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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

BRENDA CAPRIO, *Petitioner/Appellee*,

v.

BRUCE TOMSON, *Respondent/Appellant*.

No. 1 CA-CV 17-0396 FC
FILED 5-15-2018

Appeal from the Superior Court in Maricopa County
No. FN2016-070215
The Honorable Jennifer C. Ryan-Touhill, Judge

VACATED AND REMANDED

COUNSEL

Burggraff Tash Levy, PLC, Scottsdale
By Bryan K. Levy, Randi Burggraff, Justin Tash
Counsel for Respondent/Appellant

Davis Miles McGuire Gardner, PLLC, Tempe
By Douglas C. Gardner
Counsel for Petitioner/Appellee

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Peter B. Swann joined.

B E E N E, Judge:

¶1 Bruce Tomson (“Husband”) appeals from a decree of dissolution of marriage. Husband argues he was denied a fair trial when the superior court, having permitted his counsel to withdraw on the day of trial, denied his motion for continuance. Because we conclude the court abused its discretion in those rulings, we vacate the decree and award of attorneys’ fees and remand the case for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 In March 2016, Brenda Caprio (“Wife”) filed a petition for dissolution of her marriage to Husband. The parties attended mediation and a resolution management conference but could not agree on an equitable resolution and the case was set for trial.

¶3 During mediation, the parties agreed to select an appraiser to perform an appraisal on the couple’s multiple properties. Wife’s counsel attempted to contact Husband’s counsel at least four times over the course of several months regarding hiring an appraiser but received no response. Wife subsequently filed a motion requesting attorneys’ fees, which the superior court granted. Wife again requested attorneys’ fees when Husband and his counsel failed to appear for a scheduled deposition. The court ordered Husband’s attorney to provide proof of his claim that a scheduling conflict caused him to miss the deposition, and threatened to award additional attorneys’ fees if the scheduling issue could not be verified. Additionally, in its minute entry, the court admonished Husband’s counsel for his repeated failures and stated that it would be reporting him to the State Bar.

¶4 On April 24, 2017, one day before trial, Husband’s counsel filed a combined motion to withdraw and motion to continue. In the motion to withdraw, Husband’s counsel stated that Husband had terminated him but was unwilling to sign a written consent for withdrawal.

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Wife objected to both motions, noting that the motion for withdrawal did not meet the requirements of Arizona Rule of Family Law Procedure (“Rule”) 9(A)(2)(c).

¶5 The superior court addressed Husband’s motions at the beginning of trial. After a brief, off-the-record meeting with the parties’ attorneys, the court asked Husband if he wished to terminate his counsel. Husband stated that he wished to read a prepared statement to the court before answering the question, but the court refused Husband’s request. Husband answered, “I have not terminated [my counsel] yet, but yes, Your Honor. I don’t feel like he’s been ethical with me[.]” Immediately thereafter, the court granted counsel’s motion to withdraw.

¶6 After Husband’s counsel left the courtroom, the court denied Husband’s motion to continue without elaboration, but allowed Husband to read his statement. Husband said that he was concerned his counsel was not interested in his case. His suspicions were confirmed five days before trial when he met with counsel and counsel informed Husband that he was having mental health issues, which were affecting his judgment and performance. Counsel told Husband that he would find substitute counsel and admit his problems to the court but, according to Husband, that was never done. Husband claimed to have evidence of counsel’s multiple ethical violations and stated that he had already reported counsel to the State Bar. Finally, Husband opined that counsel’s “grossly inadequate representation” would unfairly influence the outcome of trial and again asked the court to grant him time to find substitute counsel.

¶7 The court reiterated its denial of Husband’s request for a continuance and told him that as a litigant, it was his responsibility to provide evidence to support the positions he advanced. The court then admonished Husband that he would be held to the same standard as an attorney, handed him a piece of paper for taking notes, and proceeded with trial.

¶8 Husband represented himself *pro per* at trial despite his multiple pleas to the court that he was not prepared and was “ineffective counsel.” During trial, Husband did not cross examine Wife, waived his claims to spousal maintenance, and admitted he had no evidence to support his marital waste claim.

¶9 The superior court entered a decree dissolving the parties’ marriage, apportioning community property, and dividing community debts. In addition, the court found that Husband acted unreasonably

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during the litigation and ordered Husband to pay Wife's reasonable attorneys' fees.

¶10 Husband filed a timely notice of appeal from the decree. We have jurisdiction 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).

DISCUSSION

¶11 Husband argues the superior court abused its discretion and denied him a fair trial by granting his counsel's motion to withdraw before trial and then denying his motion to continue the trial. We agree.

¶12 A superior court's decision whether to grant counsel's motion to withdraw from representation and to continue trial is left to the sound discretion of the court. *Coconino Cty. Pub. Def. v. Adams*, 184 Ariz. 273, 275 (App. 1995); *Dykeman v. Ashton*, 8 Ariz. App. 327, 330 (1968). "We will not interfere in matters within [the family court's] discretion unless we are persuaded that the exercise of such discretion resulted in a miscarriage of justice or deprived one of the litigants of a fair trial." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 308, ¶ 31 (App. 2007) (citation omitted).

I. The Superior Court Abused its Discretion by Granting Counsel's Motion to Withdraw

¶13 The Arizona Rules of Family Law Procedure provide procedural safeguards to protect litigants' rights to be heard. Under Rule 9, an attorney shall not be permitted to withdraw after trial has been set unless:

- 1) the substituting attorney signs the application stating that such attorney is advised of the trial date and will be prepared for trial, or the client signs the application stating that the client is advised of the trial date and has made suitable arrangements to be prepared for trial, or
- 2) the court finds good cause to permit the attorney to withdraw.

Rule 9(A)(2)(c).

¶14 Here, the superior court did not comply with Rule 9. Husband's counsel failed to obtain the signature of substitute counsel

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avowing knowledge of the trial date and readiness to proceed on the scheduled trial date. Nor did Husband acknowledge that he made suitable arrangements to be prepared for trial. In fact, the record demonstrates that Husband refused to sign a document consenting to his counsel's withdrawal.

¶15 In its minute entry, the superior court stated that Husband made an oral motion to terminate his counsel, and that good cause existed to allow Husband's counsel to withdraw. The record, however, shows that Husband did not make such an oral motion, and instead, the court asked Husband if he would like to terminate his counsel. Husband answered in the affirmative after being denied a chance to read a statement addressing serious ethical issues with counsel and requesting time to find substitute counsel. Husband was not informed that the trial could proceed if he elected to terminate his counsel. The record shows that the court made no findings describing what good cause existed to allow Husband's counsel to withdraw on the day of trial. Thus, the superior court did not comply with Rule 9 and abused its discretion in granting the motion to withdraw.

II. The Superior Court Abused its Discretion by Denying Husband's Motion to Continue

¶16 Once a matter is set for trial, the superior court may not grant a continuance "except upon written motion setting forth sufficient grounds and good cause, or as otherwise ordered by the court." Rule 77(C)(1). In determining whether good cause for continuation exists, courts should evaluate the facts of the particular case, including prior delays and their reasons, hardship to the nonmovant, the good faith of the movant, and the conduct of the moving party. *See* 17 Am. Jur. 2d *Continuance* § 6.

¶17 Here, considering those factors, Husband established good cause for a continuance. Husband had not previously requested a continuance and no evidence indicates Husband made the motion in bad faith or as a delay tactic. The situation regarding his counsel was unique and serious, as evidenced by his statement at trial and the court's own admonishment of his counsel before trial. Moreover, granting Husband a continuance would allow him to retain counsel and provide him an opportunity to effectively be heard. The superior court, however, denied Husband's motion to continue, effectively stripping him of his right to be represented by counsel and forcing him to represent himself without adequate time to prepare. Thus, the court abused its discretion in denying Husband's request for a continuance, depriving him of the right to a fair trial.

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CONCLUSION

¶18 For the foregoing reasons, we find the superior court abused its discretion by first failing to follow Rule 9 when it granted Husband's counsel's motion to withdraw and then denying Husband's motion to continue. Accordingly, we vacate the court's decree of dissolution, including the decree's attorneys' fees award, and remand the matter for further proceedings consistent with this decision.¹ Both parties request attorneys' fees pursuant to A.R.S. § 25-324(A), A.R.S. § 12-341, and ARCAP 21(a). In our discretion, we deny both requests.



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

¹ Because we vacate the decree of dissolution and award of attorneys' fees and remand the matter on the grounds that the superior court abused its discretion, we need not address Husband's argument that the court violated his constitutional right to due process.