IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 11/06/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

In re the Matter of:	)	1 CA-CV 11-0425
	)	
HEATH SERITT,	)	Department E
	)	
Petitioner/Appellant,	)	
	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication
	)	Rule 28, Arizona Rules
JULIE VIERRA,	)	of Civil Appellate Procedure
	)	
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. FC2004-095117

The Honorable Timothy J. Ryan, Judge

AFFIRMED

David Alan Dick and Associates — Chandler
By David Alan Dick
Attorneys for Petitioner/Appellant

Fabiola Jean-Gilles, PLC — Tempe
By Fabiola Jean-Gilles
And Christopher Post
Attorneys for Petitioner/Appellee

T H O M P S O N, Judge

¶1 Heath Seritt (father) appeals the family court's order with respect to custody and child support. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Father and Julie Vierra (mother) were married in Arizona in 2001 after having two children together; they were divorced by consent decree in Arizona in early 2005.[1] The 2005 consent decree, drafted by father's current attorney, stated in pertinent part, that the parties would have joint custody of the minor children with father having primary custody subject to co-parenting time with mother as outlined in the agreement.[2] As to child support, that decree stated only, "No child support should be order [sic] at this time due to the employment status of both parties." The settlement agreement states that child support will be calculated prior to the final agreement. The joint custody agreement did not discuss child support.[3] Father's "Child Support Information Form" from 2005 was incomplete. It

[1] We note that mother was unrepresented during the dissolution. Father was represented by his current counsel from at least March 21, 2005, prior to entry of the consent decree and settlement agreement.

[2] Mother's parenting time was every other weekend and one-half of the fall and spring breaks.

[3] This agreement did, however, indicate that no party was to relocate the children's residence out of Maricopa County without a court order or written consent by the other parent.

did not include information as to wages, parenting time or day care expenses. Mother, in 2005, submitted a financial worksheet indicating that she made $1000 per month and father made $6000 per month. Father did not update his financial information or include any expenses, other than the cost of health insurance, prior to the entry of the consent decree. No documents from 2005 indicate any calculation of child support occurred.

¶3 Father moved back to Canada in July 2009; he left the children in mother's care. On June 30, 2010, father filed a petition to modify custody, modify parenting time and to relocate the children to Canada, notwithstanding the fact that at the time he was pursuant to the decree the children's primary caregiver. Father asserted that it was in the children's best interest to live with him rather than with mother.

¶4 Mother filed a cross-petition to modify custody and parenting time, as well as seeking designation as primary residential parent and child support as well as attorneys' fees pursuant to Arizona Revised Statutes (A.R.S.) sections 12-349 (2007) and 25-324 (2010). Pre-trial motions and a hearing took place regarding father's failure to disclose requested financial records.[4] Father was precluded from introducing exhibits or financial records not timely disclosed.

---

[4] Father did complete a timely worksheet for child support

¶5 The custody hearing was held over two days. Twenty-two exhibits were admitted, from both parties, and testimony was taken from father, mother, and paternal grandmother.

¶6 The family court issued a seven-page order. It ruled that father and mother would continue to share joint legal custody with mother as the primary residential parent. Father's parenting time was modified to summer break and time at Christmas. The family court ordered father to pay $924 each month in child support commencing from the time mother took residential responsibility for the children in June 2009 with offsets for any monies paid to date. Father was assigned travel costs associated with visitation and ordered to pay attorneys' fees in an amount to be determined.

¶7 Father filed a motion alleging new evidence of abuse at mother's home, seeking to have the children re-interviewed regarding their preferred residence, and filed a motion for reconsideration. Father's motions were summarily denied. The family court found credible evidence that between the first day of trial, when the court interviewed the children, and the second day of trial, father had been coercing or manipulating the children to change their parenting preference. The family

---

amount and an affidavit of financial information on October 18, 2010. Those documents stated that father earned $3000 per month and sought child support from mother.

court entered a judgment for attorneys' fees against father in the entire amount sought of $30,146.36. Father filed a timely appeal.

DISCUSSION

¶8 Father asserts the following errors on appeal:

> 1. The family court failed to make all statutory findings required under A.R.S. § 25-403(A) in determining custody and failed to make the "best interests" findings required by A.R.S § 25-403(B);
>
> 2. The family court failed to follow the child support guidelines and statutes by failing to consider the cost of travel or health insurance;
>
> 3. The family court erred in making the child support payments retroactive to the time when father moved to Canada; and
>
> 4. Irregularities in the trial and evidentiary rulings denied him fair trial.

Custody

¶9 We review child custody determinations under an abuse of discretion standard. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). Before the family court can change a previous custody order, it must determine that there has been a material change in circumstances affecting the welfare of the child. *Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994). The court has broad discretion in making this determination, and we will not disturb its decision absent a clear abuse of discretion. *Id.*; *In re Marriage of*

Diezsi, 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1191 (App. 2002). "The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom." *Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (App. 1971). We will not substitute our opinion for that of the family court. *See id.* at 169, 481 P.2d at 539. Viewing the evidence in the light most favorable to sustaining the family court's findings, we determine whether the record reasonably supports the findings. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998).

¶10 When a parent petitions for modification of custody of a child, Arizona law mandates that the court "shall determine custody . . . in accordance with the best interests of the child." A.R.S. § 25-403(A) (2010).[5] We find that, contrary to

[5] Those factors are: (1) each parent's wishes regarding custody; (2) the child's wishes regarding custody; (3) the interaction of the child with her parents, siblings, or any other person who may significantly affect her best interests; (4) the child's adjustment to home, school and community; (5) the mental and physical health of all individuals involved; (6) which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent; (7) which parent has provided primary care of the child; (8) the nature and extent of any coercion used by a parent in obtaining a custody agreement; (9) parental compliance with chapter 3 article 5 of Title 25 (requiring completion of a domestic relations educational program); (10) any conviction for false reporting of child abuse or neglect; and (11) whether there has been any domestic violence or child abuse. A.R.S. § 25-403(A).

father's assertion, the family court did consider all the factors outlined in A.R.S. § 25-403(A). The seven-page order addressed each of the eleven statutorily enumerated items. Those findings included:

> **1.** The children wanted the court to decide who they should live with;
>
> **2.** "Father has a substantial and ongoing problem with alcohol dependence that played a major role in his relocation to another country. Although Father has presented his own testimony as to Mother's alcohol use, the Court is not aware of any pending charges for felony offense allegations pertaining to substance abuse, as does Father."
>
> **3.** Mother has been the primary caregiver for both children since father's unilateral decision to relocate.

¶11 The family court found no evidence to suggest illicit drug use by mother.[6] The family court heard testimony from mother that she had obtained permanent resident status in the United States as of September 28, 2010, and was getting health insurance for the family through her employer.[7]

---

[6] Three negative drug tests were introduced by mother: she voluntarily took drug tests after receiving the petition to modify which asserted she had a substance abuse problem and before the trial itself and she also submitted copies of a negative drug test done pursuant to her immigration application.

[7] Exhibit 16, which was admitted without objection, shows mother's employer's health care policy information and rates.

¶12 The family court's decision demonstrates it took abundant evidence and thoroughly considered the relevant statutory factors necessary to determine which primary custodian was in the children's best interests. A.R.S. § 25-403(A), (B); *Downs v. Scheffler*, 206 Ariz. 496, 500, ¶ 16, 80 P.3d 775, 779 (App. 2003). Based on our review of the record on appeal, we conclude family court did not abuse its discretion in determining that these parents should continue with joint legal custody or in determining it was in the children's best interests to have mother be the primary residential parent.[8] The family court's order regarding custody is affirmed.

Child Support

¶13 Father first asserts that the family court erred in failing to consider the cost of travel or health insurance. We disagree. The family court specifically found father to be responsible for travel expenses because he unilaterally moved to Canada. The family court took evidence as to mother's

[8] Father alleges, inter alia, that the trial court failed to consider evidence of "extreme domestic violence." However, again based on our review of the record, the evidence does not sustain father's allegations. In some instances father's allegations have no evidentiary foundation (for example, mother's alleged driving intoxicated with the children in the car), in some instances the alleged incidents do not constitute domestic violence under A.R.S. § 13-3601(A) even if true (for example, gangs in the children's school or a dangerous neighborhood), and in other instances father's accounts are not corroborated (for example, the post-trial incident investigated by police which resulted in no official action).

insurance; father had previously submitted a verified response to mother's cross-petition to modify which asserted that the children would receive free health care in Canada under the Canadian medical system. The family court ordered both parents to maintain health insurance on the children and split any non-covered expense 75 percent to father and 25 percent to mother.

¶14 Father asserts that the family court erred by ordering child support "retroactively" for the year between when he left the country and when the petition for modification was filed in June 2010. To that end, he cites A.R.S. § 25-327(A), which provides that a child support order may be modified "only on a showing of changed circumstances that are substantial and continuing" and limits any modification to the date the request was filed. A.R.S. § 25-327(A) (2007); *Little v. Little*, 193 Ariz. 518, 520-21, ¶ 6, 975 P.2d 108, 110-11 (1999).

¶15 We find the family court was not modifying an existing child support order, it was making an initial determination of support. At the time of the consent decree, the court failed to make a child support determination. The signed consent decree said, in the document drafted by father's current counsel, "No child support should be order[ed] at this time due to the employment status of both parties." The record at the time of the consent decree was nearly devoid of information as to their

incomes or child rearing expenses and mere "employment status" is insufficient information on which to make a child support determination. There was no determination of what child support might have been in 2005 under the Guidelines and the decree deferred such a determination. Section 25–403.09 places a duty on the court to ensure that child support is properly addressed when the court issues parenting time and custody orders. Therefore, we find this was the first time any judge had determined support. We find no abuse of discretion in the family court's determination of child support amount or arrearages. *See McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6, 49 P.3d 300, 302 (App. 2002); A.R.S. § 25-320(C) (court may order back support up to three years prior to the filing of the pleadings).

Evidentiary Objections and Other Asserted Irregularities

¶16 Finally, father argues that various irregularities in the trial and evidentiary rulings denied him a fair trial. We review a trial court's evidentiary rulings for an abuse of discretion and do not reverse absent unfair prejudice. *Larsen v. Decker*, 196 Ariz. 239, 241, ¶ 6, 995 P.2d 281, 283 (App. 2000). We have reviewed the record and find no abuse of discretion by the family court.

Attorneys' Fees on Appeal

¶17 Mother, citing A.R.S. §§ 25-324 and 12-349, requests attorneys' fees and costs on appeal. Mother will be granted costs and fees on appeal, in an amount to be determined after compliance with Arizona Rules of Civil Appellate Procedure (ARCAP) 21.

/s/

_____
JON W. THOMPSON, Judge

CONCURRING:

/s/

_____
PATRICIA K. NORRIS, Presiding Judge

/s/

_____
DIANE M. JOHNSEN, Judge