IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

JOHN GARCIA, *Petitioner/Appellant*,

v.

MELISSA ROBINSON, *Respondent/Appellee*.

No. 1 CA-CV 19-0726 FC
FILED 4-8-2021

Appeal from the Superior Court in Maricopa County
No. FC2018-006042
The Honorable Bradley H. Astrowsky, Judge

AFFIRMED

COUNSEL

John Angel Garcia, Tucson
Petitioner/Appellant

Melissa Robinson, Address protected
Respondent/Appellee

MEMORANDUM DECISION

Judge Brian Y. Furuya delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Samuel A. Thumma joined.

F U R U Y A, Judge:

¶1 John Garcia ("Father") appeals the superior court's order establishing legal decision-making authority and parenting time as to his minor child ("Child"). Father claims error, in part, based on Melissa Robinson's ("Mother") failure to comply with a pretrial court order and the court's alleged failure to make requisite statutory findings. Because Father has not established any error or abuse of discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The parties share one minor child. In September 2018, Father filed a petition to establish legal decision-making and parenting time. Trial was held in September 2019.

¶3 At trial, without objection, the superior court took judicial notice of Father's felony criminal conviction for aggravated assault, a domestic violence offense committed against Mother in September 2017. *See* Ariz. Rev. Stat. ("A.R.S.") § 25-403.03(C) (permitting the superior court to consider "[f]indings from another court of competent jurisdiction" to determine if a person has committed an act of domestic violence). In the presence of Child, Father strangled Mother to the point she lost consciousness. As a result, Mother also was unable to swallow for some time. Father admitted this occurrence.

¶4 The superior court found that this domestic violence was significant and precluded Father from being involved in legal decision making for the Child. *See* A.R.S. § 25-403.03(A). Accordingly, after making specific best-interests findings under A.R.S. §§ 25-403(A) and -403.01(B), the court awarded Mother sole legal decision-making authority, which Father had acquiesced to in his petition. The court found that it would not be "in Child's best interests to develop a relationship with Father while he [wa]s in prison for a violent assault against Child's mother," and thus denied Father's request for parenting time.

¶5 Father timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶6 Father challenges the superior court's order establishing legal decision-making and parenting time on various grounds, which we review for abuse of discretion.[1] *See DeLuna v. Petitto*, 247 Ariz. 420, 423, ¶ 9 (App. 2019) (involving legal decision-making and parenting time). Accordingly, Father is required to show an error of law or that the record "is devoid of competent evidence to support the court's decision." *Woyton v. Ward*, 247 Ariz. 529, 531, ¶ 5 (App. 2019). We will not disturb the court's factual findings unless they are clearly erroneous. *Strait v. Strait*, 223 Ariz. 500, 502, ¶ 6 (App. 2010). "A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue of State of Ariz.*, 206 Ariz. 480, 482, ¶ 9 (App. 2003). We view the evidence in the light most favorable to sustaining the court's rulings. *Lehn v. Al-Thanayyan*, 246 Ariz. 277, 283, ¶ 14 (App. 2019).

¶7 First, Father challenges the timeliness of Mother's filing of her separate pretrial statement and the exchange of trial exhibits. However, Father never raised objections regarding Mother's alleged procedural failings to the superior court, and therefore this issue is waived on appeal. *See Canyon Ambulatory Surgery Ctr. v. SCF Ariz.*, 225 Ariz. 414, 418, ¶ 10 n.11 (App. 2010) ("We generally do not consider issues raised for the first time on appeal."); *see also Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 86 (App. 1995) ("We cannot consider issues and theories that were not presented to the court below.").

¶8 Second, Father contends that the superior court solely relied on Mother's pretrial statement, rather than witness testimony, to inform some of its best-interests and domestic violence findings entered under A.R.S. §§ 25-403(A), -403.01(B), and -403.03(C). However, this contention is unfounded. The record reflects the court's consideration of the evidence presented at trial, including the demeanor of the witnesses, exhibits, and

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[1] Mother did not file an answering brief. In the exercise of our discretion, and because the best interests of a minor child are implicated, we decline to treat her failure to file an answering brief as a confession of error. *See Michaelson v. Garr*, 234 Ariz. 532, 544, ¶ 4 n.3 (App. 2014) (citing *Gonzales v. Gonzales*, 134 Ariz. 437, 437 (App. 1982) ("Although we may regard [the] failure to respond as a confession of reversible error, we are not required to do so.")).

case history, as well as the parties' arguments and agreements. Both Mother and Father testified at trial, and contrary to Father's contention, he was allowed to refute Mother's testimony. *See Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 18 (App. 2015) ("[T]he family court is in the best position to judge the credibility of witnesses and resolve conflicting evidence, and appellate courts generally defer to the findings of the family court.").

¶9 Third, Father objects to the court-appointed best interests attorney's ("BIA") participation at trial. But the BIA did not "testify in court" as Father contends. Rather, consistent with the appropriate scope of her role, the BIA cross-examined Mother, made arguments to the superior court, and otherwise properly acted in a representative capacity in advocating for the Child's best interests. *See Askamit v. Krahn*, 224 Ariz. 68, 71–72, ¶¶ 12, 14 (App. 2010); ARFLP 10.

¶10 Fourth, Father argues the superior court failed to make findings under A.R.S. § 25-403.03(D), (E), and (F) before entering its legal decision-making and parenting time orders. No error is evident in this regard.

¶11 Subsection (D) of this statute provides that if the superior court determines a parent has committed an act of domestic violence, a rebuttable presumption arises that awarding sole or joint legal decision-making to that parent is contrary to a child's best interests. A.R.S. § 25-403.03(D). Subsection (E) sets forth factors the court must consider in determining if the offending parent has rebutted the presumption. A.R.S. § 25-403.03(E). However, when the court finds the existence of "significant domestic violence pursuant to section 13-3601," the court may not award legal decision-making to the perpetrator of such "significant domestic violence." A.R.S. § 25-403.03(A).

¶12 Here, the superior court took judicial notice of Father's conviction for assaulting Mother in the presence of Child and expressly found such conduct to constitute significant domestic violence. *See id.* Having made this finding, subsections (D) and (E) were inapplicable, and Father's arguments concerning any failure by the court to comply with those subsections are unavailing. Further, even if this were not the case, subsections (D) and (E) concern only parents who are "*seeking* sole or joint legal decision-making." A.R.S. § 25-403.03(D), (E) (emphasis added). And here, Father's petition makes clear that he sought neither sole nor joint legal decision-making authority. Rather, he requested that Mother be granted sole legal decision-making authority because he was incarcerated. Therefore, Father has failed to show any error.

¶13 With regard to Father's arguments concerning subsection (F), this provision states that before the superior court can award a parent who has committed an act of domestic violence parenting time with their child, that parent must prove to the court's satisfaction that such parenting time would not endanger the child or significantly impair the child's emotional development. A.R.S. § 25-403.03(F). Here, the court found that it would not be in Child's best interests to award Father any parenting time. Therefore, there was no need to further consider subsection (F)'s requirements. Thus, subsection (F) is inapplicable.

¶14 Lastly, Father argues the superior court failed to make findings under A.R.S. § 25-403.02(C)(4), (6)–(7) (setting forth elements to include in a parenting plan). However, subsection (C) of A.R.S. § 25-403.02 is inapplicable, again because Father was not awarded any parenting time.

CONCLUSION

¶15 Because Father has failed to establish any error or abuse of discretion by the superior court, we affirm.

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