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

DIVISION ONE
FILED: 3/14/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 12-0135
	)	
JASON E. RASSUCHINE,	)	DEPARTMENT E
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
LAURA L. BALL,	)	
	)	
Respondent/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. FC2010-071650 and FC2010-094622 (Consolidated)

The Honorable Timothy J. Ryan, Judge

AFFIRMED IN PART, VACATED IN PART, REMANDED

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P O R T L E Y, Judge

¶1 Jason Rassuchine ("Husband") challenges certain rulings issued after the divorce trial. Specifically, he contends the family court erred by denying his request for visits with his stepdaughter, granting Laura Ball ("Wife") "presumptive decision-making authority" and naming her primary residential parent for their biological child, and awarding Wife attorneys' fees. For the reasons that follow, we affirm in part, vacate in part, and remand.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife were married on June 9, 2009. They separately filed for divorce in November 2010 and the cases were consolidated. Husband also sought to have parenting time with his stepdaughter[1] pursuant to Arizona Revised Statutes ("A.R.S") section 25-415[2] (2007). Following a trial, the court divorced the parties and resolved all related issues. The court also denied Husband's request for visitation with his stepdaughter, and awarded Wife a portion of her requested attorneys' fees. We have jurisdiction over Husband's appeal pursuant to A.R.S. § 12-2101(A)(1) (West 2013).

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[1] Husband was present at his stepdaughter's birth, was listed as the father on her birth certificate, and acted as her father during the term of the marriage.

[2] The *in loco parentis* statute was amended and renumbered effective January 1, 2013. *See* S.B. 1127, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

DISCUSSION

A.

¶3 Husband contends the court erred by determining it lacked jurisdiction over his visitation request. He also contends the court erred by finding that he failed to provide sufficient notice to his stepdaughter's putative father under A.R.S. § 25-415(E). We review de novo the court's interpretation and application of the statute and are not bound by the court's conclusions of law "that combine both fact and law when there is an error as to the law." *Riepe v. Riepe*, 208 Ariz. 90, 92, ¶ 5, 91 P.3d 312, 314 (App. 2004).

¶4 Section 25-415(C)(2) provides that *in loco parentis*[3] visitation may be awarded to a non-parent if visitation is in the child's best interests, and the child's "biological parents are not married to each other at the time the petition is filed." Additionally, "[n]otice of a custody or visitation proceeding filed pursuant to this section" must be served on the child's parents. A.R.S. § 25-415(E).

¶5 Husband served the putative father, Ryan Alexander, and other John Does, by publishing a summons directed to Alexander and all potential fathers. The summons was published

[3] "*In loco parentis*" is defined as "a person who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child for a substantial period of time." A.R.S. § 25-415(G)(1).

in a newspaper of general circulation in Maricopa County, Arizona, and in Douglas County, Georgia, where Alexander may be residing. Despite the publication of the summons, the court found that because Husband failed to "give notice of the *trial* to the [child's] biological Father," the court did not have jurisdiction over his request.

¶6 Husband contends the publication of the summons giving notice of the proceeding was sufficient and that A.R.S. § 25-415(E) does not require a notice of "trial." Wife concedes that Husband was not required to serve Alexander with notice of the trial, and we agree.

¶7 Section 25-415(E) provides that notice of the *in locos parentis* proceeding shall be served on the child's parents. To determine whether the court erred by finding that notice of the trial had to be served, we must interpret the statute. We look first to the provision's language "and will ascribe [a] plain meaning to its terms unless the legislature [has] assigned a special meaning to [it]." *W. Corrs. Grp., Inc. v. Tierney*, 208 Ariz. 583, 587, ¶ 16, 96 P.3d 1070, 1074 (App. 2004). To determine a term's plain meaning, "we refer to established and widely used dictionaries." *Id.* at ¶ 17. Webster's II New Riverside University Dictionary (1994) defines a "proceeding" as "[t]he act of instituting and conducting litigation." Similarly, Black's Law Dictionary (9th ed. 2009) indicates that

a "proceeding" is "[a]n act or step that is part of a larger action."

¶8 We presume that the legislature means what it says. *See In re Marriage of Downing*, 228 Ariz. 298, 300, ¶ 7, 265 P.3d 1097, 1099 (App. 2011). If the legislature wanted a party to give notice of a hearing or trial it would have said so because it has mandated such a requirement in other cases. *See, e.g.,* A.R.S. § 8-111 (West 2013) (requiring notice of hearing be served "[a]fter a petition to adopt has been filed"); A.R.S. § 8-872(B) (West 2013) (requiring "notice of the hearing" be given to all parties in a permanent guardianship action); A.R.S. § 8-535(A) (West 2013) (requiring "[n]otice of the initial hearing" be given to child's parents in a termination action); A.R.S. § 8-522(G) (West 2013) (special advocate shall be given "notice of all hearings" in a dependency action). Consequently, it is clear that § 25-415(E) only requires that the unmarried parent of the child be served with notice of the *in loco parentis* action.

¶9 Here, the published summons informed the potential fathers of Husband's *in loco parentis* suit. The summons warned that a judgment may be taken against any individual if they failed to file a response. Accordingly, the published summons was sufficient under § 25-415(E) and gave notice of the *in loco parentis* proceeding. Consequently, and because Wife was never

married to the child's father, *see* A.R.S. §§ 25-409(A)(3) (2007), and -415(C)(2), the family court had jurisdiction to address Husband's request to visit his stepdaughter.

¶10 After determining that it did not have jurisdiction, the court entered an alternative ruling in the event jurisdiction existed. The court found that Husband failed to meet the statutory requirements for visitation because the child's father was neither deceased nor missing under A.R.S. § 25-409(A). The court, however, failed to consider that Husband would be entitled to have visits with his stepdaughter under § 25-409(A)(3) because she was born out of wedlock, as Wife concedes. Accordingly, because Husband has satisfied the requirements of § 25-409(A), we vacate the determination that the court did not have jurisdiction over the issue and the alternative ruling, and remand the matter for a determination of whether visitation with Husband would be in the child's best interests. A.R.S. §§ 25-409(C), -415(C).

B.

¶11 Husband also contends the court abused its discretion by awarding Wife "presumptive decision-making authority" over their biological daughter. We disagree.

¶12 As the trier of fact, the family court is in the "best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings."

Christina G. v. Ariz. Dep't of Econ. Sec., 227 Ariz. 231, 234, ¶ 13, 256 P.3d 628, 631 (App. 2011). Accordingly, we will not reweigh the evidence and will affirm the court's order if reasonable evidence supports it. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009).

¶13 The family court found that Wife was the primary caregiver of their child. As such, the court gave Wife presumptive decision-making authority only if, after a good faith effort, Husband and Wife could not agree on a decision involving the child.[4] The court was in the best position to weigh the evidence and make the determination, and we will not second guess its findings. *See Bergman v. Bergman*, 1 Ariz. App. 209, 213, 401 P.2d 163, 167 (1965) ("This court will not attempt to substitute its judgment for that of the [Family] Court.").

¶14 In a related issue, Husband also contends the court erred by naming Wife as their child's "primary residential parent." He contends that because they share joint custody and have equal parenting time with her, neither should be listed as the child's primary residential parent. Husband, however, cites no legal authority which restricts the court from designating a primary residential parent in such a case. Moreover, Wife cites A.R.S. § 25-403.07, which recognizes valid reasons for making

[4] Per the court's order, Husband may also seek judicial review if he believes Wife's decision is not in the best interests of the child.

the primary caretaker designation in this case. Consequently, we find no abuse of discretion.

C.

¶15 Finally, Husband contends the court erred by awarding Wife a portion of her attorneys' fees. We review a fee award for an abuse of discretion. *Mangan v. Mangan*, 227 Ariz. 346, 352, ¶ 26, 258 P.3d 164, 170 (App. 2011).

¶16 A court may, "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings," award attorneys' fees to either party. A.R.S. § 25-324 (West 2013). In making its award, the court is obliged to consider "the degree of the resource disparity between the parties [and] the ratio of the fees owed to the assets and/or income of each party." *Magee v. Magee*, 206 Ariz. 589, 592, ¶ 17, 81 P.3d 1048, 1051 (App. 2004). "If the trial court finds such a disparity, it is then authorized to undertake its discretionary function of determining whether an award is appropriate." *Id.* at 593, ¶ 18, 81 P.3d at 1052.

¶17 Here, the court considered "the economic disparity between the parties" as well as Wife's contention that Husband had "unreasonably forced" their case to go to trial. The court considered the income of the parties, Wife's request for more than $21,000 in fees, as well as its knowledge of the case in

deciding to only award her a portion of the requested fees. *See Baum v. Baum*, 120 Ariz. 140, 146-47, 584 P.2d 604, 610-11 (App. 1978). Consequently, we cannot say the court abused its discretion by awarding Wife a portion of her attorneys' fees.

D.

¶18 Wife requests her attorneys' fees on appeal pursuant to A.R.S. § 25-324. Based on the disparity of income of the parties, we will, in the exercise of our discretion, award Wife a portion of her reasonable attorneys' fees upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶19 Based on the foregoing, we affirm the court's orders pertaining to custody of their daughter and the award of attorneys' fees to Wife. We, however, vacate the determination that the court did not have jurisdiction over Husband's *in loco parentis* request and remand for proceedings consistent with this decision.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
PHILIP HALL, Judge