DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:	)	No. 1 CA-CV 09-0550
	)	
DEANNE LAURELLE ADAMS,	)	DEPARTMENT C
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules
	)	of Civil Appellate
WILLIAM EDWARD ADAMS II,	)	Procedure)
	)	
Respondent/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2005-094448
FC 2006-094242
(Consolidated)

The Honorable David M. Talamante, Judge

AFFIRMED

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D O W N I E, Judge

¶1 Deanne Adams ("Mother") appeals from post-decree orders of the family court. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Mother and William Adams ("Father") divorced for the first time in 1999; they remarried in 2003. Mother obtained an order of protection against Father in December 2005, which was dismissed at Mother's request in April 2006.[2]

¶3 A decree of legal separation was issued in July 2006. The decree awarded Mother sole custody of the parties' son but did not mention any domestic violence. In April 2007, the parties signed a Consent Decree of Dissolution of Marriage ("consent decree"), which incorporated essential terms of the decree of separation and stated that "Domestic violence has occurred, but the domestic violence has not been significant."

¶4 In September 2008, Father filed a petition seeking, *inter alia,* joint custody and increased parenting time. Mother

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[1] We view the evidence in the light most favorable to sustaining the family court's findings. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998) (citation omitted).

[2] Mother's request to dismiss the order of protection stated:

> Defendant has cooled down. As well my concern of him being with me in the home has been addressed. He will be moving into a new home in a week and he has agreed to not come to the home without my permission.

objected. At the ensuing evidentiary hearing, Mother's counsel discussed presenting evidence about pre-decree domestic violence. Father argued that the proper focus should be on post-decree matters. The family court did not preclude Mother from presenting evidence, but indicated it would be inclined to give post-decree conduct more significant weight. At the end of the first day of hearing, Mother requested additional time so witnesses could testify about Father's "emotional abuse and assertiveness and control." She presented one such witness, who testified Mother was upset with Father because of a lack of communication and cooperation. He did not testify about any domestic violence.

¶5 At the conclusion of the hearing, the court made several findings on the record and took the matter under advisement. On July 8, 2009, it issued a written ruling awarding the parties joint custody. Mother timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 and -2101(B) (2003).

DISCUSSON

¶6 We review the family court's custody decisions for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003) (citation omitted). To constitute an abuse of discretion, "the record must be devoid of

competent evidence to support the decision of the trial court." *Borg v. Borg*, 3 Ariz. App. 274, 277, 413 P.2d 784, 787 (1966) (quoting *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963)). "The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom." *Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971) (citations omitted). We will not substitute our opinion for that of the family court. *Id.* at 169, 481 P.2d at 539 (citation omitted).

1. Domestic Violence

¶7 Mother contends the family court's statements were "tantamount to a ruling precluding any evidence of the domestic violence Mother suffered during her marriage to Father." The record does not support this claim. At the outset of the evidentiary hearing, the court stated:

> Domestic violence between parents is relevant. It's always relevant when you're dealing with the best interests of the child. And I am not going to tell counsel how to put on their case. You can put on whatever evidence you think is relevant. Again, I'm cautioning both of you that to the extent that you focus on occurrences before the decree, you do so at your own peril, because I consider more significant what has gone on since the decree of dissolution has been entered and the dynamic of the relationship since then.
>
> The dynamic of mother/father relationship change -- changes after decree

of dissolution of marriage is entered. The relationship changes. The contact changes. The buttons that are pushed by the parties during that relationship change after the decree of dissolution. And so while domestic violence is relevant, it becomes less material to the issue that I'm going to decide today in a petition to modify custody and parenting time.

So when you get -- I'm not going to prevent you from calling a witness, any witness. If there is an objection to any of the testimony to be given, I will consider the objection. And if I decide to preclude the testimony because I think it's not relevant or material to today's proceeding, I will allow counsel to put on an offer of proof and to persuade me that what is being presented today is both relevant and material to the issue that I'm going to decide in these modification proceedings.

The danger is you're going to open the door -- if pre decree matters are placed on the record, the other side has to be given an opportunity to cross examine and rebut, and we are then going to be focused on what happened between these parties before they divorced. I'm -- I'm going to have to be persuaded that that's in the best interest of the child. I'm focused on what's happened since the decree of dissolution of marriage has been issued. If you think pre decree matters are relevant and material, I'm not going to prevent you from laying foundation and giving me an offer of proof.

. . . .

I'm assuming that the dynamics have changed since the divorce has been entered. And that's pretty much the -- the basis of -- my ruling. So you call your witnesses, you lay your foundation, and then I'll determine at that time whether I think it's significant for purposes of deciding the modification into the future.

I don't know if that answers your questions, counsel. You'll be able to call

> your witnesses and we'll see how it goes when they're called.

¶8 These statements demonstrate that the court did not intend to restrict Mother's evidence, and a review of the transcripts reveals that it did not in fact do so. The court merely explained its inclination to view pre-decree conduct as less significant when determining the child's *current* best interests. Given that the modification hearing occurred almost three years after the decree of separation was entered, and for reasons discussed *infra,* the court's comments were appropriate. Moreover, Mother did not thereafter proffer specific evidence of pre-decree domestic violence, and she has thus waived any claim of error as to evidence such as police reports or documentation she now infers the court should have reviewed.

¶9 Nor does the record support Mother's contention that the court ignored domestic violence in determining whether custody and parenting time should be modified. On the contrary, the court acknowledged that domestic violence between parents is always relevant, though it also recognized that the conduct at issue occurred some years before, and the parties had previously avowed it was not "significant."[3] Because "[t]he trial court appears to have weighed the evidence of domestic violence and

[3] The doctrine of judicial estoppel prevents a party from taking an inconsistent position in successive or separate actions. *State v. Towery,* 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996).

decided that, weighed against the other factors, it did not require a different result[, w]e cannot say that the trial court abused its discretion."[4] *Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994).

¶10 The existence of domestic violence does not "automatically tip the scales against the offending spouse." *Canty,* 178 Ariz. at 448, 874 P.2d at 1005. In *Canty,* we found no abuse of discretion where the family court determined that domestic violence was "no longer relevant" because of the time that had elapsed, and "there was no relevance shown at trial as to the care and protection and best interests of the children." *Id.* Similarly, the domestic violence at issue here occurred pre-decree, and Mother did not establish an ongoing threat of violence to herself or the child.[5] Dr. Carroll, the custody evaluator, independently evaluated the allegations of domestic violence. Nothing in her review of police reports and other available information led her to believe that pre-decree domestic violence was significant or of a nature to preclude

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[4] Section 25-403.03(A) (Supp. 2009) does not preclude joint custody unless the court finds "the existence of *significant* domestic violence." (Emphasis added.) Mother's reliance on A.R.S. § 25-403.03(C) is unavailing. That statute specifies the types of evidence courts should consider in determining "if a person has committed an act of domestic violence." It is undisputed that Father committed a pre-decree act of domestic violence.

[5] Mother's reply brief acknowledges an "absence of domestic violence since the legal separation."

joint custody. Dr. Carroll testified that the parties' past relationship was "volatile" and that both parents "contributed to that behavior."

¶11 Mother next contends the family court improperly shifted the evidentiary burden to her, ignoring the rebuttable presumption that Father's conduct precluded joint custody. Pursuant to A.R.S. § 25-403.03(D), if the family court "determines that a parent who is seeking custody has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child's best interests." The presumption may be rebutted by, *inter alia,* demonstrating that joint custody *is* in the child's best interests; that the parent has taken parenting classes; and that the parent has not committed further acts of domestic violence. A.R.S. § 25-430.03(E)(1), (4), (6). The parent who has committed domestic violence also "has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the child's emotional development." A.R.S. § 25-403.03(F).

¶12 Father presented sufficient evidence to rebut the presumption, and the record supports a determination that joint custody will not endanger the child or impair his emotional

growth.[6] Father admitted the pre-decree domestic violence, describing the parties' past relationship as "contentious." He further testified that the relationship had "[a]bsolutely" changed and that there had been no physical altercations since 2005.

¶13 Dr. Carroll observed both parents' interactions with their son for "significant lengths of time." Both behaved appropriately, and the child was "able to interact with both of them [and] did not seem afraid of either of them or drawn to one of them." Father testified that his son's interactions with his girlfriend's children increased his socialization skills. Father completed the mandatory "Parent Information Program." Father further explained that he had learned, through parenting classes and meetings with an outside source, effective methods of discipline.

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[6] Although the family court did not expressly address the presumption, we presume that judges know and correctly apply the law. *Fuentes v. Fuentes,* 209 Ariz. 51, 55-56, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (citation omitted); *In re William L.,* 211 Ariz. 236, 238, ¶ 7, 119 P.3d 1039, 1041 (App. 2005) (holding that a trial judge is not required to expressly state the burden of proof that he or she applied, as the appellate court assumes that the judge applied the proper burden of proof) (citation omitted). Moreover, "[w]here there is no request made for express findings of fact and conclusions of law, this Court will assume that the trial court found every controverted fact necessary to sustain the judgment, and, if there is reasonable evidence to support such finding, we must sustain the judgment." *Bender v. Bender,* 123 Ariz. 90, 92, 597 P.2d 993, 995 (App. 1979) (citation omitted).

¶14 Similar evidence supported increasing Father's parenting time. Dr. Carroll opined that the child would benefit from increased access to Father because he "loves his dad. He loves spending time with his dad. His dad offers him opportunities, experiences, contact that is healthy, just as his mother does." Dr. Carroll testified that joint custody and split parenting time were appropriate.

2. Material Change in Circumstances

¶15 Mother argues there were no changes in circumstances justifying the custody modification under A.R.S § 25-403(A) (2007). We conclude otherwise.

¶16 "The trial court has broad discretion to determine whether a change of circumstances has occurred and on review the trial court's decision will not be reversed absent a clear abuse of discretion." *Hendricks v. Mortenson,* 153 Ariz. 241, 243, 735 P.2d 851, 853 (App. 1987) (citation omitted). Where, as here, neither party requested findings of fact or conclusions of law, we "assume that the trial court found every fact necessary to support its judgment and must affirm if any reasonable construction of the evidence justifies the decision." *Stevenson v. Stevenson*, 132 Ariz. 44, 46, 643 P.2d 1014, 1016 (1982) (citation omitted).

¶17 The record here reflects sufficient changed circumstances. The court found that the parties' relationship

has evolved, such that they can now co-parent and make decisions in the child's best interests. Dr. Carroll opined that the parents' grievances stemmed from their relationship history, which was "occasionally volatile and not related to [the child]." She believed there had been sufficient progress such that joint custody "is appropriate and could work."

¶18 Other changed circumstances included Father's career and finances, which allow him to spend more time with the child; Father's committed relationship and contemplated marriage; the child's bonding with Father's girlfriend and her children; Mother having moved forty miles away from Father, having previously lived within six miles; and Mother's desire that the child attend an academically inferior school in Maricopa, though he was already registered at an academically "superior" charter school near Father's home that the parties had agreed he would attend. Considered together, these factors were sufficient to establish a change in circumstances justifying modification. *See Hoffman v. Hoffman*, 4 Ariz. App. 83, 85, 417 P.2d 717, 719 (1966) (finding "a sufficient sum total of changes [of] circumstances affecting the welfare of the children from which the trial court derived the authority to change the previous custody decree affecting these two children.").

3. Findings on the Record

¶19 Pursuant to A.R.S. § 25-403(A), the court must consider certain enumerated factors, where relevant, in determining a child's best interests. Section 25-403(B) requires that, "[i]n a contested custody case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interest of the child."

¶20 The court here complied with its statutory obligations. Its written ruling adopted the "findings set forth on the record on June 8, 2009." Those findings are sufficiently detailed and demonstrate that the court considered the following relevant factors:

> 1. The wishes of both parents.
>
> 2. The wishes of the child, as expressed through the evaluation received as Exhibit 16.
>
> 3. Father's relationship with his girlfriend; Father being "not very good" at communicating with Mother; Mother's "victim mentality," which affects her ability to communicate and is detrimental to the son; the child's "good relationship with both of his parents and . . . good relationship with the father's significant other and her children."
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> 4. The child "has done an exceptional job of adjusting to the changes in -- in home and at school and community, notwithstanding his parents' inability to

communicate regularly in an appropriate fashion."

5. The court found no "physical, emotional, or mental health issues that prevent either party from enjoying custody of their son."

6. Mother's status as primary caretaker.

¶21 As to the A.R.S. § 25-403.01(B)(1)-(4) (2007) factors, the court found:

1. Mother does not agree to joint custody.

2. Mother's "refusal to agree to joint legal custody is unreasonable." Mother mischaracterized the issue of modification as an attempt "to take [the child] away from her" instead of a request by Father for equal custodial rights.

3. One parent having sole custody is not in the child's best interests. Maintaining the status quo will likely result in continuous litigation. The parents now have the ability to make decisions jointly that are in the child's best interest.

4. Joint custody is logistically possible.

¶22 The court's findings are supported by the evidence, and the court evaluated the necessary statutory factors. We find no error.[7]

[7] Mother argues the court failed to make a finding about which parent would be more likely to allow the child frequent and meaningful continuing contact with the other parent. *See* A.R.S. § 25-403(A)(6). Given that the court made specific findings regarding other relevant factors, we may infer that it did not consider this one relevant. Our review of the record

4. Delegating Findings

¶23 Finally, Mother contends the court improperly delegated its duties by adopting the custody evaluator's conclusions, without making independent findings. We disagree.

¶24 In *DePasquale v. Superior Court (Thrasher)*, 181 Ariz. 333, 335-36, 890 P.2d 628, 630-31 (App. 1995), the trial court declared it would order "whatever interim custody the psychologist might recommend." Thereafter, the court "consummated this error by adopting the psychologist's interim recommendation." *Id.* at 631, 890 P.2d at 336. We held that, although the trial court may consider a custody evaluator's recommendations, it "can neither delegate a judicial decision to an expert witness nor abdicate its responsibility to exercise independent judgment." *Id.* Unlike *DePasquale*, the court here did not state it would adopt whatever form of custody the evaluator recommended. It clearly considered all evidence and arguments presented before independently deeming it appropriate "to accept the assessment and recommendations of the custody evaluator set forth in Exhibit 16."

CONCLUSION

¶25 We affirm the orders of the family court. In the exercise of our discretion, we decline to award either party

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reveals no evidence that either parent prevented the other from having meaningful, continuing contact with the child.

attorneys' fees incurred on appeal. As the successful party, however, Father is entitled to recover his costs upon compliance with ARCAP 21.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PETER B. SWANN, Judge