DIVISION ONE
FILED: 05-25-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	1 CA-CV 09-0092
	)	
DANIEL KEITH TAPLEY,	)	DEPARTMENT C
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
v.	)	Rule 28, Arizona Rules
	)	of Civil Appellate
KIRA L. GARFIAS,	)	Procedure)
	)	
Respondent/Appellant.	)	
	)	
_____	)	
	)	
STATE OF ARIZONA ex rel. THE ARIZONA DEPARTMENT OF ECONOMIC SECURITY,	)	
	)	
Intervenor/Appellee	)	
_____	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2007-094024
FC 2008-091426
(Consolidated)

The Honorable Bruce R. Cohen, Judge

AFFIRMED

Kira L. Garfias
In Propria Persona

Apache
Junction

Daniel Keith Tapley Tempe
In propria Persona

Terry Goddard, Attorney General Phoenix
By Kathryn E. Harris, Assistant Attorney General
Attorneys for Intervenor/Appellee State of Arizona[1]

K E S S L E R, Judge

¶1 Respondent-Appellant Kira L. Garfias ("Mother") appeals the superior court's order establishing custody and parenting time and approving a transfer of schools for one of the parties' daughters. For the reasons stated below, we affirm the superior court's order.

FACTUAL AND PROCEDURAL HISTORY

¶2 Daniel Keith Tapley ("Father") filed a petition to establish custody, parenting time and child support. The case was consolidated with an action by the State seeking reimbursement of child support funds the State paid to Mother as part of the Temporary Aid for Needy Families program. On December 12, 2008, the superior court conducted an evidentiary hearing and received testimony from Mother, Father, and a witness. On December 18, 2008, the court filed an order

[1] The State of Arizona filed a notice of nonparticipation in this appeal pursuant to Arizona Revised Statutes ("A.R.S.") § 25-509(C) (2007). However, the State requested that it be noticed on all pleadings and orders relating to this case. To accomplish such notice, we are including the attorneys for the State in the list of attorneys having appeared so they will receive notice of this decision.

awarding the parties joint custody, allocated them substantially similar amounts of parenting time, and approved of the school age daughter attending the school Father requested. Pursuant to the court's order, Father will have parenting time from Monday morning until Thursday afternoon each week. Mother's parenting time will occur during the weekend. The court ordered that the older daughter transfer to Imagine Elementary School, which is "near Father's home" and is attended by the children of Father's new significant other.

¶3 The superior court supported its order with several detailed pages of factual findings. The court found that the parties were significantly in dispute and that true resolution will only come when both parents commit to working together in a joint and productive fashion. It also found that Father's work schedule is heaviest on the weekends and Mother's work schedule includes three weekdays, neither parent wished to keep the daughter in her current school, and neither parent's proposed parenting plan was truly viable. Mother filed a timely notice of appeal. This court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-2101(A), (B) (2003).

ANALYSIS

¶4 Mother claims that the superior court's order is erroneous because 1) it is not in the best interest of the

children, 2) not supported by appropriate findings of fact, 3) unduly vague and therefore impossible for her to follow, 4) obtained through fraud on the court, and 5) entered without jurisdiction. She also claims that the order violates her right to due process of law because 1) the superior court was biased against her, 2) the superior court failed to rule on the matter within the 60 day period prescribed by the Arizona Constitution, and 3) the Rules of Family Law Procedure apply rather than the Rules of Civil Procedure and Rules of Evidence.[2]

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[2] Mother also generally alleges numerous other constitutional violations, including equal protection, all of Article II of the Arizona Constitution, the Bill of Rights, the rules of court, and equal access to the courts. Because she has failed to specify how any of these rights may have been violated, we deem the arguments waived and decline to consider them. ARCAP 13(a)(6); *State v. Bolton,* 182 Ariz. 290, 297-98, 896 P.2d 830, 837-38 (1989) (failure to sufficiently argue a claim on appeal constitutes abandonment of that claim); *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (noting opening briefs must present significant arguments setting forth an appellant's position on the issues raised).

Moreover, Mother's opening brief appears to attempt to appeal from a May 22, 2008 order of the superior court awarding child support and ordering payments of child support in arrears. As no notice of appeal was filed within thirty days of that appealable order, we lack jurisdiction to review that order. ARCAP 9(a).

We also note that Father filed an answering brief with this Court but repeatedly failed to serve Wife with that brief. Ultimately, this Court struck the brief. Given that this case involves the custody of children, we exercise our discretion to not consider the failure of an answering brief to be a confession of error. *Gibbons v. Indus. Comm'n of Ariz.*, 197 Ariz. 108, 111, ¶ 8, 3 P.3d 1028, 1031 (App. 1999) (exercising discretion to not treat failure to file answering brief as confession of error).

¶5 We review an order establishing custody and parenting time for clear and manifest error. *Hurd v. Hurd*, 223 Ariz. 48, 51, ¶ 11, 219 P.3d 258, 261 (App. 2009). An appellant contending that the superior court's decision was not supported by the evidence must include a certified transcript of all relevant evidence in the record on appeal. ARCAP 11(b)(1). When the appellant fails to produce a transcript of the evidentiary hearing, we will assume that the evidence supports the superior court's discretionary ruling. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Mother has failed to file the transcript of the evidentiary hearing in the superior court and we deny her request to have this Court order such transcripts for her.[3] Nor will we review the audio recording of that hearing in lieu of a transcript. *See* ARCAP 11(a)(1) & (b)(10).

I. The Superior Court Did Not Abuse Its Discretion in Awarding Joint Custody and Parenting Time

¶6 The record reveals no abuse of discretion in the superior court's custody and parenting time determination. Mother seems to contend that the superior court abused its discretion by failing to consider evidence that 1) Father was responsible for two deaths, 2) Father was delinquent in his payment of child support obligations, 3) Father was not

[3] No Arizona statute or case provides a right to a state-subsidized transcript on appeal in a non-criminal case.

available to the children when he had parenting time, and 4) an additional fact her brief does not identify which Mother thought appropriate for judicial notice. Because of a lack of a transcript, we cannot conclude that the trial court improperly addressed any of these matters. *Baker*, 183 Ariz. at 73, 900 P.2d at 767. We have no way of determining whether the evidence was presented to the court, how it was presented, and whether Father countered it with controverting evidence or evidence of mitigating circumstances. Without a transcript of the evidentiary hearing, we will assume that all of the evidence the court received supported its order.[4] *Id.*

¶7 Nor can we review Mother's contention regarding the superior court's alleged failure to take judicial notice because her brief does not identify any fact susceptible to judicial notice. ARCAP 13(a)(6); *Bolton,* 182 Ariz. at 297-98, 896 P.2d at 837-38 (failure to sufficiently argue a claim on appeal constitutes abandonment of that claim); *Carver,* 160 Ariz. at 175, 771 P.2d at 1390 (noting opening briefs must present significant arguments setting forth an appellant's position on the issues raised).

[4] To the extent Father is not complying with child support orders, Mother must seek relief from the superior court to enforce those orders. A.R.S. §§ 25-503(L), -504 (Supp. 2009).

II. The Superior Court's Minute Entry Contains A Specific Statement of Facts

¶8 Mother contends that the superior court's detailed four page minute entry violates A.R.S. §§ 25-403(B) (Supp. 2009) & -403.01(B) (Supp. 2007) by failing to include specific findings of fact to support its decision regarding custody. We disagree. The superior court's decision expressly considered several of the relevant factors in A.R.S. § 25-403(A) and the lack of a transcript requires us to assume that no evidence implicated the factors not discussed. *Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶9 A.R.S. §§ 25-403 & 403.01(B) require the superior court to consider certain factors and produce a factually specific written decision when parents litigate custody. Mother requested sole custody, so the requirement to make "specific findings" applies.

¶10 The superior court's decision reflects written consideration of most of the statutory factors that the court is required to consider. *Supra*, ¶ 3. The decision indicates that the parents had contradictory desires regarding custody and parenting time, A.R.S. § 25-403(A)(1), and that the parents are significantly in dispute over custody. A.R.S. § 25-403(A)(4). It also found that all options advocated by the parties jeopardized the daughter's school stability so A.R.S. § 25-

403(A)(5) deserves little weight in its analysis. The superior court also found that neither parent would act to preserve the other parent's relationship with the children if given sole custody. A.R.S. § 25-403(A)(6). Finally, the superior court considered the ability of the parents to cooperate and found that their inability to cooperate in raising their common children would be exacerbated if either parent obtained control through sole custody. A.R.S. § 25-403.01(B).

III. The Superior Court's Minute Entry Is Not Unduly Vague

¶11 Mother contends that the superior court's order regarding which school the older child will attend and where she will pick the children up is unduly vague. Regarding the school, Mother alleges that there is no school bearing the exact name designated in the superior court's order but that there are several schools with similar names in the area. Because of the lack of a transcript, we must assume that no evidence of this alleged discrepancy was presented to the superior court and affirm. *Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶12 The superior court's decision not to specify the particular place at which the parties will exchange the children does not render the order void for vagueness. The superior court ordered the parties to use a particular website to send each other electronic correspondence and ordered them to respond to each other's good faith inquiries. The superior court also

admonished the parties to "commit to working together in a joint and productive fashion." Because the order does not specify a particular place, Mother and Father must collaborate to select a place for Mother to pick up the children from Father.

¶13 Mother alleges that the reason she cannot determine where she will pick up the children without judicial intervention is Father's persistent refusal to respond to her good faith inquiries. If that is true, enforcement of the order must first be sought in the superior court before we may consider the matter. *See* A.R.S. § 25-414 (2007) (permitting superior court to enforce custody and parenting time orders through contempt proceedings).[5] However, we join the superior court in admonishing both parties to commit to work together in a cooperative and productive manner.

IV. This Court Will Not Revisit The Superior Court's Credibility Determinations

¶14 Mother contends that Father obtained the ruling she appeals from by presenting false evidence to the superior court. We will not second-guess the superior court's credibility determinations. *Gutierrez v. Gutierrez,* 193 Ariz. 343, 347, ¶

[5] Mother contends the order places her in "an automatic position of contempt" for violating the order. Nothing in the order purports to limit the superior court's discretion in administering contempt sanctions. Further, since the filing of the notice of appeal in this case, Father has requested contempt sanctions and the superior court has denied them on both occasions.

13, 972 P.2d 676, 680 (App. 1998). Deference to the family court is especially necessary in light of Mother's failure to provide a transcript of the evidentiary hearing. *Baker*, 183 Ariz. at 73, 900 P.2d at 767.

V. The Superior Court Has Jurisdiction To Decide Custody and Parenting Time

¶15 Mother contends that the superior court lacked jurisdiction to enter an order establishing child custody and parenting time. We disagree. An Arizona court has jurisdiction to make an original custody determination if Arizona is the "home state" of the child. A.R.S. § 25-1031(A) (2007). That jurisdiction continues until a court determines that the child and his parents do not reside in Arizona or have no substantial connection with the state and evidence concerning custody is no longer available in the state. A.R.S. § 25-1032(A) (2007). The superior court's minute entry indicates that prior to ruling, the children resided with each parent for part of each week. Each parent was in Arizona. Therefore, the superior court has jurisdiction to determine custody.

VI. The Superior Court's Ruling is Not Tainted by Bias

¶16 Mother contends that the superior court's order is tainted by bias. We disagree. Bias is "a hostile feeling or spirit of ill-will . . . towards one of the litigants." *State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984). A

party challenging a trial judge's impartiality must overcome the presumption that trial judges are "free of bias and prejudice," *State v. Rossi*, 154 Ariz. 245, 247, 741 P.2d 1223, 1225 (1987), and must "set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced." *State v. Medina*, 193 Ariz. 504, 510, ¶ 11, 975 P.2d 94, 100 (1999). The bias and prejudice necessary for disqualification generally "must arise from an extra-judicial source and not from what the judge has done in his participation in the case." *State v. Emanuel*, 159 Ariz. 464, 469, 768 P.2d 196, 201 (App. 1989) (quotation omitted). The factual basis for Mother's contention is that the superior court declined to sanction Father for an alleged act of perjury. Mother's bias claim rests solely on adverse court rulings, so she has failed to demonstrate bias. *See id.*

¶17 Additionally, Mother contends that the order granting her joint custody results from gender-motivated bias in violation of A.R.S. § 25-403.01. We disagree. Mother has not proffered any basis in the record to support the claim of gender bias, and our own review of the record reveals none. The order appealed from discusses gender-neutral factors such as the relationship of the parties, the schedules of the parties, and the specific contentions the parties raised to support its order.

VII. The Superior Court Did Not Improperly Delay Its Ruling

¶18 Mother alleges that the superior court violated Article 6, Section 21 of the Arizona Constitution by failing to rule within sixty days. The sixty-day period mandated by Article 6, Section 21 begins to run when the superior court takes a matter under advisement. *See Wustrack v. Clark*, 18 Ariz. App. 407, 408-09, 502 P.2d 1084, 1085-86 (1972). The superior court conducted the evidentiary hearing and took this matter under advisement on December 12, 2008. The court issued its decision on December 15, 2008. The decision was well within the sixty-day period prescribed by the Arizona Constitution.[6]

VIII. The Rules of Family Law Procedure Comport with Due Process

¶19 Mother contends that the provisions of the Rules of Family Law Procedure limiting the applicability of the Rules of Civil Procedure and Rules of Evidence in family law disputes violates her right to due process. Absent a transcript we cannot determine whether Mother raised this issue in the superior court and must assume that the superior court complied with due process. *Baker*, 183 Ariz. at 73, 900 P.2d at 767.

[6] Mother also seems to argue that delay occurred regarding her petition for child support and enforcement. As noted above, ¶ 6, we have no transcript of the December 12 hearing. We assume the court was aware of the support petitions at that time and properly considered the support issue. Whether the superior court timely ruled on the support petitions is not relevant to this appeal.

Further, without a transcript we cannot determine what part of the proceeding, if any, deviated from the rules Mother contends should have applied.

¶20 The portion of the record that is available supports our assumption that Mother received due process. Due process ensures that a party receives adequate notice, an opportunity to be heard at a meaningful time and in a meaningful way, and an impartial judge. *Mathews v. Eldridge,* 424 U.S. 319, 333-34 (1976); *Goldberg v. Kelly,* 397 U.S. 254, 267-68 (1970); *Emmett McLoughlin Realty, Inc. v. Pima County,* 212 Ariz. 351, 355, ¶ 17, 132 P.3d 290, 294 (App. 2006); *Comeau v. Ariz. State Bd. of Dental Exam'rs,* 196 Ariz. 102, 107, ¶ 20, 993 P.2d 1066, 1071 (App. 1999). The record reflects that Mother received service of Father's petition in advance of the proceeding and notice that it would take place. She appeared and the superior court allowed nearly two hours for the presentation of evidence. The superior court's order reflects the fact that the court heard and understood what custody arrangement she wanted and her reasons. As we discussed *supra*, Mother has failed to demonstrate that the judge was partial to a particular side. Mother's hearing comported with basic due process standards notwithstanding the distinct procedure employed in family law cases.

CONCLUSION

¶21 For the foregoing reasons, we affirm the superior court's order regarding custody and parenting time and reject Mother's request that we declare that order void.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge