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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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:

MICHELLE ADAIR-LEE, *Petitioner/Appellant*,

v.

STACY LEE, *Respondent/Appellee*.

No. 1 CA-CV 19-0762 FC

FILED 12-1-2020

Appeal from the Superior Court in Maricopa County

No. FC2017-093726

The Honorable Joshua D. Rogers, Judge

AFFIRMED

COUNSEL

Scott L. Patterson P.L.L.C., Tempe
By Scott L. Patterson
Counsel for Petitioner/Appellant

MEMORANDUM DECISION

Judge D. Steven Williams delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge David D. Weinzweig joined.

WILLIAMS, Judge:

¶1 In this dissolution proceeding, Michelle Adair-Lee (“Mother”) appeals from the award of joint legal decision-making authority, unsupervised parenting time, and attorneys’ fees to Stacy Lee (“Father”). Because Mother shows no abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mother married Father in 2003. They share a minor son, born in 2009. Mother petitioned for dissolution in June 2017. After court-ordered mediation with Conciliation Services, the parties agreed to joint legal decision-making authority in November 2017. The superior court entered an order consistent with their agreement in December 2017 (“the 2017 order”). Neither the agreement nor the 2017 order addressed parenting time or stated that Father was a registered sex offender.

¶3 In January 2018, Father moved for temporary parenting time orders, alleging that Mother was not letting him see the child. At a subsequent evidentiary hearing, Mother opposed overnight parenting time and, despite the prior agreement, objected to joint legal decision-making authority. Mother testified that after the parties agreed to joint legal decision-making authority, she learned of new information that led her to believe Father posed a significant risk of harm to the child. Mother testified that the child does not have his own room at Father’s residence and had slept in Father’s bed. Mother also testified she was not comfortable with overnight visits because, in 2008, Father’s adult daughter, from a different marriage, who was a victim of Father’s 1984 sexual misconduct conviction, told Mother she was not comfortable allowing Father to be around his grandchildren. In contrast, Father testified that the child sleeps in his own room and had only, on occasion, fallen asleep in his bed. Father also testified he had not committed any sexual offenses since the 1984 conviction, and Mother did not allege that Father had any inappropriate contact with the child.

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¶4 The superior court found the mediation agreement was binding under Arizona Family Law Rule of Procedure (“Rule”) 69 and that Mother provided no basis for setting aside the agreement. The court specifically rejected Mother’s claim that she changed her mind after hearing from Father’s adult daughter, who shared her discomfort when Father was around her own children. The court found that, based on the evidence, Father did not pose a significant risk to the child and that joint legal decision-making and unsupervised parenting time were not precluded under Arizona Revised Statutes (“A.R.S.”) section 25-403.05(A). The court also awarded Father \$20,000 in interim attorneys’ fees based on the significant financial disparity favoring Mother.

¶5 Mother petitioned for accelerated relief from this order under Rule 85, alleging fraud based on Father’s misrepresentations at the hearing and in response to Mother’s discovery requests. She claimed that at the time of the mediation agreement and temporary orders hearing, she only knew what Father had told her about his prior convictions and did not learn the details of those convictions until after the hearing. Mother also alleged that, contrary to Father’s testimony, he did not successfully complete probation for the 1984 conviction; it was revoked. She further alleged that Father failed to disclose his recent guilty plea for failing to register as a sex offender. As a condition of probation, Father cannot have contact with minors, including his child, without the approval of the probation department or court order. Mother also moved to modify the temporary orders, arguing that these allegations constituted a substantial and continuing change of circumstances. Father responded that he was attempting to modify the terms of his recent plea agreement to allow contact with his child and denied that his testimony at the earlier hearing was fraudulent. The court denied the motion to modify, finding the recent plea agreement was not a substantial and continuing change of circumstance and delayed ruling on the motion for relief from the temporary order until Father completed his criminal sentencing hearing. The court did, however, suspend Father’s parenting time pending resolution of his criminal case.

¶6 The criminal court granted Father’s motion to set aside his plea agreement, but again precluded any contact with minors, including his child, as a condition of his release. The family court then denied Mother’s motion for relief from the temporary orders, finding the condition of Father’s release was temporary and did not constitute a continuing change warranting modification. However, the family court again precluded Father’s parenting time until sentencing because the terms of Father’s release barred contact with minors. Father was ultimately sentenced to

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ten-years supervised probation and prohibited from contacting minors, unless the family court allowed contact with his child.

¶7 At the dissolution trial, Mother testified to the details of Father’s prior convictions and offered exhibits related to those convictions. She testified that she agreed to joint legal decision-making authority without knowing the details of the prior conviction and would not have agreed had she known all the facts. The decree specifically found that Father did not pose a significant risk to the child and ordered unsupervised overnight parenting time and joint legal decision-making authority. The court awarded Father an additional \$18,000 in attorneys’ fees based on the significant financial disparity favoring Mother. The court later denied Mother’s motion to amend the decree under Rule 83.

¶8 Mother filed a timely notice of appeal from the order denying relief from the temporary order, the decree, and denial of the motion to amend the decree. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1) and (5). Father did not file an answering brief on appeal. Although we could regard this as a confession of error, we exercise our discretion and consider the merits of the appeal. *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 2 (App. 2002).

DISCUSSION

I. *The Temporary Order and Order Denying Relief from the Temporary Order Are Not Appealable.*

¶9 Mother contends the temporary order and the 2017 order did not comply with A.R.S. § 25-403.05(A). She also appeals from the denial of her motion for relief from the temporary orders. Temporary orders are not appealable. *Gutierrez v. Fox*, 242 Ariz. 259, 264, ¶ 12 (App. 2017). The proper challenge to a temporary order is by special action, and Mother failed to bring a special action regarding these orders. *See DePasquale v. Thrasher*, 181 Ariz. 333, 336–37 (App. 1995). In any event, the court subsequently reconsidered both legal decision-making authority and parenting time based on additional evidence and testimony presented at trial, and Mother has also appealed that ruling.

II. *Evidence Supports the Award of Joint Legal Decision-Making Authority and Unsupervised Parenting Time.*

¶10 The decree awarded Father joint legal decision-making authority and unsupervised overnight parenting time. We review legal decision-making orders, parenting time orders, and the denial of a motion

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to amend for an abuse of discretion. *Nold v. Nold*, 232 Ariz. 270, 273, ¶ 11 (App. 2013) (legal decision-making and parenting time orders); *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10 (App. 2009) (Rule 83 motions).

¶11 Mother contends the superior court misapplied A.R.S. § 25-403.05 by focusing on her credibility and giving too much deference to the March 6, 2018 order affirming the agreement for joint legal decision-making. Mother argues the court found that she “waived” the protections of § 25-403.05 by relying on that order. Although the court “affirmed” the March 6, 2018 order, its findings do not suggest that the court improperly deferred to the prior agreement or found Mother waived anything. The decree set forth detailed findings offered to support the court’s independent conclusion, based on the evidence presented at trial, that Father did not pose a significant risk to the child. Mother has not shown that the record could not support this conclusion.

¶12 The prior acts took place nearly 40 years ago, and no evidence was presented that Father has committed similar acts since then. Mother has not alleged that Father ever assaulted their child, or any child, after his 1984 conviction. The presentence report regarding Father’s more recent charge for failing to register as a sex offender found he was a medium to low risk to re-offend, but noted “additional sex offender specific assessments need to be completed . . . to determine a more accurate risk level.” The evidence presented also shows that Father’s adult daughter, who was one of the victims of the 1984 crimes, and her children have an ongoing relationship with Father. The court did not find Mother’s allegations that Father showered with and regularly shared a bed with the child to be credible. Mother alleged the showering incidents occurred in 2016, meaning she knew of them before the evidentiary hearings, but she did not bring them up at the temporary orders hearing.

¶13 Despite Mother’s testimony to the contrary, there was evidence to support the finding that she was “fully aware of Father’s criminal history.” Among other things, the evidence showed that Father’s adult daughter avowed she had a conversation with Mother and Father in 2008, at which time “it appeared that [Mother] already was aware of my father’s past sexual child abuse.” She denied telling Mother that Father should not be allowed to have overnight parenting time. Father testified he told Mother about his background before they got married: “I talked to her about the criminal history. I talked to her about the molestation of my children.” This supports a finding that he told Mother he molested more than just his daughter, which differs from Mother’s testimony that Father only admitted to inappropriately touching his daughter one time.

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¶14 Mother argues other evidence supports her claim that she was unaware of the details until after the temporary orders hearing. For example, Father admitted he was the only one at the temporary orders hearing who knew the details of what he had done to his children. Also, Father's earlier testimony regarding the termination of his probation in 1989 was not accurate in some respects. Although Father failed to complete some of the terms of his probation, and his probation was terminated unsuccessfully, the court took no further action against Father and did not incarcerate him for additional time as would have been authorized. Mother also points to Father's 2011 conviction for financial crimes against a vulnerable adult. However, those crimes were not relevant to the court's analysis under A.R.S. § 25-403.05.

¶15 The evidence before the superior court was conflicting and, although Father's prior crimes are of the most serious nature, this court does not reweigh the evidence on appeal or make credibility determinations even though another judicial officer may have ruled differently. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16 (App. 2009). Viewed in the light most favorable to upholding the ruling, Mother has not shown the record could not support the decision she challenges.

¶16 Finally, Mother contends the record does not support the finding that Father had no mental health issues. See A.R.S. § 25-403(A)(5) (courts shall consider the parties' mental health in determining the child's best interests). According to Mother, Father's criminal history constitutes a mental health issue that the court failed to consider. The court expressly considered the relevant facts from Father's criminal history in addressing A.R.S. § 25-403.05. Therefore, the court did not abuse its discretion by not also specifically addressing it under A.R.S. § 25-403(A)(5).

¶17 Mother has shown no abuse of discretion regarding joint legal decision-making authority and unsupervised parenting time.

III. *The Superior Court Did Not Abuse Its Discretion in Awarding Attorneys' Fees to Father.*

¶18 The court awarded Father a total of \$38,000 in attorneys' fees based on the significant financial disparity favoring Mother. Courts may award attorneys' fees after considering the parties' financial resources and "the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324(A). We review an award of attorneys' fees under A.R.S. § 25-324 for an abuse of discretion. *Myrick v. Maloney*, 235 Ariz. 491, 494, ¶ 6 (App. 2014).

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¶19 Mother's income is far more than Father's \$775 per month in social security benefits. This significant disparity, despite the lack of unreasonableness by either party, supports the award of attorneys' fees to Father.

CONCLUSION

¶20 The joint legal decision-making and unsupervised parenting time orders, as well as the award of attorneys' fees in the decree of dissolution are affirmed.



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