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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Matter of:

TIFFANY KAY RIDDLE, *Petitioner/Appellant*,

v.

GARY WAYNE MARTIN, *Respondent/Appellee*.

No. 1 CA-CV 23-0442 FC
FILED 4-30-2024

Appeal from the Superior Court in Maricopa County
No. FC2023-091861
Glendale Municipal Court
No. M0747PO023004650
The Honorable Harriet M. Bernick, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Jeffery M. Zurbriggen, P.C., Phoenix
Counsel for Petitioner/Appellant

Davis Miles McGuire Gardner, Mesa
By Melissa Benson
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Jennifer B. Campbell and Judge Michael J. Brown joined.

T H U M M A, Judge:

¶1 Tiffany Riddle (Mother) appeals from the superior court's removal of S.M., her biological child with Gary Martin (Father), from an order of protection issued against Father. She also challenges the court's decision not to prohibit Father from possessing or purchasing firearms for the duration of the order. Because Mother has shown no error, the order of protection is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Father, who previously lived together, are the parents of S.M., born in November 2022. In April 2023, Mother filed a petition for an order of protection against Father. Mother's petition, filed in Glendale City Court, alleged four incidents of domestic violence. Mother sought an order of protection on behalf of herself and S.M. to prohibit contact with Father. Based on Mother's allegations, the City Court issued an ex parte order of protection prohibiting Father from having direct contact with Mother or S.M., also listing Mother's residence and workplace as protected locations. The ex parte order also prohibited Father from possessing, receiving, or purchasing firearms.

¶3 At Father's request, the order of protection petition was transferred to superior court to be part of a family court case he filed against Mother. *See* Ariz. R. Prot. Ord. P. 34(a) (2024).[1] In late May 2023, Father requested a hearing on the ex parte order, asking that it be "quashed in its entirety."

¶4 In June 2023, the superior court held an evidentiary hearing. Both Mother and Father, who were represented by counsel, testified. After considering the conflicting testimony, as well as the other evidence and arguments, the court "did not find that there is sufficient evidence to keep

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

the child in common on the Order of Protection." The court issued an amended order of protection that kept Mother as a protected person but removed S.M. as a protected person. The superior court also found Father did not present a "a credible threat to the physical safety of [Mother] and/or whether he may inflict bodily injury or death on" Mother, Ariz. Rev. Stat. (A.R.S.) section 13-3602(G)(4), and removed the prohibition on Father's possession of firearms.

¶5 This court has jurisdiction over Mother's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, A.R.S. §§ 12–2101(A)(1), –2101(A)(5)(b), and Rules 42(a)(2) and 42(b)(2) of the Arizona Rules of Protective Order Procedure.

DISCUSSION

¶6 This court reviews an order of protection for an abuse of discretion, *Savord v. Morton*, 235 Ariz. 256, 259 ¶ 10 (App. 2014), reviewing issues of law de novo. *Mahar v. Acuna*, 230 Ariz. 530, 534 ¶ 14 (App. 2012). This court construes the evidence in a light most favorable to affirming the order, "giving deference to the superior court's assessment of witness credibility." *Femiano v. Maust*, 248 Ariz. 613, 615 ¶ 9 (App. 2020) (citing cases). This court will vacate only if the decision "'is devoid of competent evidence to support the decision.'" *Michaelson v. Garr*, 234 Ariz. 542, 544 ¶ 5 (App. 2014) (citation omitted).

I. Mother Has Not Shown the Superior Court Abused Its Discretion by Removing S.M. from the Order of Protection.

A. Mother Has Not Shown the Superior Court Applied Incorrect Legal Standards to Its Findings.

¶7 At the beginning of the evidentiary hearing, in describing the difference between the standard of proof to obtain an ex parte order of protection and an order of protection after a contested evidentiary hearing (sometimes called a return hearing), the court stated Mother was "going to need to show by a preponderance of the evidence that one of these acts did actually occur or ***will*** occur in the future." (Emphasis added.) For future domestic violence incidents, the statute requires a showing that "defendant ***may*** commit an act of domestic violence." A.R.S. § 13-3602(E)(1) (emphasis added). At the evidentiary hearing, the parties -- both of whom were represented by counsel -- made no objection to this reference to "will." Soon after the court's statement, during Mother's opening statement, her attorney asserted that the evidence would show that, as to the child, Father "has committed at least one act of domestic violence or may in the future."

Mother repeated the "may occur" statutory requirement several times during the hearing, and the court acknowledged that the statute uses "may" (not "will"). And in making findings on the record, the court used the statutory term "may" (not "will"). The amended order of protection, which is based on an approved form adopted by Administrative Directive No. 2022-07, also uses the statutory term "may" (not "will.").

¶8 Now, Mother argues the trial court committed "fundamental legal error" requiring reversal "when it determined that the standard to satisfy domestic violence was that the domestic violence WILL occur in the future, not that it MAY occur." Not so.

¶9 First, by failing to raise any "may" vs. "will" issue in a timely fashion, Mother has waived that argument. *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535 ¶ 18 (App. 2007). Second, other than an initial, passing reference to "will" in describing the standard of proof and describing the proceeding, the parties and the court properly referenced "may," as used in the statute. Thus, Mother is factually wrong in asserting that the court "determined" an improper standard to apply. Finally, Mother has shown no error (let alone "fundamental legal error" resulting in prejudice) on the record presented. The transcript and resulting amended order of protection show that the court applied the correct legal standard.

B. Mother Has Not Shown the Superior Court Improperly Precluded Evidence of Father's Mental Health.

¶10 Mother claims that the court "improperly precluded evidence . . . relat[ing] to [Father's] mental health and threat of future domestic violence against" Mother and S.M. At the hearing, Mother sought to introduce evidence that Father had sought mental health treatment to show he may commit an act of domestic violence in the future. When Father objected, the court observed: "I don't think just because you're mentally ill you run a risk of domestic violence." After an exchange, the court allowed Mother to "very, very briefly testify about it and I'll give it the weight that I believe is appropriate." Mother's counsel, however, responded "I'll move on. That's fine." Mother then offered no further evidence about Father's mental health.

¶11 The record presented shows no evidence about Father's mental health that the court "precluded." Nor does it show what the purportedly "precluded" evidence would have shown, as a typical offer of proof would require. *Cf.* Ariz. R. Evid. 103(a)(2) (discussing what is required for an offer of proof when the Arizona Rules of Evidence apply).

Instead, Mother's counsel voluntarily chose to abandon this line of questioning. Mother has shown no error regarding admissibility of evidence regarding Father's mental health.

C. Mother Has Not Shown the Superior Court Erred in Removing S.M. from the Order.

¶12 Of the four alleged incidents of domestic violence, the court found that an April 2023 dispute supported continuing the order of protection as to Mother but not S.M.[2] That incident, which arose out of Mother questioning Father's fidelity to her, was captured, at least in part, on a video recording received by the court. The video showed an argument between the two, that occurred in part in S.M.'s nursery while the child was in a crib. It became heated, with the court finding an incident of domestic violence occurred because the "[p]arties were clearly yelling at each other. Police were called . . . and it was loud and it was upsetting the child." The court continued the order of protection as to Mother based on that domestic violence incident. As to S.M., however, the court found that "[j]ust because it was in the vicinity of the child doesn't mean that it's an act of domestic violence against the child. It just means it was in the vicinity of the child." Accordingly, the court removed S.M. as a protected person.

¶13 Mother argues that being in the vicinity of domestic violence against Mother makes S.M. a victim of domestic violence. According to Mother, "being in the vicinity of domestic violence is exactly why the child should be included on the [order of protection] due to endangerment." Thus, Mother argues, the court erred by removing S.M. from the order of protection.

¶14 Depending upon the evaluation of the conflicting evidence, the record might have supported continuing the inclusion of S.M. as a protected person. However, weighing and assessing conflicting evidence was for the superior court at the hearing. This court defers to the trial court's "determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347 ¶ 13 (App. 1998). Similarly, this court does not "re-weigh[] conflicting evidence or

[2] One of the alleged incidents occurred before S.M. was born, and no evidence was offered for an alleged March 2023 incident. The fourth incident, in December 2022, is discussed below.

redetermin[e] the preponderance of the evidence" on appeal. *Hurd v. Hurd*, 223 Ariz. 48, 52 ¶ 16 (App. 2009).

D. Mother Has Not Shown the Superior Court Erred in Finding Father Had No Intent to Harm S.M.

¶15 Mother argues that the superior court "improperly analyzed the law and improperly determined the facts" when it found Father was not trying to suffocate S.M. in December 2022. The evidence addressing that incident was conflicting testimony by Mother and Father. Mother testified that Father was holding his hand over a fussy S.M.'s mouth and nose; Father responded that S.M. (who had colic at the time) looked like he was going to vomit and Father "put my hand up to catch whatever was coming out." The issue never arose again, and Mother left S.M. alone with Father quite a few times after the incident. On this record, Mother has not shown that the court abused its discretion in finding that Father was not trying to harm S.M.

II. Mother Has Not Shown the Superior Court Erred in Finding Father was not a Credible Threat to Her Safety.

¶16 A court may prohibit a defendant from possessing or purchasing firearms while an order of protection is in place if it finds the "defendant is a credible threat to the physical safety of the plaintiff." A.R.S. § 13-3602(G)(4); *see also* 18 U.S.C. § 922(g)(8). Such a prohibition "should be based on a court's assessment of credible threats of physical harm by the specific person whose rights would be affected by the order." *Mahar*, 230 Ariz. at 536 ¶ 20.

¶17 Mother's petition did not ask that the court prohibit defendant from possessing firearms. After the evidentiary hearing, the court explicitly found that Father was not a credible threat because it did not find "any specific actions where Mother was injured in this case, physically injured . . . she did not testify that she had received any physical injuries." Although "there was yelling and screaming and there may have been emotional injuries," that was not "sufficient to rise to the level of a credible threat" to Mother's physical safety. Mother points to several of her contested allegations in arguing this was error. In substance, her arguments ask that this court reweigh the trial evidence, something this court will not do. *See State v. Barger*, 167 Ariz. 563, 568 (App. 1990) ("When reviewing the sufficiency of the evidence, an appellate court does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact."). Mother has shown no error.

III. Attorneys' Fees and Costs on Appeal.

¶18 Husband requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324 and ARCAP 2l(a), alleging Mother has raised "several unfounded positions in her appeal." In the court's discretion, Father's request for fees is denied. Father, however, is awarded his taxable costs on appeal, *see* A.R.S. § 25-324(A), contingent upon his compliance with ARCAP 21.

CONCLUSION

¶19 The order of protection is affirmed.

AMY M. WOOD • Clerk of the Court
FILED: AA