State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 18-237

Judge:

Complainant:

ORDER

The commission initiated this investigation against a superior court commissioner regarding allegations of gender bias, failure to follow the law and an appearance of impropriety.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

After review, the commission found the commissioner violated Rule 1.2 where he issued an order with facts not supported by evidence in the record, as this may create an appearance of impropriety. While this was improper under Rule 1.2, the Scope Section of the Code of Judicial Conduct provides that it is not intended that every transgression will result in the imposition of discipline. The commission decided, after considering all the facts and circumstances, to dismiss the complaint pursuant to Rules 16(b) and 23(a), but to issue a warning letter to the judge suggesting that he avoid including unsupported facts in his orders.

Commission members George H. Foster, Jr., Diane M. Johnsen and J. Tyrrell Taber did not participate in the consideration of this matter.

Dated: November 7, 2018

FOR THE COMMISSION

/s/ Louis Frank Dominguez
Hon. Louis Frank Dominguez
Commission Chair

Copies of this order were distributed to all
appropriate persons on November 7, 2018.

This order may not be used as a basis for disqualification of a judge.

OPINION

Presiding Judge delivered the opinion of the Court, in which Judge and Judge joined.

Judge:

¶1 appeals from the dissolution decree ending his marriage to . We reverse and remand the decree's parenting-time provisions because they are the product of impermissible presumptions about equal parenting time and gender. We also reverse portions of the decree that violate federal law governing military retirement pay and vacate and remand the attorney's fees award. In all other respects, we affirm the decree.

FACTS AND PROCEDURAL BACKGROUND

¶2 The parties ("Husband" and "Wife," respectively) were married in 2004 and have three children, all girls, . The family moved to Arizona in , . Wife filed a petition for dissolution in August 2015, but the couple remained together in the marital home until shortly after the superior court issued temporary orders in March 2016.

¶3 Following a three-day trial, the superior court entered a decree of dissolution in . Relevant to this appeal, the decree continued joint legal decision-making but reduced Husband's parenting time to 130 days a year, plus specified holidays and a summer vacation, and divided the community's interest in Husband's retirement. The court declined both parties' requests for equalization payments and awarded attorney's fees to Wife.

¶4 We have jurisdiction of Husband's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2018) and -2101(A)(1) (2018).[1]

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[1] Absent material change after the relevant date, we cite the current version of applicable statutes.

DISCUSSION

A. Parenting Time.

¶5 By agreement, the temporary orders had allowed Husband more parenting time than Wife because Wife was in training . The parties shared joint legal decision-making, but temporary orders granted Husband parenting time every Thursday through Sunday until Wife Wife but did not take a full-time job and did not petition the court for weekend parenting time. The dissolution decree, entered 14 months after issuance of temporary orders, reduced Husband's parenting time to one overnight a week plus every other weekend from Friday afternoon through Monday morning.

¶6 On appeal, Husband argues the superior court abused its discretion in failing to order equal parenting time. We review a parenting-time order for an abuse of discretion. *Nold v. Nold*, 232 Ariz. 270, 273, ¶ 11 (App. 2013). An abuse of discretion occurs when the court commits legal error, *Arpaio v. Figueroa*, 229 Ariz. 444, 447, ¶ 7 (App. 2012), or "when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision," *Little v. Little*, 193 Ariz. 518, 520, ¶ 5 (1999) (quoting *Fought v. Fought*, 94 Ariz. 187, 188 (1963)).

¶7 As relevant here, A.R.S. § 25-403.02(B) (2018) requires the superior court to adopt a parenting plan that is "[c]onsistent with the child's best interests in § 25-403" and that "maximizes [each parent's] respective parenting time." Section 25-403 (A) (2018) requires the court to determine parenting time "in accordance with the best interests of the child." Further, § 25-403(A) states:

> The court shall consider all factors that are relevant to the child's physical and emotional well-being, including:
>
> 1. The past, present and potential future relationship between the parent and the child.
>
> 2. The interaction and interrelationship of the child with the child's parent or parents . . . .
>
> 3. The child's adjustment to home, school and community.

> 4. If the child is of a suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.
>
> 5. The mental and physical health of all individuals involved.

¶8 In findings and conclusions issued in support of the decree's parenting-time provisions, the superior court stated:

> The primary focus concerning parenting time is the best interest of the children and not the parents. If the interests of parents are more important than children, then children, like timeshares, would always be equally time-shared.
>
> A totality of circumstances tip the scales in favor of designation of [Wife] as primary residential parent.
>
> A. [Wife] has been the primary care provider for the children prior to this action. The children have historically spent more time with [Wife] than [Husband] since their birth.
>
> B. The children have not fully adjusted to equal parenting time during the pendency of the temporary orders. The court finds the children want and need to spend more time with [Wife].
>
> C. The of [Husband] often make him unavailable during his parenting time resulting in the children spending too much time with the paternal grandparents relative to time they could be with [Wife].
>
> D. The children are girls who naturally will gravitate more to [Wife] as they mature.
>
> E. The experience during the temporary orders has been unreasonable occasionally. . . . The court finds [Husband] has been comparatively more unreasonable and inflexible than [Wife] [in agreeing to trade parenting time]. In particular, [Husband] has placed his interest over the best interest of the children in not allowing more frequent weekend parenting time by [Wife] regardless of the strict terms of the stipulated temporary order.
>
> F. It is unlikely the parties will both reside in during the minority of all the children. Significant

> geographical separation of the parties precludes equal parenting time. Changing equal parenting time now would be less disruptive than in the future.
>
> G. Children should have a primary home and bedroom where special items like collections, posters and private things are maintained as opposed to forcing children to equally divide their time and things and clothes equally between two homes.
>
> H. A primary residence promotes stability and continuity for children.

¶9 With one exception, we agree with Husband that the findings the court made in determining parenting time are contrary to law and not supported by the evidence.

¶10 First, the court legally erred by applying a presumption against equal parenting time. Nearly all of the court's findings disregarded the statute's starting point, which is that, when consistent with a child's best interests, each party's parenting time should be maximized. A.R.S. § 25-403.02(B). Wife offers no legal argument in defense of the court's broad generalization that "[c]hildren should have a primary home and bedroom . . . as opposed to forcing children to equally divide their time and things and clothes equally between two homes." And no evidence in the record supports application of that principle here. By its nature, dissolution of a marriage compels children to divide their time between the homes of their two parents. That being the case, nothing in the law allows a court considering the best interests of the children to presume that one of those homes must be the children's "primary" residence.

¶11 At trial, Wife rejected the notion of equal parenting time, protesting without offering specifics that her "children need more consistency of staying in one place." But the court's broad finding that "[a] primary residence promotes stability and continuity for children" is supported neither by the law nor the evidence in the record. When each parent can provide a safe, loving and appropriate home for the children, there is no place in a parenting-time order for a presumption that "stability and continuity" require the children to spend more time in one home than the other. Here, Wife offered no evidence that Husband is not a good parent, nor that his home is inappropriate for the children. To the contrary, she testified Husband has the girls' best interests at heart, and, when asked to describe his strengths as a parent, she testified he is "very loving," plays

with the girls and is good "at discipline." She also testified the girls enjoy spending time at Husband's home.

¶12 Second, the court erred by basing parenting time on its finding that the parties' three girls "naturally will gravitate more to [Wife] as they mature." The implicit premise of this finding is that, as a general proposition, girls need to spend more time with their mother than their father. Nothing in the law nor the record supports that proposition.

¶13 Under the Equal Protection Clause of the Fourteenth Amendment, gender-based presumptions by the government require an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 531 (1996). In this inquiry, "overbroad generalizations about the different talents, capacities, or preferences of males and females" cannot suffice. *Id.* at 533. The Arizona legislature has recognized this principle by mandating that in determining parenting time, a "court shall not prefer a parent's proposed plan because of the parent's or child's gender." A.R.S. § 25-403.02(B).[2]

¶14 Wife argues it was "reasonable for the court to anticipate that the children's needs for a stable maternal influence would increase rather than decrease as they entered puberty." She cites no factual or legal authority, however, for that proposition. Nor does she offer any explanation for why an equal parenting-time plan would not allow her to maintain a "stable maternal influence" over her girls. Wife also argues the finding is supported by § 25-403(A)(2), which directs a court considering best interests to take into account "[t]he interaction and interrelationship of the child with the child's parent or parents." But there was no evidence before the court that Wife's relationship or interaction with the children was better than Husband's. By Wife's logic, all things being equal, the gender of the children necessarily would drive parenting time, a governing

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[2] Arizona law once required a presumption in favor of women with respect to the custody of young children. *See* A.R.S. § 14-846(B) (1956) ("[O]ther things being equal, if the child is of tender years, it shall be given to the mother. If the child is of an age requiring education and preparation for labor or business, then to the father."). *See Dunbar v. Dunbar*, 102 Ariz. 352, 354 (1967) (applying "tender years" statute as "the declared policy of this state"). The legislature repealed the statute in 1973. 1973 Ariz. Sess. Laws, ch. 75, § 3.

THE COMMISSION'S POLICY IS TO POST ONLY THE FIRST FIVE PAGES OF ANY DISMISSED COMPLAINT ON ITS WEBSITE.

FOR ACCESS TO THE REMAINDER OF THE COMPLAINT IN THIS MATTER, PLEASE MAKE YOUR REQUEST IN WRITING TO THE COMMISSION ON JUDICIAL CONDUCT AND REFERENCE THE COMMISSION CASE NUMBER IN YOUR REQUEST.