IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

IN RE THE MATTER OF:

KEITH HOLTROP, *Petitioner/Appellee*,

v.

AMANDA CLEARY, *Respondent/Appellant*.

No. 1 CA-CV 13-0561
FILED 10-21-2014

Appeal from the Superior Court in Mohave County
No. L8015D0201107271
The Honorable Randolph A. Bartlett, Judge

AFFIRMED

COUNSEL

Keith Holtrop, Lake Havasu
Petitioner/Appellee in Propria Persona

Amanda Cleary, Lake Havasu
Respondent/Appellant in Propria Persona

MEMORANDUM DECISION

Judge Dean M. Fink[1] delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge John C. Gemmill joined.

F I N K, Judge:

¶1 Appellant Amanda Cleary appeals from the superior court's order granting Appellee Keith Holtrop's petition requesting sole legal decision making authority over the parties' child. As we construe her first argument on appeal and as restated for clarity, Cleary argues Holtrop failed to present sufficient evidence in support of his petition because his testimony that she had a drug problem and had limited his contact with their child was false. The superior court is in the best position to judge the credibility of witnesses, *Mary Lou C. v. Arizona Dep't of Econ. Sec.*, 207 Ariz. 43, 47 ¶ 8, 83 P.3d 43, 47 (App. 2004), and thus we review the superior court's decision for an abuse of discretion. *Hurd v. Hurd*, 223 Ariz. 48, 51, ¶ 11, 219 P.3d 258, 261 (App. 2009).

¶2 Arizona Revised Statutes ("A.R.S.") section 25-403(A) (2013) enumerates specific factors for the court to consider before modifying legal decision making. *See Hurd*, 223 Ariz. at 51, ¶ 11, 219 P.3d at 261. In this case, the court issued a written minute entry in which it analyzed the applicable factors and set forth its factual findings. The court found there was evidence of "substance abuse based upon the father's testimony" and that Holtrop was "the parent more likely to allow . . . frequent, meaningful and continuing contact with the other parent." At the evidentiary hearing on Holtrop's petition, the court made additional statements on the record explaining its findings.

¶3 Although Cleary disputes Holtrop's testimony and the court's factual findings, she failed to include a transcript of the evidentiary hearing in the record on appeal. It is the appellant's responsibility to make certain "the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal. . . . When a party fails to do so, we assume the missing portions of the record would support

---

[1]Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Dean M. Fink, Judge of the Maricopa County Superior Court, to sit in this matter.

the trial court's findings and conclusions." *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 16, 66 P.3d 70, 73 (App. 2003) (internal citations omitted); *see also* ARCAP 11(b)(1) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a certified transcript of all evidence relevant to such finding or conclusion."). Without the transcript, we are required to assume the record supports the superior court's rulings. *See Kohler v. Kohler,* 211 Ariz. 106, 108 n.1, ¶ 8, 118 P.3d 621, 623 n.1 (App. 2005). Accordingly, we reject Cleary's first argument.

¶4 Next, Cleary argues she was handicapped from fully contesting Holtrop's petition at the hearing. Specifically, she argues, Holtrop failed to serve her with the petition, the court's order to appear, and all other documents he had filed, "[no] less than ten (10) days prior to the date of the hearing," as directed by the superior court's order. Instead Holtrop served her with these filings at least seven calendar days before the hearing.[2] Despite Holtrop's late service, Cleary appeared telephonically at the hearing and testified. There is no indication in the record before us that Cleary asserted to the court she was not prepared to address the issues raised in the petition, or otherwise objected to proceeding with the hearing on August 21, 2013. She also does not identify on appeal how this matter would have proceeded any differently had Holtrop timely complied with the court's order.

¶5 Before a court can modify an existing child custody order, all entitled parties must receive "notice and an opportunity to be heard." A.R.S. § 25-1035 (2001). Cleary did not receive the full ten day notice ordered by the court, but Cleary does not explain how nor does the record reveal that she suffered any prejudice as a result of the shortened notice; she received actual notice of the hearing, appeared, and testified. *Cf. Scott v. G.A.C. Fin. Corp.*, 107 Ariz. 304, 305, 486 P.2d 786, 787 (1971) ("[T]he purpose of process is to give the party to whom it is addressed actual notice of the proceedings . . . ."). Moreover, to preserve her objection Cleary should have objected to the late notice at or before the time of the hearing. Without the hearing transcript, we do not know whether she objected to the late notice. Indeed, there appears to be no indication that she objected at all until after the court granted Holtrop's petition. Even then, Cleary did not

[2]Cleary states in her opening brief she received a package from Holtrop containing the petition, and court's order to appear on August 12. The certificate of service, however, shows August 14 as the date of delivery.

identify witnesses, documents, or any other evidence she would have presented if she had received the full ten day notice.

¶6 Finally, Cleary argues the superior court did not treat her fairly, asserting she "did not have a fair hearing," the "Judge . . . did not listen to [her] case," and no "actual evidence was used to support the claims against [her]." "A trial judge is presumed to be free of bias and prejudice and to overcome this presumption, a party must show by a preponderance of the evidence that the trial judge was, in fact, biased." *Cardoso v. Soldo*, 230 Ariz. 614, 619-620, ¶ 19, 277 P.3d 811, 816-817 (App. 2012). Cleary has not established any judicial bias, and the record before us does not support a claim of judicial bias. The superior court's thorough minute entry following the hearing belies Cleary's contention that the judge did not listen to or rely on the evidence presented to make his ruling.

¶7 For the forgoing reasons, we affirm the order of the superior court. As the prevailing party, Holtrop is entitled to his statutory taxable costs on appeal contingent upon his compliance with Arizona Rule of Civil Appellate Procedure 21.

Ruth A. Willingham · Clerk of the Court
FILED: gsh