DIVISION ONE
FILED: 06/14/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 10-0521
	)	
ROGER E. THOMPSON,	)	DEPARTMENT B
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	
	)	Not for Publication –
TANYA F. THOMPSON,	)	(Rule 28, Arizona Rules
	)	of Civil Appellate Procedure)
Respondent/Appellee.	)	
	)	
	)	
	)	
	)	

Appeal from the Superior Court in Apache County

Cause No. DO2004-117

The Honorable Kay H. Wilkins, Judge *Pro Tempore*

AFFIRMED

Roger Thompson — Petitioner/Appellant, *In Propria Persona*

Eagar

B A R K E R, Judge

¶1 Petitioner appeals from the trial court's order denying his request for a change in parenting time. We will not disturb the trial court's decision "[u]nless it clearly appears

that the trial judge has mistaken or ignored the evidence." *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). Finding no such error in this case, we affirm.

Facts and Procedural History

¶2 Petitioner and his former wife have been engaged in litigation over custody of their three minor children since 2004. Petitioner's current parenting time consists of approximately half of his children's weekends and school vacations. Petitioner's most recent request sought to modify the parenting time schedule with the following requests: (1) an extra weekend alone with his ten-year-old son to take him hunting; (2) an additional vacation week with the children during their spring break; (3) an additional weekend with the children every month for a total of three weekends per month; (4) an additional week with each of the three children separately while the mother attended to the other two children in addition to his current five weeks out of the children's nine-week summer break; and (5) custody of the children during the Easter holiday each year.

¶3 The trial court denied Petitioner's request, finding both that circumstances had not changed substantially since the court's last parenting time order and that Petitioner had failed to show that such a modification would be in the children's best

interest. Petitioner appealed.[1] We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

Discussion

¶4 Petitioner raises five issues,[2] which we address in turn.

1. The Role of the Parenting Coordinator

¶5 Petitioner asserts that the trial court abused its discretion by refusing to determine "what constitutes substantial change in parenting time" and by "not allowing the parenting coordinator to resolve motions." The order appointing the parenting coordinator provides that "the Coordinator shall not have the authority to make a recommendation affecting child support, a change of custody, or a substantial change in parenting time." As to the motion at issue, the parenting coordinator stated: "In the opinion of the current author, absent agreement between the parents or court order, the requests made in Mr. Thompson's proposed motion involve

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[1] Respondent chose not to file an answering brief. Although we could treat this as a confession of error, *see* Arizona Rule of Civil Appellate Procedure 15(c), in our discretion we decline to do so. *See Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994).

[2] To the extent other tangential arguments are raised, we decline to address them as not being fully briefed or included within the issues presented.

substantial changes to existing orders that are beyond the scope of the parenting coordinator."[3] The court then resolved the issues. We see no abuse of discretion in the trial court addressing the matters without referring them to the parenting coordinator. Indeed, the court has implied authority to do so regardless of the parenting coordinator's order. *See* Ariz. R. Fam. Law P. 74(E), (H), (J) (stating that parenting coordinator's authority is limited to making recommendations to the court, which the court may reject, modify, or approve and adopt). Accordingly, there is no error on this ground.

2. Timeliness of the Superior Court's Order

¶6 Petitioner next claims that the superior court did not have jurisdiction to rule on his petition because it failed to timely rule on the matter. Under the Arizona Constitution, "[e]very matter submitted to a judge of the superior court for [] decision shall be decided within sixty days from the date of submission thereof." Ariz. Const. art. VI, § 21. The sixty-day requirement does not begin to run with the filing of a motion, but rather from the date of "submission." *Id*. This means that a ruling must take place within sixty days of the date that the matter is fully briefed and at issue, or the briefing time

[3] We have been unable to locate this order in the record. We utilize Petitioner's rendition of it as quoted in his objection in the trial court.

periods have run. *See In re Appleton's Estate*, 15 Ariz. App. 490, 492, 489 P.2d 864, 866 (1971) (calculating sixty-day time period from date matter was taken under advisement to the date decision was issued); *see also Wustrack v. Clark*, 18 Ariz. App. 407, 408-09, 502 P.2d 1084, 1085-86 (1972) (finding sixty-day time period would expire on November 27, sixty days from when the court issued order taking matter under advisement on September 27).

¶7 In this case, our review of the motion, response, and time for reply shows that there was no violation of the sixty-day rule. Even if there had been such a failure, the remedy is not a reversal due to lack of jurisdiction, but rather a mandate from this court that the superior court rule. *W. Sav. & Loan Ass'n v. Diamond Lazy K Guest Ranch, Inc.*, 18 Ariz. App. 256, 261, 501 P.2d 432, 437 (1972). Thus, there is no error.

3. Sufficiency of Trial Court's Findings of Fact

¶8 Petitioner next argues that the trial court made insufficient findings of fact because it did not explicitly weigh the factors listed in A.R.S. § 25-403 when denying Petitioner's request for a modification of parenting time. Section 25-403 lists all of the relevant factors that the trial court must analyze to determine the best interest of the children when establishing custody. Petitioner also made a request for findings pursuant to Rule 52, Arizona Rules of Civil

Procedure. Petitioner asserts the findings were insufficient to satisfy that rule as well.

¶9 It is undisputed that the trial court did not address each issue raised specifically. Rather, the trial court found that the circumstances of its parenting time determination had not substantially changed since its previous order as to parenting time. In its previous order, the court expressly (and in detail) weighed all relevant best interest factors when making its custody and parenting time determinations. As to its findings with regard to the motion at issue, the court noted:

> [Petitioner] does not present any evidence of a change of circumstance; he merely argues that it is in the best interest of the children to spend more time with [Petitioner]. [Petitioner] does not present any facts specific to this case to support this argument, but makes a general argument regarding all children. This is an argument which [Petitioner] has made at every hearing.

¶10 When timely requested, the trial court must enter findings of fact and conclusions of law. *In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. 291, 294, ¶ 7, 18 P.3d 85, 88 (App. 2000). The court is only required, however, "to make findings on the ultimate facts, not each subsidiary evidentiary fact on which the ultimate facts are based." *Id*. We have noted that "the purpose of requiring the trial court to enter findings

of fact and conclusions of law is to enable this court to examine the bases for the trial court's decision." *Id*.

¶11 Here, the trial court's findings are sufficient. In this matter, as the trial court notes, Petitioner made similar arguments "at every hearing." The record discloses that 354 separate documents have been filed in this case from either the parties or the court. Examining the portions of the record referenced by the trial court in conjunction with the trial court's order "enable[s] this court to examine the bases for the trial court's decision." *Id.* Therefore, the trial court was appropriately economical in its findings given the frequency and repetitive nature of the issues presented in Petitioner's motion.

4. Sufficiency of Evidence as to Best Interest Finding

¶12 Petitioner also contends that the court based its best interest finding on insufficient evidence. Petitioner argues that the court provided no facts as to why its refusal to modify parenting time was in the best interest of the children. This assertion, however, misstates the burden of proof. In a petition to modify parenting time, the burden is on the party seeking to modify the schedule (here, Petitioner) to show that the modification would be in the children's best interest. *See Bailey v. Bailey*, 3 Ariz. App. 138, 141, 412 P.2d 480, 483 (1966).

¶13 Here, the trial court found that Petitioner "present[ed] no evidence that the present order regarding parenting time is not in the best interests of the children." Thus, the court found that Petitioner did not meet his burden of proof in showing that the modification would be in the children's best interest.

¶14 Petitioner's attempts to meet this burden as revealed in his briefing to this court do not reveal an abuse of discretion by the trial court in making this finding. Petitioner supports his argument by (1) citing portions of the modification hearing where he testified that children in general benefit from "one-on-one time" with their fathers, and (2) asserting that the 72%/28% parenting time split between Petitioner and Respondent unfairly restricted his children's relationship with Petitioner. As to Petitioner's first point, should Petitioner wish to spend "one-on-one" time with his children, he may do so under the current parenting time schedule by spending time with one child and procuring child care for the other two (as, presumably, Respondent is required to do when she wishes to spend time alone with one of the children). As to Petitioner's second point, although he has the children 28% of the time, that 28% consists of vacations, weekends, and holidays. A significant portion of Respondent's time consists of school and work time. Petitioner does not request more

parenting time during school and work days, but rather believes that his perceived time deficit should consist of additional vacation time.

¶15 Respondent opposed Petitioner's request to take more vacation time at the modification hearing. She testified:

> I have just as much right to spend time with them, and the request that you're putting in here is taking the time I have allocated in my vacation when they're off. You're requesting the time when they are off from school, and that's the opportunity I look forward to spending time with them, and you have a great bulk of it, and now you are still trying to ask for the time that I finally can have with them.

This testimony is representative of the oppositions to Petitioner's requests, and constitutes sufficient evidence upon which to base the trial court's ruling. *See Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 72, 730 P.2d 245, 249 (App. 1986) (holding that testimony of interested party can be sufficient evidence to support trial court's ruling). Therefore, there is no error on this asserted basis.

5. Application of Res Judicata to Change in Visitation Time

¶16 Finally, Petitioner claims that the trial court committed reversible error in requiring Petitioner to show a change of circumstance in order to modify the existing visitation agreement. As quoted in part above, in its minute entry, the trial court stated:

> [T]he principle of *res judicata* indicates that the court should not modify an existing order [regarding parenting time] unless there is a change of circumstance to justify modification of the order.
>
> [Petitioner] does not present any evidence of a change of circumstance; he merely argues that it is in the best interest of the children to spend more time with [Petitioner]. [Petitioner] does not present any facts specific to this case to support this argument, but makes a general argument regarding all children. This is an argument which [Petitioner] has made at every hearing.
>
> [Petitioner] presents no evidence that the present order regarding parenting time is not in the best interests of the children. The Court finds that the present order is in the best interest of the children, and that no modification is warranted at the present time.

Petitioner argues that, although a change of circumstance is required to modify a custody arrangement, it is not a requirement for a modification of visitation rights.

¶17 We do not read the trial court's minute entry to suggest a requirement that there be a change in circumstance before one can *consider* modification of a parenting time order. We view the trial court's statement as expressing the sound guideline that "the *principle* of res judicata *indicates*" that the order should not be modified. To us, this reveals that the trial court applied the general theory that if the facts and the law have not changed the order should not.

¶18 Regardless, we need not decide whether a change in circumstance or the direct application of res judicata would constitute error if applied here. Although the trial court did find that Petitioner's request failed due to lack of change of circumstance, the trial court also found that Petitioner "present[ed] no evidence that the present order regarding parenting time is not in the best interests of the children," and "that the present order is in the best interest of the children, and [] no modification is warranted." As the trial court correctly observed, a modification of parenting time rights must be in the best interest of the children. A.R.S. § 25-411(D). As discussed above, the record sufficiently supports the trial court's finding that modification was not in the best interest of the children. We therefore affirm the trial court's ruling on this ground.

Conclusion

¶19 For the reasons set forth above, we affirm. Some, if not all, of the issues raised by Petitioner may be considered frivolous. We find this particularly troubling as this matter seems to be in a constant state of litigation. Although we decline to order sanctions at this time, we advise Petitioner (because he is the only one who has made a filing in this court), that in the future sanctions may be applied either here

or in the trial court pursuant to the applicable court rules or statutes.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
PATRICIA K. NORRIS, Judge