DIVISION ONE
FILED: 07/12/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	No. 1 CA-CV 11-0509
	)	
JENNIFER G. SCHWIMER,	)	DEPARTMENT B
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
GREGRORY R. SCHWIMER,	)	Civil Appellate Procedure)
	)	
Respondent/Apellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-006106

The Honorable Pamela Gates, Judge

AFFIRMED

Nirenstein Garnice PLLC — Scottsdale
By Victor A. Garnice
Attorneys for Petitioner/Appellant

Davis Limited — Scottsdale
By Greg R. Davis
Attorneys for Respondent/Appellee

O R O Z C O, Judge

¶1 Jennifer G. Schwimer (Mother) appeals the family court's order denying her motion for new trial. For the reasons that follow, we affirm.

BACKGROUND

¶2 Mother and Gregory R. Schwimer (Father) married in 1998 and had two children. On September 15, 2010, Mother petitioned for dissolution of the marriage. Mother sought joint legal custody of the children but requested she be designated as the "primary custodial parent with final decision-making authority." In response, Father alleged neither party should be designated the primary custodial parent and Mother should not have final decision-making authority. Father also sought equal parenting time.

¶3 Following mediation, the parties came to an agreement regarding most of the custody and parenting time issues. Specifically, they agreed Mother would have final decision-making authority regarding the children's medical and educational matters. The parties could not agree, however, to a weekday access schedule. Mother requested that Father have access to the children for 2.5 hours on Wednesdays, alternating weekly with the same access time on Tuesdays and Thursdays and no overnight weekday visits during the school year. During summer and school breaks, Mother would have agreed to Father having Wednesday overnights alternating weekly with Tuesday and

Thursday overnights. Father, however, requested overnight visits shared equally year-round. After a hearing, the court issued temporary orders designating Mother as the primary resident parent and giving Father parenting time of 2.5 hours on Wednesday evenings, plus weekend overnights alternating weekly with Tuesday overnight visits.

¶4 Meanwhile, in a series of e-mail exchanges in October 2010, the parties discussed counseling for their young girls who were "upset, confused and devastated" by the divorce. Father and Mother agreed to utilize Dr. Parker's counseling services and set up an appointment. Over Father's objection, Mother suddenly retained Dr. Mellen as a counselor and cancelled Dr. Parker's appointment. Father objected to retaining Dr. Mellen because he believed Mother wanted Dr. Mellen to do "court work" for resolving the parenting issues, and he believed Mother was "opinion shopping" by searching for a therapist who would make recommendations that Mother wanted "the court to hear." In response to Father's concerns, Mother assured him that she requested Dr. Mellen's "services as a therapist only" and that "Dr. Mellen [would] not be testifying to anything unless we ask her to." Mother repeated: "The girls will be attending counseling sessions with Dr. Mellen solely for therapy. . . . Please recognize that therapy will help them. This has nothing to do with court."

¶5 The parenting time issue remained unresolved at trial. In their joint pretrial statement, Father reiterated his position that equal parenting time was in the children's best interests. Mother requested the temporary orders be made permanent.

¶6 After considering the factors set forth in Arizona Revised Statutes (A.R.S.) section 25-403 (Supp. 2011), the court ordered equal parenting time during the school year on a "5-2-2-5" basis. Further, the court ordered Mother shall be the primary residential parent with neither party having superior decision-making authority.

¶7 Mother moved for a new trial under Rule 83.A of the Arizona Rules of Family Law Procedure, arguing "it was impossible" for the court to adequately make the required statutory findings regarding the children's best interests because the court was not presented with Dr. Mellen's "assessment of the children." Conceding that neither party offered such evidence,[1] Mother argued "preclusion for procedural reasons deprived the Court of its ability to perform its statutory responsibility [to consider the children's best

[1] The parties agree that Dr. Mellen was precluded from testifying because they made a "safe harbor agreement." The record, however, does not contain the "safe harbor agreement" and it does not otherwise reflect the specific substance of the agreement. The record also does not support either party's position as to the circumstances of the agreement's inception.

interests] . . . .” The court denied the motion, finding that although evidence from Dr. Mellen was not considered, “the Court heard considerable testimony regarding the children’s wishes presented by [the parties]. Further, the Court heard testimony regarding the inappropriate involvement of the minor children in the litigation and adult issues related to the parties’ separation.”

¶8 Mother timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to A.R.S. § 12-2101.A.5(a) (Supp. 2011).

DISCUSSION

¶9 When determining custody on a contested petition for dissolution, the court must consider and “make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.” A.R.S. § 25-403.B. We review a family court’s decisions on child custody and whether to grant a new trial for an abuse of discretion. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982); *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003); *Melcher v. Melcher*, 137 Ariz. 210, 212, 669 P.2d 987, 989 (App. 1983).

¶10 Mother argues she was entitled to a new trial so she could provide evidence “relative to Dr. Mellen’s therapeutic treatment.” Mother contends Father deprived her of a fair trial

because he engaged in misconduct by "demand[ing] the creation and execution of the 'safe harbor' agreement." *See* Ariz. R. Fam. L.P. 83.A.1, 2 (irregularity in the proceedings or a party's misconduct are bases for a new trial). Mother also characterizes the therapy evidence as "material evidence which could not have been discovered or produced at trial." *See* Ariz. R. Fam. L.P. 83.A.4. Finally, absent this evidence, Mother argues the family court's judgment was not factually justified. *See* Ariz. R. Fam. L.P. 83.A.6. We disagree.

¶11 First, before trial, Mother could have sought a ruling from the family court to allow Dr. Mellen to testify. Instead, she waited until after she got an unfavorable ruling from the family court to make this request.

¶12 Second, as previously noted, no evidence in the record supports Mother's contention that Father improperly induced her to assent to the "safe harbor agreement." Indeed, as the family court noted and the record indicates, Mother agreed before trial that evidence gleaned from the children's therapy with Dr. Mellen would not be admitted at trial because she believed the children's interests would best be served if the counseling sessions were confidential and privileged. Thus, this evidence was not "newly discovered, which with reasonable diligence could not have been discovered and produced at the trial." Ariz. R. Fam. L.P. 83.A.4.

¶13 Also, although Mother proclaims "Dr. Mellen should have been able to offer evidence and testimony relevant and material [to determining the children's best interests]," Mother does not explain the substance of that evidence. Mother did not provide the family court with an affidavit or other evidentiary items that explained the relevance of Dr. Mellen's observations or opinions resulting from her counseling of the children.

¶14 Finally, Mother has not provided us with a transcript of the trial where she, Father, and their respective family members testified. The court's order in this case includes detailed findings on each of the § 25-403.A factors and sets forth substantial explanations of the facts supporting the findings. We presume, in the absence of a transcript, that the testimony supports the family court's findings of fact. *Biddulph v. Biddulph,* 147 Ariz. 571, 574, 711 P.2d 1244, 1247 (App. 1985); *see also* ARCAP 11(b) (requiring appellant to order a copy of any transcript deemed necessary for appeal). Indeed, the family court noted that even without Dr. Mellen's testimony, the court had a sufficient factual basis to determine the children's best interests. On this record we cannot conclude the court abused its discretion. *See, e.g.*, *Pridgeon*, 134 Ariz. at 179, 655 P.2d at 3 (court's custody determination reversed

only if there is "a clear absence of evidence to support its actions").[2]

CONCLUSION

¶15 The family court's order denying Mother's motion for new trial is affirmed. Father requests his attorney fees under A.R.S. § 25-324 (Supp. 2011). Based on the lack of merit to Mother's arguments, we conclude she brought this appeal for an improper purpose. Accordingly, we award Father his reasonable costs and attorney fees incurred on appeal subject to his compliance with Arizona Rule of Civil Appellate Procedure 21. *See* A.R.S. § 25-324.B.3.

/S/
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
JON W. THOMPSON, Judge

/S/
JOHN C. GEMMILL, Judge

[2] Mother relies primarily on *Hays v. Gama*, 205 Ariz. 99, 67 P.3d 695 (2003), in support of her argument that, in order to properly determine the children's best interests, the family court was required to consider evidence relating to Dr. Mellen's counseling sessions. *Hays*, however, is inapposite. In that child custody case, the Arizona Supreme Court held that the family court erred in precluding a child therapist's testimony as a sanction for the mother's violation of a court order. *Hays*, 205 Ariz. at 101, 104, ¶¶ 9, 22-23, 67 P.3d at 697, 699-700. Here, evidence of Dr. Mellen's therapy was not ordered precluded by the court as a sanction or for any other reason. Instead, Mother and Father agreed that such evidence would not be admitted at trial because the children's best interests required maintaining the confidentiality of their therapy sessions. Mother points to no authority that requires a court in these circumstances to consider a therapist's testimony for purposes of determining child custody issues.