DIVISION ONE
FILED: 10/3/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 12-0319
	)	
FREDRIC J. SUSSER,	)	DEPARTMENT B
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
PAULA M. THOMAS,	)	
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2009-006060

The Honorable David J. Palmer, Judge

AFFIRMED

The Baker Law Firm, L.L.C. — Phoenix
By Michael S. Baker
Ashley A. Donovan
Attorneys for Respondent/Appellant

Fredric J. Susser, Petitioner/Appellee — Phoenix
In Propria Persona

D O W N I E, Judge

¶1 Paula M. Thomas ("Mother") appeals the denial of her motion for new trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Fredric J. Susser ("Father") were married in Maui, Hawaii, in September 2009. Two days later, they argued over money issues in their hotel room. Both had been drinking. Mother threw her wedding ring at Father and, according to the police report, slapped him. Father struck back several times, grabbed Mother by the neck, and forced her from the room. Two-year-old H., born to the parties prior to their marriage, observed these events. The police arrived, spoke with the parties, and arrested Father. Both parties declined medical treatment.

¶3 Father pled no contest to misdemeanor abuse of a family or household member. The Hawaii court sentenced him to two days in jail (time served) and ordered him to attend an anger management class in Arizona and to pay a fine and a fee. Father complied with these terms and also completed domestic violence offender and substance abuse treatment programs. He tested negative for alcohol and illegal drugs over a four-month period.

¶4 The parties obtained orders of protection against each other after returning to Arizona. The Scottsdale City Court denied Mother's request to include H. as a protected person on the order entered against Father.

¶5 Without notice to Father, Mother left Arizona with H. at the end of September 2009. She filed a divorce petition in Washington. Mother refused Father telephonic contact with H. for the next ten months.

¶6 Meanwhile, Father filed a dissolution petition in Arizona. In response, Mother conceded Arizona was H.'s home state under Arizona Revised Statutes ("A.R.S.") section 25-1002(7) and agreed Arizona could exercise initial child custody jurisdiction.[1] Pursuant to the family court's May 2010 temporary order, H. returned to Arizona to live with Father.

¶7 The court dissolved the parties' marriage by order filed July 26, 2011, reserving various issues for a later trial. In November 2011, it held a hearing regarding custody, Mother's request to relocate H. to Washington, and other issues. The court permitted one of Mother's witnesses, Steven Davis, to remain in the courtroom throughout trial and to testify as an expert regarding domestic batterers. But the court sustained Father's objection to Davis testifying about his observations of Father during the course of trial.[2]

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[1] We cite the current version of statutes because no revisions material to this decision have occurred.

[2] The court permitted Mother to make an offer of proof that Father exhibited certain characteristics of domestic batterers who engage "in denial, blame shifting, minimization"; "mischaracterize[] what caused the violence"; engage in "stalking behaviors"; and "use[] the court system to get what

¶8 In a detailed 22-page ruling, the court: (1) made findings pursuant to A.R.S. §§ 25-403(A), -403.01(B), -403.03, and -408; (2) awarded joint legal custody to the parties, with Father serving as primary residential parent with final decision-making authority; and (3) denied Mother's relocation request. Mother moved to amend the decree and also sought a new trial. She contended, *inter alia*, that the court erred by: (1) limiting Davis's testimony; (2) stating that her actions had alienated H. from Father; (3) ruling that no significant domestic violence had occurred; and (4) failing to support certain findings. After receiving Father's response, the court adjusted expense responsibilities, addressed property issues, and clarified certain findings. It, however, denied the motion for new trial.

¶9 Mother appealed from the denial of her motion for new trial. We have jurisdiction pursuant to A.R.S. § 12-2101.01(A)(5).

DISCUSSION

I. Motion For New Trial

¶10 We review an order denying a motion for new trial for an abuse of discretion. *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10, 222 P.3d 909, 912 (App. 2009) (citation omitted). Mother

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they want, and then once they have it, to prevent the victim from exercising their proper role as a parent."

bears the burden of demonstrating an abuse of discretion. *See id*. An erroneous ruling does not justify a new trial unless it affects a party's substantial rights. *See* Ariz. R. Fam. L.P. ("Rule") 86. We likewise review the exclusion of evidence for an abuse of discretion and resulting prejudice. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996) (citation omitted). "[T]he prejudice must appear from the record." *Dykeman v. Ashton*, 8 Ariz. App. 327, 329, 446 P.2d 26, 28 (1968).

A. Precluded Testimony

¶11 According to Mother, the court erred by not allowing Davis "to offer his expert opinion about domestic violence, common dynamics and public misconceptions, and the adequacy of Father's rehabilitation following his completion of TASC counseling." The record does not support this contention.

¶12 The court permitted Davis to testify about the general characteristics of domestic batterers and their behavior dynamics, including how they act when successfully rehabilitated. For example, he testified that rehabilitated batterers do not engage in "blaming, minimizing or justifying conduct" or attribute their conduct to substance abuse. Unrehabilitated batterers, he testified, manifest power through controlling the victim's finances and stalking them through social networking. Davis opined that anger management

counseling is inappropriate for domestic batterers because it "teach[es] them how to manipulate." Davis also offered his opinion regarding Father's litigation conduct, stating:

> After reviewing the initial records, I found so many things that really kind of popped out at me as being just morally and questionable, and . . . I have a real issue with victims being re-victimized, and I have a real issue with the fighting that goes on, and especially about the child.
>
> My ideal would be that we'd all just get along, but that's not our reality. So I looked at a lot of things. There were a lot of things in this case. The judge's prior decisions, I was uncomfortable with some of those. I was uncomfortable with the idea that the child was kind of a tool manipulation. I was uncomfortable with a lot of those things, and I felt like it needed to be heard again, and that perhaps I could help by educating the Court on domestic violence intervention.

¶13 Despite Davis's rather extensive testimony, Mother contends the exclusion of his trial-based observations about Father rewarded Father for "lying in wait" with a disclosure objection -- a tactic rejected in *Allstate Insurance Co. v. O'Toole*, 182 Ariz. 284, 288, 896 P.2d 254, 258 (1995). We disagree.

¶14 Mother listed Davis as a witness in the joint pretrial statement filed in July 2011, without describing the substance of his testimony, as required by Rule 49(H). Father did not object at the time. At trial, though, he objected to Davis

testifying about his in-court observations of Father. According to Father's counsel, Davis told him during a pretrial meeting:

> [T]hat he had not interviewed these two parties and could not make an opinion based on that. Now, to hit me now, to have him make an opinion based on what he's seen today, and then use that against my client, I think it's just unfair. It's inherently unfair. And I would have to have the opportunity to then rebut that with another witness.

Mother did not dispute that Davis made this representation to Father's counsel.

¶15 The record also does not support Mother's characterization of Father lying in wait with his disclosure objection -– especially when he was never advised Davis planned to observe him in court and then offer opinions based on those observations. Nor has Mother established how she was prejudiced by the ruling. Davis was permitted to testify about Father's litigation conduct, the behavioral patterns of rehabilitated batterers, and the dynamics of the victim-batterer relationship. We find no abuse of discretion relating to the scope of Davis's trial testimony.

II. Section 25-403.03

¶16 Mother contends the court failed to properly apply A.R.S. § 25-403.03 in rendering its joint custody determination.[3]

[3] January 2013 revisions to § 25-403.03(A) changed the term "joint custody" to "joint legal decision-making." 2012 Ariz.

We review custody decisions for abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003) (citation omitted). A court abuses its discretion if it commits a legal error in the process of exercising its discretion. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004) (citation omitted).

¶17 Joint custody is improper if the court finds "significant domestic violence pursuant to § 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence." A.R.S. § 25-403.03(A). Mother contends this statute precluded joint custody here because Father committed aggravated assault -- one of the offenses listed in § 13-3601(A). *See* A.R.S. § 13-3601(A) (including aggravated assault, A.R.S. § 13-1204, in the definition of criminal domestic violence).

¶18 Evidence in the record, though, supports the determination that Mother and Father assaulted each other in an isolated incident, though Father's retaliatory actions were of greater magnitude. Mother contends the court ignored evidence of her nasal fracture, diagnosed one week after the Maui incident, which she claims is proof Father committed aggravated assault and significant domestic violence. *See* A.R.S.

Sess. Laws ch. 309, § 9 (2d Reg. Sess.). For the sake of consistency, we refer to "joint custody" -– the term used by the family court.

§ 13-1204(A)(3) (defining aggravated assault to include "assault by any means of force that causes . . . a fracture of any body part"). Father has denied causing the nasal fracture.

¶19 To some extent, it appears the family court disbelieved Mother's version of events because it found Father's acts were not "significant as contemplated by the statute, nor does the Court find that there has been a significant history of domestic violence between the parties." As the court noted, Mother told the Washington court she was a "bloody heaping mess" after the Maui incident, when the circumstances were not in fact as she avowed. The court also labeled other claims by Mother not "credible," indicating concerns about her veracity. The family court was in the best position to weigh the conflicting evidence and assess the parties' credibility, including their divergent claims about Mother's condition. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998) (citation omitted) (deferring to trial court's assessment of conflicting evidence).

¶20 Because the family court's findings are supported by a reasonable interpretation of the record, A.R.S. § 25-403.03(A) did not preclude an award of joint custody.

III. Other Findings

¶21 Mother argues the court misapplied A.R.S. § 25-403.01(B) -- the statute enumerating factors to be

considered in determining whether sole or joint legal custody is appropriate. One factor is whether a parent's lack of an agreement regarding joint custody "is unreasonable or is influenced by an issue not related to the child's best interests." A.R.S. § 25-403.01(B)(2). In analyzing this factor, the family court stated:

> The Court does not find that Mother's refusal to agree to joint legal custody is based solely on the best interests of the child. This concern is based upon Mother's actions in this case that clearly alienated [H.] from Father for an extended period of time. To illustrate, the Court cannot conceive any possible reason why Mother would refuse to allow Father to speak with [H.] on her birthday; such an action is clearly not in [H.'s] best interest.

Mother objected to the finding she had alienated H. from Father. In a later order, the court clarified that its use of the term "alienat[ed]" did not refer to clinical alienation, but to Mother's decision to isolate H. from Father by taking her to Washington and denying even telephonic contact with Father for ten months, including on the child's birthday. The record supports this determination.

¶22 Finally, Mother contends the court made unsupported findings regarding certain factors enumerated in A.R.S. §§ 25-403(A) and -408(H), which resulted in the joint custody award, denial of her relocation request, and designation of Father as primary residential parent. We view the evidence in

the light most favorable to sustaining the family court's findings and determine whether there was evidence that reasonably supports them. *Mitchell v. Mitchell*, 152 Ariz. 317, 323, 732 P.2d 208, 214 (1987) (citation omitted); *Gutierrez*, 193 Ariz. at 346, ¶ 5, 972 P.2d at 679 (citation omitted).

¶23 Mother argues the court erroneously concluded that: (1) Father was "by far" the more likely parent to allow frequent and meaningful continuing contact between H. and her other parent; and (2) the likelihood that Mother would comply with parenting time orders was "not high."

¶24 According to A.R.S. § 25-403(A)(6), the factor regarding likelihood of allowing contact with the other parent does not apply if a parent acts in "good faith to protect the child from witnessing an act of domestic violence." The family court acknowledged that Mother's move was in good faith to the extent "she wishes for [H.] to live with her and believes it is in [H.'s] best interest." Nevertheless, it found she displayed "little to no regard" for any resulting damage to the father-daughter relationship by not permitting even telephone contact for a period of ten months. Mother's fear of Father, the court reasoned, did not justify this action. Reasonable evidence supports the family court's application of A.R.S. § 25-403(A)(6) and its conclusion Father was more likely than Mother to allow H. meaningful contact with her other parent.

¶25 We also cannot conclude that the court erroneously assessed the likelihood that Mother would comply with parenting time orders if H. were allowed to relocate. Although Mother testified she would comply, the family court was in the best position to evaluate her credibility, and we defer to its assessment. *See Rowe v. Rowe*, 154 Ariz. 616, 620, 744 P.2d 717, 721 (App. 1987) (deferring to the family court's credibility determinations).

¶26 Mother further argues the court failed to acknowledge a previous finding that H. was "well-adjusted" to her prior home in Washington. However, we assume the family court considered all evidence presented and was familiar with the record. *See Fuentes*, 209 Ariz. at 55-56, ¶ 18, 97 P.3d at 880-81 (appellate court assumes trial judge considered evidence presented before making decision). Moreover, Mother's living circumstances at the time of trial were not developed, leading the family court to note that she "now lives in an undisclosed place with an undisclosed boyfriend in undisclosed conditions."

¶27 Mother takes issue with the family court's weighing of other relevant relocation factors under A.R.S. § 25-408(I). Appellate courts, though, do not reweigh the evidence. *O'Hair v. O'Hair*, 109 Ariz. 236, 240, 508 P.2d 66, 70 (1973) (citations omitted). "[T]he duty of a reviewing court begins and ends with the inquiry whether the trial court had before it evidence which

might reasonably support its action viewed in the light most favorable to sustaining the findings." *Id.* (citations omitted). The family court's relocation findings are amply supported by the record.

¶28 Finally, Mother challenges the award of final decision-making authority to Father, notwithstanding the court's finding that long-distance parenting was feasible. The record, though, reflects a history of conflict between these parents, leading to disruptions in H.'s life. We find no abuse of discretion in permitting Father to have final decision-making authority if, after "good faith consideration to the views of [Mother] . . . [and] best efforts to reach a consensus decision," the parties are unable to agree.

CONCLUSION

¶29 We affirm the judgment of the superior court and deny Mother's request for attorneys' fees incurred on appeal pursuant

to A.R.S. § 25-324(A). Father is entitled to recover his costs on appeal, contingent on compliance with ARCAP 21.

_/s/_____
MARGARET H. DOWNIE, Judge

CONCURRING:

_/s/_____
PETER B. SWANN, Presiding Judge

_/s/_____
PATRICIA K. NORRIS, Judg