DIVISION ONE
FILED: 08/31/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:	)	1 CA-CV 09-0616
	)	
BRIAN CRUM,	)	DEPARTMENT C
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
JEANINE QUICK,	)	
	)	
Respondent/Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. DO-2008-0030

The Honorable Julie S. Roth, Judge Pro Tempore

AFFIRMED

Brian Crum, Petitioner/Appellee — North Las Vegas
In Propria Persona

Eric J. Engan PC — Kingman
By Eric J. Engan
Attorney for Respondent/Appellant

S W A N N, Judge

¶1 Jeanine Quick ("Mother") appeals from the family court's order modifying child custody and awarding primary physical custody of her minor child to Brian Crum ("Father"). For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 While residing in Kingman, Arizona, Mother and Father had a child ("E.E.") together in July 2002. Mother and Father married in April 2003, but in September 2003, Father relocated to Nevada and Mother and E.E. remained in Kingman. Father had no contact with E.E. until January 2007.

¶3 In January 2007, Child Protective Services ("CPS") removed E.E. from Mother's care. E.E. lived with her maternal grandparents in Kingman until mid-July 2007; she was then placed with her paternal grandparents in Kingman.

¶4 In January 2008, Father filed a petition for dissolution in Mohave County Superior Court. He requested sole custody of E.E. and supervised parenting time for Mother. Mother responded and requested sole custody and supervised parenting time for Father.

¶5 A consent decree of dissolution was entered in July 2008. In January 2009, Mother and Father entered a stipulation regarding child custody, parenting time, and child support. The stipulation was filed and adopted by the court in March 2009. The stipulation provided that the parties would have joint legal

custody of E.E. and equal parenting time. The stipulation also provided that E.E. would continue to attend the Kingman Academy of Learning.

¶6 Days after the court adopted the parties' stipulation, the CPS dependency petition from January 2007 was dismissed on the State's motion. Shortly thereafter, Mother sent a certified letter to Father in which she advised him that she intended to relocate to California as soon as possible.

¶7 Father received the letter in April 2009. That month, pursuant to the parties' stipulation, E.E. was to spend her spring break with Father. Mother, however, failed to appear with E.E. at the exchange point and did not answer Father's phone calls.

¶8 On May 1, 2009, Father filed a petition to prevent E.E.'s relocation. Three days later, before the end of the school term, Mother withdrew E.E. from the Kingman Academy of Learning. The next day, Mother and E.E. moved to California to live with Mother's current husband and one of E.E.'s siblings. Mother then filed a response to Father's petition to prevent relocation. She contended that the stipulation's provision concerning E.E.'s continued attendance at the Kingman Academy of Learning was premised on Mother's continued residence in Kingman. She requested ratification of the relocation and

sought an order holding Father in contempt for violating the stipulation's visitation and child support provisions.

¶9 In response, Father filed a petition to modify custody and parenting time. He requested, *inter alia*, sole custody of E.E. and supervised parenting time for Mother. The matter proceeded to an emergency custody hearing in Mohave Superior Court in June 2009.

¶10 At the hearing, Mother testified that E.E. has adjusted well to her new school and community in California. Mother's current husband, with whom Mother has cohabitated since January 2004, testified that he had a close relationship with E.E. and that he has supported E.E. financially since 2004. Mother also testified that E.E. has a close relationship with the sibling who lives with Mother and her husband.

¶11 Mother acknowledged that at the time of the hearing, E.E. had semi-regular time with Father and enjoyed the visits. Mother also acknowledged that in 2007 she was convicted of custodial interference, a felony, in connection with her other children who live in Texas. She finally acknowledged that when she lived with Father, she had a history of suicide attempts. She explained that she had not been trying to kill herself, but instead was trying to get attention. She testified that she is not currently on any medications and has completed counseling.

¶12 Father testified that E.E. has a positive relationship with his current wife, and during visits appears to adjust well to being separated from her California sibling. Father further testified that he did not agree to E.E.'s relocation, and feared that unless he was awarded sole custody, E.E.'s time with him and her grandparents would be "slim to none."

¶13 Father acknowledged that he had no contact with E.E. from September 2003 until January 2007, and also admitted that he had not paid child support for E.E. in the past. He explained that he thought child support for E.E. was being deducted from his paycheck along with a different child support obligation, and testified that he provided a check for E.E. after learning that no deduction was being taken for her. He further testified that Mother did not ask him to pay child support until she moved to California, and had declined his offer of an insurance card for coverage he had purchased for E.E.

¶14 Both Mother and Father testified that they had used methamphetamine in the past, but had stopped using the drug.[1] Father testified that he stopped drinking excessively about four years ago.

[1] According to Father, he and Mother had used the drug together, and he stopped using it approximately five or six years ago. Mother denied using methamphetamine with Father but admitted to trying it fifteen years ago.

¶15 The court awarded primary physical custody to Father and ordered that Mother have parenting time in California. Mother filed an unsuccessful motion for reconsideration pursuant to ARFLP 35(D). The court entered its signed custody order in August 2009, along with a separate order directing Mother to pay child support. Mother timely appeals.

DISCUSSION

I. JURISDICTION

¶16 We have an independent duty to determine whether we have jurisdiction, and cannot consider an appeal on the merits unless the superior court had jurisdiction. *Riendeau v. Wal-Mart Stores, Inc.*, 223 Ariz. 540, 541, ¶ 4, 225 P.3d 597, 598 (App. 2010).

¶17 Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), A.R.S. §§ 25-1001 to -1067 (2007 & Supp. 2009), an Arizona court generally has exclusive and continuing jurisdiction to modify its child custody determination. A.R.S. § 25-1032(A). But if a court of any state determines that "the child, the child's parents and any person acting as a parent do not presently reside in [Arizona]," the Arizona court no longer has exclusive and continuing jurisdiction and may modify its custody determination "only if it has jurisdiction to make an initial determination under

§ 25-1031." A.R.S. § 25-1032(A)(2), (B). A court generally has jurisdiction to make a determination under A.R.S. § 25-1031 if:

> 2. A court of another state does not have jurisdiction under paragraph 1 or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under § 25-1037 or 25-1038 and both of the following are true:
>
> (a) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (b) Substantial evidence is available in this state concerning the child's care, protection, training and personal relationships.

¶18 Here, the family court found (and the parties agree) that at the relevant time, neither E.E., Mother, nor Father resided in Arizona. Therefore, the court no longer had exclusive and continuing jurisdiction to modify its custody order.

¶19 The court did, however, have jurisdiction pursuant to A.R.S. § 25-1031(2). At the time Father filed his petition for custody modification, E.E. had resided in California for less than two months. Therefore, California was not her home state. *See* A.R.S. § 25-1002(7) (the "home state" of a child who is more

than six months old is "[t]he state in which [the] child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding"); *Welch-Doden v. Roberts*, 202 Ariz. 201, 208-09, ¶ 33, 42 P.3d 1166, 1173-74 (App. 2002) (holding that for purposes of determining initial jurisdiction, a child's "home state" is where he or she last resided for six consecutive months -- it is not necessarily limited to the six-month period immediately preceding the commencement of the custody proceeding). E.E. and Mother still had a significant connection with Arizona because they resided in Arizona for almost all of E.E.'s life, E.E.'s grandparents were located in Arizona and there is substantial evidence in Arizona concerning E.E.'s care, protection, training, and personal relationships.

¶20 The court therefore had jurisdiction to enter the modification order, and we have jurisdiction over the appeal.

II. MODIFICATION OF CUSTODY

¶21 Mother contends that the family court abused its discretion by awarding primary physical custody to Father. The family court has broad discretion in determining child custody, and we review its decision for abuse of discretion. *Pridgeon v. Superior Court (LaMarca)*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982). A court abuses its discretion when the record is "devoid of competent evidence to support" the court's decision.

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)). An abuse of discretion also occurs when a court 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).

¶22 To modify the custody award set forth in the parties' stipulation, the court was required to apply the factors enumerated in A.R.S. § 25-403(A) (Supp. 2009) to determine whether the custody change was in E.E.'s best interest.[2] Mother contends that the court did not properly interpret or apply the statutory factors.

A. Interpretation of A.R.S. § 25-403(A)(8)

¶23 Mother's only true interpretation argument concerns A.R.S. § 25-403(A)(8). That provision requires the family court to consider "[t]he nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody." The statute does not define "coercion" or "duress."

¶24 Black's Law Dictionary defines "coercion" as "[c]ompulsion by physical force or threat of physical

[2] The relocation provisions of A.R.S. § 25-408 (Supp. 2009) do not apply to this case. That statute applies only when both parents reside in Arizona. A.R.S. § 25-408(B); *Buencamino v. Noftsinger*, 223 Ariz. 162, 164, ¶¶ 7-10, 221 P.3d 41, 43 (App. 2009). It is undisputed that Father resided in Nevada at all relevant times.

force. . . . [or] [c]onduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it." Black's Law Dictionary 294 (9th ed. 2009). Duress is "[b]roadly, a threat of harm made to compel a person to do something against his or her will or judgment; esp., a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition." *Id.* at 578-79.

¶25 Here, evidence was presented that Mother entered the stipulation without intending to remain in Kingman, despite the stipulation's provision that E.E. would continue to attend the Kingman Academy of Learning. A few months before signing the stipulation, Mother had told her probation officer that she was planning to move to California. At the hearing, Mother testified that she had entered into the stipulation to get rid of CPS; she also testified, however, that she had informed CPS that she planned to move out of state.

¶26 The family court characterized Mother's conduct as coercive,[3] but her conduct is more accurately described as deceptive or fraudulent. Though the conduct does not meet the letter of A.R.S. § 25-403(A)(8), it was a relevant consideration

[3] The court found that Mother "used coercion to obtain a custody agreement from father by making promises or entering into custody terms without an intention to live by the terms of the agreement."

under A.R.S. § 25-403(A)(6), which requires consideration of "[w]hich parent is more likely to allow the child frequent and meaningful continuing contact with the other parent." Notwithstanding Mother's actions, the family court resolved this factor in her favor. We therefore do not find that the court's consideration of Mother's conduct was an abuse of discretion.

B. Application of A.R.S. § 25-403(A)(3), (4), (7), and (8)

¶27 Mother also contends that the family court failed to consider or give appropriate weight to the factors described in A.R.S. § 25-403(A)(3), (4), (7), and (8). The family court is in the best position to determine what is in a child's best interest. *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). We do not reweigh testimony, and determine only whether substantial evidence supports the family court's decision. *Rowe v. Rowe*, 154 Ariz. 616, 620, 744 P.2d 717, 721 (App. 1987). We find substantial evidence for the court's decision here.

1. A.R.S. § 25-403(A)(3)

¶28 A.R.S. § 25-403(A)(3) requires the family court to consider "[t]he interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest." Mother contends that the court gave "almost no weight" to her husband's role in E.E.'s life; E.E.'s relationship with her California sibling; and E.E.'s

relationship with Mother's other children, who live in Texas. Mother further contends that the family court failed to consider the disruptive effect of removing E.E. from California to Nevada. The record does not support Mother's contentions, and provides substantial evidence to support the family court's decision.

¶29 The court acknowledged, and the evidence reflected, that E.E. has a number of good relationships with relatives who reside in different states, including Arizona, Texas, Nevada, and now California. The court explicitly found that E.E. had a positive relationship with Mother's husband. The court further found that E.E. has limited personal contact with her Texas siblings, and Father testified that during her visits with him, E.E. was not adversely affected by her separation from her California sibling. Mother conceded that E.E. enjoyed her visits with Father, and Mother did not rebut Father's testimony that E.E. has a good relationship with his wife.

2. A.R.S. § 25-403(A)(4)

¶30 A.R.S. § 25-403(A)(4) requires the family court to consider "[t]he child's adjustment to home, school and community." Mother contends that the court failed to consider evidence concerning E.E.'s adjustment to her new school and home in California, and failed to consider the destabilizing effect of removing E.E. from Mother, her stepfather, and her sibling.

As we have already discussed, the court made findings, supported by the evidence, that E.E. had adjusted well to her relatives and communities in both California and Nevada. Though the court made no specific finding regarding E.E.'s adjustment to her new school, we assume that the family court considered the evidence that Mother presented on that point. *See Fuentes*, 209 Ariz. at 55-56, ¶ 18, 97 P.3d at 880-81.

3. A.R.S. § 25-403(A)(7)

¶31 A.R.S. § 25-403(A)(7) requires the family court to consider "[w]hether one parent, both parents or neither parent has provided primary care of the child." Mother contends that the court gave "lip service" to the fact that for many years, Mother was E.E.'s primary caregiver and Father was totally uninvolved in E.E.'s life.

¶32 The court expressly found that in the past, Mother was E.E.'s primary caregiver. The court also appropriately recognized, however, that for a period of time E.E. was a ward of the court in protective custody due to problems associated with Mother's care. Substantial evidence supports the court's findings.

4. A.R.S. § 25-403(A)(8)

¶33 As we have already discussed, the family court's consideration of Mother's conduct in connection with obtaining the stipulation, though not relevant to A.R.S. § 25-403(A)(8),

was relevant to A.R.S. § 25-403(A)(6). The court therefore did not abuse its discretion by considering the conduct.

¶34 We conclude that the court did not abuse its discretion in applying the factors set forth in A.R.S. § 25-403(A)(3), (4), (7), and (8). We further conclude that the court considered all relevant factors as required by the statute, and the evidence taken as a whole was sufficient to support the court's decision to award primary physical custody to Father.

CONCLUSION

¶35 For the reasons set forth above, we affirm the court's order modifying child custody. We award Father his costs on appeal subject to his compliance with ARCAP 21(a).

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge