DIVISION ONE
FILED: 07-20-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	1 CA-CV 09-0066
MELODY A. BODINE,	DEPARTMENT D
Petitioner/Appellee-Cross Appellant,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
GREGORY R. BODINE,	
Respondent/Appellant-Cross Appellee.	

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-DO-0020060917

The Honorable Howard D. Hinson, Jr., Judge (Retired)

AFFIRMED

Favour Moore & Wilhelmsen PA — Prescott
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Gregory R. Bodine — Prescott
Respondent/Appellant-Cross Appellee *In Propria Persona*

O R O Z C O, Judge

¶1 Gregory R. Bodine (Father) appeals the family court's denial of his motion for a new trial. For the reasons that follow, we affirm the judgment of the family court.

FACTS AND PROCEDURAL BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the family court's findings. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998).

¶3 Father and Melody Anne Bodine (Mother) were married in June 1982. Mother petitioned for legal separation in October 2006. Mother and Father are the parents of seven children, four of whom were minors (collectively, the children) at the time of trial and subject to the court's custody orders.[1] Mother and Father initially agreed to temporary orders that included, in part, an agreement for Father to pay the mortgage, car payments, insurance, utilities and pay Mother $1000 per month in "family support." After custody issues arose, the family court ordered a custody evaluation.

¶4 The custody evaluator, K.S., a licensed psychologist, documented her summary and opinions in a twenty-five page report (Custody Evaluation). The Custody Evaluation was based on, in part: individual interviews with each family member, including

[1] The eldest of the minor children turned eighteen shortly after trial, but prior to the issuance of the decree. As such, she was not subject to the child custody decision of the family court.

Mother and Father's adult children; joint interviews; home visits; a variety of documents, including letters written by or on behalf of Mother and Father; court documentation; psychological testing of Mother, Father and the children; and telephone conversations with family friends and Father's father.

¶5 K.S. noted that the children grew up in a "very rigid and isolated upbringing," including homeschooling and "rather particular biblical beliefs" that centered around the family structure described by Father as a "benevolent patriarchy." Further, K.S. noted that all of the children showed signs of "alienation from their father," and she opined this was "a direct result of the children's reactions to this very rigid structure that [Father] has set." K.S. reported that all of the children were experiencing "emotional distress" and that none of the children wished to live with Father. Based on those findings, K.S. recommended awarding sole physical and legal custody to Mother.

¶6 At trial, the family court granted Father's request to convert the matter from legal separation to dissolution. After hearing testimony and considering all the evidence, the family court awarded Mother sole legal and physical custody of the children, $2400 per month in spousal maintenance for ten years, $762.22 per month in child support, half of Father's retirement

account, and it divided both the community debts and real property between Mother and Father.

¶7 After the decree was filed, Father filed a motion for a new trial based on "significant irregularities" that Father alleged deprived him of his right to a fair trial. The family court denied Father's motion. Father timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 and -2101.B (2003).

DISCUSSION

¶8 A family court has broad discretion in determining whether to grant or deny a motion for new trial, and its decision will not be disturbed absent an abuse of that discretion. *Pullen v. Pullen*, 223 Ariz. 293, ___, ¶ 10, 222 P.3d 909, 912 (App. 2009). A family court abuses its discretion if, in reaching its determination, it misapplies the law. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). The burden is on the party seeking to overturn the family court's decision to show the court abused its discretion. *Pullen*, 223 Ariz. at ___, ¶ 10, 222 P.3d at 912.

¶9 Father raises various issues on appeal, contending that the family court abused its discretion: (1) in awarding sole physical and legal custody of the children to Mother; (2) in awarding Mother a portion of her attorney fees; (3) when it made an "illegitimate finding" that the marriage was

irretrievably broken; and (4) when it made a "ruinous" final order regarding spousal maintenance.

I. Custody of the children

¶10 Father challenges the award of sole physical and legal custody to Mother, arguing: (1) judicial bias and prejudice, (2) lack of due process, and (3) that the family court did not make appropriate factual findings and impermissibly "abdicated [its] duty to independently determine custody" when it utilized the Custody Evaluation.

¶11 We review the family court's decision regarding child custody for an abuse of discretion. *See In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1191 (App. 2002). On appeal, we do not re-weigh the evidence; instead, we give due regard to the family court's opportunity to judge the credibility of witnesses and weigh the evidence. *See In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999).

(A) No judicial bias or prejudice

¶12 Father asserts the family court was biased against him and therefore, he was deprived of a full and fair hearing.

¶13 A judge is presumed to be free of prejudice and bias. *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 38, 124 P.3d 756, 768 (App. 2005). A party challenging a judge's partiality must overcome that presumption. *State v. Hurley*, 197 Ariz. 400, 404-

05, ¶ 24, 4 P.3d 455, 459-60 (App. 2000). "Overcoming this burden means proving 'a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants.'" *State v. Cropper*, 205 Ariz. 181, 185, ¶ 22, 68 P.3d 407, 411 (2003) (quoting *In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d 717, 720 (1975)). Adverse judicial rulings "almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

¶14 At no time during the entirety of the proceedings did Father request the family court judge recuse himself pursuant to A.R.S. § 12-409.B.5 (2003). Nor did Father move for a change of judge pursuant to Arizona Rule of Civil Procedure 42(f). *See* Ariz. R. Fam. Law P. 6 (adopting Ariz. R. Civ. P. 42). Father raised his claim of judicial bias for the first time in his motion for a new trial. Generally, issues raised for the first time in a motion for new trial are waived. *Conant v. Whitney*, 190 Ariz. 290, 293-94, 947 P.2d 864, 867-68 (App. 1997). Because Arizona Rule of Family Law Procedure 83.A.1 indicates "irregularity in the proceedings of the court" as a basis for a new trial motion, we will address Father's argument.

¶15 As a basis for his arguments that the family court was prejudiced and biased, Father relies on the family court's adverse rulings regarding deficient service; custody orders that

limited Father to daytime visits; rulings that allegedly punished Father for religious beliefs and practices; the family court's decision to combine the contempt proceedings against Father and custody proceedings; and the court's order requiring Father to make "impossible" support payments. While Father argues bias based on his religious practices and beliefs, Father fails to cite any portion of the record establishing any alleged bias; therefore, we do not consider this issue.[2]

¶16 Father's arguments focus almost exclusively on the family court's ruling holding Father in contempt for failing to abide by the temporary orders. Although he argues this finding constitutes an irregularity that requires a new trial, Father agreed to the terms of the temporary orders in open court. Father also argues the court had no authority to hold him in contempt when Father failed to make payments he had agreed to make. The family court acted within its authority. *See generally* Ariz. R. Fam. Law P. 92.

¶17 Additionally, the record contradicts Father's assertions that the family court always ruled against him. While the family court found Father in contempt at a November

[2] An opening brief must contain arguments supported by citations to the record and legal authority. *See* ARCAP 13(a)(6) (opening brief must contain argument supported by citations to the record and legal authority); *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990) (failure to properly develop an argument on appeal results in waiver).

29, 2007 hearing, it allowed him to purge himself of contempt by making payments required by the temporary orders. The family court also rescheduled proceedings multiple times in response to Father's motions to continue. Despite Mother's requests, the family court declined to impose incarceration as a sanction for Father's contempt.

¶18 Father has not overcome his burden to show the family court was in some way biased or prejudiced against him.[3] Absent a more definite indication that Father was, in some way, denied a fair trial, we will not reverse on the basis of bias or prejudice. *See Standage v. Standage*, 147 Ariz. 473, 482, 711 P.2d 612, 621 (App. 1985).

(B) No denial of fair trial or due process

¶19 Father argues the family court "trampled [his] rights to fundamental fairness" and an "impartial tribunal." Specifically, Father argues that Mother's failure to personally

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[3] Father also complains that the family court relied upon Exhibit 111 and ignored his evidence that the document grossly understated his expenses. Father failed to object to the admission of this exhibit at trial and used it himself on redirect. We fail to see how the family court's reliance on this exhibit evidences prejudice or bias.

Father also argues that the court was biased when it delayed ruling on contempt issues and when it combined the contempt proceeding with the trial on dissolution issues. Father concedes, however, that A.R.S. § 25-328.C (2007) allows the court to "try any issue separately and in any sequence." The family court's ruling combining these proceedings does not reflect bias or prejudice; rather, it stems from scheduling delays to which Father had contributed.

serve him with an order to appear for contempt violated his due process rights.

¶20 Our supreme court has held that "contempt requires that the alleged contemnor be given advance notice of the charge, an opportunity to be heard, and present testimony in his own behalf." *Ong Hing v. Thurston*, 101 Ariz. 92, 99, 416 P.2d 416, 423 (1966); *see also Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 558, ¶ 12, 48 P.3d 505, 508 (App. 2002) (holding that due process required at least the "chance to confront adverse evidence and question adverse witnesses.").

¶21 Although Mother did not personally serve Father with an order to appear, Father's attorney received a copy. *See* Ariz. R. Civ. P. 5(c)(1) (stating, in part, that "[i]f a party is represented by an attorney, service under this rule *must* be made on the attorney.") (Emphasis added.) Father was present at the order to show cause hearing, and he testified regarding his non-payment of expenses as required by the temporary orders. Because Father was present and offered evidence, his due process rights were not violated and he suffered no prejudice.

(C) Sufficient factual findings

¶22 Father argues the family court, "not store-bought psychologists, are obligated to make custody decisions that are in the best interests of the children" and, in this case, the family court impermissibly relied on the Custody Evaluation when

making its custody decision. Father asserts the family court failed to make adequate findings pursuant to A.R.S. § 25-403.A (Supp. 2009).[4]

¶23 A family court may not abdicate its discretionary responsibilities to a custody evaluator. *See DePasquale v. Superior Ct.*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995). In *DePasquale*, the family court stated, before receiving evidence, that it would follow the psychologist's custody recommendation. *Id.* at 334, 890 P.2d at 629. The psychologist made a recommendation without communicating with or meeting the mother and the court adopted the recommendation. *Id.* at 334-35, 890 P.2d at 629-30. On appeal, we found that although the family court could rely on an expert's opinion, the court also needed to conduct an independent evaluation of the evidence. *Id.* at 336, 890 P.2d at 631. We held that the court improperly delegated its authority to the psychologist, noting that judges do not serve as rubber stamps for expert recommendations. *Id*.

¶24 This case, however, presents no such issue. Unlike *DePasquale*, the family court here never indicated it would, without reviewing evidence and hearing testimony, adopt K.S.'s recommendations. Further, K.S.'s evaluation was based on personal interviews and contained references, detailed accounts

[4] Unless otherwise specified, we cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

of interviews, documentation reviewed and summaries of evidence. The family court reviewed the Custody Evaluation in addition to other evidence presented at trial and made its own findings. The court's modification of some of K.S.'s recommendations demonstrates it did not simply "rubber stamp" K.S.'s conclusions.[5] Although the family court ultimately adopted K.S.'s recommendation in awarding sole legal and physical custody of the children to Mother, the record reflects an independent analysis by the family court, not just a rubber-stamp decision.

¶25 In the decree, the family court stated it had reviewed and considered the factors set forth in A.R.S. § 25-403. Mother and Father both requested sole legal and physical custody of the children. *See* A.R.S. § 25-403.A.1. Both Mother and Father had previously cared for "the children with respect to all of their needs." *See* A.R.S. § 25-403.A.3. Until Mother obtained employment after the separation, she had previously maintained a full-time presence within the family home, while Father had full-time employment outside the home. *See* A.R.S. § 25-403.A.3 and 7. As of the date of the decree, Father's employment

[5] K.S., for example, made separate recommendations that Father, Mother and some of the children would benefit from counseling. The family court, however, specifically declined to enter orders reflecting these recommendations.

required him to travel approximately five to ten workdays per month. *See id.*

¶26 The decree also incorporated findings from the Custody Evaluation with respect to A.R.S. § 25-403.A.2, 4, 5, 6 and 8. The Custody Evaluation noted all of the children showed "alienation from their father" and K.S. opined this was "a direct result of the children's reactions to this very rigid structure that [Father] has set." *See* A.R.S. § 25-403.A.3 and 4. The family court also heard supporting testimony from Mother regarding Father's belief system as to racial equality and women's roles; Mother noted that this was not in the best interests of the children.[6] K.S. reported that all of the children were experiencing "emotional distress" and that none of the children wished to live with Father. *See* A.R.S. § 25-403.A.2, 3 and 5.

¶27 Much of Father's argument on appeal is essentially a request for a different weighing of the evidence, which is not appropriate for appellate review. *Hurd v. Hurd*, 223 Ariz. 48, ___, ¶ 16, 219 P.3d 258, 262 (App. 2009). We decline to substitute our own analysis of the statutory factors. Although

[6] Mother testified, in part, that Father believed women were not to work outside of the home as it was sinful; if his daughters wished to marry, the man needed to sign a contract agreeing to home school any children they may have, disallow the wife to work outside of the home and attesting that he owned a home; and that Father believed other races were of a "lower culture."

the family court indicated it had "placed significant reliance" on the Custody Evaluation as to five factors set forth in A.R.S. § 25-403, the court did not impermissibly delegate its decision-making authority to K.S. *See DePasquale*, 181 Ariz. at 336, 890 P.2d at 631. The family court sufficiently analyzed the applicable statutory factors and described its reasoning. Accordingly, the family court did not abuse its discretion in awarding Mother sole legal and physical custody of the children.[7]

II. Mother's attorney fees

¶28 Father contends that the family court abused its discretion by awarding Mother any portion of her attorney fees. He argues the family court erred by failing to look at the totality of the circumstances by examining both parties' conduct pursuant to A.R.S. § 25-324.A (Supp. 2009). Father asserts that the family court's finding that he had been unreasonable shows "malice" toward him, and that he established he was in "dire financial condition," which the court rejected when it awarded Mother a portion of her attorney fees.

¶29 Mother cross-appeals the family court's decision to award her only a portion of her attorney fees. Specifically, Mother argues that the fee award should be increased: (1) due to

[7] Father argues that K.S. "never testified at any stage of the proceeding" so he had no "opportunity to challenge the myriad of flaws" in her report. We note, however, that Father himself chose not to call K.S. as a witness.

the significant disparity of income between her and Father; and (2) the unreasonable positions Father took before the family court.

¶30 Although a court may award attorney fees, it is not required to do so. *Alley v. Stevens*, 209 Ariz. 426, 429, ¶ 12, 104 P.3d 157, 160 (App. 2004). The family court may award attorney fees, "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324.A. On appeal, we review a family court's decision as to whether to award attorney fees for an abuse of discretion, recognizing that the family court had the opportunity to observe the conduct of the parties and review their financial records. *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8, 200 P.3d 1043, 1045 (App. 2008); *Graville v. Dodge*, 195 Ariz. 119, 131, ¶ 56, 985 P.2d 604, 616 (App. 1999).

¶31 The record does not support Father's contention that the family court failed to examine all relevant circumstances prior to awarding fees. The family court heard testimony and considered other evidence, including over one hundred exhibits. While Father claims the family court's findings show "malice," he again primarily relies on the finding of contempt for the temporary orders. We have addressed this above, *supra* ¶¶ 16-18,

and found no abuse of discretion.[8] The record reflects that Father's positions, including violation of temporary orders during the proceedings, were more unreasonable than Mother's positions. Father's vacillation on whether the marriage was irretrievably broken is one example of his delays.

¶32 Although there was a disparity in income between Mother and Father, Mother received a substantial spousal maintenance award of $2400 per month for ten years. Mother also received $762.22 per month in child support for the children. Additionally, Mother was awarded half of Father's retirement account and Father was ordered to create the qualified domestic relations order and pay any costs associated with the order.

¶33 Based on these circumstances, we determine the family court did not abuse its discretion in awarding Mother a portion of her requested attorney fees and costs.[9]

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[8] Father also contends that the family court "failed to consider [Mother's] unreasonableness" when she did not timely disclose certain credit card statements. Mother was found in contempt for her failure to timely disclose records. She was fined $3000, assessed attorney fees and given the opportunity to purge the fine if she produced the statements before a specified time. Mother timely complied with the court's order.

[9] Father asserts "the judge ordered him to pay [Mother's] attorney fees of over $130,000." Father's assertion is entirely contradicted by the record. Mother requested $115,923.50 in attorney fees and $2,206.40 in costs relating to the dissolution proceedings; she requested $3,015.00 in attorney fees and $1,406.69 in costs relating to Father's failure to comply with applicable discovery rules. The family court awarded Mother the total amount in fees and costs she requested for Father's

III. Finding that marriage was irretrievably broken

¶34 Father argues that the family court erred when it found the marriage was irretrievably broken and that, as a result, "no decree of dissolution should have been made." Specifically, Father asserts the requirements of A.R.S. §§ 25-313 and -316 (2007) were not met. Father contends that the "entire proceeding [was] defective and deficient" and that the decree is "illegitimate" and requests a new trial with a different judge.

¶35 Preliminarily, we note that A.R.S. § 25-313 is inapplicable because it pertains to a decree of separation and in this case, the decree was one of dissolution. Section 25-316.A states, in part, that if one party makes a statement under oath that the marriage is irretrievably broken and the other party does not deny it, "the court shall make a finding as to whether or not the marriage is irretrievably broken."

¶36 At trial, the court had the following exchange with Father about the proceedings:

> Q: Throughout the time that this divorce or separation proceeding has been going on you always wanted it to be a divorce and not a separation?
>
> A: Yes, Your Honor.

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failure to comply with discovery. The court awarded Mother $23,375.00 in attorney fees and $2,206.49 in costs relating to the dissolution proceedings.

. . . .

Q: In this case you believe this action should be a dissolution of marriage?

A: It has to be, Your Honor, yes.

Q: And ever since it was filed, that's the way you felt?

A: Yes, and before it was filed.

¶37 Additionally, when asked by his own attorney whether he wanted to convert the matter to a divorce, Father replied, "I'm afraid so, yes." In the decree, the family court expressly found that "[t]he marriage is irretrievably broken with no reasonable prospect of reconciliation." At the trial, Father testified that if the parties would not reconcile, he would not accept a legal separation; therefore, Father testified "it has to be" a divorce. Mother did not object or otherwise deny Father's statement about a divorce instead of a separation.

¶38 Because Father testified that a divorce was required and Mother did not otherwise object, the family court correctly found the marriage was irretrievably broken pursuant to A.R.S. § 25-316.A. Accordingly, we find no error in the family court's determination that Mother and Father's marriage was irretrievably broken.

IV. Spousal maintenance determination

¶39 Father argues that the trial court abused its discretion when determining the amount of spousal maintenance

because it "consigned [Father] to bankruptcy and homelessness" in violation of A.R.S. § 25-319 (2007).

¶40 The family court has "substantial discretion" to determine the amount and duration of spousal maintenance under A.R.S. § 25-319.B. *Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993). Absent an abuse of that discretion, we will not disturb the family court's award. *Gutierrez*, 193 Ariz. at 348, ¶ 14, 972 P.2d at 681. A family court is not necessarily required to apply every factor listed in A.R.S. § 25-319.B. *Rainwater*, 177 Ariz. at 502, 869 P.2d at 178. The determination by the court is done on a case-by-case basis and some statutory factors will not apply. *Id.*; *see also Elliott v. Elliott*, 165 Ariz. 128, 131 n.1, 796 P.2d 930, 933 n.1 (App. 1990) (concluding A.R.S. § 25-319.B did not require a court to make a specific finding regarding each factor listed prior to awarding spousal maintenance; rather, the statutes themselves only require the court to consider the factors in question).

¶41 The court stated it had considered the statutory factors set forth in A.R.S. § 25-319.B, and, after doing so, it awarded Mother $2400 per month in spousal maintenance for a period of ten years.

¶42 The court found that the parties were married for twenty-four and one-quarter years prior to the filing of the

petition for legal separation. *See* A.R.S. § 25-319.B.2. It also found that although both parties were college graduates, Mother's work as a homemaker for the entire marriage limited her earning ability in the labor market while Father had worked outside the home throughout the parties' marriage. *See* A.R.S. § 25-319.B.5. The court also found that Mother's "emotional condition [was] fragile" given the stress of the proceedings on her and the children. *See* A.R.S. § 25-319.B.3. The court heard testimony that, at the time of trial, Father's annual pay was approximately $98,000 and he had just been approved for a raise, which could increase his annual salary to approximately $103,000. *See* A.R.S. § 25-319.B.5. Mother's amended financial affidavit, admitted as an exhibit at trial, indicated Mother earned $10 per hour and had a net income of approximately $1416 per month. *See id.* While Mother expressed an interest in acquiring additional education, the court found her custodial duties and responsibilities would "severely impact upon her ability to train herself for adequate employment." *See* A.R.S. § 25-319.B.10. The family court also found that given Father's earning capacity, he had the ability to meet his financial needs while contributing to Mother's financial needs.[10] *See* A.R.S. §

[10] In his answering brief, Father states he is unable meet his financial needs. Father states that after all of his payments, including child support, spousal maintenance, insurance policy premiums, health insurance for the children, and the cost of

25-319.B.4. Further, the court found Mother was not able to meet her reasonable financial needs independently. *See* A.R.S. § 25-319.B.9.

¶43 The evidence before the family court supported the spousal maintenance award; accordingly, we find no error.

V. Attorney fees on appeal

¶44 Both parties request attorney fees on appeal. Mother requests fees pursuant to A.R.S. § 25-324; Father requests attorney fees pursuant to Arizona Rule of Civil Appellate Procedure 21. Rule 21, however, only sets forth the procedure for requesting attorney fees and may not be cited as a substantive basis for an award of fees. *See Tilley v. Delci*, 220 Ariz. 233, 239, ¶ 19, 204 P.3d 1082, 1088 (App. 2009). Accordingly, we deny Father's request. Section 25-324 requires us to examine both the financial resources of the parties and the reasonableness of the positions of each party. After doing so, in our discretion, we award Mother her attorney fees and costs upon her compliance with Rule 21(c).

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obtaining a qualified domestic relations order, he has $5,068.56 to pay his own expenses, which includes debt apportioned to him in the decree. The family court could have reasonably found that Father could meet his own needs while also contributing to those of Mother.

CONCLUSION

¶45 For the foregoing reasons, we conclude the family court did not abuse its discretion in denying Father's motion for a new trial and affirm the judgment of the family court.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
DIANE M. JOHNSEN, Judge

/S/
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JON W. THOMPSON, Judge