

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 23 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHELL TARDY,)	
)	2 CA-CV 2011-0189
Petitioner/Appellant,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JESSE MURPHY,)	Rule 28, Rules of Civil
)	Appellate Procedure
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100DO200601380

Honorable Daniel A. Washburn, Judge

AFFIRMED

Michell Tardy

Apache Junction
In Propria Persona

Jesse Murphy

Mesa
In Propria Persona

ESPINOSA, Judge.

¶1 In this child custody dispute, Michell Tardy appeals the trial court's order granting Jesse Murphy's petition to modify custody of their minor daughter, K., and awarding primary physical custody of K. to Murphy, parenting time to Tardy, and joint

legal custody to both parents. Tardy primarily contends the trial court erred in failing to dismiss Murphy's petition as a sanction for multiple procedural violations and there was insufficient evidence to support the custody order; she also raises several other arguments, all of which we address below. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 In March 2007, Murphy and Tardy's marriage was dissolved and they were awarded joint custody of K., with child support and spousal maintenance to be paid by Murphy to Tardy. Tardy married Brian in May 2009, and in August 2010, she petitioned to modify custody and spousal maintenance.¹ Murphy contested Tardy's petitions and in June 2011 filed an emergency petition requesting sole custody of K., citing concern for K.'s safety due to domestic violence incidents in Tardy's home. The court issued an emergency temporary order, finding clear and convincing evidence based upon testimony and police reports that "irreparable injury w[ould] occur as a result of [K.] being in the custody of [Tardy]"; awarded Murphy temporary primary custody of K.; and appointed an attorney to represent K.'s best interest. Tardy was granted parenting time subject to Brian not being present.

¶3 At the hearing on Murphy's petition to modify custody, the trial court heard testimony from both parents and several other witnesses, considered statements made by K.'s best-interest attorney, and reviewed police reports regarding domestic violence in

¹Tardy also filed a request for court permission to relocate and an emergency petition to relocate out of state with K. because she faced impending eviction and desired to move closer to Brian's family. The court denied the emergency petition, and she later withdrew her request to relocate.

Tardy and Brian's home. Murphy expressed concern for K.'s safety if she were to remain in Tardy's home, and Tardy testified she had cared for K. following the domestic violence incidents and K. had never been away from her. In a detailed minute entry ruling, the court examined the factors prescribed in A.R.S. § 25-403 and found it was in K.'s best interest for primary physical custody to be awarded to Murphy. Tardy timely filed her notice of appeal, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

Discussion

¶4 Tardy argues there were insufficient facts supporting the trial court's determination that it was in K.'s best interest for Murphy to be awarded primary physical custody. In considering a motion for change of custody, the court determines whether such a change would be in the child's best interest. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982). The court's discretionary decision will not be reversed unless there is "a clear absence of evidence to support its actions." *Id.*

¶5 In awarding custody of K. to Murphy, the trial court examined the "best interest" factors set forth in § 25-403. The court considered the "substantial amount of evidence regarding a history of domestic violence between [Tardy] and [Brian]," including one incident witnessed by K. during which Brian "stabbed himself several times in the stomach and then told police [Tardy] had stabbed him." The court found that Brian was in treatment for alcohol abuse, that he is abusive and given to a high level of violence, and that Tardy failed to remove K. from exposure to domestic violence. The court expressed concern that Tardy "has tried to minimize the acts of domestic violence" and found it "very troubling that [Tardy] has obtained three orders of protection against

[Brian] over the years but has requested each order be dismissed so that she [could] resume a relationship with [him].” And, although Tardy accused Murphy of neglect for failing to attend to K.’s dental, financial, and clothing needs, the court found no evidence supporting her allegations.

¶6 Tardy asserts that K. was “out of harm[’]s way” because there was a protective order in place, Brian was in psychiatric care, and the city prosecutor had declined prosecution of Brian’s most recent domestic violence incident without “stat[ing] anything about child endangerment.” But the trial court’s findings that there had been several unaddressed incidences of domestic violence, and that Tardy had dropped all orders of protection against Brian, are supported by the record on appeal. Additionally, although Tardy, as the appellant, was responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues she raises, *see* Ariz. R. Civ. App. P. 11(b), she has failed to file any transcripts of the trial court proceedings. In the absence of a certified transcript, we assume it would support the trial court’s findings and conclusions. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶7 Tardy also challenges the trial court’s denial of her motion to dismiss, asserting Murphy had failed to comply with the court’s August 4, 2011, order to provide witness lists, anticipated testimony, and exhibits no later than five days before the final evidentiary hearing in October 2011. She claims, as she did below, that because Murphy’s list of witnesses failed to describe their anticipated testimony, he was subject to sanctions, including dismissal of his petition. *See* Ariz. R. Fam. Law P. 49(G). She also

argues Murphy should not have been permitted to call his witnesses, citing Rule 65(A)(3) (evasive or incomplete disclosure treated as failure to disclose), (C)(1) (untimely disclosure renders testimony inadmissible unless failure harmless or good cause shown), and (D) (failure to timely disclose damaging or unfavorable information grounds for discretionary sanctions including dismissal), Ariz. R. Fam. Law P.² In reviewing a trial court's ruling on a motion to dismiss for discovery violations, we will uphold its order unless the record reflects a clear abuse of discretion. *Seidman v. Seidman*, 222 Ariz. 408, ¶ 18, 215 P.3d 382, 385 (App. 2009). The trial court enjoys even broader discretion when it imposes lesser sanctions. *Id.*

¶8 The record before us establishes that Murphy initially filed a list of witnesses on February 16, supplemented with extensive notarized witness affidavits on August 18 and 30, and filed a second witness list on September 19, far in advance of the disclosure deadline. The child's best-interest attorney advocated against Tardy's motion to dismiss because Murphy previously had disclosed witness affidavits, Tardy could not have been surprised by the familiar subject matter of the testimony pertaining to shared family history, and Tardy had made no demand for disclosure before seeking sanctions.

¶9 The record on appeal, which consists of written motions and minute entries, shows Murphy filed witness lists, contact information, and testimonial affidavits before the court-imposed disclosure deadline as required by Rule 49, and supports the trial court's determination "that the parties complied with the Court[']s requests and provided

²Tardy also cites Rules 49(F) (disclosure of debts in dissolution proceedings) and 50 (complex case disclosure), Ariz. R. Fam. Law P., both irrelevant to this case.

[the] information needed in this matter.” We find no abuse of discretion in its denial of Tardy’s motion for sanctions.

¶10 Tardy further contends that although the parties’ medical records were requested, “no one ever asked for [a] mental evaluation.” Tardy does not specify whose mental evaluation should have been ordered, fails to cite to the record, and provides no authority imposing a duty on the trial court to order such evaluations. The record reflects that the court ordered both parents to sign medical release forms on behalf of themselves and K. and encouraged Brian to sign a release form even though he was not a party. Within a week of the order, Murphy signed medical authorization forms for himself and K., whereas Tardy initially resisted signing a medical authorization release for K. and ultimately refused to authorize release of or provide her own mental health information, even following a contempt hearing. In any event, Tardy has abandoned this issue by failing to properly develop and support her argument. Ariz. R. Civ. App. P. 13(a)(6) (appellant’s brief must cite to authorities, statutes, or parts of record relied on); *Sholes v. Fernando*, 228 Ariz. 455, nn.1 & 2, 268 P.3d 1112, 1114 nn.1 & 2 (App. 2011) (court may disregard portions of appellate briefs that fail to comply with Rule 13).

¶11 Tardy raises a number of additional claims, all of which she asserted below, apparently challenging the temporary orders issued in this case. As best we can discern, she contends: (1) Murphy did not timely disclose the domestic violence police report before the temporary orders hearing; (2) she did not receive proper notice that she could request an “earlier” hearing on the emergency petition; (3) the trial court erred by failing to include in its temporary order the terms, reasons for, and duration of the appointment

of the best-interest attorney pursuant to Rule 10(A)(3), Ariz. R. Fam. Law P.; and (4) no evidence supported Murphy's assertion that he feared Tardy would leave the state with K. But the temporary orders could have been challenged only by special action. *See Villares v. Pineda*, 217 Ariz. 623, ¶ 11, 177 P.3d 1195, 1197 (App. 2008); *DePasquale v. Superior Court*, 181 Ariz. 333, 336-37, 890 P.2d 628, 631-32 (App. 1995). Because Tardy did not seek special-action relief and the temporary orders are no longer effective, having been superseded by the final order, we cannot grant relief from the temporary orders. Accordingly, we do not address Tardy's arguments on these issues further.

Disposition

¶12 For the reasons stated herein, the trial court's custody award is affirmed. As Murphy was self-represented in this appeal, his request for attorney fees is denied. *See Lisa v. Strom*, 183 Ariz. 415, 419, 904 P.2d 1239, 1243 (App. 1995). He is entitled to his costs as the prevailing party, contingent upon his compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge