DIVISION ONE
FILED: 1/22/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	No. 1 CA-CV 11-0820
SHARON LEIGH ELLIOTT,	DEPARTMENT A
Petitioner/Appellant,	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
GREGORY JOHN GUERRERO,	
Respondent/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-001471

The Honorable Thomas L. LeClaire, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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D O W N I E, Judge

¶1 Sharon Leigh Elliott ("Mother") appeals certain provisions of a divorce decree entered by the family court, as

well as the partial denial of her motion for new trial. Because the record does not support findings made regarding Mother's mental health, we vacate the custody and parenting time orders and remand for reconsideration of those matters. In all other respects, we affirm the family court's orders.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Mother and Gregory John Guerrero ("Father") have three minor daughters. Father sought joint legal custody of the children, and Mother requested sole custody. Mother alleged "considerable domestic violence" by Father during the marriage.

¶3 The parties agreed to temporary parenting time orders, with Father's time being supervised. Mother later sought temporary sole custody, alleging that Father's parenting time was not being fully supervised and that his girlfriend had struck the children. After a hearing, the court ruled:

> **THE COURT FINDS** that there is compelling evidence to suggest paternal grandparents are supervising Father's parenting time. Therefore,
> **IT IS ORDERED** denying Mother's March 3, 2011 Emergency Petition for Pre-Decree Temporary Sole Custody with Notice.
> **IT IS FURTHER ORDERED** awarding Father two and one-half hours of additional parenting time to compensate for Mother's failure to

[1] "We view the evidence in the light most favorable to sustaining the family court's findings . . . ." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998).

> follow court orders, as advised by counsel, regarding Father's parenting time.

¶4 The court appointed a Therapeutic Interventionist ("TI") to work on restoring the relationship between Father and the oldest child. It granted Father's request to modify his parenting time with the two younger girls but deemed modification as to the oldest premature, electing to wait until "some degree of success" was achieved in restoring that relationship. The court lifted the requirement that Father's parenting time be supervised and stated:

> [T]he Court is concerned about the many ways in which [Mother] seems to be placing obstacles between [Father] and the children. The Court did not find an allegation of [Father's] girlfriend allegedly assaulting one of the children to be substantiated. Actions taken early in this litigation showed [Mother] unilaterally withholding parenting time. That alone would not suffice to alter the Court's earlier ruling; however, the Court learned at the March 10th hearing that [Mother] had unilaterally modified the Court's Order regarding parenting time by withholding the children on the date of the hearing. As a result, the Court admonished [Mother], directed that the children be immediately turned over to [Father] following the hearing, and granted extended parenting time on that date for the time improperly withheld. The Court has significant concerns about [Mother's] ability to set aside her personal feeling about [Father], follow the orders of the Court, and focus on the best interests of the children, not [Mother's] view of what the best interests are, but the objective best interests of the children.

¶5 Meanwhile, an order of protection that Mother had obtained against Father in May 2010 expired. Mother sought new orders of protection in June and July 2011, but her requests were denied.

¶6 After a trial, the court entered a decree of dissolution. Mother moved for a new trial or, alternatively, to alter or amend the decree. The court granted Mother's motion in part and denied it in part. Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2), (5)(a).

DISCUSSION

¶7 Mother raises several issues in her opening brief. Father did not file an answering brief.[2] Although his failure to appear could be treated as a confession of reversible error, *Swift Transportation v. Industrial Commission of Arizona*, 189 Ariz. 10, 11, 938 P.2d 59, 60 (App. 1996), we prefer to address custody and parenting time disputes on the merits where possible.

[2] An *amicus curiae* brief was filed by the Phoenix School of Law Family Pro Bono Project. Although that brief raises interesting and thoughtful issues, appellate courts confine their review to arguments that the parties themselves advance. *See Ruiz v. Hull*, 191 Ariz. 441, 446, ¶ 15, 957 P.2d 984, 989 (1998) (appellate court addresses legal issues raised by the parties, not those asserted by *amici curiae*). Mother has not argued that A.R.S. § 25-403.03 is impermissibly vague. And, as discussed *infra*, ¶ 23, the statute does not require the family court to make findings of fact on the record.

I. Mental Health Finding

¶8 Mother contends the court erroneously found that she suffers from bipolar disorder. The decree states:

> Mother admits that she is bi-polar and previously took medication for the condition. Mother states that she does not currently take any medication for this condition. Paternal Grandfather also stated that during the Grandparents' visits to the parties' home prior to the separation, Mother would remain in her bedroom ten out of twelve visits. He further stated that he did not know what Mother's mood would be when they visited and that the "mood of the house was sporadic." Paternal Grandfather depicts Mother as having mood issues and that tension in the house resulted from Mother's moods.
>
> If the testimony of the Paternal Grandparents is accurate, Mother has had some difficulties with her bi-polar disorder that interfered with her ability to parent the children and to care for the home.

¶9 Nothing in the record suggests that Mother has ever been diagnosed with bipolar disorder or that she has taken medication for that condition. Mother testified at trial that she was treated for "situational depression" on two occasions. No other witness testified that Mother has bipolar disorder, and the trial exhibits do not support such a finding.

¶10 The court discussed Mother's alleged bipolar disorder in resolving disputed custody and parenting time issues. It stated that "difficulties" associated with that condition appeared to interfere with Mother's "ability to parent the

children and to care for the home," and it mentioned that Mother no longer takes medication for that condition. As noted, though, the record does not support the underlying premise that Mother has *ever* suffered from bipolar disorder. Because we cannot determine whether the court would have entered the same orders absent such a finding, we vacate the existing custody and parenting time orders and remand for reconsideration of those matters without reliance on a mental health condition that is unsupported by the record. The superior court shall determine on remand whether the existing record is adequate for purposes of reconsideration or whether additional proceedings are necessary.

II. Delegation of Decision-Making

¶11 Mother asserts the family court "erred in delegating its authority to make parenting time orders to the therapeutic interventionist." The decree reads, in pertinent part:

> **IT IS ORDERED** that the parties shall have equal parenting time with the minor children, except that parenting time of [oldest child] shall occur when the relationship has been normalized as indicated by the TI. Upon a restoration of the parent/child relationship between [Father] and [oldest child], parenting time as indicated here shall apply to [oldest child].

¶12 *DePasquale v. Superior Court (Katz)*, 181 Ariz. 333, 890 P.2d 628 (App. 1995), upon which Mother relies, is

distinguishable. In *DePasquale*, the trial court did not make a best-interests determination, instead stating it would award custody to whomever the psychologist recommended, which it later did. *Id.* at 335-36, 890 P.2d at 630-31. In the case at bar, the court made detailed findings regarding the children's best interests and the relevant custody and parenting time factors. *See* A.R.S. § 25-403(A). Further, in ruling on Mother's motion for new trial, the court clarified:

> The Court is not delegating its authority to the Therapeutic Interventionist. The Court has made a parenting time determination. There is an ongoing estrangement or strained relationship between child and the parent. The Court is requesting the TI to provide information to the Court when the parenting time *already awarded* may be implemented from a therapeutic perspective. The TI has no role in determining the amount or duration of parenting time.

¶13 The court considered the current state of the relationship between Father and the oldest child and ruled that upon restoration of that relationship -– a therapeutic benchmark –- its previously-determined parenting time orders would become effective as to that child.

III. Child Support

¶14 Mother argues the court "erred in applying a parenting time adjustment [for child support] based on a prospective parenting schedule not then in effect." Specifically, the court gave Father credit for "essentially equal time" with all three

children, although the eldest child spends significantly less time with him.

¶15 In her motion for new trial, Mother contended the parenting time credit should reflect the number of days the oldest child actually spends with Father. In response, Father argued he had been following the TI's recommendations, that "great progress" had been made in restoring the relationship with his oldest daughter, and that the reunification plan had come to a halt "due to the mother's refusal to pay her portion of the TI's bill, a direct violation of the court's order," thus preventing implementation of the parenting time already in place for the two younger girls. Without comment, the family court refused to revisit its parenting time allocation.

¶16 "Child support awards are highly discretionary, and appellate courts review them deferentially." *In re Marriage of Pacific*, 168 Ariz. 460, 463, 815 P.2d 7, 10 (App. 1991). Although Mother presented a colorable claim about the parenting time credit, we cannot say the family court clearly abused its discretion by rejecting it. The record conveys the court's continuing concern over Mother's willingness to encourage a relationship between the children and Father. A reasonable inference from the record is that but for Mother's recalcitrance, the oldest child would be spending essentially equal time with Father. Given the unique circumstances of this

case, we cannot conclude that the court abused its discretion in calculating child support.[3]

IV. Domestic Violence

¶17 Mother contends Father's acts of domestic violence preclude an award of joint custody. Section 25-403.03(A)[4] reads, in pertinent part:

> Notwithstanding subsection D of this section, joint custody shall not be awarded if the court makes a finding of the existence of significant domestic violence pursuant to § 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence.

¶18 Mother alleged that Father perpetrated significant domestic violence during the marriage. She testified at trial regarding several incidents and introduced documentary evidence regarding some of them. Father admitted some of the conduct, but disputed other claims by Mother.

¶19 The court found "there has been domestic violence in the marriage perpetrated by Father," and it cited Father's convictions for two incidents. Nonetheless, the court was "unconvinced . . . that the domestic violence was significant."

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[3] If the court modifies its custody or parenting time orders on remand, it should re-examine child support as well.

[4] This statute was revised effective January 2013. We quote the version of statutes that is applicable to the court's ruling.

It discussed the trial evidence and commented on certain witnesses' credibility, including:

> Mother offered the testimony of the Maternal Grandmother on this point as well. The Court does not credit Maternal Grandmother's statements. Maternal Grandmother did not testify truthfully to the Court's question about her daughter's alleged suicide attempt, which occurred at age sixteen.

¶20 The court labeled the maternal relatives' testimony about Father's aggressive behavior around the children unconvincing and instead accepted as more credible Father's family's testimony on this point. It also noted the maternal grandmother "simply would not testify in any manner that she saw as less than complimentary of her daughter." The court rejected the contention that Father's conduct precluded joint custody, reiterating that although "some" domestic violence had occurred, it was not "significant."

¶21 We review custody decisions for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003) (citation omitted). In reviewing for an abuse of discretion, "[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." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567,

571, 694 P.2d 1181, 1185 (1985) (quoting *Davis v. Davis,* 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring).

¶22 Credibility played a clear role in the family court's decision. Even if we might have reached a different conclusion regarding the level of domestic violence, we cannot say that the court ruled without fairly considering the evidence before it. *See Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007) ("A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or 'the record fails to provide substantial evidence to support the trial court's finding.'").

¶23 The record also does not support Mother's assertion that the court failed to consider the presumption against awarding custody to a parent who has perpetrated domestic violence. *See* A.R.S. § 25-403.03(D). Courts must consider the factors listed in A.R.S. § 25-403.03(E) in determining whether the presumption has been rebutted, but the statute does not require findings of fact on the record. *Compare* A.R.S. § 25-403(B) (requiring the court to "make specific findings on the record" in contested custody cases). And neither parent requested findings of fact or conclusions of law pursuant to

Rule 82. Nevertheless, the court did discuss the relevant factors and stated:

> [Father] admitted the act of domestic violence to which he pleaded guilty and has acknowledged its adverse impact on the relationship of the parties. The Court is impressed, though, that [Father] attended a twenty-six week Domestic Violence Program, which the administrator of the program specifically noted was a difficult program to complete given its length. She also noted [Father's] perfect attendance.

In terms of the children's best interests, *see* A.R.S. § 25-403.03(E)(1), the court voiced misgivings about Mother "hamper[ing]" Father's relationship with the children if given sole custody, and specifically found Father was the parent "more likely to allow frequent and meaningful contact with the other parent." The court also expressed concern about Mother's multiple petitions for orders of protection, stating:

> Mother seeks to have this Court issue a new Order of Protection (OOP) after the existing order lapsed. This matter was brought before the Superior Court less than two weeks before this trial and Mother's request was rejected by the presiding Commissioner. The Court finds no basis to reassess the earlier Court ruling. In the past, the existence of the OOP has been an impediment to Father exercising parenting time. Whether this was a calculated result or merely a misinterpretation of the manner in which the OOP operates is irrelevant to its factual impact. There was no evidence offered at the trial to suggest that there is an ongoing threat to [Mother] from [Father]. The only relevant post-filing evidence suggests that [Father] has sought

> significant assistance in addressing his anger issues and has been successful in that goal.[5] Moreover, this Court has previously expressed its concern with actions taken by Mother that impeded Father's parenting time and in one instance was in contravention of a Court Order.

¶24 Appellate courts do not re-weigh conflicting evidence, but instead "give due regard to the trial court's opportunity to judge the credibility of the witnesses." *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009). The family court's superior ability to view the witnesses and assess the conflicting trial evidence, coupled with its detailed ruling, and its ongoing involvement with the case over a 16-month period, persuade us that it did not exercise its discretion in a manifestly unreasonable fashion. *See Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982) ("'abuse of discretion' is discretion manifestly unreasonable or exercised on untenable grounds, or for untenable reasons").

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[5] We disagree with Mother's claim that nothing in the record supports the finding that Father "has sought significant assistance in addressing his anger issues and has been successful in that goal." A report from the TI discusses Father's past anger management issues and his progress in addressing them. The record also includes Father's certificate of completion for a domestic violence diversion program and a letter from the course instructor documenting Father's compliance.

V. Evidentiary Issues

¶25 Mother contends the court erred by refusing to admit exhibit 15 into evidence and by admitting exhibit 42 into evidence over her objection. "We review the trial court's evidentiary rulings for a clear abuse of discretion; we will not reverse unless unfair prejudice resulted or the court incorrectly applied the law." *Larsen v. Decker*, 196 Ariz. 239, 241, ¶ 6, 995 P.2d 281, 283 (App. 2000).[6]

¶26 Exhibit 15 consisted of notes from a marriage counselor who worked with the parties. Mother waived the privilege attached to the records, but Father did not. The family court ruled the records inadmissible, but permitted Mother to testify about the therapy and to testify that she had discussed the history of domestic violence and Father's "control issues" with the therapist.

¶27 On appeal, Mother argues the exhibit "supported [her] testimony that she had complained of physical abuse – domestic violence, during the marriage." However, she was allowed to testify regarding this point, and Mother has not explained why the document was admissible over Father's assertion of a legal privilege. The court did not err in excluding the exhibit.

[6] As Mother notes in her opening brief, neither party invoked strict compliance with the Arizona Rules of Evidence. *See* Rule 2(B), Rules of Family Law Procedure.

¶28 Exhibit 42 consists of two American Express credit card statements for June and July 2010, around the time of service of the petition. Mother objected to the exhibit because Father had not timely disclosed it. The court overruled her objection.

¶29 Mother asked the court to divide the parties' property and debt, and she noted in her pretrial statement that Father had an American Express account during the marriage that he should be required to pay. The court advised Mother at trial that it could not fairly apportion the parties' debt without considering exhibit 42. It ultimately held the parties equally responsible for the American Express debt and a Visa card account balance in Mother's name.

¶30 The family court would have acted within its discretion by precluding exhibit 42 based on its untimely disclosure. On the other hand, as the court noted, its duty was to fairly allocate the parties' assets and debts. "[S]o long as the trial court acts equitably, it is allowed great discretion in the allocation of community debts." *Luna v. Luna*, 125 Ariz. 120, 126, 608 P.2d 57, 63 (App. 1979). Mother did not request a continuance or an opportunity to conduct further discovery regarding the American Express debt, and she has raised only speculative claims of prejudice stemming from the admission of

exhibit 42. Under the circumstances presented, we find no abuse of discretion in the court's evidentiary ruling.

VI. Attorneys' Fees

¶31 Mother requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324 and ARCAP Rule 23. Her only stated basis for the requests is Father's allegedly unreasonable opposition to her motion for new trial in the family court and his evidentiary objections at trial. We deny Mother's requests.

CONCLUSION

¶32 We vacate the family court's custody and parenting time orders and remand for reconsideration of those matters. In all other respects, the judgment of the family court is affirmed.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Acting Presiding Judge

/s/
DIANE M. JOHNSEN, Judge