DIVISION ONE
FILED: 04/10/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	1 CA-CV 11-0058
	)	
SCOTT JOSEPH SAKRY,	)	DEPARTMENT C
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
LEI ANN VARLETTA YOUNG,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2009-000737

The Honorable David J. Palmer, Judge

AFFIRMED

Law Office of Alyson M. Foster, PLC — Tempe
By Alyson M. Foster
Attorney for Petitioner/Appellee

Lei Ann Varletta Young, *In Propria Persona* — Tracy, CA

N O R R I S, Judge

¶1 Lei Ann Varletta Young ("Mother") appeals from the judgment of the family court in this paternity and child custody action. The family court awarded sole legal custody of the

parties' child to Scott Sakry ("Father") and parenting time to Mother. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The parties are the unmarried parents of one minor child. They lived together in Arizona for approximately 17 months after the birth of their child. On October 25, 2008, the parties argued and had a physical altercation. When Father left the house the next day for a planned hunting trip, Mother filed a police report alleging domestic violence and moved to California with their child. When Father returned home, police arrested him on domestic violence charges, which Father subsequently pled no contest to, then completed the terms of his plea agreement.

¶3 On February 9, 2009, Father petitioned to establish paternity, custody, parenting time, and child support. Mother challenged Arizona's jurisdiction over the matter, but the court denied her motion and exercised jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 25-1001 to –1067 (2007). After a trial, the family court awarded sole legal custody to Father and established a schedule for Mother's parenting time. The court also ordered Mother to pay 65% of Father's attorneys' fees, "based upon Mother's recalcitrance during [the] litigation,

exemplified by her failure to cooperate in the discovery process and the preparation of a custody evaluation."

DISCUSSION[1]

¶4 Mother raises a number of arguments on appeal, including two she did not raise in the family court[2] and which, therefore, we do not address. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) (citation omitted) (appeals court generally does not consider issues raised for first time on appeal).

I. Jurisdiction

A. Father's Petition

¶5 Mother argues the family court lacked jurisdiction over Father's paternity action because Father initiated the paternity action. We disagree. We "independently review the jurisdiction of the trial court as an issue of law." *R.A.J. v. L.B.V.*, 169 Ariz. 92, 94, 817 P.2d 37, 39 (App. 1991).

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[1]Father did not file an answering brief. Although we could consider this a confession of error, *see* ARCAP 15(c), in the exercise of our discretion we decline to do so. *See Thompson v. Thompson*, 217 Ariz. 524, 526 n.1, ¶ 6, 176 P.3d 722, 724 n.1 (App. 2008).

[2]The record does not reflect Mother raised in the family court her arguments the family court incorrectly determined Arizona was the child's home state and Father's failure to visit the child and pay child support constituted "abandonment" of the child.

¶6 Mother relies on case law holding that an earlier statute governing paternity petitions did not allow a father to bring "a paternity action against the mother." *Sheldrick v. Maricopa Cnty. Superior Court*, 136 Ariz. 329, 331, 666 P.2d 74, 76 (1983); *see also Allen v. Sullivan*, 139 Ariz. 142, 143, 677 P.2d 305, 306 (App. 1984) ("[W]e are constrained to hold that [the father] has no statutory means of establishing his own paternity."). Current statutes and case law, however, make it clear that fathers can file petitions to establish their own paternity. *See* A.R.S. § 25-803(A)(2) (2007); *Ban v. Quigley*, 168 Ariz. 196, 198-99, 812 P.2d 1014, 1016-17 (App. 1990) (amendments to the code "must have been intended to provide standing to commence a paternity action to a putative father").

B. Improper Service

¶7 Mother also argues the family court lacked jurisdiction because Father served her with the petition and summons "via the posting method." At a hearing on July 29, 2009, however, Mother expressly agreed to accept service of the petition and summons in light of the family court's decision to continue the temporary orders hearing to allow her more time to prepare. Mother accordingly waived any objection to Father's method of service, and we therefore reject Mother's argument she was not properly served.

C. Inconvenient Forum

¶8 Mother further argues the family court lacked jurisdiction because it abused its discretion in determining Arizona was the most convenient forum for the custody proceedings.[3] Specifically, Mother argues the court failed to consider all of the relevant factors listed in A.R.S. § 25-1037. We disagree. The record reflects the parties submitted lengthy memoranda to the court discussing all of the applicable factors, and the family court noted in its minute entry that it had considered "the information and argument presented . . . [and] the [statutory] factors." We therefore hold the family court did not abuse its discretion in determining Arizona was the most convenient forum.

II. Civil Contempt[4]

¶9 On August 27, 2009, Father requested the family court hold Mother in contempt, alleging she had failed to obey a court order to execute and return an acceptance of service of the

[3]We review this decision for an abuse of discretion. *Tiscornia v. Tiscornia*, 154 Ariz. 376, 377, 742 P.2d 1362, 1363 (App. 1987).

[4]Although "[t]his court lacks jurisdiction over an appeal from a civil contempt adjudication . . . [i]n the exercise of our discretion . . . we elect to treat [Mother's] appeal from the contempt order as a petition for special action and accept special action jurisdiction." *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18, 66 P.3d 70, 73 (App. 2003) (citations omitted).

paternity petition and to timely provide discovery responses. At the temporary orders hearing, Father re-urged his motion for contempt, but the family court declined to address the contempt issues at the hearing, noting Mother had not yet responded. Mother eventually responded, but the court struck her response for failing to comply with Arizona Rule of Family Law Procedure ("Rule") 31.[5] On January 28, 2010, the family court found Mother in contempt for failing to respond to discovery requests as previously ordered. The court awarded Father his attorneys' fees that were "expended in seeking to procure [discovery] responses" as a sanction and notified Mother that it would consider imposing additional sanctions if she did not respond to the discovery requests by February 28, 2010. On October 4, 2010, the family court again found Mother in contempt for "failing to provide discovery," and, as sanctions, awarded Father his attorneys' fees and prohibited Mother from introducing exhibits at trial or giving oral testimony on "the issues of her income or earning potential or child support."

A. Due Process

¶10 Mother argues that because "no order to show cause for any violation of any court order was ever issued," she "never had . . . prior notice of any hearings related to any contempt[]

[5]Mother never filed a proper response to the contempt motion.

of court issue and thus, the orders finding her in contempt of court were made without due process." We disagree.

¶11 We review de novo Mother's claim she was denied due process. *Mack v. Cruikshank*, 196 Ariz. 541, 544, ¶ 6, 2 P.3d 100, 103 (App. 1999) (citation omitted). Rule 92(B) specifies "[n]o civil contempt may be imposed without notice to the alleged contemnor and without providing the alleged contemnor with an opportunity to be heard." *See also Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 555, 880 P.2d 1098, 1101 (App. 1993) (citation omitted) ("[T]he imposition of sanctions should be preceded by some form of notice and opportunity to be heard on the propriety of imposing the sanctions.")

¶12 Here, the record is clear Mother received notice of the pending request for sanctions; Father had urged the motion several times and the court repeatedly extended the time Mother had to provide discovery responses. Mother also had an opportunity to respond in writing, which she failed to do after her original response was stricken. The family court's imposition of sanctions did not violate Mother's due process rights.

B. Improper Sanctions

¶13 Mother further argues "the contempt sanctions imposed by the [family] court unnecessarily interfered with its duty to consider the child's best interests" by preventing Mother from "introducing any witnesses or evidence at the time of trial related to any issue concerning [the child]." Mother relies on and quotes extensively from *Hays v. Gama*, where our supreme court vacated evidentiary sanctions excluding "the testimony and records of the child's therapist" because this evidence had "an especially significant effect on the ability of the court to determine the child's best interests." 205 Ariz. 99, 103, ¶ 22, 67 P.3d 695, 699 (2003). We review the family court's contempt order for an abuse of discretion. *Id.* at 102, ¶ 17, 67 P.3d at 698 (citation omitted).

¶14 At trial, Mother asked the family court to "reconsider its sanctions regarding submitting evidence, because at the root of this case is the issue of domestic violence . . . [and if she was] not able to submit evidence to that regard, . . . [it] goes against the grains of the best interest of the child." Mother also sought to introduce evidence of "other issues concerning [her] move to California." The court told Mother she could testify about those issues, but, due to the evidentiary sanctions it had imposed, she could not offer witnesses or

exhibits. Mother later attempted to introduce as an exhibit a police report relating to Father's domestic violence, but the family court "preclude[d] the documents for lack of disclosure as [it] indicated in [its sanction] order." The court told Mother it was aware Father had "pled no contest to a domestic charge" and she could "testify to domestic violence." The family court also denied Mother's request to present testimony from "a couple [of] witnesses."

¶15 The family court did not abuse its discretion in excluding this evidence, and Mother's reliance on *Hays* is misplaced for two reasons. First, the *Hays* court emphasized that the evidentiary sanctions at issue there were not authorized by the discovery rules because "[n]either the superior court nor any party ha[d] identified any discovery order that Mother failed to obey," and thus, the sanctions were "imposed pursuant to the court's inherent contempt power." 205 Ariz. at 101-02, ¶¶ 15-16, 67 P.3d at 697-98. Here, the family court repeatedly found Mother had failed to comply with discovery orders, and Rule 65(B)(2)(b) specifically authorizes orders "prohibiting [the disobedient] party from introducing designated matters in evidence." Second, unlike the evidentiary sanctions in *Hays,* the family court did not exclude any evidence that had an "especially significant effect" on its ability to

determine the child's best interests. Here, in the months leading up to trial, Mother filed multiple memoranda describing the domestic violence incident in depth and evidencing Father's convictions for assault and disorderly conduct. The family court also specifically permitted Mother to testify regarding the child's best interests. Accordingly, the family court did not abuse its discretion by imposing evidentiary sanctions on Mother.

III. Disqualification of Family Court Judge

A. Mother's Motion to Disqualify the Family Court Judge

¶16 The family court judge held a telephonic status conference with the parties on September 28, 2010 at 8:39 a.m. During this conference, counsel for Father reminded the judge that he had filed motions requesting the court find Mother in contempt and issue discovery sanctions. Mother objected, and told the judge she had filed a motion to disqualify him. The family court judge told Mother her motion had not yet been filed, but, if and when it was filed, it would "be given due consideration." After setting a trial date, the court concluded the conference. The record reflects the clerk of the court filed Mother's motion to disqualify the family court judge at 1:33 p.m. the same afternoon. On September 30, a different family court judge entered an order denying Mother's motion. On

October 4, 2010, the judge assigned to her case entered orders finding Mother in contempt and imposing discovery sanctions, *see supra* ¶ 9.

¶17 Mother argues that, by "issuing contempt orders and sanctions," the family court judge assigned to her case "exceeded his authority by continuing to act in the matter after a motion to disqualify was filed against him and was filed with the court." We disagree. Mother's argument ignores or overlooks that, as discussed above, the judge assigned to her case did not issue the contempt order while her motion to disqualify that judge was pending. That judge did not rule on the contempt issue until after the second judge had denied her motion to disqualify. The family court judge did not, therefore, exceed his authority. *See* Ariz. R. Civ. P. 42(f)(3)(B) ("If the court determines that the party who filed the notice of affidavit is not entitled to a change of judge, then the judge named in the notice or affidavit shall proceed with the action.").

B. The Family Court Judge's Post-Judgment Recusal

¶18 Approximately five months after issuing a final judgment decree in the custody matter, the family court judge voluntarily disqualified himself for reasons not stated in the record. Mother argues that, because the family court judge

recused himself after the judgment, "it can only be assumed that [the judge] was . . . biased and prejudiced at the time he presided over the trial." Mother cites, as proof of the family court judge's alleged bias and prejudice, his failure to rule on Mother's motion for attorneys' fees in a timely manner as well as his finding that Mother had refused to participate in the custody evaluation.

¶19 We find no support for this argument in the record. The family court filed a post-judgment minute entry explaining in detail why it had not ruled on Mother's motion for attorneys' fees. The court noted the delay occasioned by Mother removing the case to federal court and the federal court then remanding the case back to the family court, and explained that "[i]mplicit in [the family court's] award of attorney's fees to Father was the fact that the Court was denying Mother's request for attorney's fees, costs and expert witness fees." The family court nevertheless acknowledged it had "failed to note that denial in its original ruling" and expressly denied Mother's motion for fees "[t]o correct that inadvertent oversight." In addition, the record contains ample evidence supporting the family court's finding that Mother failed to cooperate with the custody evaluation. Further, Mother's allegations of prejudice do not arise from an extra-judicial source. "It is generally

conceded that the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case." *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977). We therefore reject Mother's argument the family court judge was prejudiced or biased during her trial.

IV. Custody

A. Domestic Violence

¶20 Mother further argues the family court incorrectly found that Father's acts of domestic violence against Mother did not constitute "significant domestic violence" as that term is described in A.R.S. § 25-403.03(A) (2007). We review the family court's custody decisions for an abuse of discretion, do not re-weigh the evidence on appeal, and "affirm the [family] court's ruling if substantial evidence supports it." *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009).

¶21 Mother testified to one incident of domestic violence, occurring roughly two years earlier. Father was verbally abusive and, according to Mother, grabbed her, pushed her down, and slapped her. Domestic violence is never acceptable, but on this record we cannot say the family court abused its discretion by finding that Father's acts were not "significant" when viewed "in the spectrum of domestic violence" and in the context of the

parties' overall relationship. Mother testified Father was drunk on that occasion and stated she had never claimed he "beat [her] up, or . . . held a gun to [her] head." Under these circumstances, where an isolated incident occurred some years previously, a trier of fact could reasonably conclude that A.R.S. § 25-403.03(A) did not preclude awarding custody to Father.[6] *See Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (citation omitted) ("[T]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge.").

[6]Mother contends that the court incorrectly found Father completed a domestic violence course and successfully completed misdemeanor probation. Father testified he successfully completed the terms of his no contest plea by meeting with a counselor and completing one year of probation. Thus, the family court's finding is reasonably supported by this testimony. Mother also challenges the evidence supporting the court's finding she waited several days to call the police after her altercation with Father. The record reflects this finding was incorrect; as Mother points out, Father testified at trial Mother waited 17 or 18 hours before calling the police. The family court did not, however, rely on this finding in reaching its conclusion their altercation was not "significant domestic violence" for purposes of A.R.S. § 25-403.03(A) and, therefore, this factual error does not affect our holding that the court did not abuse its discretion in awarding sole custody to Father.

B. Best Interests Attorney

¶22 Mother argues the family court abused its discretion by denying her motion to appoint a best interests attorney for the child and not joining the child as a party. We disagree. The family court has statutory discretion to appoint an attorney to represent the interests of a child in a custody dispute. A.R.S. § 25-321 (2007). We will reverse this decision only upon an abuse of that discretion. *J.A.R. v. Superior Court*, 179 Ariz. 267, 275, 877 P.2d 1323, 1331 (App. 1994). Mother's motion did not allege any relevant basis for appointing an attorney for the child. *See id.* at 276, 877 P.2d at 1332 (setting forth factors relevant in deciding motion to appoint attorney pursuant to A.R.S. § 25-321). Rather, Mother alleged Father was dishonest and made questionable parenting decisions. We therefore hold the family court did not abuse its discretion in denying Mother's motion to appoint an attorney for the child.

C. Findings of Fact

¶23 Mother argues several of the family court's factual findings were "erroneous and do not comport with the record of testimony." We "view the evidence in the light most favorable to sustaining the [family] court's findings and determine whether there was evidence that reasonably supports the court's findings." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972

P.2d 676, 679 (App. 1998). The evidence in the record, however, supports the findings challenged by Mother.

V. Attorneys' Fees

¶24 Mother argues the family court abused its discretion by not granting her request for attorneys' fees pursuant to A.R.S. § 25-403.08 (2007). We disagree.

¶25 On February 25, 2010, Mother requested the court order Father to "pay Mother's attorney's fees, expenses and costs to enable Mother to obtain adequate legal representation and to prepare evidence for the hearing." Father did not respond to this motion, and neither party raised the issue of Mother's pending request for attorneys' fees at the status conference held one week before the trial. As discussed above, the court eventually denied Mother's request for attorneys' fees. We review "for an abuse of discretion the court's denial of attorneys' fees." *Hormel v. Maricopa County*, 224 Ariz. 454, 461, ¶ 27, 232 P.3d 768, 775 (App. 2010) (citation omitted).

¶26 Although Mother argued in her motion she was "financially insolvent" and there was a "huge financial disparity between the parties," she did not provide any financial documentation establishing her lack of resources or any other evidence that would have allowed the family court to make a finding of financial disparity, as required by the

statute. A.R.S. § 25-403.08(B). In addition, the statute expressly makes the family court's decision to award fees discretionary: "If the court finds there is a financial disparity between the parties, the court *may* order payment of reasonable fees, expenses and costs to allow adequate preparation." *Id.* (emphasis added). Given the limited information provided to the family court, it did not abuse its discretion in denying Mother's request for an award of attorneys' fees pursuant to A.R.S. § 25-403.08(B).

CONCLUSION

¶27 For the foregoing reasons we affirm the judgment of the family court.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
DIANE M. JOHNSEN, Judge