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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 2/26/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Marriage of: ) No. 1 CA-CV 12-0179  
)  
DAVID NIEL JEFFERSON, ) DEPARTMENT B  
)  
Petitioner/Appellant, ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule 28,  
v. ) Arizona Rules of Civil Appellate  
) Procedure)  
JENNIFER LYNN JEFFERSON, )  
)  
Respondent/Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause Nos. FC2010-052369

The Honorable Alfred M. Fenzel, Judge

**AFFIRMED IN PART; REMANDED IN PART**

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David Niel Jefferson Gilbert  
*In Propria Persona*

Jennifer Lynn Jefferson Chandler  
*In Propria Persona*

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**G O U L D**, Judge

¶1 David Jefferson ("Father") appeals from the family court's decree of dissolution of his marriage to Jennifer Jefferson ("Mother"). He challenges custody, parenting time,

and spousal maintenance, among other orders and findings. For the reasons that follow, we affirm in part and remand in part.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 Father and Mother married on May 18, 1996. They have four minor children who have special needs. During the dissolution proceedings, Mother gave birth to the parties' fifth child ("J").

¶3 Pursuant to the parties' agreement, and prior to J's birth, the court issued temporary orders granting Father sole custody of the children, directing Mother to undergo an independent evaluation with a psychiatrist, ordering Father to pay Mother \$650 per month in spousal maintenance, and allowing Mother supervised parenting time of up to two and a half hours per week with each child. After J's birth, the court issued additional temporary orders granting Mother supervised visiting time with J every day from 8:00 am until 5:00 pm.

¶4 Following trial, the court entered a signed minute entry on May 16, 2011, granting the parties joint custody of all five children. The court affirmed Mother's visitation schedule with all of the children and provided that after July 1, 2011, Mother's visits with J need not be supervised if Mother continues counseling and follows the recommendations of her therapist. Additionally, the court ordered Father to pay Mother

\$1,000 per month in spousal maintenance and directed Father to submit a decree.

¶5 Father filed a motion for new trial and a motion to alter or amend. Thereafter, Father and Mother lodged proposed decrees. The court entered signed orders denying Father's motion for new trial and motion to alter or amend.<sup>1</sup> On January 30, 2012, the court signed and entered Mother's proposed dissolution decree. Father timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (West 2013).

## DISCUSSION<sup>2</sup>

### I. Custody

¶6 Father argues the court erred by granting the parties joint custody of the children because the evidence and testimony do not support the findings. Rather, Father asserts the evidence supported an award of sole legal and physical custody

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<sup>1</sup> Father filed a notice of appeal after entry of these signed orders. This court dismissed the appeal for lack of jurisdiction, finding the May 16, 2011 minute entry was not a final appealable order because the court directed further filings, the court did not resolve all of the parties' claims, and the order does not contain a determination of finality pursuant to Rule 78(B), Arizona Rules of Family Law Procedure. See 1 CA-CV 11-0696.

<sup>2</sup> Mother failed to file an answering brief. Although we could consider this a confession of error, see ARCAP 15(c), in the exercise of our discretion, we decline to do so. *Thompson v. Thompson*, 217 Ariz. 524, 526 n.1, ¶ 6, 176 P.3d 722, 724 (App. 2008).

to him. We review the court's decision regarding child custody for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). A court abuses its discretion when it misapplies the law or when there is no competent evidence supporting the court's decision. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App.2004); *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963).

¶7 Father contends the court abused its discretion by relying solely on the testimony of Mother's psychiatrist and therapist instead of Father's four experts who all expressed concern about Mother's parenting skills. In support of his argument, Father explains Mother's psychiatrist never observed Mother interacting with the children and Mother's therapist has not seen Mother apply her new coping skills with the children.

¶8 Although the court heard evidence concerning Mother's mental illness, there was evidence presented showing Mother has been stable since June 2010, Mother has complied with her doctors' orders and directives, and the children's safety is not in jeopardy under Mother's care. When making findings, the court noted the conflicting testimony about Mother's parenting skills. This court does not reweigh the evidence or witness credibility on appeal. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009). Because there is reasonable

evidence supporting the court's decision, the court did not abuse its discretion in granting joint custody.

#### **A. Custody Findings in the Decree**

¶9 Father argues some of the custody findings in the decree are erroneous and do not accurately reflect the court's findings on the record after trial. See *Reid v. Reid*, 222 Ariz. 204, 209-10, ¶¶ 19-20, 213 P.3d 353, 358-59 (App. 2009) (declining to find waiver despite a party's failure to raise lack of custody findings in the family court proceedings).

¶10 In a contested custody case, a court must consider and make findings on the record about all the relevant statutory factors enumerated in A.R.S. § 25-403(A) regarding the children's best interests.<sup>3</sup> A.R.S. § 25-403(B). At the conclusion of trial, the court made some A.R.S. § 25-403(A) findings. The decree contains findings on the remaining

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<sup>3</sup> Those factors are: 1) the wishes of the parents as to custody; 2) the wishes of the children; 3) the interaction and interrelationship of the children with the parents; 4) the children's adjustment to home, school and community; 5) the health of the parties involved; 6) which parent is more likely to allow the children frequent and meaningful contact with the other; 7) whether one parent has provided primary care of the children; 8) the extent of coercion or duress used by a parent in obtaining an agreement for custody; 9) whether the parents have complied with the education program requirements; 10) whether either parent was convicted of false reporting of child abuse or neglect; and 11) whether there has been domestic violence or child abuse. A.R.S. § 25-403(A)(1)-(11) (West 2012). This statute was revised on January 1, 2013. We cite to the previous version of the statute.

factors. Father contends the court failed to comply with A.R.S. § 25-403(B) by not making findings at the conclusion of the trial on three statutory factors, but nevertheless including such findings in the decree.

¶11 First, at the conclusion of the trial the court did not recite findings about A.R.S. § 25-403(A)(6) concerning which parent is more likely to allow the children frequent and meaningful contact with the other parent. However, the trial court did make findings concerning A.R.S. § 25-403(A)(6) in the decree. The decree provides that Father has not allowed Mother to participate in school conferences or medical appointments, sometimes cancels Mother's visits and appointments without significant reason, and omitted Mother from the children's school records. There is testimony supporting these findings. *See Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (App. 1971) ("The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom.").

¶12 The second factor Father challenges is A.R.S. § 25-403(A)(9), which requires both parents to comply with the parental education program requirements.<sup>4</sup> Father submitted his

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<sup>4</sup> In his motion for new trial, Father asserted A.R.S. § 25-403(A)(9) was not applicable.

certificate of completion on December 14, 2010. The joint pretrial statement provides Mother took the required parenting class. Mother disclosed a certificate of compliance showing she attended 10 hours of "Parenting with Integrity," which was admitted as an exhibit at trial. Father proposed a finding in his decree that "[b]oth parties have taken the Parent Information Program course required by statute." The decree provides both parties have taken the parenting class and the evidence shows this finding was not contested. *See Harsh Bldg. Co. v. Bialac*, 22 Ariz. App. 591, 593, 529 P.2d 1185, 1187 (App. 1975) (parties are bound by their stipulations which includes an admission or concession made in a judicial proceeding).

**¶13** The third factor Father challenges is A.R.S. § 25-403(A)(11) regarding domestic violence. During the underlying proceedings, Father obtained an order of protection against Mother. The allegations in Father's petition for the order of protection concern an incident that occurred in March 2010, where Mother held a knife while she was in bed and had thoughts of hurting herself and the children. This incident was addressed extensively at trial. The court acknowledged Mother's mental health issues and stated it had concerns about her parenting and visitation due to these issues. Nevertheless, the court also stated Mother's condition is now stable. In the decree, the court found no significant domestic violence

occurred and the evidence supports this finding. See A.R.S. § 25-403.03(A).

¶14 The court supplemented its findings from the conclusion of trial by including these additional findings in the decree. Because there is evidence supporting these findings, there was no error.

**B. Parenting Time with J.**

¶15 Father argues the court abused its discretion by awarding Mother 63 hours per week of parenting time with J. He contends this is contrary to J's best interest and it is inconsistent for the court to award limited parenting time with the four older children while granting extensive parenting time with J.

¶16 Since November 2010, Mother has had 63 hours per week of supervised parenting time with J. Mother's supervisor testified she observed very good parenting from Mother and has no concerns about Mother's ability to parent J. One of Father's experts testified that Mother could provide decent care to J. Another expert testified Mother and J developed an attachment to each other and another testified he had no concerns about Mother being inattentive or physically doing something bad to the children. The four older children's counselors put together a visitation schedule for Mother that included limited supervised parenting time and there was testimony the older children have

more complex needs than J. Based on this evidence, there was no error awarding Mother 63 hours per week of parenting time with J.

¶17 Father also argues the court erred by allowing unsupervised parenting time with J. Although there was testimony to the contrary, one expert testified she had not observed anything supporting a conclusion that Mother's visitation with J needs to be supervised, and another expert testified Mother will not necessarily need continued supervision with J.

¶18 Additionally, Father contends the court erred in ordering Mother's unsupervised parenting time be contingent upon continuing her current counseling because there was no evidence Mother received counseling since December 2010. According to the testimony, Mother's last in session therapy occurred in December 2010; however, Mother has been calling her therapist since that time. There was no error including this condition for Mother's parenting time.

¶19 Finally, Father asserts it is error for the decree not to require Mother to continue her medication and psychiatric treatment.<sup>5</sup> We agree. The evidence at trial shows once Mother

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<sup>5</sup> Although Father did not raise this issue in the joint pretrial statement, we decline to find it waived because it concerns the best interests and safety of the children. See *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App.

was properly diagnosed and given the correct medication, she has been stable. One expert discussed the importance of Mother taking her medication, another testified Mother is stable because of her medication and another testified that Mother's compliance with her medication assists in her ability to parent. Thus, continuing her medication should be a requirement for Mother's parenting time. Accordingly, we remand this issue to the family court to include a provision to this effect in the decree.

### **C. Parenting Time with Four Older Children**

¶20 Father argues the decree did not accurately reflect the parenting time orders for the four older children and contends the decree does not comply with A.R.S. § 25-312(4) because it does not specify how the parties are to divide the costs associated with Mother's supervised parenting time.<sup>6</sup> In the May 16, 2011 minute entry, the court affirmed the current orders for Mother's parenting time with the four older children

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1983) (the joint pretrial statement "controls the subsequent course of the litigation.").

<sup>6</sup> Because Father did not specify his objections to Mother's proposed decree and only asserted the findings in the decree are not an accurate reflection of the court's prior findings and rulings, this argument is waived. *Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990); *Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994). Nevertheless, because it concerns the best interests of the children, we address it.

and affirmed Mother's visitation schedule with them. The decree affirms Mother's current visitation schedule with the four older children, specifies the visitation allowed and references the temporary orders entered in 2010.

¶21 Under A.R.S. § 25-312(4), a dissolution decree should include provisions for child custody, support, maintenance of either spouse and the disposition of property. Although the statute requires the court to make provisions regarding custody and support, we decline to read the statute as requiring a provision for dividing costs of supervised visitation. See *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 432, 561 P.2d 750, 756 (App. 1977) (we cannot read into a statute something that is not there).

¶22 In the temporary orders, the court directed Father to pay the fees associated with Mother's supervised parenting time.<sup>7</sup> Additionally, in Father's proposed decree, he failed to provide how the costs associated with Mother's supervised parenting time should be divided. By affirming Mother's current visitation and directing supervised visits by an individual selected by Father, we infer the court intended to affirm the temporary orders in which it directed Father to pay for the costs of the supervised

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<sup>7</sup> In the joint pretrial statement, Father asserted the parties should equally divide the cost of Mother's supervised visits with J.

visits. See Ariz. R. Fam. L.P. 47(M) (temporary orders become ineffective upon termination of an action following entry of a final decree unless the final decree provides otherwise).

## **II. Debts**

¶23 Father argues the court erred by failing to divide the parties' debts in the decree. We agree.

¶24 During trial, the parties discussed the division of debts. The court stated it would order the debts to be divided equally between the parties and agreed the decree could include a hold harmless clause.<sup>8</sup> The decree does not provide for a division of debts. Accordingly, we remand this issue to the family court with instructions to include a division of the parties' debts consistent with its rulings.

## **III. Spousal Maintenance**

¶25 Father challenges the spousal maintenance award. We review an award of spousal maintenance for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998). We view the evidence in the light most favorable to sustaining the award and "will affirm the judgment if there is any reasonable evidence to support it."

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<sup>8</sup> In her objection to Father's proposed decree, Mother indicated she requested the debts be omitted from the decree so as not to impair the parties' ability to discharge the debts in bankruptcy. There is no evidence that Mother requested the division of debts be omitted from the decree. During trial, the parties discussed how the court should word the division of debts in the decree.

*Cullum v. Cullum*, 215 Ariz. 352, 354, ¶ 9, 160 P.3d 231, 233 (App. 2007).

¶26 Once a spouse establishes a statutory basis for spousal maintenance, the court must then consider the relevant factors listed in A.R.S. § 25-319(B) in setting the amount and duration of the award. *Leathers v. Leathers*, 216 Ariz. 374, 377, ¶ 10, 166 P.3d 929, 932 (App. 2007). Those factors include the standard of living established during the marriage; duration of the marriage; age, employment history, earning ability and physical condition of the spouse seeking maintenance; the supporting spouse's ability to pay and meet his own financial needs; the comparative earning power of the spouses; and the financial resources of the spouse seeking maintenance and the time necessary to enable the party seeking maintenance to find appropriate employment. A.R.S. § 25-319(B)(1)-(5), (9)-(10).

¶27 Father does not contest Mother's entitlement to spousal maintenance. Father contends the court did not consider A.R.S. § 25-319(B)(4) when determining the amount of maintenance to award because the award impacts his ability to meet his financial needs and the needs of the children.<sup>9</sup> See A.R.S. § 25-

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<sup>9</sup> Although Father arguably waived this argument by failing to raise it in his motion for a new trial or motion to alter or amend, see *State v. Davis*, 117 Ariz. 5, 7-8, 570 P.2d 776, 778-79 (App. 1977) (failure to raise error in motion for new trial results in waiver)), because we find there is reasonable

319(B)(4) (maintenance shall be in an amount the court deems just after considering "[t]he ability of the spouse from whom maintenance is sought to meet that spouse's need while meeting those of the spouse seeking maintenance."). Contrary to Father's argument, however, the court expressly stated the amount of maintenance will depend on Father's ability to pay.

¶28 The parties were married for 14 years and had a modest standard of living during the marriage. A.R.S. § 25-319(B)(1), (2). Mother does not have a job and has been unable to obtain employment. She worked for a few months in 2010 as a mother's helper, but has otherwise been a homemaker since 2002. A.R.S. § 25-319(B)(3). Mother's expenses are approximately \$2,800 per month.<sup>10</sup> A.R.S. § 25-319(B)(9).

¶29 Father, however, earns \$8,700 per month. A.R.S. § 25-319(B)(5). Although the expenses listed in Father's affidavit of financial information exceed his income, the court implicitly determined not all of his expenses were reasonable and/or some of his expenses were inflated.<sup>11</sup> See *Coronado Co., Inc. v.*

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evidence to support the court's finding on this issue, we elect, in our discretion, to address it.

<sup>10</sup> Mother requested \$2,000 per month in maintenance.

<sup>11</sup> Father's monthly expenses are over \$9,000. These expenses include health and dental insurance (\$577.56); child care costs (\$1,800); housing, utilities, food, clothing and transportation expenses (\$5,410); and miscellaneous expenses (\$1,214) excluding "monthly debt payments." Some of the monthly debt payments include expenses stated elsewhere on the affidavit

*Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981) ("Implied in every judgment, in addition to express findings made by the court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings."); and *Able Distrib. Co., Inc. v. James Lampe, Gen. Contractor*, 160 Ariz. 399, 402, 773 P.2d 504, 507 (App. 1989) (we will sustain presumptive findings if they are justified by any reasonable construction of the evidence.).

¶30 After initiating these proceedings, Father agreed to pay Mother spousal maintenance of \$650 per month plus other expenses totaling over \$900 per month. Because Father paid Mother over \$900 per month during these proceedings, the court properly determined he can afford to pay Mother \$1,000 per month in maintenance.

¶31 Finally, Father argues the court's order for indefinite spousal maintenance violates public policy because it

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such as auto loan payments. Additionally, after this appeal is remanded, many of the debts will be evenly divided between the parties. See *supra* ¶ 24. The affidavit of financial information reflects Father pays approximately \$4,000 per month in extraordinary expenses for the older children; however, he receives a \$5,000 per month subsidy to assist with those expenses. The court properly stated it would not consider the subsidy.

gives Mother no incentive to obtain employment.<sup>12</sup> Mother has been trying to obtain employment and the court determined her mental illness prevents her from working. *Cf. Hughes v. Hughes*, 177 Ariz. 522, 524, 869 P.2d 198, 200 (App. 1993) (it was error to award indefinite maintenance because there was no incentive to obtain employment and no findings that wife could not be employed). Mother's expenses exceed the amount of maintenance she is receiving from Father. Consequently, she has incentive to obtain employment.

#### CONCLUSION

¶32 For the foregoing reasons we affirm the decree in part and remand in part for entry of an amended decree that includes provisions concerning Mother's need to continue her medication and for division of the parties' debts.

/S/  
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ANDREW W. GOULD, Judge

CONCURRING:

/S/  
\_\_\_\_\_  
PATRICIA K. NORRIS, Presiding Judge

/S/  
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RANDALL M. HOWE, Judge

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<sup>12</sup> Father also argues the court was required to indicate the length of the maintenance award. In his motion for new trial and in his brief, however, Father acknowledges the court awarded indefinite maintenance.