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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 01/20/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN RE THE MARRIAGE OF:) 1 CA-CV 09-0668
)
DONNA J. PEACE,) DEPARTMENT A
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication
) - Rule 28, Arizona
v.) Rules of Civil
) Appellate Procedure)
EDWARD D. PEACE, SR.,)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Navajo County

Cause No. D020070343

The Honorable Thomas L. Wing, Judge

AFFIRMED

David J. Martin
Attorney for Petitioner/Appellee

Lakeside

Edward D. Peace, Sr.
In Propria Persona

Pinetop

H A L L, Judge

¶1 Edward Peace appeals from the decree of dissolution entered by the trial court. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 Edward Peace (Husband) and Donna Peace (Wife) married on July 10, 1994. During their marriage, the parties had four children. On July 16, 2007, Wife filed a petition for dissolution of marriage requesting, among other things, physical custody of the parties' children and an award of child support. On August 31, 2007, Wife filed a petition for temporary orders requesting that Husband be ordered to vacate the marital residence and that she be awarded custody of the children and child support. In response, Husband requested the marital residence, physical custody of the children and an award of spousal maintenance.

¶13 On October 15, 2007, the trial court held a hearing on the petition for temporary orders. At the outset, the trial court asked Wife's attorney and Husband, who was representing himself, how they would like to apportion the allotted time between the issues. Wife's attorney stated that she intended to use her time to address the use of the marital residence. In response, Husband stated "I think there are - (indiscernible) - Your Honor, because I have (indiscernible) - I would like to have (indiscernible) - the house. If I were to leave the house - (indiscernible)." The trial court then asked the parties to proceed.

¶14 Husband testified that he is licensed to practice law in New York and on the Navajo Nation, but is currently unemployed. When asked whether he is pursuing employment, Husband stated that he is not and explained that he and Wife agreed in 2005 that he would stay home full-time to care for the parties' children.

¶15 Wife testified that she is a physician employed by Indian Health Services Hospital. She stated that she prepares the children's breakfast each morning and dresses and grooms them before she leaves for work. She testified that she works in excess of forty hours per week because she is required to do so by her employer. She explained, however, that she is only obligated to continue working for the Indian Health Services Hospital for two more months in order to fulfill her obligation to the federal government. As Wife further explained, the federal government "paid for all of medical school, supplies and equipment, books" and provided a monthly stipend, and she is required to work in underserved areas for a limited period of time as repayment. Wife also testified that when she returns home in the evening after work, she prepares dinner and helps the children with their homework and puts them to bed while Husband watches television. Wife disputed Husband's claim that he is the children's primary caregiver and testified that he

only began taking an active role in their care after she filed for divorce. Wife also testified that she and Husband never agreed that he would stay at home to care for the children.

¶16 Following Wife's testimony, the trial court asked Wife's attorney and Husband to make their closing arguments. At that point, Husband complained that he had been "cut off" and asked for additional time to present his evidence. The trial court denied Husband's request, stating that Husband knew the "amount of time allotted to the hearing."

¶17 On October 17, 2007, the trial court entered a signed ruling on temporary orders, finding:

1. The discord or acrimony between the parents in the home is unhealthy and not in the best interest of the children.
2. The father-respondent has been dilatory in attempting to be employed and provide financial support for the family since the parties recognized the impending marital break-up and considering the financial history and current circumstances of the parties.
3. The father-respondent is capable of earning monthly income which is necessary to assist the family in maintaining the lifestyle in which the children have lived for years prior to the impending marital break-up. Such employability includes employment related to or requiring skill(s) and/or experience from his years of past employment, or alternatively, in a work force utilizing his past education, experience and training.
4. The parents each have been primary care givers to the children previous to the impending marital break-up and father-respondent's additional time with the children due to his lack of employment does not warrant his remaining unemployed.

5. The father has sufficient liquid financial assets and means to provide for himself for a reasonable period of time and to become employed with income to more adequately provide for his maintenance at or near the parties' previous lifestyle.
6. The evidence is insufficient to support a finding that temporary spousal maintenance is warranted.
7. The following are factors bearing on the children's best interest in regard to temporary custody and parenting time:
 - a. To the extent that it can be determined, the wishes of the children do not favor either parent.
 - b. The wishes of the parents to be custodian are not materially different.
 - c. The interaction and interrelationship of the children with the parents and other person(s) who may significantly affect the child's best interest are better with the mother than with the father.
 - d. The adjustment of the children to home, school and community is not materially different, subject to the parent living in the parties' current marital residence.
 - e. The mental and physical health of the parents are not materially different.
 - f. The parent more likely to allow the children frequent and meaningful contact with the other parent is the mother.
 - g. As stated above, both parents have provided primary care of the children, and the father's previous additional time as care giver is not significant as to the best interest of the children in the current circumstances of the parties. In other words, if both parents are employed, the

factor of primary care does not favor either party.

- h. There is no evidence of domestic violence or use of illicit substance(s) and these are non-factors in determining best interest of the children.

The trial court then granted Wife exclusive use of the marital residence and awarded her sole custody of the children. Based on Husband's unemployment, the court did not enter a child support order. The court also denied Husband's request for spousal maintenance, but stated it would revisit the issue if Husband obtained employment.

¶18 On November 1, 2007, Husband filed a motion for a new trial on temporary orders. Husband argued that he was denied his right to present his case and that the trial court's findings were not supported by the evidence. The trial court denied Husband's motion for new trial, stating in pertinent part that Husband failed to identify any additional evidence he would present if another hearing were held.

¶19 On January 10, 2008, Husband filed a motion for release of community funds to cover the expenses associated with studying and sitting for the Arizona Bar Exam and for retaining an attorney to represent him in this matter. On February 22, 2008, Husband filed a motion to modify temporary orders, asking the court to award him spousal maintenance in the amount of

\$3,000.00 per month based on his recent acquisition of full-time employment.

¶10 On April 11, 2008, the trial court held a hearing on Husband's motions to release community funds and modify the temporary orders.¹ Husband testified that he began work as a ski instructor on December 14, 2007, with a take-home pay of approximately \$1,400.00 per month. The position was seasonal, however, and his employment terminated the first week of April. Husband further testified that he had applied for several in-house counsel and legal aid positions, but that he had not received any offers for those positions. Husband testified that he planned to apply for a deputy tribal attorney position "opening up next month" with the White Mountain Apache Tribe. Husband further testified that he supported Wife and the children while Wife attended medical school and completed her residency.

¶11 Wife testified that she quit her job with Indian Health Services Hospital once she completed her obligation to the government because she was working an average of sixty hours per week and wanted more time to spend with the children. She

¹ For purposes of the Statement of Facts, we rely on the transcripts submitted on appeal for the April 11 and November 21, 2008 evidentiary hearings. These transcripts, however, are not certified as required by Arizona Rule of Civil Appellate Procedure (ARCAP) 13(a)(4).

then opened her own family practice that allows her more schedule flexibility. Because of this change, Wife's monthly income decreased from approximately \$11,000.00 per month to approximately \$7,000.00 per month. Wife testified that Husband contributed very little to the family's support while she was in medical school. Indeed, Wife testified that, although all of her medical school expenses were paid by the government and she received a monthly stipend of \$900.00 for living expenses, she took student loans totaling approximately \$60,000.00 during her four years of medical school to cover the family's living and childcare expenses. Wife testified that the outstanding balance on her student loans is approximately \$40,000.00.

¶12 After taking the matter under advisement, the trial court entered a signed minute entry awarding Husband temporary spousal maintenance in the amount of \$2,500.00 per month. On May 19, 2008, Wife filed motions for reconsideration and new trial, asserting that she did not have the financial ability to both provide for the financial needs of the children and pay Husband \$2,500.00 per month. She also noted that Husband paid golf club dues in the amount of \$2,154.05 on April 4, 2008. On June 12, 2008, the trial court entered a minute entry finding that Husband's payment of golf club dues qualified as newly discovered evidence warranting a new hearing on the matter.

¶13 On November 21, 2008, the trial court held another evidentiary hearing. Wife testified that her current monthly income is approximately \$9,600.00. Wife also testified that during her medical schooling and residency program, the parties' children were in daycare "during working hours." Wife also admitted that she had failed to pay Husband any spousal maintenance in violation of the court's temporary orders.

¶14 Alexander Ritchie, former tribal attorney for the White Mountain Apache Tribe, then testified that he handled Husband's application for a position with the White Mountain Apache Tribe legal department. On April 10, 2008, Ritchie and Husband attended a meeting with the tribal council during which the council approved Husband's application for employment with the tribe. Ritchie testified that, as of the April 11, 2008 evidentiary hearing, however, Husband was not officially an employee of the tribe because preliminary matters such as a background check had not yet been completed.

¶15 Husband testified that Wife did not contribute to the household expenses during her medical schooling and residency. He acknowledged that the children were in daycare at that time, but stated that he took care of the children after daycare hours when Wife was working. Husband also acknowledged that he recently paid approximately \$2,000.00 to continue his country

club membership, but testified that it was a community asset he was compelled to preserve. Husband further testified that he recently passed the Arizona Bar Exam.

¶16 When asked about his employment with the White Mountain Apache Tribe, Husband testified that he commenced his employment on April 14, 2008 with an annual salary of \$84,000.00. He also testified that he was terminated based on allegations that he had committed perjury by failing to disclose his employment with the tribe at the April 11, 2008 hearing. Husband stated that he was postponing his search for new employment until after he is cleared of any perjury charges that the County Attorney's Office may be considering. On cross-examination, Husband admitted that he did not disclose to the court that he had been approved for hire by the White Mountain Apache tribal council when he was questioned about his job prospects at the April 11, 2008 hearing, and further acknowledged that he had testified that he had heard a position with the tribe was opening up in the future and he planned to apply.

¶17 On February 11, 2009, the trial court entered a signed minute entry setting forth its "decisions and rulings on disputed issues at trial." As a preliminary matter, the trial court noted that its rulings were "influenced by the weight to

be given to the testimony of the respondent-husband in some areas of the evidence because of the unusually disconcerting discrepancies which the court found between his testimony and other credible evidence." The trial court then: (1) awarded custody of the children to Wife; (2) ordered each party to pay one-half of the outstanding balance on Wife's student loans; (3) vacated and set aside the temporary orders; and (4) denied Husband's request for spousal maintenance.

¶18 On June 29, 2009, the trial court held a hearing on child support. Husband testified that he earned \$37,696.00 in 2008 from his seasonal employment as a ski instructor and his four-month employment as a tribal attorney. He stated that he sustained several injuries on January 12, 2009 while skiing, which require physical therapy. He also testified that the Navajo County prosecutor charged him with perjury, but the charges have since been dismissed. He further testified that he is scheduled to begin receiving Social Security benefits in July 2009. Husband requested that Wife pay him child support in the amount of \$51.00 per month. On cross-examination, Husband acknowledged that he still actively participates in golf and asserted that his golfing activities facilitate his recovery from the skiing injuries. Husband also acknowledged that he paid another \$1,700.00 in golf club dues in January 2009.

¶119 On July 2, 2009, the trial court entered an unsigned minute entry ruling on child support and a signed child support order. The trial court found that Husband chose to be unemployed before commencing his employment as a tribal attorney and that he chose to not disclose his employment as a tribal attorney "as a means of seeking spousal maintenance." The court further found that Husband was terminated by the White Mountain Apache Tribe due to "misconduct." Based on Husband's dilatory efforts to find employment and the misconduct that resulted in his termination, the trial court attributed a monthly gross income to Husband of \$4,167.00 and ordered him to pay child support in the amount of \$597.00 per month and arrearages in the amount of \$21,010.00.

¶120 On August 20, 2009, the trial court entered a signed order on attorneys' fees, awarding Wife attorneys' fees in the amount of \$6,172.00 and costs in the amount of \$79.28. On the same date, the trial court entered a signed decree of dissolution referencing and incorporating its previous rulings on the division of the parties' assets and liabilities, child custody, child support, and spousal maintenance.

¶21 Father timely appealed.² We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION

¶22 On appeal, Husband's overarching claim is that the trial court discriminated against him based on his race and gender. Citing the Fourteenth Amendment to the United States Constitution, Husband argues that the trial court's pattern of adverse rulings against him demonstrates bias that mandates a reversal.

¶23 "Bias is a hostile feeling or spirit of ill-will . . . towards one of the litigants." *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 63, ¶ 29, 234 P.3d 623, 631 (App. 2010) (internal quotation omitted). "A party challenging a trial judge's impartiality must overcome the presumption that trial judges are free of bias and prejudice . . . and must set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or

² Wife contends that Husband did not file a timely notice of appeal because he failed to appeal from the trial court's February 11, 2007 signed minute entry rulings on child custody and spousal maintenance and the court's July 2, 2009 unsigned minute entry rulings and signed orders of child support. Neither minute entry ruling nor the orders of child support cited Arizona Rule of Family Law Procedure (Rule) 78(B) or otherwise expressly stated that the rulings were a final judgment on the issues. Therefore, Husband's appeal from the dissolution decree, which incorporated those rulings and expressly stated it is a final judgment pursuant to the Rule, was timely. Accordingly, we deny Wife's motion to dismiss.

prejudiced.” *Id.* (internal quotation omitted). “The bias and prejudice necessary for disqualification generally must arise from an extra-judicial source and not from what the judge has done in his participation in the case.” *Id.* (internal quotation omitted).

¶24 Here, Husband’s claim of judicial bias is predicated solely on the trial judge’s adverse rulings. Therefore, Husband has failed to demonstrate judicial bias. Nonetheless, even assuming that a pattern of erroneous rulings may form the basis for an inference of judicial bias, we perceive no such pattern here.³

¶25 We affirm a trial court’s factual findings unless they are clearly erroneous, but review its legal conclusions de novo. *In re Estate of Newman*, 219 Ariz. 260, 265, ¶ 13, 196 P.3d 863, 868 (App. 2008). We do not reweigh the evidence presented in the trial court because, as the trier of fact, the trial court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004).

³ Although we proceed to review Husband’s claims of erroneous rulings that pertain to the temporary orders, such orders are not appealable. See *Villares v. Pineda*, 217 Ariz. 623, 625, ¶ 11, 177 P.3d 1195, 1197 (App. 2008).

¶126 First, Husband argues that the trial court erred by permitting Wife's "parents who are white [to remain] in the courtroom" during the hearing on temporary orders. The record reflects that, at the outset of the hearing, Husband asked that the maternal grandparents be excluded from the courtroom "if they're going to be called as witnesses." The trial court inquired whether Wife's attorney intended to call them as witnesses, and when she responded that she did not, the trial court instructed the parties to proceed. Husband did not identify any other basis in the trial court, or on appeal, for excluding the maternal grandparents from the courtroom, and we perceive neither any error by the trial court in allowing them to remain nor evidence of racial bias.

¶127 Second, Husband argues that the trial court erred in its initial ruling on temporary orders by finding that the "interaction and interrelationship of the children with the parents and other person(s) who may significantly affect the child's best interest are better with the mother than with the father." At the October 15, 2007 hearing, Wife testified that she alone feeds and grooms the children before leaving for work in the morning and then feeds and prepares them for bed when she returns home in the evening. Husband testified that he provides substantial care for the children, but acknowledged that Wife

feeds and cares for them when she is home. Husband and Wife both testified that the maternal grandparents had been living in the marital residence for several months and had adopted an active role in the care of the children. Husband did not testify to any other persons who actively participated in the care of the children. Based on this record, and deferring to the trial court's role as fact-finder, we cannot say that the trial court's finding was erroneous or that it reflects any evidence of racial bias.

¶28 Third, Husband asserts that the trial court erred by denying his request for a release of \$1000.00 in community funds to allow him to retain an attorney to represent him in this matter. Husband's citation to the record for this ruling, the trial court's ruling on temporary orders, does not address this issue. Indeed, Husband did not request the release of community funds until after the trial court entered its ruling on temporary orders. Contrary to Husband's claim, our review of the record reflects that on April 25, 2008, following oral argument on this matter, the trial court ordered Wife to pay Husband the requested community funds "on or before May 19, 2008." Thus, Husband's claim is baseless.

¶29 Fourth, Husband maintains that the trial court erred by "refus[ing] to allot him additional time to present evidence

that he qualified for spousal maintenance" and in denying his request for a new trial on temporary orders. The record reflects that, before receiving any evidence or argument at the October 15, 2007 hearing on temporary orders, the trial court informed the parties that they only had one hour to address all of their issues and asked them how they would like to proceed. Husband's response was primarily indiscernible. The record also reflects that, as the hearing was drawing to a close, the trial court advised Husband that he had already spent twenty minutes of his time and he needed to decide whether he wanted to continue questioning Wife or proceed with his own argument. Husband opted to continue questioning Wife. Minutes later, when the trial court informed Husband he had already exceeded his allotted time, Husband complained that he was being "cut off" and denied the opportunity to present his case. The trial court stated that Husband "kn[ew] what time was designated." A trial court has the authority to impose reasonable time limits on the presentation of evidence, see Arizona Rule of Evidence 611(a), and the trial court's regulation of time in this proceeding does not reflect, in any manner, racial bias.

¶130 In Husband's subsequent motion for new trial on temporary orders, he again claimed that he was "cut off" and denied the "needed time to present his direct case." As found

by the trial court, however, Husband failed to identify any additional evidence that he would present. Therefore, the trial court did not abuse its discretion by denying Husband's motion for new trial on the temporary orders. See *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, 135, ¶ 6, 163 P.3d 1083, 1085 (App. 2007) (noting that we review a trial court's denial of a motion for new trial for an abuse of discretion).

¶31 Fifth, Husband contends that the trial court erred by finding that Husband should actively seek employment and by attributing income to him in its calculation of child support. At the October 15, 2007 evidentiary hearing, Husband testified that he is an attorney by profession, but unemployed and not pursuing employment because he and Wife agreed that he should stay home full-time to care for the parties' children. Wife denied that Husband acted as the children's primary caregiver, however, and claimed that he only took an active role in their care after she filed for divorce. She also denied that the parties had any agreement that Husband would stay at home. It is the province of the trial court to weigh the evidence and resolve any conflicts in testimony, and we cannot say that the trial court's finding that Husband, an attorney by profession and the father to four young children, should be gainfully employed is erroneous. Moreover, we do not find that the trial

court erred by imputing income to Husband who, by his own admission, elected not to pursue employment. See A.R.S. § 25-320 app. §5(E) (2007) (permitting a court to "attribute income to a parent up to his or her earning capacity" if earnings "are reduced as a matter of choice and not for reasonable cause"). In any event, the trial court's rulings on child support do not support a claim of judicial bias.

¶32 Sixth, Husband challenges the trial court's findings that Husband misled the court about his employment as a tribal attorney as a means of obtaining spousal maintenance and failed to meaningfully support Wife and his children during Wife's medical schooling. The transcripts Husband has submitted on appeal that relate to these issues are not certified as required pursuant to ARCAP 13(a)(4) and Husband has not attempted to provide a narrative of the evidence or proceedings as permitted under ARCAP 11(c). Therefore, that evidence is not properly before us and we presume the evidence supports the trial court's rulings. See *Ariz. Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997) (presuming the record supports the trial court's holding when the appellant fails to provide the court with the requisite transcripts). Moreover, even considering the evidence presented at the April 11, 2008 and the November 21, 2008 evidentiary hearings as reflected in

the uncertified transcripts submitted, the record supports the trial court's findings. Husband failed to inform the court that he had been approved by the tribal council for the tribal attorney position; instead, he testified that he planned to apply for the position the following month. Although Husband testified that he supported Wife and the children while Wife attended medical school and completed her residency, Wife testified that he offered minimal support, necessitating that she take out approximately \$60,000.00 in student loans to support the family. The trial court, as the trier of fact, was in the best position to weigh the evidence and substantial evidence supports the trial court's findings.⁴ We do not find that the trial court's rulings support a claim of judicial bias.

⁴ To the extent Husband contends that the trial court erred by apportioning one-half of Wife's student loan debt to him, we likewise conclude that substantial evidence supports the trial court's finding that the student loans were used to provide for the family's living expenses and are therefore a community obligation.

CONCLUSION

¶133 For the foregoing reasons, we affirm the trial court's decree of dissolution. Wife requests an award of attorneys' fees pursuant to A.R.S. § 25-324 (Supp. 2010). In our discretion, we grant Wife's reasonable attorneys' fees in an amount to be determined upon her compliance with ARCAP 21(C).

/s/

PHILIP HALL, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

LAWRENCE F. WINTHROP, Judge