DIVISION ONE
FILED: 10/26/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 09-0575
	)	
CAROLYN PACE,	)	DEPARTMENT D
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules
SAEID FARR,	)	of Civil Appellate
	)	Procedure)
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. DR 1999-011547

The Honorable Colleen L. French, Judge Pro Tem

AFFIRMED

Michael J. Shew, LTD By Michael J. Shew Attorneys for Petitioner/Appellant	Phoenix
Saeid Farr Respondent/Appellee In Propria Persona	Phoenix

I R V I N E, Judge

¶1 Carolyn Pace ("Mother") appeals from the family court's custody order granting Saeid Farr ("Father") final decision-making authority of the children's religious matters. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The parties were married in July 1996 and divorced in August 2001. The divorce decree granted them joint legal custody of their now twelve-year-old daughter and ten-year-old son ("the children"). The children were raised in the Jewish faith during the marriage and continued to attend Hebrew school after the divorce. Although both parents were Jewish during the marriage, Mother converted from Judaism to Christianity in 2005.

¶3 In December 2005, Mother filed a petition to modify parenting time, seeking custody of the children on all Christian holidays. She later requested that the parties alternate full weekends. Father objected because such an arrangement would have precluded the children from attending Hebrew school on Sunday mornings. He sought an order that the children be raised in the Jewish faith, or alternatively, that Mother take them to Hebrew school on Sundays.

¶4 In June 2007, the family court granted Mother's petition, finding Father failed to make a "clear and affirmative showing that the conflicting religious beliefs are detrimental to the welfare of the children," and it was in the best interests of the children for Mother to have more time on weekends and holidays.

¶5 In March 2008, a panel of this Court vacated the family court's order because it applied the incorrect burden of

proof and failed to consider the impact that modification would have on "the children's ability to receive instruction in the Jewish faith." *Pace v. Farr*, 1 CA-CV 07-0577, 2008 WL 4183002, at *3 n.3, ¶ 14 (Ariz. App. Mar. 25, 2008) (mem. decision).

¶6 On remand, the parties identified the following issues for trial:

Mother's Requests

1. That the children be permitted to attend the Ahwatukee Assembly of God Church for morning and evening Sunday services and Wednesday services, and that they be permitted to attend other functions of that church held during Mother's parenting time; and

2. That Father not discourage the children from holding Christian beliefs or attending Christian churches.

Father's Requests

1. That the children not attend services or other religious functions at Mother's church;

2. That the children not participate in family Bible studies concerning Mother's religious beliefs;

3. That the children not be baptized in Mother's faith;

4. That Mother not pressure the children to become indoctrinated into her faith by, for example, suggesting the reading of particular books; and

5. That Mother not discourage the children from reading particular books or other materials available from their school in

> pursuing their homework assignments for doctrinaire reasons.

¶7 On July 2, 2009, Mother failed to appear for her scheduled deposition, and Father requested a sanction to preclude her trial testimony. Father requested additional sanctions after Mother untimely filed her Pre-trial Statement and failed to disclose her witnesses' contact information until the day before trial. The court ordered Mother to pay Father's "attorney's fees and costs incurred in preparation for the July 2, 2009 deposition." It permitted Mother to testify but precluded her from presenting other witnesses or documentary evidence.

¶8 On July 17, 2009, the family court issued a detailed minute entry ruling, stating it construed Father's requests and Mother's position as a request for final decision-making authority in the area of the children's religion. It found that Father made a clear and affirmative showing that the imposition of parties' conflicting religious beliefs on the children has "adversely affected their general welfare and happiness, and will continue to do so." Recognizing that "the choice of religion is ordinarily not the province of a court of law," it stated it was "compelled to make this choice given the parties' unwillingness to agree and the adverse affect this has had on their children's welfare and happiness." Consequently, it

granted Father final "decision-making authority in the area of religion" for the children.

DISCUSSION

¶9 On appeal, Mother argues the family court erred by: (1) exceeding the scope of its authority on remand; (2) finding there were changed circumstances despite no evidence of actual harm to the children; (3) failing to make specific findings of fact under Arizona Revised Statutes ("A.R.S.") section 25-403 (2007); (4) imposing an evidentiary sanction that precluded her from presenting witnesses or documentary evidence at trial; and (5) ordering her to raise the children solely in the Jewish faith in violation of her religious freedoms under federal and state constitutions.

1. Authority to Modify Custody

¶10 Mother first argues the family court erred because the proceedings on remand were inconsistent with the mandate of this Court. She contends the "narrow issue" should have been whether she could prove, taking into account the effect on the children's religious education, that modification of parenting time was in the children's best interest. Instead, she argues, the court went "well beyond that inquiry," and sua sponte granted Father final decision-making authority over the children's religion. In effect, she contends the family court

modified legal custody without the authority to do so. We disagree.

¶11 A trial court may not transgress upon the "obvious intent" of an appellate court by deciding on issues on remand that exceed the mandate given. *Tucson Gas & Elec. Co. v. Superior Court (Bd. Of Supervisors of Pima County)*, 9 Ariz. App. 210, 212-13, 450 P.2d 722, 724-25 (1969). That rule, however, does not apply when we have not determined the issue litigated on remand. *Cagle v. Carlson*, 146 Ariz. 292, 294, 705 P.2d 1343, 1345 (App. 1985).

¶12 In the prior appeal, we specifically declined to "reach Father's additional claim that the trial court abused its discretion when it denied his request to order that the children be raised in the Jewish faith." *Pace,* 1 CA-CV 07-0577, 2008 WL 4183002, at *3 n.3, ¶ 14. Accordingly, Father's request for final decision-making authority was properly before the family court on remand.

¶13 In addition, the family court correctly construed the issues raised and positions adopted as a request to modify legal custody in the area of religion. Mother sought permission to take the children to her church and educate them in Christianity. Father objected and adopted the position that the children should be raised solely in the Jewish faith. Because their positions were mutually exclusive, and they were unwilling

and unable to agree, the trial court was called upon to determine who should have the final decision-making authority in the area of the children's religion.

¶14 Even assuming neither party requested modification of legal custody by petition or motion, we discern no error. A family court is vested with subject matter jurisdiction over child custody determinations and has continuing jurisdiction to modify a custody decree it has entered. *In re Marriage of Dorman*, 198 Ariz. 298, 301, ¶ 7, 9 P.3d 329, 332 (App. 2000). The requirement that parties seeking modification of custody do so by petition or motion is procedural and not a jurisdictional prerequisite to a valid modification order. *Id.* at 302, ¶ 9, 9 P.3d at 333. (citing *Lowther v. Hooker*, 129 Ariz. 461, 464, 632 P.2d 271, 274 (App. 1981)). As long as there are changed circumstances affecting a child's welfare, the court which entered the decree has continuing jurisdiction to change the terms of a custody order. *Ward v. Ward*, 88 Ariz. 130, 134-35, 353 P.2d 895, 898 (1960).

¶15 On this record, we agree there was a material change of circumstances that authorized the court to modify custody sua

sponte.[1]

2. Changed Circumstances

¶16 Mother also argues "the [trial] court abused its discretion in finding that the children's general welfare is affected by taking them to a Christian place of worship." She contends there was "no competent evidence" that the children were physically or emotionally harmed, and that the trial court "summarily concluded the children's welfare was affected without as much as a scintilla of actual, verifiable evidence." We disagree.

¶17 A trial court has broad discretion to modify child custody, and its decision will not be reversed absent a clear abuse of discretion. *Pridgeon v. Superior Court (Pridgeon)*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982). To determine an abuse of discretion, "the record must be devoid of competent evidence to support the decision of the trial court." *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963). A judgment will not be disturbed if there is any reasonable evidence to support it. *Id.*

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[1] "An appellant is responsible for making certain that the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal." *State ex rel. Dept. of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 16, 66 P.3d 70, 73 (App. 2003) (citing Arizona Rule of Civil Appellate Procedure 11(b)). Because Mother failed to provide transcripts of the proceedings, we assume the missing portions of the record support the trial court's findings and conclusions. *Baker v. Baker,* 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶18 A trial court must make two determinations when modifying a divorce decree with respect to child custody. *Black v. Black,* 114 Ariz. 282, 283, 560 P.2d 800, 801 (1977). First, it must ascertain a change in circumstances materially affecting the welfare of the child. *Id*. Second, it must determine whether modification of custody will be in the best interests of the child. *Id*.

¶19 Mother argues the condition of changed circumstances was not met simply because no evidence supports that the children were physically or emotionally harmed. Whether there is benefit or harm relates to the children's best interests, which is a separate inquiry that follows once the condition of changed circumstances is met.[2] To satisfy that condition, the effect on the children's welfare must be material, but it need not be adverse.

¶20 We must assume from this record that the changed circumstances condition was met. *See Baker,* 183 Ariz. at 73, 900 P.2d at 767. The children were born and raised in the Jewish faith, and all their relatives, other than Mother, also practice

[2] Mother mischaracterizes the court's finding that the children were being harmed by the new religious activities as a preference for Father's religion. The court made no such conclusion. It merely found that the parents' religious conflict itself was harmful to the children and that they should not be required to simultaneously study and observe both.

Judaism. After the divorce, the children continued to attend Hebrew school. They identify with Judaism and its traditions and consider themselves members of that faith. By taking the children to church and indoctrinating them in her new religion, Mother exposed them to teachings and beliefs that, according to a rabbi, directly contradicted the core tenets of Judaism upon which they were raised. Although she herself as a Messianic Jew was able to reconcile the two religions, the children's therapists opined that the religious conflict caused both children distress and the daughter to suffer from "anxious and depressive symptoms." There is no error.

3. Findings of Fact for Children's Best Interests

¶21 Mother also argues the decision should be reversed because the family court modified legal custody without making "any findings of fact." In determining child custody, the family court must consider A.R.S. § 25-403(A) factors regarding the children's best interests. In a contested custody case, a court must also make specific findings on the record regarding "all relevant factors and the reasons for which the decision is in the best interests of the child[ren]." A.R.S. § 25-403(B). Failure to make requisite findings pursuant to § 25-403 is an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 421-22, ¶ 12, 79 P.3d 667, 670-71 (App. 2003) (holding the family court

abused its discretion by changing a custody arrangement without making findings on the record).

¶22 In its July 17, 2009 minute entry, the family court issued specific findings of fact, stating in detail what factors it considered and why the determination was in the best interests of the children.[3] Mother does not argue that the court failed to consider any relevant factors, and she does not challenge the sufficiency of those factual findings.

¶23 Moreover, we reject Mother's earlier argument that there was no evidence the children were physically or emotionally harmed. The family court found that Mother's contentions the children were not harmed or conflicted by the religion were not credible. *See In re Estate of Pouser*, 193 Ariz. 574, 579-80, ¶¶ 13, 18, 975 P.2d 704, 709-10 (1999) (we do not reweigh conflicting evidence and give due regard to the trial court's opportunity to judge the credibility of the

[3] Specifically, the family court made findings regarding: the competing wishes of the parents to raise their children in their religion, A.R.S. § 25-403(A)(1); the children's wishes for an end to the parents' conflict, and the son's wish to carry on the family's Jewish tradition, *id.* at (A)(2); that all the relatives are Jewish and the children identify themselves as Jews, *id.* at (A)(3); that the daughter was concerned about fitting in and the son was developing the foundations of his belief system; *id.* at (A)(4); that therapists and the parenting coordinator believed the children should be raised in just one religion because the conflict was affecting their mental health, *id.* at (A)(5); that both parents are equally at fault for contributing to the religious conflict, *id.* at (A)(6); and that both parents had joint legal and physical custody of the children, *id.* at (A)(7).

witnesses). The minute entry also indicates the family court independently considered all the evidence, including the parenting coordinator's testimony, which incorporated recommendations from therapists that examined the children in 2007 (D. Vigil) and 2009 (Dr. Mellen), as well as statements from Father and his rabbi. *See DePasquale v. Superior Court (Thrasher)*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995) (holding a trial court may consider expert opinion, but may not delegate its duty to determine the child's best interest). On this record, we discern no error. *See Baker,* 183 Ariz. at 73, 900 P.2d at 767.

4. Evidentiary Sanctions

¶24 Mother contends the family court should not have prevented her from presenting other witness testimony or documentary evidence as a sanction for her failure to appear at her scheduled deposition. Contrary to her claim, the evidentiary sanctions appear to have been imposed for her failure to timely file a pretrial statement and disclose witnesses.

¶25 A trial court has broad discretion in ruling on the preclusion of witness testimony, and we will not disturb its rulings absent an abuse of discretion. *Zuern ex rel. Zuern v. Ford Motor Co.*, 188 Ariz. 486, 489, 937 P.2d 676, 679 (App. 1996). We review a trial court's sanction for discovery

violations for a clear abuse of discretion. *See Zimmerman v. Shakman*, 204 Ariz. 231, 235, ¶ 10, 62 P.3d 976, 980 (App. 2003).

¶26 Rules 51, 91 and 49 of the Arizona Rules of Family Law Procedure ("Rule") provide that, absent a showing of good cause, the family court may preclude witness testimony and exhibits that were untimely disclosed. Rule 51(D)(2). *See also* Rule 91(P)(3)(a)-(b), (6) (requiring, in no event less than three days before trial, disclosure of all exhibits and witnesses); Rule 49(H) ("A party shall not be allowed to call an expert witness who has not been disclosed . . . as may be ordered by the court."). Under Rule 76(D)(1), which governs sanctions, the court can also make "an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence." Arizona Local Rule of Practice Superior Court (Maricopa) 6.2(e) provides for further sanctions provided by statute, rule or authority of the court.

¶27 The June 23, 2008 minute entry ordered the parties to "complete all disclosure requirements required by Rules 49, 50 and 91 . . . including an exchange of all relevant information, documents and exhibits **no later than two weeks prior to trial**." It also required the pre-trial statement to be filed "no later than five (5) days prior to trial," and warned that failure to do so in the absence of good cause shown, would "result in the

imposition of any and all available sanctions pursuant to Rule 76(D) . . . and Local Rules 6.2(e) and 6.9(b).”

¶28 Despite proper notice, Mother failed to file a pretrial statement until two days before trial, and did not provide contact information for her witnesses until one day before trial. Mother also failed to provide the court with exhibits before trial as instructed. We must assume from the missing transcripts that Mother also failed to show good cause at the sanctions hearing. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶29 Mother cites *Hays v. Gama*, 205 Ariz. 99, 67 P.3d 695 (2003), to support her argument. In *Hays*, the family court imposed evidentiary sanctions against the mother for *contempt* because she brought the child to her therapist instead of the one designated by the court. *Id.* at 100, ¶¶ 6, 8, 67 P.3d at 696-97. Our supreme court vacated the sanction holding that a court--acting under its contempt power--was required to consider the effect of sanctions on third parties, which in a child custody case was the child’s best interest. *Id.* at 102-03, ¶¶ 17-18, 67 P.3d at 698-99.

¶30 Unlike *Hays*, the family court here did *not* act pursuant to its contempt power. Rather, it imposed sanctions for Mother’s discovery violations. Because she was properly noticed and had an opportunity to show good cause why she failed to

comply with the trial court's discovery orders, there was no abuse of discretion.

5. Freedom of Religion

¶31 Lastly, Mother argues the family court's custody order granting Father final decision-making authority in religion infringes upon her "constitutional rights to parent her children and to worship freely." We disagree.

¶32 A court may generally not determine custody based solely on religion. *Smith v. Smith*, 90 Ariz. 190, 193, 367 P.2d 230, 233 (1961). A parent's religious views and activities, however, are not absolute when the children's safety and welfare are at issue. *See, e.g., Allison v. Ovens,* 4 Ariz. App. 496, 502, 421 P.2d 929, 935 (1966), *reversed on other grounds by* 102 Ariz. 520, 433 P.2d 968 (1967) (holding the court may consider the religious activities of the children and their parents where their moral upbringing is a concern); *Stapley v. Stapley*, 15 Ariz. App. 64, 70, 485 P.2d 1181, 1187 (1971) (holding court may interfere with parent's religious views to protect from a serious risk to the children's life or welfare).

¶33 In *Funk v. Ossman*, 150 Ariz. 578, 579-80, 724 P.2d 1247, 1248-49 (App. 1986), the mother converted from Judaism to Lutheranism after divorce and began to raise the child as a Lutheran. Father objected and requested an order that the child be raised and educated in the Jewish faith, which the court

denied. *Id.* at 580, 724 P.2d at 1249. The trial court later enjoined the father from formally training the child in Judaism, finding indoctrination was not in the best interest of the child, who was still young, and Judaism and Christianity were mutually exclusive religions. *Id.* The father appealed, arguing inter alia that the injunction was a violation of his constitutional guarantee of freedom of religion. *Id.*

¶34 We affirmed in *Funk*, explaining that when "a conflict between divorced parents as to religious instruction is affecting the welfare of their children, a court should always act in accordance with what is best for the happiness and welfare of the child." *Id.* at 581, 724 P.2d at 1250 (citations omitted). "In legal contemplation, the court recognizes no difference in objectives between religious or other conflicts." *Id.* Recognizing the constitutional limitation, we held:

> [T]he courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, *except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.*

Id. (citing *Munoz v. Munoz*, 79 Wash.2d 810, 812, 489 P.2d 1133, 1135 (1971)).

¶35 Here, the family court correctly held that *Funk* controls and found:

> Father has made a clear and affirmative showing that the parties' religious beliefs are conflicting and that the imposition of these conflicting beliefs on the children has adversely affected their general welfare and happiness and will continue to do so. Although the choice of religion is ordinarily not the province of a court of law, this court finds itself compelled to make this choice, given the parties' unwillingness to agree and the adverse affect this has had on their children's welfare and happiness.

Furthermore, it properly limited the ruling to address only the best interests of the children, stating:

> [T]hese orders *do not preclude Mother from exercising her own religious beliefs or in exposing the children to her beliefs*, so long as she does not worship with the children in a manner that contradicts or undermines their Jewish faith, or have them engage in any behaviors that would violate the teachings of Judaism, as observed by Father.

(Emphasis added.) It also stated that Mother is not prohibited "from expressing her opinion regarding any of the children's reading material, etc. so long as her opinions do not violate the tenets of Judaism as observed by Father." Under these circumstances, we discern no error.

6. Attorneys' Fees

¶36 We deny Mother's requests for an award of attorneys' fees and costs on appeal.

CONCLUSION

¶37 We affirm the family court's child custody order.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge