IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

KATHARINA R. THOMAS,
Petitioner/Appellant,

v.

UNDRA THOMAS JR.,
Respondent/Appellee.

No. 2 CA-CV 2015-0020
Filed November 25, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
No. DO200801019
The Honorable Steven J. Fuller, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Katharina Thomas appeals the trial court's order modifying child custody and parenting time. She argues the trial court abused its discretion in basing its decision to modify custody on her lawful employment in the adult services industry and in failing to properly evaluate certain factors in determining the best interests of the child. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's ruling. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1, 169 P.3d 111, 112 n.1 (App. 2007). Katharina and Undra Thomas were married in 2006 and have one child together. The marriage was dissolved in 2009, and pursuant to a consent decree, Katharina[1] was awarded full custody of their child, E.T. In March 2014, Undra learned Katharina and her boyfriend had listed an online advertisement offering "erotic massage, companionship, erotic entertainment, fetish play, and more." He then filed a petition to modify custody and parenting time, alleging Katharina had been engaging in illegal prostitution and abusing illegal drugs "against [E.T.'s] best interests."

¶3 In August 2014, the trial court found by a preponderance of the evidence that E.T. might be facing "mental, physical, and emotional irreparable harm" in Katharina's care, and entered temporary orders awarding Undra sole legal decision-

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[1]For clarity and convenience, we refer to the parties by their first names.

making and primary custody of E.T. In December, after an evidentiary hearing, the court affirmed its temporary orders and also granted Undra's request to relocate E.T. to Texas. Katharina timely appealed; we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A) and 12-2101(B).

Child Custody

¶4 Katharina argues the trial court abused its discretion by "bas[ing] its ruling" modifying child custody and parenting time on her employment in the adult services industry and in finding it constituted a change in circumstances that materially affected E.T. She also contends the court failed to consider statutory factors in evaluating whether a change in legal decision-making or parenting time was in E.T.'s best interests and in determining whether relocation was appropriate. Finally, she alleges the court improperly imposed supervised parenting time based on an "erroneous mischaracterization" or "prejudice against [her] lawful employment."

¶5 We review the trial court's rulings addressing child custody and relocation for an abuse of discretion. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 19, 219 P.3d 258, 262 (App. 2009); *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003). A trial court abuses its discretion when the record, viewed in the light most favorable to upholding its decision, is devoid of competent evidence in its support. *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999). We do not reweigh the evidence on review because the trial court, as trier of fact, is in the best position to assess the evidence and witness credibility. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 8, 83 P.3d 43, 47 (App. 2004).

Material Change in Circumstances

¶6 We first address Katharina's argument that the trial court abused its discretion in modifying legal custody and denying her parenting time because its decision was improperly based on disapproval of her "lawful . . . adult-related employment." And, she contends, her employment does not constitute a change in circumstances affecting E.T.'s welfare because "all evidence

demonstrates [E.T.] is well-adjusted and unaware of [her] employment in a lawful industry."

¶7 To modify a previous custody order, the trial court must first determine "'there has been a material change in circumstances affecting the welfare of the child.'" *Owen*, 206 Ariz. 418, ¶ 16, 79 P.3d at 671, *quoting Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994). The court has broad discretion in making this determination, which we will not disturb absent a clear abuse of discretion. *Canty*, 178 Ariz. at 448, 874 P.2d at 1005.

¶8 In arguing her "change in employment" is not a change in circumstances, Katharina stresses that "all evidence indicates" she "kept her employment strictly separate and apart" from E.T. and asserts "he [wa]s unaware of [her] adult-related employment and has not experienced negative consequences." The record, however, contradicts that assertion.

¶9 Katharina admitted posting ads online offering adult services, and estimated they resulted in "maybe ten" clients over the course of six months, some of whom she saw at her apartment. She removed the ads and cancelled the associated telephone number in March 2014, and stated she had no intention of "doing any live performances in the future." According to Katharina, E.T. had never been at home during an "appointment," but Undra testified the child told him on "several occasions that sometimes he would have to go to bed early because [Katharina's] clients would come over." E.T. also told a court-ordered custody evaluator that he had met some of Katharina's clients, and that he "h[ad] to stay in [his] room until the massage [wa]s over."

¶10 As of the December evidentiary hearing, Katharina was working as "an on-line entertainer" out of her home,[2] but stated she intended to quit once she graduated from the massage therapy program she had been enrolled in and obtained her license. In the

[2] Katharina stated the work sometimes involved "live sex shows . . . [o]ver the internet" via "webcam."

meantime, she noted she could work from the company's office if E.T. were to be allowed "back with [her] unsupervised."

¶11 In arguing her employment did not materially affect E.T.'s welfare, Katharina maintains that her work was legal and contends the trial court's "improper . . . characterization" of and "prejudice against" her employment inappropriately influenced its decision.[3] Though the court did note its "focus" was on "[Katharina] in the sex trade," it is clear from the record that its primary concern was E.T.'s exposure to risks associated with such work and Katharina's apparent lack of insight as to how it might endanger or negatively impact E.T. The court found it was "very clear . . . that [Katharina] participated in [the sex trade] when [E.T.] was present in the home and that [she] has minimized her involvement in the sex trade." It further found Katharina was "likely to continue in that trade in the foreseeable future even if employed as a massage therapist," and that her "involve[ment] in the sex trade in the home is significantly detrimental to the well[-]being of [E.T.]"

¶12 There was nothing improper about the trial court considering Katharina's work in evaluating whether there had been a material change in circumstances. Moreover, in light of the fact that Katharina was working from home, where E.T. lived, the court appropriately considered that factor. Because the record contains substantial evidence that Katharina's employment constituted a change in circumstances justifying a modification to the custody arrangement, we have no reason to disturb the court's order on this basis. *Cf. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.2d at 262 (where conflicting evidence exists, we affirm trial court's ruling if substantial evidence supports it).

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[3]Though Katharina places much emphasis on the claimed legality of her work, the record casts doubt on that position with regard to some of the services she was soliciting online. *See* A.R.S. § 13-3211(5), (8), (9); *see also* A.R.S. § 13-3214. Nevertheless, because we agree with the trial court that the distinction is not dispositive here, we need not address this issue.

Best-Interest and Relocation Factors

¶13 Katharina next argues the trial court "failed to address all of the custody, best interests and relocation factors," "erroneously stated findings of fact," and "ignored or missed evidence" when it made its best interests findings and in evaluating "the factors governing relocation." When modifying legal decision-making and parenting time, the trial court must determine the best interests of the child by considering the factors enumerated in A.R.S. § 25-403(A). *See* A.R.S. § 25-403(B); *see also Hurd*, 223 Ariz. 48, ¶ 11, 219 P.3d at 261. If the level of decision-making is modified or relocation is involved, the court must also consider additional statutory factors. *See* A.R.S. § 25-403.01(B) (listing factors court must consider in deciding whether sole or joint decision-making is appropriate); A.R.S. § 25-408(I) (relocation factors). "In a contested custody case, the court must 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].'" *Hurd*, 223 Ariz. 48, ¶ 11, 219 P.3d at 261, *quoting* A.R.S. § 25-403(B) (emphasis omitted; alteration in *Hurd*). Failure to make the requisite statutory findings in an order or on the record constitutes an abuse of discretion. *Nold v. Nold*, 232 Ariz. 270, ¶ 11, 304 P.3d 1093, 1096 (App. 2013).

¶14 The trial court's order reflects it specifically and thoroughly considered all factors in §§ 25-403(A), -403.01(B), and -408(I),[4] and each was addressed on the record at the hearing. *See Downs v. Scheffler*, 206 Ariz. 496, ¶ 16, 80 P.3d 775, 779 (App. 2003). Katharina nevertheless contends the court "erroneously stated findings of fact" and "ignored or missed evidence" when it made its best interests findings and evaluated "the factors governing relocation." Specifically, she contends the court erroneously found: (1) it had not heard testimony regarding E.T.'s bonding with her boyfriend or E.T.'s involvement in the community; (2) her employment was significantly detrimental to E.T.'s well-being and caused him to "cease[being] well[-]adjusted" in her home; (3) E.T. expressed a desire to live in Texas; (4) neither parent had been

[4] The trial court cited § 25-408(H), which has since been reordered as § 25-408(I). *See* 2015 Ariz. Sess. Laws, ch. 317, § 2.

unreasonable; (5) the parents could not co-parent, making joint decision-making implausible; (6) Undra and his wife would receive a significant increase in income if allowed to move to Texas; and (7) Undra had complied with parenting time orders.

¶15 The record supports the findings that Katharina challenges. The trial court heard conflicting evidence relevant to each of those factors, which it ultimately resolved against Katharina. It is not our duty on review to reweigh conflicting evidence or to redetermine the preponderance of the evidence. *Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262. Instead, we give due regard to the court's opportunity to judge witness credibility, and will affirm its ruling if substantial evidence supports it, even when conflicting evidence exists. *Id.* We see no reason to interfere with the court's challenged findings.

¶16 Katharina also contends the trial court erred in making "no findings" regarding the "[e]ffect of [E.T.'s] emotional, physical or developmental needs," apparently challenging the adequacy of the court's A.R.S. § 25-408(I)(6) finding. *See* § 25-408(I)(6) (when evaluating relocation request, trial court must consider extent to which moving or not moving will affect emotional, physical or developmental needs of child). In addressing that factor, the court stated the following on the record, during the hearing: "It is [Katharina]'s position that moving to the State of Texas would estrange [E.T.] from [her] and negatively impact [E.T.]'s emotional needs and [Undra] disagrees. [Undra] testified that he [and E.T.] had a long distance exchange previously and [E.T.] was able to adjust to this exchange."

¶17 We agree with Katharina that the trial court failed to make a specific and adequate finding in accordance with § 25-408(I)(6). But Katharina did not object to this omission at the hearing or in a later motion. *See Banales v. Smith*, 200 Ariz. 419, ¶ 8, 26 P.3d 1190, 1191 (App. 2001). The court's minute entry and the hearing transcript are detailed and include numerous findings of fact and conclusions of law that show the court made every attempt to comply with § 25-408(I) in considering whether relocation was in E.T.'s best interests. *Id.* ¶ 7. Thus, the court's failure to make an express finding regarding that single factor could have been a

simple oversight, which easily could have been corrected had Katharina raised the issue below. *See id.* ¶¶ 7-8 (failure to raise lack of § 25-403 finding below waived issue on appeal); *see also Reid v. Reid*, 222 Ariz. 204, ¶ 15, 213 P.3d 353, 357 (App. 2009). Because she did not object and because the likelihood that the court did not consider this factor is remote, given its extensive and detailed findings, we need not disturb its order on that basis.

Supervised Parenting Time

¶18 Last, Katharina asserts the trial court abused its discretion in requiring her parenting time with E.T. to be supervised once again claiming its decision was based on "an erroneous characterization of [her] lawful employment." Instead of addressing that point, however, she merely reiterates her position that her employment alone did not warrant a modification in custody and parenting time. Accordingly, we decline to consider this argument. *See* Ariz. R. Civ. App. P. 13(a)(7); *Hurd*, 223 Ariz. 48, n.3, 219 P.3d at 260 n.3 (we will not address insufficiently supported arguments on appeal). We do, however, consider Katharina's related argument that the court erred as a result of contradictory findings in its modification order regarding the necessity for supervised parenting time.

¶19 A trial court may order supervised parenting time if it finds "that in the absence of supervision the children's physical health would be endangered or their emotional development significantly impaired or that unsupervised parenting time would seriously endanger the children's physical, mental, moral, or emotional health." *Hart*, 220 Ariz. 183, ¶ 16, 204 P.3d at 445; *see also* A.R.S. §§ 25-410(B), -411(J). Contrary to Katharina's assertion, these findings need not be reduced to writing or stated on the record. *See Hart*, 220 Ariz. 183, ¶ 16, 204 P.3d at 445 (court not required to make findings on record to support supervision order). In the absence of written findings regarding the specific statutory standards, we will presume the court knew the law and applied it correctly. *Id.* ¶ 18. That presumption may be overcome if the court uses language that indicates it applied an incorrect standard. *Id.*

¶20 At the end of the hearing and after it ordered that Katharina's parenting time be supervised, the trial court made the following statements on the record:

> [Katharina's parenting time] will be supervised by the . . . eight supervisors that the parties have put on the record this date. If none of the supervisors are able to supervise[, Katharina]'s parenting time will be unsupervised so, [Undra], it's [your] job to make sure those supervisors step up to the plate and they supervise because what I don't want to have happen moving forward what happened if the supervisors are not available moving forward [Katharina]'s time goes to unsupervised so you make sure one of those eight people is available to supervise the time.

¶21 The trial court's comments suggest it based its decision to impose supervised visitation on some factor other than concern that E.T.'s physical, mental, moral, or emotional health might be endangered by apparently allowing Katharina's parenting time to be unsupervised in the event a supervisor is unavailable. *See* A.R.S. § 25-411(J). Though it appears likely that the court merely intended to incentivize Undra to actively coordinate with the supervisors to ensure their availability in the future, imposing such a condition also casts doubt as to whether the court was seriously concerned that Katharina would endanger E.T.'s health if allowed unsupervised parenting time. Because a finding of endangerment is a prerequisite to modifying an order in a manner that restricts parenting time rights, *see id*., and the trial court's comments refute the presumption that it made such a finding, we vacate its order of supervised parenting and remand this issue for further proceedings, including redetermination under the proper standard. *See Hart*, 220 Ariz. 183, ¶ 19, 204 P.3d at 446.

Attorney Fees

¶22 Undra requests his attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P., contending Katharina's position that the trial court held her employment "against her" in its rulings is unreasonable. Section 25-325, A.R.S., requires that we examine both the financial resources of the parties and the reasonableness of their positions. Upon doing so, we conclude the parties should each bear their own attorney fees and costs on appeal. *See Leathers v. Leathers*, 216 Ariz. 374, ¶ 22, 166 P.3d 929, 934 (App. 2007).

Disposition

¶23 For the foregoing reasons, the trial court's order modifying legal decision-making, parenting time, and allowing relocation is affirmed. However, we vacate that portion of the order imposing supervised parenting time and remand for further proceedings consistent with this decision.