IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF:

COURTNEY BOYEN,
Petitioner/Appellee,

and

EDWARD BOYEN,
Respondent/Appellant.

No. 2 CA-CV 2014-0024
Filed November 14, 2014

Appeal from the Superior Court in Pima County
No. D20124071
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Law Office of Sandra Tedlock, Tucson
By Sandra Tedlock
Counsel for Petitioner/Appellee

The Reyna Law Firm, P.C., Tucson
By Ron Reyna
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

H O W A R D, Judge:

¶1 Appellant Edward Boyen appeals from the trial court's order granting attorney fees to his former wife, Courtney Boyen. Edward additionally argues the court erred by granting Courtney spousal maintenance for an indefinite period. Because the court did not abuse its discretion, we affirm.

Factual and Procedural Background

¶2 In November 2012, Courtney filed a petition for dissolution of marriage against Edward. Following a trial, the court, inter alia, awarded Courtney $15,000 in attorney fees and costs, and ordered that Edward pay Courtney $400 per month in spousal maintenance indefinitely. We have jurisdiction over Edward's appeal pursuant to A.R.S. §§ 12–120.21(A)(1) and 12–2101(A)(1). *See also* Ariz. R. Civ. App. P. 9(b)(2)(B).

Attorney Fees and Costs

¶3 Edward first argues the trial court abused its discretion in granting Courtney's request for attorney fees and costs. He does not dispute the court's finding that a financial disparity existed, but argues that his position was not unreasonable.

¶4 We review a trial court's award of attorney fees and costs for an abuse of discretion. *Mangan v. Mangan,* 227 Ariz. 346, ¶ 26, 258 P.3d 164, 170 (App. 2011). We view the evidence in the light most favorable to upholding the court's decision and will affirm it if any reasonable evidence in the record supports it. *Thomas v. Thomas,* 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984); *see also Graville v. Dodge,* 195 Ariz. 119, ¶ 56, 985 P.2d 604, 616 (App. 1999)

(review of attorney fees award recognizes court's opportunity to observe reasonableness of parties' conduct).

¶5 A trial court may award attorney fees and costs pursuant to A.R.S. § 25-324(A) "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." The reasonableness of a party's position is evaluated using an objective standard; not by considering the party's subjective intent. *In re Marriage of Williams*, 219 Ariz. 546, ¶ 10, 200 P.3d 1043, 1045 (App. 2008).

¶6 Before trial, Edward and Courtney shared parenting time and scheduled it around Edward's work schedule. Courtney had their son, M.B., Monday through Thursday, the same days that Edward worked. Edward had parenting time after he got off work on Thursday nights through Sunday. M.B. suffers from behavioral problems and attends elementary school for only a few hours each day. Courtney works at a stable between eight and ten hours each week on average, when and as she is able to depending on her health and M.B.'s needs.

¶7 In their pretrial filings, Edward and Courtney both requested roughly equal parenting time. At trial, however, Edward changed his position and stated he wanted M.B. to live with him primarily, reducing Courtney's parenting time to one night per week and alternating weekends. He also sought sole legal decision-making authority. Edward claimed this change was because he believed Courtney had problems with prescription drug use, she could not adequately supervise M.B., and she made decisions with which he did not agree regarding M.B.'s medical treatments. He stated that his father and other extended family were willing and able watch M.B. while Edward was at work.

¶8 A behavioral health technician testified that Courtney was active and interested in helping M.B., "her interactions were nurturing and caring," and that she was able to appropriately control M.B. Others who were familiar with the family described Courtney as a "fantastic" and "caring" mother, stated that she handled M.B. with "patience and [in a] loving manner," and that she

could adequately supervise and control his behavior. As to the prescription drug use issue, although Courtney previously had been on narcotic medications, she had been admitted to a hospital several years earlier and taken off all narcotic medications; since that time she has not taken any narcotic prescription drugs and has not had any further problems with her prescription medications.

¶9 Edward's parenting time demands would have reduced Courtney's parenting time from four days per week to one night and alternating weekends, leaving M.B. in the care of extended family, rather than his mother, during the week. And other than his assertion that he disagreed with Courtney on the best courses of treatment for M.B.'s behavioral problems, Edward presented no evidence to show that his having sole legal decision-making authority was in M.B.'s best interest. *See* A.R.S. § 25-103(B) ("absent evidence to the contrary, it is in a child's best interest . . . [t]o have both parents participate in decision-making about the child"). The record thus contains reasonable evidence to support the trial court's finding that Edward's requests for parenting time and sole legal decision-making authority were objectively unreasonable. *See Marriage of Williams*, 219 Ariz. 546, ¶ 10, 200 P.3d at 1045. Accordingly, because the record supports the court's findings, it did not abuse its discretion in awarding Courtney her attorney fees and costs based, in part, on the unreasonableness of Edward's position. *See Mangan,* 227 Ariz. 346, ¶¶ 26-27, 258 P.3d at 170-71; *Thomas,* 142 Ariz. at 390, 690 P.2d at 109; *see also* § 25-324(A).

¶10 Edward, however, argues that because he and Courtney took similar positions during the trial, his position could not be unreasonable. But the test is whether his position was objectively reasonable, not if it was subjectively reasonable when compared to Courtney's position. *See Marriage of Williams*, 219 Ariz. 546, ¶ 10, 200 P.3d at 1045. Moreover, he and Courtney did not take the same positions at trial. Courtney sought equal parenting time with roughly the same schedule to which the parties had grown accustomed, [1] as well as joint legal decision-making, with the

[1]Edward contends that because Courtney sought to relocate with M.B. to Missouri, she was, "[i]n essence, . . . requesting that the

authority to make the final decision if they were unable to agree. Edward argues the difference between sole decision-making and joint decision-making with final decision-making authority is "lexical . . . at best," but the difference is in fact an important legal distinction. *See* A.R.S. § 25-401(2), (6) (defining legal rights and responsibilities of "joint" and "sole" legal decision-making). And although Edward testified he would have consulted Courtney in regard to making decisions about M.B., he would have been under no obligation to do so had he been awarded sole decision-making authority. *See* § 25-401(6). Consequently, we reject Edward's argument that he and Courtney took similar positions and that any similarity necessarily means his position was not unreasonable.

Spousal Maintenance

¶11 Although Edward contends in his opening brief that the trial court erred in awarding spousal maintenance for an indefinite period, his notice of appeal stated he was appealing only from the court's November 7, 2013 judgment. This order awarded Courtney $15,000 in attorney fees and costs. Even if a notice of appeal is timely filed, this court does not have jurisdiction over matters not contained in the notice of appeal. *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982). Consequently, we do not have jurisdiction to address Edward's argument on the spousal maintenance award. *See id.*

¶12 However, even were we to have jurisdiction over the issue, Edward's argument fails. He contends the evidence presented at trial showed that Courtney was capable of returning to work and achieving independence and thus the trial court erred in ordering that spousal maintenance continue indefinitely. "This court reviews the superior court's award of spousal maintenance for an abuse of discretion, viewing the evidence in a light most favorable to the court's order, and will affirm if there is any reasonable evidence to support the award." *Smith v. Smith*, 235 Ariz. 181, ¶ 11, 330 P.3d 371,

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trial court permit [M.B.] to reside primarily with" her. The issue of relocation, however, was addressed at a separate hearing and the court ultimately denied Courtney's request.

374 (App. 2014). The amount and duration of spousal maintenance is determined pursuant to the factors set forth in A.R.S. § 25-319(B). The court must consider those factors, as each may be relevant in any particular case, *id.*, and has the discretion "to award indefinite maintenance when it appears from the evidence that independence is unlikely to be achieved," *Rainwater v. Rainwater*, 177 Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993).

¶13 The trial court's minute entry reflects that it considered each of the enumerated factors set forth in § 25-319(B). Courtney had worked full-time until she began having debilitating migraines in 2008, which forced her to stop working in 2009. Courtney received treatment for her migraines that reduced the frequency at which they occurred, but the sporadic and unpredictable nature of those migraines made maintaining consistent employment, either part- or full-time, difficult. One of Courtney's doctors testified she could not work full-time due to the unpredictable and severe nature of her migraines and also because her condition would be exacerbated by work that involved being in a single position or engaging in physical activity for an extended amount of time. Although Courtney works part-time at a stable in exchange for the cost of boarding her horse, she is not required to be on a schedule and can work when she feels capable. Therefore, reasonable evidence supported the court's decision that Courtney would not "have the ability to achieve financial independence based upon her disability at this time" and the court did not abuse its discretion in awarding indefinite maintenance. *See Smith*, 235 Ariz. 181, ¶ 11, 330 P.3d at 374; *see also* § 25-319(B); *Rainwater*, 177 Ariz. at 503, 869 P.2d at 179; *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995) (we defer to court's factual findings unless clearly erroneous or unsupported by record), *superseded in part by statute on other grounds as recognized in Myrick v. Maloney*, 235 Ariz. 491, ¶ 8, 333 P.3d 818, 821 (App. 2014).

Attorney Fees and Costs on Appeal

¶14 Courtney has requested her attorney fees and costs on appeal pursuant to § 25-324 and Rule 21, Ariz. R. Civ. App. P. Considering the relative financial position of the parties, as set forth in the record, and the reasonableness of their positions, we grant

Courtney her reasonable attorney fees and costs pursuant to § 25-324 upon her compliance with Rule 21.

Disposition

¶15 For the foregoing reasons, we affirm the judgment of the trial court.