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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: 06/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

In re the Matter of:) 1 CA-CV 11-0485
)
DAVID A. MARTINEZ,) DEPARTMENT D
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) (Rule 28, Arizona Rules of
JENNIFER K. RYAN,) Civil Appellate Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-093734

The Honorable David M. Talamante, Judge

AFFIRMED

David A. Martinez
In Propria Persona

Chandler

Edwards & Cherney LLP
By Laura Jane Edwards
Attorneys for Respondent/Appellant

Scottsdale

G O U L D, Judge

¶1 Jennifer K. Ryan ("Mother") appeals the trial court's grant of custody of her daughter to David A. Martinez ("Father"). For the following reasons, we affirm.

Factual and Procedural Background

¶2 In 2008, Mother and Father agreed to equal parenting time for their daughter ("Child"). Regardless, Mother typically left Child in Father's primary care, taking her overnight two nights per week.

¶3 Two years later, Mother took Child and left Arizona without Father's permission. Father located Mother, with Child, in Pennsylvania two months later. In the meantime, Father had filed this lawsuit seeking custody of Child. After an evidentiary hearing in which Mother testified that she would not relocate to Arizona, the trial court awarded sole custody to Father. Mother filed a motion for new trial which the trial court denied.

¶4 Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) and (5)(a).

Discussion

¶5 We review the trial court's child custody decision for an abuse of discretion. See *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1191 (App. 2002).

¶6 Mother first argues that the trial court failed to make findings regarding domestic violence as required by A.R.S. § 25-403(A)(11) (2011). Mother maintains that the trial court has completely disregarded the issue of domestic violence.¹ The record does not support Mother's contention.

¶7 At the hearing, the trial court considered Mother's claims of domestic violence. Specifically, the trial court described Mother's credibility on the issue as "suspect" because she did not raise this issue until after she was embroiled in this custody dispute. Of note, the trial court was concerned because it was unable to harmonize Mother's allegations of domestic violence with the relief she sought from the court. The trial court emphasized that Mother testified that Father is "by and large a good dad" and that she has "no problems" with Father having custody of Child for extended periods of time without any supervision or safeguards in place to address her supposed concerns about domestic violence.² The trial court found "no rational connection [between] what mother is alleging

¹ Father cites to page 253, line 19 through page 255, line 9 as support that the trial court addressed the issue of domestic violence, not to the individual page and line numbers as Mother suggests.

² The record also shows that Mother sought an order of protection against Father in Pennsylvania, and that order of protection was dismissed with prejudice.

and what she's asking the Court to do." The trial court summarized its analysis of the domestic abuse issue in its March 2, 2011, minute entry. The trial court then expressly incorporated the minute entry into the judgment from which Mother appeals.

¶8 We hold that the trial court satisfied the requirements of A.R.S. § 25-403(B) by making findings regarding domestic violence in the transcript of the hearing in which custody was contested and in its minute entry which was incorporated into its final judgment. See *Diezsi*, 201 Ariz. at 526, ¶ 5, 38 P.3d at 1191.

¶9 Mother next argues that the trial court's findings pursuant to A.R.S. § 25-403(A) are inadequate because the trial court makes no finding regarding domestic violence. This argument fails for the same reasons set forth above. The trial court weighed the relevant evidence and found that despite Father's acts of domestic violence towards Mother, it was in Child's best interests to award Father sole custody.³ Thus, the

³ In order to deprive a parent of custody or give rise to a presumption against a parent, there must be a finding by the court that the alleged domestic violence is significant and falls into the categories set forth within the statute. See A.R.S. § 25-403.03(A), (D). In awarding Father sole custody, the trial court found that the domestic violence that occurred between the parties was limited to verbal and emotional abuse which would make co-parenting difficult. This further belies

trial court's award of sole custody to Father was not deficient as a matter of law.

¶10 Mother's third argument is that the trial court abused its discretion by failing to apply a presumption against awarding Father custody under A.R.S. § 25-403.03(D) (2011) due to Mother's allegations of domestic violence. Mother's argument ignores a key sentence contained in the statute. The presumption Mother invokes here does not apply "if *both* parents have committed an act of domestic violence." See A.R.S. § 25-403.03(D) (emphasis added). Father obtained an order of protection against Mother in 2008 and Mother obtained an order of protection against Father the next day. Because both parties committed acts of domestic violence, Mother is not entitled to the presumption set forth in A.R.S. § 25-403.03(D).

¶11 Finally, Mother argues that the trial court's award of sole legal custody to Father is not supported by the evidence. The *Smith* court aptly explains the appellate court's role:

A child custody proceeding more than any other court hearing challenges the trial judge to view and weigh the various personalities, motives and abilities of all the parties. The trial judge observes the body movements, the facial expressions, the voice inflections, the reactions to the

Mother's contention that the trial court made no finding as to domestic violence.

testimony and the overall demeanor of all parties and witnesses. These observations, together with the transcribed testimony, make up the fabric from which a judge will cut his decision. Our observations are limited to the transcript and we must therefore be very careful in attempting to second guess the front line trial court from our rather limited appellate vantage point.

Smith v. Smith, 117 Ariz. 249, 253, 571 P.2d 1045, 1049 (App. 1977). Thus, we will not overturn a child custody decision of the trial court absent a clear showing that the judge abused his discretion. *Id.*

¶12 Mother points to Father's threats of suicide, his substance abuse issues and alleged sexual misconduct as "overwhelming evidence" that it was not in Child's best interests to award sole legal custody to Father. We disagree.

¶13 The trial court evaluated each of the eleven factors required by A.R.S. § 25-403 to determine Child's best interests. The three concerns Mother highlights as error on appeal impact only one of these eleven factors, Father's mental or physical health. The trial court weighed all of the evidence related to this factor and determined that it was still in Child's best interests for Father to have sole custody.

¶14 Father testified that although he has threatened suicide, he has never attempted to commit suicide. Rather, the threats were intended to garner a reaction from loved ones.

Mother provided no compelling evidence to the contrary. In fact, Mother's alleged concerns regarding Father's parenting abilities run counter to her testimony that Father is "by and large a good dad" and that she has "no problems" with Father having custody of Child.

¶15 Father admits he has struggled with substance abuse issues in the past, but provided evidence that he has repeatedly submitted to alcohol and drug testing.⁴ All of Father's test results have been negative. The court order forbids Father from consuming alcoholic beverages while Child is in his physical custody or while he is designated as the sole legal custodian. Additionally, Father is required to submit to random alcohol tests a minimum of 3 times per month. Thus, the trial court established safeguards so that Mother will know if Father relapses, and can seek modification of the custody order.

¶16 As for the allegations of Father's sexual misconduct with a minor, the trial court heard testimony about the alleged incident from both Father and the minor. The trial court held that because of a lack of credible evidence, it was "not inclined to find that Father has engaged in any sexual

⁴ The trial court found it likely that Father will struggle with alcohol addiction his entire life. Though an unfortunate fact of life for those addicted to alcohol, this fact alone is not a basis to permanently deny a parent custody of his or her child.

misconduct." In awarding custody to Father, the trial court explained: "Father has been the primary caretaker of the child and there is insufficient factual basis for this Court to determine Father has ever posed any risk of harm to the minor child." On the record before us, we cannot say that the trial court abused its discretion in so finding.

Conclusion

¶17 The trial court weighed all of the factors required by A.R.S. § 25-403 and determined that it was in Child's best interests that Father be awarded sole custody. On this record, we find that the trial court did not abuse its discretion. For the foregoing reasons, we affirm.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

JOHN C. GEMMILL, Presiding Judge

/S/

PETER B. SWANN, Judge