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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

JOSIAH ADAM ENGLISH, III, *Petitioner/Appellant*,

v.

BLANCA NELLY GUTIERREZ CALZONCIT, *Respondent/Appellee*.

No. 1 CA-CV 15-0678 FC
FILED 1-31-2017

Appeal from the Superior Court in Maricopa County
No. FC2014-093711
The Honorable Theodore Campagnolo, Judge

AFFIRMED

COUNSEL

Josiah Adam English, III, Scottsdale
Petitioner/Appellant

Community Legal Services, Mesa
By Aleshia Fessel, Sarah Angela Youngblood
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Patricia K. Norris and Judge Patricia A. Orozco (retired) joined.

S W A N N, Judge:

¶1 Josiah Adam English, III, ("Father") appeals from the provisions in a decree of dissolution regarding legal decision-making, parenting time, past child support, and attorney's fees. He also appeals the adverse ruling on his petition for sanctions and contempt against Blanca Nelly Gutierrez Calzoncit ("Mother"). For the following reasons, we affirm the decree and the court's ruling on the petition for sanctions.

FACTS AND PROCEDURAL HISTORY

¶2 The parties have two minor children. In June 2014, Mother called the police to report domestic violence and obtained an order of protection against Father about two weeks later. Around the same time, Father filed a petition for dissolution seeking joint legal decision-making authority and an order that neither party could leave the state with the children.

¶3 On Mother's motion, the trial court issued temporary orders without notice, granting temporary sole legal-decision-making authority to her and supervised parenting time to Father. In August 2014, the trial court held a return hearing on temporary orders, awarded Father temporary unsupervised parenting time twice a week, and allowed Father to text Mother about exchanging the children despite the existing order of protection. The court appointed an advisor to prepare a report and make recommendations.

¶4 The court held an evidentiary hearing in December 2014 to address temporary orders and Father's pending petitions.[1] The trial court

[1] Father had moved to dismiss Mother's motion for temporary orders without notice, claiming he was not served with the motion and that Mother was denying him access to the children and had filed a motion for temporary orders seeking sole legal decision-making authority, arguing

affirmed the existing temporary orders and denied Father's motion to dismiss and his petitions for sanctions and criminal contempt.

¶5 After a trial in July 2015, the trial court found it was in the children's best interests to award Mother sole legal decision-making authority. The decree of dissolution set forth the parenting time schedule, and after considering Mother's fee affidavit, the court awarded Mother more than $22,000 in attorney's fees and costs. Father appeals.

DISCUSSION

¶6 Father contends his due process rights were violated and that several findings in the decree were erroneous, fabricated, or not supported by the evidence in the record.[2] We review for abuse of discretion. *Hurd v. Hurd*, 223 Ariz. 48, 51, ¶ 11 (App. 2009). We sustain the trial court's factual findings on appeal unless they are clearly erroneous. *Nash v. Nash*, 232 Ariz. 473, 476, ¶ 5 (App. 2013). "Even though conflicting evidence may exist, we affirm the trial court's ruling if substantial evidence supports it." *Hurd*, 223 Ariz. at 52, ¶ 16.

I. FATHER'S DUE PROCESS RIGHTS WERE NOT VIOLATED AT THE DECEMBER 16, 2014, HEARING.

¶7 Father contends, without elaboration, that his due process and equal protection rights were violated. In August 2014, Father filed a petition for sanctions and a petition for an order to show cause seeking criminal contempt against Mother for allegedly making false claims of domestic violence. The trial court denied Father's petitions. Father

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that Mother might flee with the children to Mexico and alleging Mother had denied him access to the children and made false domestic violence claims. He had also filed petitions for sanctions; to show cause regarding criminal contempt, repeating these allegations; and a motion for dismissal alleging Mother had ex parte communications with the court. The court denied these petitions.

[2] In his reply brief, Father claims the official transcript of the July 31, 2015 trial omitted the transcription of an audio recording he offered. Father moves to amend his opening brief or the trial transcript to include the missing transcription. We decline to address issues raised for the first time in a reply brief. *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 404 n.1 (2005). Moreover, the transcript of the audio recording was admitted into evidence as part of an exhibit.

contends he was treated unfairly and given insufficient time to present his case at the December 16, 2014, hearing addressing those claims. Mother argues Father waived any claims stemming from the December 16, 2014, hearing because he did not include that hearing's ruling in his initial notice of appeal. Father's amended notice of appeal, however, included the rulings from the December 16, 2014, hearing, and so we will review them.

¶8 The record does not support Father's claims. The trial court gave Father an opportunity to testify, cross-examine Mother, and call a Scottsdale police officer as a witness. The hearing lasted almost forty minutes longer than scheduled, and Father was allowed to go beyond the scheduled time so he could testify and cross-examine Mother. Although the hearing was originally set to deal with temporary orders, the trial court permitted Father to present his case regarding criminal contempt and sanctions. He was given due process and treated fairly.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT TAKING THE CHILDREN'S PASSPORTS.

¶9 Father asks this court to enter an order forbidding Mother from leaving the United States with the children and requiring that she turn over the children's Mexican passports to the trial court. Mother argues that Father has waived this issue by failing to first raise it in the trial court. But Father repeatedly asked the trial court to preclude Mother from traveling to Mexico with the children and to confiscate the children's Mexican passports. By failing to include the requested orders in the decree, the court implicitly denied them. *See Qwest Corp. v. Kelly*, 204 Ariz. 25, 34, ¶ 26 (App. 2002). The issue is not waived.

¶10 Father argues such orders are necessary because Mother is a flight risk because of her Mexican citizenship and her recent visit to the Mexican embassy. Although Father testified that Mother had threatened to take the children to Mexico, Mother denied she would flee with the children and testified she was seeking help from the embassy. On appeal, we do not re-weigh the evidence even if conflicting evidence exists. *Hurd*, 223 Ariz. at 52, ¶ 16; *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 12 (App. 2002). The trial court did not abuse its discretion in accepting Mother's testimony. Accordingly, the implicit denial of Father's requests was not abuse of discretion.

¶11 Father argues the decree allows Mother to disappear to Mexico with the children. It does not. The trial court ruled that "the federal Parental Kidnapping Prevention Act [PKPA] does not apply and that no

international law concerning the wrongful abduction or removal of children applies." Under A.R.S. § 25-402(A), the court must confirm its authority "to the exclusion of any other state, Indian tribe or foreign nation by complying with the . . . [PKPA]." This jurisdictional finding indicates only that Arizona has jurisdiction consistent with the PKPA. Like any parent, Mother must proceed in accordance with Arizona law if she wishes to relocate to Mexico with the children. *See* A.R.S. § 25-408.

III. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

¶12 Father argues that many of the court's findings of fact on legal decision-making and parenting time under A.R.S. §§ 25-403 and -403.01 are unsupported by the evidence and that some of the supporting evidence was fabricated. Mother argues that Father's requested relief on appeal is an amended judgment, that this court lacks the authority to amend the trial court's judgment, and that Father's only remedy would have been filing a motion for a new trial under ARFLP 83. Though Father's pro per briefs do request that we enter such relief, we read his arguments also to ask us to determine whether the trial court abused its discretion in making its findings. *See Nash*, 232 Ariz. at 476, ¶ 5.

¶13 Alternatively, Mother argues that to the extent the "court erred in recounting the testimony given at trial," such error is harmless and does not warrant reversing the decree pursuant to ARFLP 86.[3] We address each challenged finding in turn.

A. Lack of Agreement Concerning Custody.

¶14 The trial court found that Father denied entering into the April 1, 2015, ARFLP 69 agreement and that his claims of coercion and manipulation were evidence of "the difficulty in obtaining any meaningful agreement with Father." The court again cited Father's claim that he did not willingly enter into the Rule 69 agreement in examining the parties' past, present, and future ability to cooperate in making decisions regarding the children, *see* A.R.S. § 25-403.01(B)(3), and whether either party used coercion to obtain a legal decision-making or parenting-time agreement, *see* A.R.S. § 25-403(A)(9). Father contends that he never denied entering the Rule 69 agreement and never claimed he was coerced.

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[3] ARFLP 86 provides, in relevant part, "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

¶15 Though we do not see, and Mother does not point to, anything in the record to suggest that Father ever denied entering the agreement, there is ample evidence of "the difficulty in obtaining any meaningful agreement with Father" and that he claimed coercion during the proceedings. On April 22, Mother, through her attorney, asked to change the exchange location to a more central one. Father responded "Sure I will agree to that" and also cordially asked to change the exchange times and weekend parenting time. On April 29, Mother's attorney e-mailed Father indicating that Mother agreed to most of his requests but wanted to keep the Saturday schedule unchanged because of the bus schedule. Mother's attorney offered to draft a document to submit to the trial court for his review and signature. A few hours later, Father e-mailed Mother's attorney stating, "I am NOT agreeing to any of the terms we previously discussed regarding my parenting time." Father then accused Mother of not cooperating, playing games, and "ly[ing] on [his] name." He accused Mother's attorneys and the court system as a whole of racial bias before emphasizing at length that he wished to keep the original Rule 69 agreement and threatening to report Mother's attorneys to the bar association if they attempt to argue the previous emails showed he agreed to change the custody agreement.

¶16 At trial, he testified that he refused to agree because he felt Mother's attorney was being manipulative. Text messages between Mother and Father referencing the potential changes show Father to be combative, and he attempted to get Mother to follow his proposed schedule after he had expressly insisted on keeping to the original agreement. Father also testified that the previously assigned judge coerced him into allowing his daughter's therapist to attend sessions in his home. Although the court may have misstated which specific agreements Father disputed, the findings that Father claimed manipulation and coercion and the difficulty in getting him to enter into agreements are supported by the record.

B. Custodial Interference and Domestic Violence.

¶17 Father attacks the credibility of Mother and her attorneys regarding the allegations that he was "convicted of custodial interference" with his older child. The court, however, did not mention any conviction in addressing the best-interests factors. And Father admitted he was held in civil contempt and jailed for eight months for removing his older child from Texas. There was no error.

¶18 The trial court found that Father struck Mother in the nose, but did not determine whether it was intentional. Father denied having *any*

physical contact with Mother and argues she fabricated the claim of domestic violence. Mother testified Father elbowed her in the nose and pushed her. On appeal, we defer to the trial court's determination of witness credibility and the weight to give to conflicting evidence. *See Hurd*, 223 Ariz. at 52, ¶ 16; *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13 (App. 1998). Mother's testimony is sufficient to support the finding that Father struck Mother.

C. Past, Present, and Future Abilities of the Parents to Cooperate in Decision-Making.

¶19 The court found "evidence that Mother is fearful of Father, does not want to communicate with him, and believes that he is paranoid." Father disputes the finding that Mother is fearful of him and argues Mother never testified that he is paranoid. Mother testified that (1) she was scared of Father, (2) he kept her isolated and without a phone for a while, (3) he controlled the money, and (4) he did not let her have friends or go shopping. Mother also testified that Father followed her, was "bipolar," and thought everyone was unfair to him and treated him badly. She worried about his mental state and requested he undergo a psychological evaluation because of the "ideas he has in his head." Although Mother did not use the specific term "paranoid," her testimony, his e-mails to Mother's attorneys, and his text messages to Mother support the substance of the court's findings, and we find no clear error.

¶20 Father also argues that the trial court ignored evidence that Mother sent him derogatory notes, which show that Mother was not afraid of him. The trial court referred to this evidence in finding that neither party was more likely to allow frequent and meaningful contact with the other party absent a court order. *See* A.R.S. § 25-403(A)(6). The court reasonably found that this factor did not weigh in favor of either party and did not ignore the evidence.

D. Past, Present, and Potential Future Relationship Between the Parent and the Child.

¶21 The trial court found both parents needed mental health counseling and parenting classes. The court also found that based on the court-appointed advisor's report, "Mother has been seeking counseling and classes." Father argues there was no evidence Mother has taken any "mental health classes." Evidence, however, demonstrated that Mother attended group therapy and parenting classes at a domestic violence shelter. There was no error.

E. Interaction and Interrelationship of the Child with Others.

¶22 The trial court found Father has custody of an older child from a previous relationship because her mother "has drug issues." Father argues he never testified to this and that this finding shows how the trial court retaliated against him. Father testified that he had legal custody of his older child and moved with her to Arizona when her mother married a "dangerous man." Father stated her husband was a drug dealer in an earlier pleading, which was admitted into evidence. Thus, the trial court's finding is not clearly erroneous, and it does not show any prejudice or bias.

¶23 The trial court also found that "Mother has taken the children to Mexico to visit with her family members." Father contends this finding is not supported by the evidence. It is undisputed that Mother has family in Mexico and that the parties' older child was born in Mexico and lived there briefly. Although there is no evidence that Mother took both children to Mexico to visit relatives, the mistake was not prejudicial to Father. The court did not find the children had any *significant relationship* with Mother's family in Mexico. We see no reversible error.[4] *See* ARFLP 86.

F. Mental and Physical Health of all Individuals Involved.

¶24 Father argues there is no evidence supporting the trial court's findings that Mother's mental health has been adversely affected by the parties' relationship or that he needs mental-health counseling. The court specifically found Father verbally abused Mother and that Mother was getting help to cope with her relationship with Father. These findings are supported by the evidence. Mother was concerned about Father's state of mind based on the allegations in his pleadings. The court-appointed advisor recommended Father attend "domestic violence classes" to learn how "*all forms* of domestic violence" impact the family and advised Father to consider "individual therapy" to address his own trauma. This supports the court's finding that "counseling" is appropriate. Moreover, the order was not prejudicial to Father because the court found "both parents need mental health counseling and appropriate parenting classes."

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[4] In his reply brief, Father suggests this finding is prejudicial because Mother filed a letter of intent to relocate the children to Mexico after the decree was entered. However, the post-decree filings are not relevant to deciding whether this misstatement was prejudicial. The relocation proceedings will be determined independently based on evidence presented at that hearing.

¶25 The trial court's findings regarding the children's best interests are supported by reasonable evidence. The record and trial court findings suggest the parties are uncooperative, argumentative, and cannot co-parent. The trial court did not, as Father alleges, disregard the law, retaliate against him, or otherwise abuse its discretion. Accordingly, we affirm the award of sole legal decision-making to Mother.

IV. THERE WAS NO ERROR IN SETTING FATHER'S PARENTING TIME.

¶26 Under the temporary orders entered in April 2015, Father had parenting time from 9 a.m. Tuesdays to 9 a.m. Wednesdays, 9 a.m. to 7 p.m. Thursdays, and 10 a.m. to 5 p.m. Sundays. The decree awarded Father parenting time on the first, second, and fourth weekends every month and an equal amount of holidays and summer vacation time. Although the decree awarded Father less parenting time in the regular schedule, it added equal holiday and vacation time Father did not have under the temporary orders. Given the animosity between the parties and the facts in the record, we see no abuse of discretion.

V. THE COURT DID NOT ERR BY PERMITTING THE TELEPHONIC APPEARANCE OF THE COURT-APPOINTED ADVISOR.

¶27 At trial, Father orally requested that the court-appointed advisor testify in person. The trial court denied the request on the grounds that Father did not previously file a motion pursuant to ARFLP 10. Father argues he was not required to file a motion for the advisor to appear in person. ARFLP 10(E)(5) permits a party to cross-examine the advisor without listing the advisor as a witness. Nothing in Rule 10 requires the advisor to testify in person. The advisor was available telephonically at the trial, yet Father did not call her as a witness to address what he alleges are false, inflammatory, and misleading statements in her report. Father did not address the allegedly false statements in his testimony.[5] Accordingly, we find no abuse of discretion.

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[5] Father's appellate brief includes his version of events which is not part of the trial transcript or supported by any other citations to the record. We do not consider statements unsupported by citations to the record. *See* ARCAP 13(a). Father could have made these statements at trial to rebut the advisor's report, but he failed to do so.

VI. FATHER WAIVED HIS ARGUMENTS ON THE INSUFFICIENCY OF THE PARENTING PLAN.

¶28 Father contends the parenting plan set forth in the decree omitted four of the elements required by A.R.S. § 25-403.02(C). Mother argues these requirements only apply to parenting plans proposed by the parties and not court-issued decrees. Section 25-403.02(D) requires the trial court to determine all elements of a parenting plan not agreed to by the parties. These requirements are not limited to parenting plans proposed by the parties. However, "a litigant is required 'to object to inadequate findings at the trial court level so that the court will have an opportunity to correct them, and failure to do so constitutes a waiver.'" *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 39 (App. 2011) (citation omitted). Father failed to raise the missing elements to the trial court; accordingly, he has waived this argument.

VII. THE ATTORNEY'S FEES AWARD TO MOTHER'S ATTORNEYS WAS PROPER.

¶29 The trial court awarded attorney's fees to Mother on the grounds that Father's unreasonableness increased the cost of litigation. Father contends the court failed to support this finding with any examples. However, the court specifically noted (1) Father filed numerous specious pleadings to increase the cost of litigation or in an attempt to delay the case and (2) repeated unfounded "aspersions" and allegations of racism that, if made by an attorney, would be grounds for discipline. An award of attorney's fees will be affirmed on appeal absent an abuse of discretion. *MacMillan*, 226 Ariz. at 592, ¶ 36.

¶30 Father contends his filings were merely an attempt to assert his rights and imposing attorney's fees constitutes unlawful retaliation. Father filed multiple pleadings, including motions for sanctions and contempt, asserting that Mother fabricated allegations of domestic violence. This supports the finding that Father's duplicative pleadings increased the cost of litigation. Father also filed pleadings making unfounded allegations that Mother's counsel and court personnel treated Father unfairly based on his race and gender. Further, the court found that Father had knowingly accused Mother of making false claims by claiming that she and her attorney "had been dishonest, deceptive and unethical towards him" without presenting evidence to support his accusations. *See* A.R.S. § 25-415(A). We conclude that the finding of unreasonableness is supported by the record and justified an award of attorney's fees under A.R.S. §§ 25-324 and -415.

¶31 Father also argues he should not have to pay Mother's attorney's fees because the parties entered a Rule 69 agreement in September 2014 that they would pay their own attorney's fees. However, a Rule 69 agreement does not protect a party from sanctions if the party behaves unreasonably, as Father did here.

VIII. THE EFFECTIVE DATE OF THE CHILD SUPPORT ORDER WAS PROPER.

¶32 Father argues his child support obligation should have begun in September 2015 instead of August 2014 as ordered in the decree. Pursuant to A.R.S. § 25-320(B), the child support obligation starts on the date a petition for dissolution is filed. The petition for dissolution was filed on July 7, 2014. There was no error.

CONCLUSION

¶33 We affirm the decree and the orders resulting from the December 2014 hearing. As the overall successful party on appeal, Mother is entitled to an award of costs on appeal upon compliance with ARCAP 21. *See* A.R.S. § 12-342(A).

AMY M. WOOD • Clerk of the Court
FILED: AA