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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 05/08/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

In re the Matter of:) 1 CA-CV 11-0253
)
MAHMOUD REZA AUSSIE,) DEPARTMENT D
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication-
v.) Rule 111, Rules of the
) Arizona Supreme Court)
ZAHRA HASHEMI,)
)
Respondent/Appellee.)
)
_____)

Appeal from the Superior Court of Maricopa County

Cause No. FC2008-001437

The Honorable Robert E. Miles, Judge

AFFIRMED

Vescio Law Firm, P.C.
By Lisa M. Sirard
Attorneys for Petitioner/Appellant

Glendale

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T H O M P S O N, Judge

¶1 Mahmoud Reza Aussie (father) appeals from the trial court's orders awarding Zahra Hashemi (mother) sole legal custody of their seven-year old child (child), denying his motion to reopen the evidence, and denying his motion for a new trial. For the

reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The parties were married in October 2001. Child was born in 2004. In February 2008, father filed a petition for dissolution of marriage requesting joint legal custody of child, with mother designated the primary custodial parent, and parenting time for father every other weekend and four hours on Wednesday. Mother sought sole custody of child, with supervised visitation for father. By May 2008 father also sought sole legal custody. The trial court held an evidentiary hearing in May 2008 and entered temporary orders regarding custody and parenting time. The court ordered that child live with mother from Monday through Friday and with father on weekends, with shared legal custody of child. The court declined to order supervised visitation. Subsequently the parties settled their divorce; a consent decree was filed in April 2009. Pursuant to the consent decree, mother and father were awarded joint legal custody of child, with parenting time for mother Monday through Friday and with father Friday through Monday.

¶3 In October 2009, father filed a petition to modify custody, parenting time, and child support. The trial court held an evidentiary hearing. After closing arguments but prior to the trial court's decision, among other motions, father filed a motion to reopen the evidence, and an objection to Dr. Weinstock's report regarding child. The trial court denied the motion to reopen the

evidence as well as father's objection to Dr. Weinstock's report regarding child.

¶4 The court awarded mother sole legal custody of child but kept the parenting time schedule set forth in the consent decree. Specifically, the court found that the parties could not communicate well enough to continue joint legal custody and that mother had been more involved in child's education and activities than father. The court also found that the existing parenting time arrangement was in child's best interests. The court found that neither party had proven that child had been abused by the other parent, despite numerous allegations by both parents.

¶5 Father filed a motion for new trial, which the trial court denied. Father timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) § 12-2101(B) (2003).

DISCUSSION

Motion to Reopen the Evidence

¶6 Father first argues that the trial court erred in denying his motion to reopen the evidence, thereby warranting a new trial pursuant to Rule 83(A)(5) of the Arizona Rules of Family Law Procedure (Rule 83(A)(5)).¹ (OB at 28). We review a denial of a

¹ Rule 83(A)(5) provides: "A ruling, decision or judgment **may** be vacated and a new trial granted on motion of the aggrieved party for any of the following causes materially affecting that party's rights: . . . 5. error in the admission or rejection of evidence or other errors of law occurring at the trial or during the progress of the action" (Emphasis added).

motion for new trial under an abuse of discretion standard. *State Farm Fire & Casualty Co. v. Brown*, 183 Ariz. 518, 521, 905 P.2d 527, 530 (App. 1995).

¶7 In his motion to reopen the evidence, filed in October 2010, subsequent to the closing arguments on September 22, father claimed again that mother physically abused child, this time in an incident that allegedly occurred subsequent to the trial on April 9, 2010, but prior to a camping trip father took with child in May 2010. Father sought to introduce into evidence a videotaped forensic interview conducted by police with child September 6, 2010, pictures of an alleged burn on child's wrist, the testimony of a police detective, the testimony of the forensic interviewer, and testimony of additional family members. Father had previously submitted some of this evidence to Dr. Weinstock in June 2010; father acknowledged that the alleged burn incident was addressed in Dr. Weinstock's final report but stated, "it is not apparent as to the extent to which Dr. Weinstock took such incident into considerations for his final report."

¶8 In denying the motion to reopen the evidence, the trial court observed:

After trial on [April 9, 2010], the Court concluded that neither party had proven abuse of the minor child by the other party, but the Court was still concerned about the allegations. The Court held a status conference with counsel for the parties on April 14, 2010, to discuss having Dr. Weinstock, the parties' Parenting Coordinator, perform a forensic interview of the child.

Neither party objected to such an interview, nor did either party object to the Court's minute entry regarding the status conference, which stated that "once the Court has received Dr. Weinstock's report the matter will be taken under advisement", nor did either party request an additional evidentiary hearing regarding the report.

As reflected in Dr. Weinstock's Request for Appointment as limited Assessment Evaluator, counsel for the parties then contacted and discussed the matter with Dr. Weinstock, and apparently broadened the Court's request from just an interview of the child to a limited family assessment Neither party objected to the appointment of Dr. Weinstock on that basis, nor did either party request, nor did either party request an additional hearing on the report.

Dr. Weinstock provided his report, dated August 13, 2010. Father then made a request, not for an evidentiary hearing, but for an opportunity to present closing arguments regarding the report, "so as to enable this Court to make its final ruling." Father specifically stated that he did not wish to call Dr. Weinstock as a witness, "as he believes closing final statements will be sufficient." Indeed, in Addendum to Father's Request for Final Closing Arguments, Father stated that he did "not necessarily object to Dr. Weinstock's final recommendations."

The Court granted Father's Request and closing arguments were presented on September 22, 2010. Neither party requested an additional evidentiary hearing at that argument, and the Court took the matter under advisement.

¶19 "The reopening of a case for further testimony is a matter within the discretion of the court." *Greenwell v. Spellman*, 110 Ariz. 192, 194, 516 P.2d 328, 330 (1973) (citing *Johnson v. Johnson*, 64 Ariz. 368, 172 P.2d 848 (1946)). We find no abuse of

discretion. The evidence father sought to present was inconclusive as to whether the injury suffered by the child in May was or was not accidental and thus added nothing substantive to the court's consideration of the issues.² Father had already presented much of the evidence to Dr. Weinstock; that evidence was considered by Dr. Weinstock and, in turn, considered by the court. Furthermore, all the judge did was reaffirm a physical custody arrangement that father had stipulated to in the consent decree only six months prior to filing the petition to modify custody, which stipulation came after he had made numerous allegations against mother that she was an abusive parent.³

Custody Determination

¶10 Father next argues that the trial court erred by awarding mother sole legal custody and that he is therefore entitled to a new trial. (OB at 28). We will not disturb the trial court's decision on child custody absent a clear abuse of discretion. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982) (citations omitted).

² Although child purportedly said that mother burned his hand on the stove in the forensic interview, mother apparently claimed that the injury occurred when child was running and fell. The forensic physician consulted by the police said that the injury was a burn caused either by thermal contact with the stove or by frictional contact consistent with mother's explanation.

³ While the trial court awarded sole legal custody to mother, the court reasonably discerned that a joint legal custody arrangement could not work because the parents were highly antagonistic and . . . (continuation)

¶9 "In considering a motion for change of custody, the court must initially determine whether a change of circumstances has occurred since the last custody order. Only after the court finds a change has occurred does the court reach the question of whether a change in custody would be in the child's best interest." *Id.*

A.R.S. § 25-403(A) (2007) provides:

The court shall determine custody, either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all relevant factors, including:

1. The wishes of the child's parent or parents as to custody.
2. The wishes of the child as to the custodian.
3. The 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.
4. The child's adjustment to home, school and community.
5. The mental and physical health of all individuals involved.
6. Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.
7. Whether one parent, both parents or neither parent has provided primary care of the child.
8. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.

adversarial.

9. Whether a parent has complied with chapter 3, article 5 of this title.
10. Whether either parent was convicted of an act of false reporting of child abuse or neglect under § 13-2907.02.
11. Whether there has been domestic violence or child abuse as defined in section 25-403.03.

¶10 Father argues that the trial court failed to consider all of the relevant factors in awarding mother sole legal custody of child. We find no abuse of discretion. The trial court made all of the relevant findings, and as we have noted above, the trial court reasonably concluded based on the evidence that the parties could no longer cooperate in a manner required to sustain joint legal custody. See A.R.S. § 25-403.01(B)(3) (2007) (in determining whether joint custody is in a child's best interests court must consider "past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint custody").

Attorneys' Fees

¶11 Mother requests an award of attorneys' fees on appeal pursuant to A.R.S. §§ 25-324, 12-349, and Arizona Rule of Civil Appellate Procedure 21 (Rule 21). Father also requests attorneys' fees. After consideration of the relevant factors under section 25-324, we award mother attorneys' fees on appeal in an amount to be determined upon compliance with Rule 21 and decline to award attorneys' fees to father.

CONCLUSION

¶10 We find no abuse of discretion in the trial court's decision denying father's motion for a new trial, denying his motion to reopen the evidence, and awarding mother sole legal custody of child. Accordingly, the trial court is affirmed.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

MICHAEL J. BROWN, Judge