

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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 Matter of:

CHRISTINA ZIMMERMAN,
Petitioner/Appellee,

v.

JEREMY K. ATWELL,
Respondent/Appellant.

No. 1 CA-CV 21-0099 FC
FILED 10-26-2021

Appeal from the Superior Court in Maricopa County
No. FC2019-010933
The Honorable Bradley H. Astrowsky, Judge

AFFIRMED

COUNSEL

Lorona | Mead, PLC, Phoenix
By Frank R. Mead
Counsel for Respondent/Appellant

Jennings, Haug, Cunningham, LLP, Phoenix
By Blake E. Whiteman
Counsel for Petitioner/Appellee

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MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Maurice Portley joined.¹

T H U M M A, Judge:

¶1 Jeremy Atwell (Father) challenges the superior court's judgment denying his counter-petition seeking to modify parenting time, as well as the denial of his Rule 83 motion challenging the court's child support calculations. Because Father has shown no reversible error, the judgment and order are affirmed.

FACTS² AND PROCEDURAL HISTORY

¶2 Father and Christina Zimmerman (Mother), who were never married, share one minor child. In 2017, Mother petitioned to establish paternity, legal decision-making, parenting time and child support. Later in 2017, the court entered a stipulated ruling resolving the petition and establishing paternity, awarding joint decision-making authority for all major decisions about medical and educational matters, deferring to the child's pediatrician for matters of disagreement. The 2017 order also established that neither party would pay child support but would split the cost of the child's private education. Father was to have parenting time one weekend per month and each Wednesday night until Thursday morning.

¶3 In January 2020, Mother petitioned for a modification of legal decision-making, seeking final legal decision-making authority over all medical issues based on Father's alleged failure to cooperate. In April 2020, Father responded and filed a counter-petition seeking to modify parenting time to equal parenting time, and a resulting change in child support.

¹ The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

² This court views the evidence in the light most favorable to upholding the superior court's factual findings. *Powers v. Taser Int'l Inc.*, 217 Ariz. 398, 399 n.1 ¶ 4 (App. 2007).

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¶4 In December 2020, after an evidentiary hearing, the court found Mother had shown the required “substantial and continuing” change in circumstances, Arizona Revised Statutes (A.R.S.) § 25-327(A), given “Father has not followed the current Order and has unreasonably refused/delayed the child’s access to therapy despite the pediatrician’s recommendation for same.” Granting Mother’s petition, including finding that doing so was in the child’s best interest, the court awarded joint legal decision-making, with Mother making the final decision if they could not agree in good faith. That ruling is not challenged in this appeal.

¶5 The court denied Father’s counter-petition, finding:

[A]s to parenting time, a substantial and continuing change does not exist. The child is not comfortable in Father’s home; Father does not properly supervise the interaction between the child and the child of Father’s significant other; and Father’s uninvolved parenting style would create harm to the child should Father’s parenting time increase. Father also could not provide any credible testimony regarding any specific changes in circumstances since 2017, that would justify a change in the parenting time schedule. Furthermore, it is clear that Father’s request for more parenting time was done in retaliation to Mother’s Petition. Father only asked for more parenting time after Mother[] filed her Petition, which is consistent with what Father told Mother in 2017 via an e-mail, i.e. Father told Mother that if she takes him to Court he will then ask for 50/50 parenting time.

Thus, the court denied Father’s counter-petition “in its entirety” in a Rule 78(c) final judgment.

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¶6 Noting Father “did not come close to properly filling out his” affidavit of financial income, the court looked to other evidence to find that Father’s monthly gross income was \$7,419 “at a minimum.” Applying the Arizona Child Support Guidelines, A.R.S. § 25-320 app., the court then ordered Father to pay \$1,236 in monthly child support. Finding there was no substantial disparity of financial resources between the parties, but that Father acted unreasonably in the litigation, the court awarded Mother \$4,888.10 in attorneys’ fees and costs. *See* A.R.S. § 25-324.

¶7 Father filed a timely Rule 83 motion to amend judgment, arguing the December 2020 child support order did not account for the support he provides to a minor child from a different relationship. The court rejected that argument, noting “Father testified that that child is not in his household and the evidence did not demonstrate that Father supports that child.”³ This court has jurisdiction over Father’s timely appeal from the denial of his Rule 83 motion.

DISCUSSION

¶8 Father’s opening brief claims the superior court abused its discretion (1) by failing to grant his Rule 83 motion, arguing the court ignored his support of a minor child from a different relationship, and (2) by finding his counter-petition was retaliatory and that he had not shown a significant change in circumstances.⁴ This court will affirm the superior court’s orders absent an abuse of discretion. *Engstrom v. McCarthy*, 243 Ariz. 469, 471 ¶ 4 (App. 2018); *Nold v. Nold*, 232 Ariz. 270, 273 ¶ 11 (App. 2013). This court accepts the superior court’s finding of fact unless clearly erroneous. *DeLuna v. Petitto*, 247 Ariz. 420, 423 ¶ 9 (App. 2019).

³ The court granted Father’s Rule 83 motion to the extent it sought relief from the calculation of his parenting time days (implicating his child support obligations) in the December 2020 order, a ruling not at issue.

⁴ Although Father discusses additional issues for the first time in his reply, those issues are waived. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, 204 n.3 (App. 2005).

I. Father Has Not Shown that the Superior Court Abused Its Discretion in Calculating Child Support.

¶9 Father contends that the superior court abused its discretion by omitting another minor child, from a different relationship, whom Father claims he supports in determining his child support obligations. The court, however, noted that Father testified the child did not live with him and found the evidence presented was insufficient to find that Father provided financial support for that child. The court also noted Father failed to provide accurate and complete financial information, making it difficult to accurately determine Father's finances. Moreover, the rulings were based on "the demeanor of the witnesses," with credibility determinations properly made by the superior court. *See Femiano v. Maust*, 248 Ariz. 613, 615 ¶ 9 (App. 2020) (noting this court gives deference "to the superior court's assessment of witness credibility"). On this record, Father has not shown that the court erred in rejecting his claim that he supported a non-custodial child from a different relationship. Nor has Father shown an abuse of discretion in the court's calculation of child support.

II. Father Has Not Shown the Superior Court Abused Its Discretion in Denying His Counter-Petition.

¶10 The court denied Father's counter-petition, concluding he failed to make the required showing that there had been a substantial and continuing change in circumstances. *Backstrand v. Backstrand*, 250 Ariz. 339 ¶ 14 (App. 2020) (citations omitted). A superior court has "broad discretion" to determine whether a change of circumstance exists. *Id.*; *Pridgeon v. Sup. Ct.*, 134 Ariz. 177, 179 (1982).

¶11 Father contends that the superior court abused its discretion in finding he proved no substantial and continuing change in circumstances. Father claims many positive changes have occurred since the entry of the 2017 order, such as meeting and marrying his current wife, moving, buying a home and establishing a business. While laudable, Father's argument, however, does not address the court's findings that some of these changes have led to Father not properly supervising the interactions between the child and others in his home. The court also found that "Father also could not provide any credible testimony regarding any specific changes in circumstances since 2017, that would justify a change in the parenting time schedule." On this record, and deferring to the superior court's credibility determinations, Father has shown no abuse of discretion. *See Femiano*, 248 Ariz. at 615 ¶ 9.

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¶12 Father also argues that the superior court abused its discretion in finding his counter-petition “was done in retaliation to Mother’s petition.” It is true that the court noted Father filed his counter-petition only after Mother filed her petition, and that he had threatened to do so in a 2017 email. Nowhere, however, does the court state that it was denying his counter-petition because it was retaliatory. Instead, the court denied it because Father had shown no “substantial and continuing change,” specifically noting he had failed to provide “any credible testimony regarding any specific changes in circumstances since 2017.” On this record, Father has not shown that conclusion was error.

III. Attorneys’ Fees on Appeal.

¶13 Mother seeks an award of attorneys’ fees on appeal as a sanction under A.R.S. § 25-324(B). But the record does not compel a finding that Father’s counter-petition was filed in bad faith or was not grounded in fact or law, as Mother argues. Thus, Mother’s request for an award of attorneys’ fees on appeal as a sanction is denied. Mother is, however, awarded her taxable costs on appeal contingent upon her compliance with ARCAP 21.

CONCLUSION

¶14 The judgment denying Jeremy Atwell’s counter-petition to modify parenting time, and the order denying his Rule 83 motion addressing child support calculations, are affirmed.



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