IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ANDREW STORY,
Appellant,

v.

JORDAN KALLAN,
Appellee.

No. 2 CA-CV 2023-0050-FC
Filed November 7, 2023

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Maricopa County
No. FC2017070771
The Honorable Stasy Avelar, Judge

AFFIRMED

COUNSEL

Ortega & Ortega PLLC, Phoenix
By Alane M. Ortega
Counsel for Appellant

Jordan Kallan, Peoria
In Propria Persona

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Gard concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this domestic-relations proceeding, Andrew Story ("Father") appeals from the superior court's order denying his petition to modify legal decision-making authority and parenting time. He argues the court violated his right to due process by summarily denying his petition after determining he had not presented adequate cause for modification. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the superior court's decision. *Baker v. Meyer*, 237 Ariz. 112, ¶ 2 (App. 2015). In May 2018, Father and Jordan Kallan ("Mother") entered into a consent decree in which they agreed on a parenting plan and joint legal decision-making authority for their child, born in 2013. In October 2019, after the child disclosed that Father had engaged in "inappropriate sexual contact" with her, Mother requested temporary and permanent modification of legal decision-making authority and parenting time. The superior court temporarily awarded Mother sole legal decision-making authority and suspended Father's parenting time. The parties engaged in mediation and agreed Mother would remain the sole legal decision maker and Father would have supervised parenting time. The court entered a stipulated order memorializing the terms of the agreement in February 2021.

¶3 In April 2022, Father filed a motion for temporary orders to modify parenting time and a petition to modify legal decision-making authority and parenting time. Following an evidentiary hearing on Father's motion for temporary orders, the superior court denied both the motion and the petition in an August 2022 minute entry. The court found that there had not been a material change in circumstances to warrant modification.

Father appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).[1]

Discussion

¶4 On appeal, Father challenges the superior court's denial of his petition to modify legal decision-making authority and parenting time. Father asserts the court violated his "right to [d]ue [p]rocess" by denying his petition after a hearing that "only" contemplated his motion for temporary orders. As Father correctly points out, due process generally encompasses the right to notice and the opportunity to be meaningfully heard. *See Curtis v. Richardson*, 212 Ariz. 308, ¶ 16 (App. 2006). Father points to time limits imposed by the court at the temporary orders hearing to support his argument that he had no meaningful opportunity to be heard on his petition to modify. And he claims he was not given notice that the court would be evaluating the sufficiency of his petition before a hearing.[2]

¶5 Father's arguments are not supported by the record or legal authority. First, a petition for modification must set forth "detailed facts supporting the requested modification," and the superior court must deny the motion "unless it finds that adequate cause for hearing the motion is established by the pleadings, in which case it shall set a . . . hearing." 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

[1]This court stayed Father's appeal because he attempted to appeal from the superior court's unsigned order. The superior court's August 2022 order also set a hearing on unresolved issues of back child support and unreimbursed medical expenses. The court resolved the outstanding issues and later entered a signed order stating that no further matters remain pending and the August 2022 judgment is "entered under Rule 78(c)," Ariz. R. Fam. Law P., and Father filed a new notice of appeal.

[2]Father also makes the unsupported claim that the judge assigned to his case "prior to [a] judicial rotation" had determined that his petition established adequate cause for a hearing and a subsequent judge's denial of his petition without a hearing "collaterally attack[ed]" the previous ruling, violating the principle of res judicata. However, as Father repeatedly acknowledges, the previous judge granted an evidentiary hearing only on his motion for temporary orders, not "the underlying petition."

child. *Pridgeon v. Superior Court*, 134 Ariz. 177, 180 (1982); *see Backstrand v. Backstrand*, 250 Ariz. 339, ¶ 14 (App. 2020).

¶6 Second, in interpreting that provision, our supreme court has rejected the same sort of due process arguments Father now attempts to make. *See Pridgeon*, 134 Ariz. at 180-82. The court determined that the parent seeking modification "bears the statutory burden of proof of showing adequate cause for a hearing." *Id.* at 182. Therefore, "due process is satisfied by a procedure which requires a court to review the petition and the affidavits of both parties to make a determination whether a hearing is required." *Id.*

¶7 Moreover, the cases Father cites are readily distinguishable. In *Cook v. Losnegard*, we concluded that the superior court erred when, following a trial on a custody dispute, it adjudicated child support where evidence relevant to child support was not presented. 228 Ariz. 202, ¶¶ 16-19 (App. 2011). And in *Cruz v. Garcia*, we determined the superior court erred by issuing a ruling changing legal decision-making authority after a trial on a party's motion to suspend supervised parenting time. 240 Ariz. 233, ¶¶ 14-17 (App. 2016). Here, in contrast, the superior court denied Father's petition without a hearing because it concluded the petition failed to make the threshold showing that a change of circumstances warranted modification. *See Backstrand*, 250 Ariz. 339, ¶ 14. To the extent Father claims that conclusion was an abuse of the superior court's discretion, we disagree.

¶8 "The superior court is vested with broad discretion to decide whether a change of circumstances has occurred." *Id.* A court generally abuses its discretion when it makes a decision unsupported by the record or commits an error of law in reaching a discretionary conclusion. *Engstrom v. McCarthy*, 243 Ariz. 469, ¶ 4 (App. 2018). On appeal, Father repeats the assertions from his petition and contends they constitute a change in circumstances. Specifically, he maintains that he and the child desired additional time together and the supervisor for his parenting time "repeatedly recommended increases in Father's parenting time." Mother refused to agree to an increase in parenting time, and Father's denials "that he inappropriately touched" the child had been "deemed to be truthful" in a polygraph examination. However, Father does not meaningfully develop his argument or cite authority that the grounds he alleged were sufficient to justify a hearing. And that failure could constitute a waiver of the argument. *See* Ariz. R. Civ. App. P. 13(a)(7) (argument must contain "[a]ppellant's contentions concerning each issue presented for review, with supporting reasons for each contention"); *see also Polanco v. Indus. Comm'n*,

214 Ariz. 489, n.2 (App. 2007) (failure to develop argument waives issue on appeal).

¶9 Exercising our discretion, however, we address the argument on its merits. *See Varco Inc. v. UNS Elec., Inc.*, 242 Ariz. 166, n.5 (App. 2017) (waiver for failure to comply with Rule 13 discretionary); *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984) ("[C]ourts prefer to decide each case upon its merits rather than to dismiss summarily on procedural grounds."). The superior court's February 2021 order implicitly contemplated that Father and the child would enjoy Father's parenting time and that Mother might disagree with an increase to Father's parenting time. *Cf. Pridgeon*, 134 Ariz. at 180-82 (child expressing "strong desire" to live with non-custodial petitioning parent not sufficient change in circumstance). And we are unaware of authority suggesting that a parent's newfound or continued compliance with the existing decree constitutes a change of circumstances. *But see Stapley v. Stapley*, 15 Ariz. App. 64, 70-71 (1971) (parent's violation of court orders can constitute change of circumstance).

¶10 The parenting-time supervisor's reports do not support Father's assertion that she had recommended an increase in Father's parenting time. In fact, she informed Father that making such recommendations was "out of the scope of her role." And, as Father acknowledges, he consistently and "vehemently" denied the sexual abuse allegations when they were made in 2019 and the Department of Child Safety found the claims unsubstantiated that same year, well before the February 2021 decree. *See Engstrom*, 243 Ariz. 469, ¶ 19 (evaluating change of circumstances "since the last custody order" (quoting *Pridgeon*, 134 Ariz. at 179)). At most, the polygraph results support Father's credibility. *But see Hansen v. Chon-Lopez*, 252 Ariz. 250, ¶ 18 (App. 2021) ("It is well settled in Arizona that polygraph evidence is unreliable . . . ."). Thus, even crediting Father with the evidence presented at the temporary orders hearing,[3] the

[3]Father asserts the superior court "refus[ed] to consider the evidence presented [at the temporary orders hearing] displaying a material change in circumstance." But the court stated it had "considered th[e] evidence and testimony, including the witnesses' demeanor, reviewed the exhibits and the case history, and considered the various arguments presented."

Father also apparently argues the court deprived him of due process regarding his modification petition by limiting his time during the temporary orders hearing. As noted above, the court did not grant Father a hearing on that petition, so this argument is meritless. In any event, the

record supports the superior court's finding that his allegations did not constitute a change of circumstances. *See Castro v. Ballesteros-Suarez*, 222 Ariz. 48, ¶ 11 (App. 2009) ("We will not reweigh the evidence or substitute our evaluation of the facts.").

Disposition

¶11 We affirm the superior court's order denying Father's petition to modify legal decision-making authority and parenting time. Although Mother did not request it, as the successful party on appeal, we award her costs on appeal pursuant to A.R.S. § 12-341, upon her compliance with Rule 21, Ariz. R. Civ. App. P. *See Garcia*, 240 Ariz. 233, ¶ 19.

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court has broad discretion to "impose reasonable time limits appropriate to the proceedings." Ariz. R. Fam. Law P. 22(a); *see also Volk v. Brame*, 235 Ariz. 462, ¶ 20 (App. 2014). Here, the court held an hour-long evidentiary hearing in which Father testified, offered ten exhibits for admission, and briefly cross-examined Mother's expert witness before running "out of time," and Father did not request additional time. *See* Ariz. R. Fam. Law P. 22(a) ("A party may request additional time.").