schedules into account, Mother still had the ability to work more hours than she was currently working, as the court found. Therefore, sufficient evidence supported the court’s finding that Mother could afford the TI’s fees.

¶18 Mother also argues that the court abused its discretion and violated her due process rights by not allowing her to respond or admit evidence with one hour of the allotted hearing time remaining. Mother relies on *Brown v. United States Fid. and Guar. Co.*, 194 Ariz. 85 (App. 1998), where the court noted that trial courts have the discretion to impose reasonable time limits on trial proceedings to avoid undue delay, waste of time, or needless presentation of cumulative evidence. 194 Ariz. at 90–91 ¶ 29. The imposition of a time limit is reviewed for an abuse of discretion. *Id.* ¶ 30. Here, the court allotted each party 45 minutes for the hearing. Before the allotted time expired, the court determined that it had sufficient evidence to make its ruling. As stated earlier, the record reflects that sufficient evidence supported the court’s decision. Furthermore, the record shows that Mother’s oral argument near the end of the hearing was off topic and did not relate to the issue of her ability to pay the TI’s fees. As such, the court did not abuse its discretion by ending that part of the hearing.¹

3. Disclosure and Discovery

¶19 Last, Mother claims that the court abused its discretion by setting the deadline date for disclosure and discovery for the October hearing one day after her receipt of the order stating that the hearing was

¹ Although not clearly specified, Mother appears to argue that the court abused its discretion by not allowing her to admit evidence pertaining to her petition for modification. That argument fails, however, because the petition did not satisfy A.R.S. § 25–411(L). Thus, no hearing took place and no evidence was needed.

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set.² Although Mother states that she did not have adequate time to disclose her payment receipts and 2015 taxes, she does not provide a reason why four days was insufficient. Moreover, she does not support her assertion with any citations to legal authority. An appellant's argument must contain "citations of legal authorities and appropriate references to the portions of the record on which the appellant relies." Ariz. R. Civ. App. P. 13(a)(7)(A). "Failure to do so can constitute abandonment and waiver of that claim." *Ritchie v. Krasner*, 221 Ariz. 288, 305 ¶ 62 (App. 2009). Because this argument was insufficiently argued in Mother's brief, it is deemed waived. *See id.*

CONCLUSION

¶20 For the foregoing reasons, we affirm.



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

² The October 27 hearing date was set on September 23, so the deadline was September 27 and Mother had four days for disclosure.