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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: CHRISTOPHER STEVEN HUNT, Petitioner/Appellant, and ISABELLA LIOBA HUNT, Respondent/Appellee.	2 CA-CV 2013-0026 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. S0200DO201100847

Honorable John F. Kelliher Jr., Judge

AFFIRMED IN PART; VACATED IN PART;
REMANDED WITH INSTRUCTIONS

Christopher Steven Hunt — Sierra Vista
In Propria Persona

Isabella L. Hunt — Sierra Vista
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Christopher Hunt appeals from the trial court's order modifying child custody and enforcing his child support and spousal maintenance obligations to appellee Isabella Hunt. Christopher argues the court erred by failing to make the required statutory findings before modifying child custody and by failing to address "the completeness or veracity" of Isabella's financial affidavits. For the reasons stated below, we affirm in part, vacate in part, and remand with instructions.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to upholding the trial court's order. *In re Marriage of Yuro*, 192 Ariz. 568, ¶ 3, 968 P.2d 1053, 1055 (App. 1998). The parties' marriage was dissolved in January 2012. Pursuant to a consent decree, the parties were awarded joint legal custody of their four minor children. Christopher was awarded physical custody of the two older children, and Isabella was awarded physical custody of the two younger children. The decree ordered Christopher to pay Isabella "child support pursuant to the Arizona Child Support Guidelines" according to the calculations filed with the decree. It also ordered Christopher to pay Isabella spousal maintenance in the amount of $832 per month until the marital residence was sold. It further provided: "When [Christopher] is no longer making the house payment the temporary increase in spousal maintenance shall be one-half of the difference in the current payment of $2500.00 per month for the residence and the new monthly housing cost for [Christopher]."

¶3 In October 2012, Isabella filed a "Petition to Modify/Enforce Decree of Dissolution." She asked the trial court "to modify the parenting plan to award her sole

legal custody of the three younger children." She also alleged Christopher was not paying spousal maintenance or child support as ordered by the decree. At a November 2012 hearing on the petition, Isabella sought physical custody of A., the second oldest child, in addition to the two youngest children already in her custody. The court allowed Christopher the opportunity to cross-examine Isabella, but he declined, and he also "stated he did not wish to testify and . . . did not have witnesses to call."[1] At the conclusion of the hearing, the court granted Isabella's request "to change the physical custody" of A., ordered Christopher to pay Isabella $1,700 per month in spousal maintenance effective that month contingent upon proof of Christopher's monthly residence rental expense, and directed counsel to prepare a revised child support calculation.

¶4 Christopher filed a combined motion for reconsideration and petition for modification of child custody and spousal maintenance, accompanied by an affidavit of A. He argued the trial court "was under an obligation to ascertain [A.'s] wishes" before modifying custody but failed to do so. Christopher also asserted that "spousal maintenance should be terminated or substantially reduced in light of [Isabella's] other sources of income, and her failure to report the same." The trial court denied the motion for reconsideration, explaining that Christopher had been "afforded ample opportunity at the hearing . . . to present evidence/testimony and [he] repeatedly declined said offers."

[1]The day before the hearing, Christopher filed a motion to continue on the grounds that he was "having trouble getting documents to refute the[] claims" and that he was "trying to get a [l]awyer." The trial court denied the motion, and Christopher does not challenge the court's ruling on appeal. Notably, the order to appear at the hearing was filed October 11, 2012, over a month before the hearing.

The court also implicitly denied Christopher's petition for modification, directing him to "A.R.S. § 25-411 and the Arizona Rules of Family Law Procedure with respect to his Petition." In January 2013, the court entered a final signed order awarding Isabella "sole legal and physical custody" of the three youngest children and modifying Christopher's spousal maintenance and child support obligations. This appeal followed.[2] We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A).

Discussion

Custody Findings

¶5 Christopher argues the trial court erred by modifying custody of A. without making the required statutory findings. In response, Isabella contends the court did consider all of the factors in A.R.S. § 25-403(A), particularly seven of the enumerated factors she asserts were raised at the November 2012 hearing. We review a trial court's decision regarding child custody for an abuse of discretion. *In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 3, 38 P.3d 1189, 1191 (App. 2002).

¶6 Pursuant to § 25-403(A),[3] when determining custody, either originally or through a petition for modification, the trial court must consider all factors relevant to the

[2]Christopher's notice of appeal indicates he is appealing the trial court's unsigned minute entry from the November 2012 hearing. Although the notice of appeal was file-stamped December 21, 2012, that stamp was crossed out and the notice was apparently refiled on February 1, 2013, after entry of the final signed order. *See Hanen v. Willis*, 102 Ariz. 6, 9, 423 P.2d 95, 98 (1967) (notice of appeal containing date of minute entry rather than judgment not defective, particularly in absence of prejudice).

[3]Because the custody statutes were substantively amended effective January 1, 2013, *see* 2012 Ariz. Sess. Laws, ch. 309, §§ 1-28, we cite the version in effect at the time of the November 2012 hearing.

child's best interests, including those specifically enumerated therein. And, "[i]n a contested custody case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." A.R.S. § 25-403(B); *see also Hart v. Hart*, 220 Ariz. 183, ¶ 13, 204 P.3d 441, 444-45 (App. 2009) (in weighing statutory factors, court "statutorily required to document" its findings). The requirement of specific findings applies when the court modifies either or both physical and legal custody. *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 11, 79 P.3d 667, 670 (App. 2003).

¶7 The requirement facilitates appellate review because it enables this court to determine which factors the trial court relied upon in making its decision and whether the court "focus[ed] too much attention on [one factor] to the exclusion of other relevant considerations." *Id.* ¶ 12. But, more importantly, the requirement "aid[s] all parties and the [trial] court in determining the best interests of the child or children both currently and in the future." *Reid v. Reid*, 222 Ariz. 204, ¶ 18, 213 P.3d 353, 358 (App. 2009). A court abuses its discretion by failing to make the required statutory findings. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 11, 219 P.3d 258, 261 (App. 2009).

¶8 Here, neither the trial court's minute entry from the November 2012 hearing nor the January 2013 order contain the findings required by § 25-403(B). But, § 25-403(B) requires only that the court make findings "on the record," so it could have complied by making the necessary findings orally at the conclusion of the hearing. *See also* Ariz. R. Fam. Law P. 82(A) (oral findings of fact sufficient when recorded in open court following close of evidence); *Hart*, 220 Ariz. 183, ¶ 16, 204 P.3d at 445. However,

Christopher failed to include the transcript of the hearing in the record on appeal.[4] *See* Ariz. R. Civ. App. P. 11(b); *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (discussing appellant's duty to provide necessary transcripts). And, in the absence of a transcript, we ordinarily presume the record supports the trial court's findings and conclusions. *See Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

¶9 Although we do not have the transcript, it does not appear from the record that the trial court orally made the necessary findings at the November 2012 hearing or that the court even considered the statutory factors.[5] Rather, the court's November 2012

[4]Isabella apparently requested a court reporter for the November 2012 hearing—a request Christopher suggests he relied upon. However, no court reporter was present. On December 18, 2012, the trial court denied Christopher's motion to obtain a copy of the compact disc recording of the proceeding. In denying the motion, the court noted that the "recording was not designated by the Court as the official record." *See* Ariz. R. Sup. Ct. 123(d)(4) (unofficial recording used in preparing minute entries closed); Cochise Cnty. Super. Ct. Admin. Order No. 2011-13 (in absence of court reporter, court may direct recording to serve as official record). Christopher then filed a motion with this court requesting an order directing the trial court to produce the recording for this appeal. We denied the motion. *See* Ariz. R. Civ. App. P. 11(b)(3), (4) (in absence of certified court reporter, appellant shall order certified transcript from authorized transcriber).

[5]Christopher contends that, in his motion for reconsideration, he "specifically pointed out to the trial [c]ourt [its] failure to address" the § 25-403(A) factors. It does not appear from our reading of the motion that Christopher made that argument "specifically." However, he did cite and extensively quote an unpublished decision of this court in a factually similar case, where we reversed the trial court's custody order because it had failed to make the requisite findings. It generally is improper to cite unpublished decisions as authority. *See* Ariz. R. Civ. App. P. 28(c) ("Memorandum decisions shall not be regarded as precedent nor cited in any court except for . . . informing the . . . court of other memorandum decisions so that the court can decide whether to . . . grant a motion for reconsideration."). Nevertheless, because of the importance of custody determinations, we are not prevented from considering Christopher's argument on appeal. *See Reid*, 222 Ariz. 204, ¶ 20, 213 P.3d at 359

minute entry includes only its findings that a change of physical custody was in A.'s best interests based on Christopher's "work travel schedule" and Isabella's "ability to provide a greater degree of parental supervision." But neither of those factors is explicitly included in § 25-403(A). And, the court made them specifically with respect to physical, not legal custody, although it later awarded Isabella "sole legal and physical custody" of A. in the January 2013 order. Moreover, the court also modified legal custody of the two youngest children in the January 2013 order without any reference to those children in the November 2012 minute entry.

¶10 Because it appears from the record that the trial court did not consider all of the relevant factors enumerated in § 25-403(A), the court's order granting Isabella's petition to modify custody is deficient as a matter of law and must be vacated. *See Diezsi*, 201 Ariz. 524, ¶ 3, 38 P.3d at 1191. And, because the parties' child support obligations are dependent on the custody determination, *see, e.g.*, A.R.S. § 25-320 app. § 11, we similarly vacate that portion of the court's order. Without suggesting a particular outcome, we remand to the trial court with instructions to articulate its findings pursuant to § 25-403(B). We leave it to the court's discretion to determine whether further evidentiary proceedings are necessary in order to make the statutory findings and to enter any order it deems appropriate based on those findings.[6]

(declining to apply waiver rule given § 25-403(B)'s explicit requirement for specific findings).

[6]To the extent Christopher argues the trial court erred by failing to consider A.'s wishes as to his custody, the court was not required to consider evidence presented for the

Financial Affidavits

¶11 Christopher next argues the trial court erred by "not addressing the completeness or veracity" of Isabella's financial affidavits. He contends Isabella failed to disclose all sources of her income and "her spousal maintenance should be reduced accordingly or terminated altogether." We review the trial court's spousal maintenance ruling for an abuse of discretion. *Boyle v. Boyle*, 231 Ariz. 63, ¶ 8, 290 P.3d 456, 458 (App. 2012). In doing so, we defer to the trial court's determination of witness credibility and the weight to give conflicting evidence. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998).

¶12 As part of his argument, Christopher directs us to Isabella's two financial affidavits submitted in this matter. The first financial affidavit he refers to is one Isabella apparently disclosed in November 2011, in support of her temporary orders petition. With regard to this affidavit, Christopher contends Isabella failed to disclose all of her income and information about her savings account. Likewise, Christopher argues Isabella's second financial affidavit, filed in support of her October 2012 petition to modify, contained "omissions . . . intentionally withheld from the trial court." According to Christopher, these omissions included income earned as an author and for services rendered as a "Certified Reiki Master," information about her savings account, and receipt of her share of Christopher's retirement. In light of Isabella's "fail[ure] to

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first time in an affidavit attached to Christopher's motion for reconsideration. *See Tilley v. Delci*, 220 Ariz. 233, ¶ 17, 204 P.3d 1082, 1087 (App. 2009).

disclose," Christopher maintains the court's spousal maintenance award was in error and asks that we either modify or terminate the award or remand to the trial court to do so.

¶13 We first address Christopher's contention that the trial court erred by failing to address Isabella's "clearly misleading" November 2011 financial affidavit. Christopher did not object to the affidavit when Isabella disclosed it, and any questions concerning the affidavit's contents should have been brought to the court's attention at that time. *See* Ariz. R. Fam. Law P. 32(A), (F) (presentation and waiver of defenses and objections). Moreover, the January 2012 decree was a final, appealable judgment. *See Perras v. Perras*, 151 Ariz. 201, 202, 726 P.2d 617, 618 (App. 1986). Because Christopher did not timely appeal from that judgment, the decree became final and any challenge to the November 2011 financial affidavit is precluded. *See id.*; *Brubaker v. Ariz. Dep't of Econ. Sec.*, 156 Ariz. 577, 579, 754 P.2d 304, 306 (App. 1987).

¶14 We next turn to Christopher's argument that the trial court erred by not addressing Isabella's October 2012 financial affidavit. Christopher objected to this affidavit for the first time in the motion for reconsideration; he did not object prior to or during the hearing. And, Christopher had numerous opportunities to challenge the affidavit during Isabella's testimony on direct examination, during cross-examination, or through his own or another witness's testimony. As we mentioned above, on at least two occasions during the November 2012 hearing, the court asked Christopher if he wanted to cross-examine Isabella, but he declined. *See Spector v. Spector*, 94 Ariz. 175, 184, 382 P.2d 659, 665 (1963) ("On cross-examination a party should be permitted to ask any question which bears upon the credibility of the witness and sheds light upon the issues

of the case."). He also chose not to testify or to present any witnesses. And, the court was "not required to accept and examine evidence presented to it for the first time in connection with [Christopher's] motion for reconsideration." *Tilley v. Delci*, 220 Ariz. 233, ¶ 17, 204 P.3d 1082, 1087 (App. 2009). As we have also noted, Christopher failed to provide a transcript on appeal, and we presume the record supports the trial court's ruling.[7] *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

Disposition

¶15 For the reasons stated above, we affirm in part, vacate in part, and remand with instructions.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge

[7]To the extent Christopher argues that any omissions in Isabella's affidavits affected her credibility, we defer to the trial court's determination of her credibility. *See Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d at 680.