IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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IN RE THE MARRIAGE OF

ENRIQUE J. CAPERON,
*Petitioner/Appellant*,

*and*

ANDREA M. CAPERON,
*Respondent/Appellee*.

No. 2 CA-CV 2015-0223
Filed June 8, 2017

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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NOT FOR PUBLICATION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).

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Appeal from the Superior Court in Pima County
No. DO20150182
The Honorable Karen Adam, Judge
The Honorable Deborah Bernini, Judge

**AFFIRMED**

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COUNSEL

Goldstein & Scopellite, P.C.
By Sheldon I. Goldstein, Michelle J. Scopellite,
and Siovhan A. Sheridan
*Counsel for Petitioner/Appellant*

Law Office of Keith A. Singer, P.L.L.C.
By Keith A. Singer
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**MEMORANDUM DECISION**

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly[1] concurred.

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S T A R I N G, Presiding Judge:

**¶1** Enrique Caperon petitioned the trial court for dissolution of his marriage to Andrea Caperon. At trial, he sought joint legal decision-making authority and equal parenting time for the couple's daughters, J. and A. After trial, the court awarded Andrea sole legal decision-making with limited parenting time for Enrique. Enrique appealed and, for the reasons that follow, we affirm.

**Factual and Procedural Background**

**¶2** "We view the facts in the light most favorable to supporting the trial court's judgment."[2] *In re Estate of Pouser*, 193 Ariz. 574, ¶ 2, 975 P.2d 704, 706 (1999). Andrea and Enrique married in October 2006 and J. and A. were born in 2008 and 2010, respectively. At the time of the marriage, Enrique was in the United States Marine Corps. He left the Marines at the end of 2009. During his service, he

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]Unless a party files a notice with the court on or before forty-five days prior to trial requesting strict adherence to the Arizona Rules of Evidence, all relevant evidence is admissible, subject to certain discretionary considerations. *See* Ariz. R. Fam. Law P. 2(B). Neither party filed such a notice in this matter.

was deployed twice to Iraq. After his second deployment, Enrique was diagnosed with a traumatic brain injury and post-traumatic stress disorder, for which he receives counseling.

**¶3** Enrique committed acts of domestic violence against Andrea throughout the marriage. Although she testified only about events "that [stuck] out in [her] mind the most," she also testified she had "to deal with the physical effects of domestic violence . . . at least seven or eight times a year." The violence left her with bruises that made it painful to hug her children and forced her to wear certain clothes to hide the marks. After each incident, Enrique would deny having hit her, saying, "Don't say that I hit you. My dad used to beat the shit out of my mom and leave her black eyes[;] that is domestic violence. What I do to you is not domestic violence."

**¶4** Throughout the marriage and dissolution proceedings, Enrique continuously referred to Andrea as "a piece of shit," including in front of the children and his mother and great aunt. He also discouraged her from having relationships and activities outside of work, and from having a relationship with her parents. On several occasions, Enrique threatened to kill Andrea if she left him or if he caught her having an affair.

**¶5** In November 2014, Andrea told Enrique she wanted a divorce and they agreed that, in January 2015, he would move out and she would get to keep the house. But in January 2015, when she returned from a business trip, he locked her out of the house. Enrique petitioned for dissolution that same month. He also sought temporary orders awarding him sole legal decision-making authority. In March 2015, the couple stipulated to temporary orders awarding joint legal decision-making authority and equal parenting time.

**¶6** On the morning of March 25, 2015, Enrique went to the house Andrea had been renting since the separation. C.P., Andrea's boyfriend, was there. Andrea, wrapped in a sheet, opened the door, and Enrique told her he needed a jacket for one of the girls. Andrea closed the door, to which Enrique responded, "What, you can't let me in? Like I can't come into your house? Who do you have there?" When she reopened the door, he again asked, "Who do you have in

there?" She tried to close the door again, but he forced it open and shoved her against a wall.

**¶7** Once inside, Enrique attacked C.P., repeatedly striking him in the face. He then went after Andrea, taking her phone from her, and grabbing her breast. As C.P. attempted to telephone the police, Enrique knocked the phone from his hand and struck him again. Enrique then pushed Andrea out the front door, saying "[her] children deserved to see [her] naked like that." The children had been sitting in Enrique's truck throughout the attack. Andrea subsequently sought and obtained an order of protection against Enrique, but he continued to harass her through text messages.

**¶8** A bench trial was held over three days in August, September, and October 2015. After the first day, Enrique retained different counsel, who hired a private investigator to surveil Andrea. Enrique used the information gathered by the investigator to harass Andrea prior to the second day of trial, saying, "I know you're on the other side of town."

**¶9** In an under-advisement ruling following trial, the court ordered that sole legal decision-making authority for Andrea and limited parenting time for Enrique was "in the children's best interest." Enrique moved for a new trial, and subsequently filed two amended motions for new trial. Enrique also filed a separate notice appealing the under-advisement ruling. We revested jurisdiction in the trial court pending determination of the motion for new trial.

**¶10** In January 2016, the trial court denied Enrique's motion for new trial, and he appealed the denial of that motion. He later amended his notice of appeal to include the court's under-advisement ruling. In May 2016, we revested jurisdiction in the court to issue a final, signed decree of dissolution. The court did so and Enrique filed a timely third amended notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) and (A)(5)(a).

## Discussion

**¶11** Enrique raises several arguments on appeal, asserting the following: the trial court made numerous erroneous findings of

fact; the court made erroneous conclusions of law pertaining to A.R.S. § 25-403; the court erred in determining he failed to rebut the presumption of A.R.S. § 25-403.03; and the court erred in denying his motion for new trial.

**¶12** We review an award of legal decision-making authority for abuse of discretion. *Christopher K. v. Markaa S.*, 233 Ariz. 297, ¶ 15, 311 P.3d 1110, 1113 (App. 2013). In reviewing findings of fact, we "examine the record only to determine whether substantial evidence exists to support the trial court's action"; that is, "evidence which would permit a reasonable person to reach the trial court's result." *Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d at 709. "[A]ny additional findings necessary to sustain the judgment are implied if they are reasonably supported by the evidence and not in conflict with the court's express findings." *Sholes v. Fernando*, 228 Ariz. 455, ¶ 6, 268 P.2d 1112, 1115 (App. 2011). We will reverse only if there exists "a clear absence of evidence to support" the court's actions. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982).

**¶13** Moreover, we "give due regard to the trial court's opportunity to judge the credibility of witnesses," and we do not "re-weigh[] conflicting evidence or redetermin[e] the preponderance of the evidence." *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). And, while a court may reject the testimony of an interested party, *Dumes v. Harold Laz Advert. Co.*, 2 Ariz. App. 387, 388, 409 P.2d 307, 308 (1965), the acceptance or rejection of testimony is a credibility determination left explicitly to the trial court, *In re Marriage of Foster*, 240 Ariz. 99, ¶ 5, 376 P.3d 702, 704 (App. 2016).

**¶14** A trial court may award sole or joint legal decision-making authority to the extent either is "in accordance with the best interests of the child." A.R.S. §§ 25-403(A), 25-403.01(A). In making its determination, a court must consider the factors listed in § 25-403(A) and § 25-403.01(B). A court is prohibited, however, from awarding joint legal decision-making if it finds "the existence of significant domestic violence pursuant to § 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence." A.R.S. § 25-403.03(A); *Hurd*, 223 Ariz. 48, ¶ 12, 219 P.3d at 261 ("[A] finding of significant domestic violence or a history of significant domestic violence precludes an

award of joint custody . . . ."). Further, "evidence of domestic violence" must be construed "as being contrary to the best interests of the child." § 25-403.03(B). And the "safety and well-being" of both the child and the victim of domestic violence are "of primary importance." *Id.*

**¶15** Moreover, if a court finds a parent "has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed domestic violence is contrary to the child's best interests."[3] § 25-403.03(D). The presumption attaches if the parent:

> 1. Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury.
>
> 2. Places a person in reasonable apprehension of imminent serious physical injury to any person.
>
> 3. Engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child's siblings.

*Id.* In considering whether a parent has rebutted the presumption, courts consider whether: the parent has demonstrated an award of sole or joint legal decision-making is in the child's best interests; has successfully completed "a batterer's prevention program," or "a program of alcohol or drug abuse counseling," or "a parenting class," if the court deems the latter two appropriate; "[i]f the parent is on probation, parole or community supervision, whether the parent is restrained by a protective order"; and "[w]hether the parent has committed any further acts of domestic violence." § 25-403.03(E).

[3] The presumption "does not apply if both parents have committed an act of domestic violence." § 25-403.03(D).

**¶16** When a court finds "the party that committed the act of [domestic] violence has not rebutted the presumption that awarding custody to that person is contrary to the best interest of the child, the court need not consider all the other best-interest factors in" § 25-403(A). *Hurd*, 223 Ariz. 48, ¶ 13, 219 P.3d at 261. Similarly, once the court is precluded from awarding joint decision-making because the person seeking legal decision-making has failed to rebut the statutory presumption of § 25-403.03(D), it need not consider the factors listed in § 25-403.01(B). *See id.* ¶¶ 12-13.

**Significant History of Domestic Violence**

**¶17** Enrique argues the "court's determination that [the] marriage had a 'significant history' of domestic violence is unsupported by the record." Specifically, he asserts that "*nothing* in the record, short of [Andrea's] self-serving and conclusory statement, supports a finding of 'seven or eight' annual instances of domestic violence 'through the separation of 2015'" and that there was no evidence of "*any* possible domestic violence incidents against [Andrea] after [he] ceased consuming alcohol in 2013." Enrique also cites *Hurd* to suggest a court cannot find a significant history of domestic violence where a witness proffers only one of the seven factors listed in § 25-403.03(C).[4] He stresses Andrea "admitted she neither sought medical attention nor reported these alleged acts of violence to the police," nor did she provide any corroborating evidence.[5]

**¶18** Enrique essentially asks us to re-weigh the evidence, including the credibility of Andrea's testimony, which we will not do. *See Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262. Andrea testified she had "to deal with the physical effects of domestic violence . . . at least

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[4]Those factors include the following: another court's findings, police reports, medical reports, records from the department of child safety, domestic violence shelter records, school records, and witness testimony. § 25-403.03(C)(1)–(7).

[5]We agree with the trial court that one does not need "to call police or get medical attention for it to be domestic violence."

seven or eight times a year," with the frequency of incidents increasing after she started a new job in 2011. And, while she testified concerning only select incidents, she also testified she was "only describing the ones that [stuck] out in [her] mind the most[;] there [were] more." Notwithstanding, Andrea testified to numerous instances of domestic violence,[6] including the March 2015 attack on her and C.P. The record contains "evidence which would permit a reasonable person to reach the trial court's result." *Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d at 709.

**¶19** Furthermore, although in *Hurd* we cited multiple sources of evidence supporting the trial court's finding of a "significant history of domestic violence," we did not purport to give one factor greater weight than another; nor did we suggest multiple sources of evidence were required. *See* 223 Ariz. 48, ¶¶ 14-17, 219 P.3d at 261-62. Additionally, § 25-403.03(C) does not designate a weight to be carried by any of the factors. The statute merely states "the court, subject to the rules of evidence, shall consider all relevant factors including" those listed. § 25-403.03(C). The fact Andrea only provided testimony, without additional support from police reports or medical records, does not diminish the weight of that testimony, or render it insufficient. *Cf. State v. Munoz*, 114 Ariz. 466, 469, 561 P.2d 1238, 1241 (App. 1976) (uncorroborated testimony of victim sufficient to sustain criminal conviction); *see also Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262

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[6]Enrique emphasizes "not all of the alleged events involved physical violence; often, these disputes involved verbal altercations in which [Andrea] was an enthusiastic, willing participant." Pursuant to § 25-403.03(A), however, a court may find "the existence of significant domestic violence pursuant to § 13-3601," which does not require physical violence for an incident to be considered domestic violence. A.R.S. § 13-3601(A); *see also* A.R.S. §§ 13-1202 (threatening or intimidating), 13-1203 (assault), 13-1303 (unlawful imprisonment), 13-1602 (criminal damage), 13-2904(A)(1), (2), (3), (6) (disorderly conduct), 13-2915 (preventing the use of a telephone in an emergency), 13-2916 (use of electronic communication to terrify, intimidate, threaten or harass), 13-2921 (harassment), 13-2923 (stalking).

(deference to trial court's determinations of witness credibility and weight of conflicting evidence). In this instance, there was more than sufficient evidence for the court to find a significant history of domestic violence.

**Failure to Rebut**

**¶20** Enrique next challenges the trial court's finding he failed to rebut the statutory presumption of § 25-403.03(D). While he concedes the court had a basis for applying the presumption, he argues that, although it addressed the § 25-403.03(E) factors, it "came to an incorrect and unsupportable conclusion, equaling an abuse of discretion."

**¶21** The trial court found, pursuant to § 25-403.03(D), that "[Enrique] intentionally, knowingly and recklessly caused physical injury to [Andrea]; [he] placed, and continues to place, [her] in reasonable apprehension of imminent serious physical injury; and [he] engaged in a pattern of behavior for which [she] was entitled to an ex parte order of protection to protect herself." The court then determined that Enrique had not demonstrated that sole or joint legal decision-making was in the children's best interest, and that he continued to commit acts of domestic violence. Specifically, the court found Enrique continued to deny any domestic violence had occurred; he continued to harass and intimidate Andrea via text messages; he retained a private investigator to obtain additional information about Andrea between the first and second days of trial; and he used the children to harass and intimidate Andrea.

**¶22** The trial court also found Enrique was participating in a batterer's prevention program through Veteran's Court, but he had yet to complete it at the time of trial. Also, the court did not find the Peaceful Parenting Program in which Enrique was participating to be "evidence-based [or] designed for parents involved in domestic violence." The court did find, however, Enrique had "stopped drinking without any program or education." The trial court's findings were amply supported by the evidence.

**Lack of A.R.S. § 25-403.01 Findings**

**¶23** Enrique further argues the court's "failure to make conclusions of law under A.R.S. § 25-403.01—when said conclusions are mandatory and not discretionary—amounts to an abuse of discretion." We again disagree.

**¶24** Here, the trial court found "there [had] been a significant history of domestic violence and that [Enrique had] not rebutted the presumption against sole or joint legal decision-making and nearly equal parenting time." As discussed above, the record contains substantial evidence supporting the court's findings. Accordingly, the court was not required to make findings pursuant to § 25-403.01(B). *See Hurd*, 223 Ariz. 48, ¶¶ 12-13, 219 P.3d at 261.

**Section 25-403 Findings**

**¶25** Enrique argues the trial court's conclusions of law pursuant to § 25-403 were erroneous. As stated above, when a court finds the perpetrator of domestic violence has failed to rebut the statutory presumption against an award of decision-making authority, it "need not consider all the other best-interest factors" of § 25-403(A). *Hurd*, 223 Ariz. 48, ¶ 13, 219 P.3d at 261. Finding no error in the court's § 25-403.03(D) determination, any error in the court's § 25-403 findings would not alter our disposition. Accordingly, we need not address the court's § 25-403 rulings. *See Robson Ranch Mountains, L.L.C. v. Pinal County*, 203 Ariz. 120, n.2, 51 P.3d 342, 348 n.2 (App. 2002) ("We do not address the propriety of that ruling because it is not pertinent to our disposition.").

**Findings of Fact**

**¶26** Enrique argues the trial court made "[a] substantial number of . . . factual findings . . . wholly unsupported by the evidence." He asserts the court's factual findings "amount to mere conjecture and surmise and represent a severe injustice."

**¶27** If we conclude, "with a definite and firm conviction that the trial court has made a mistake in its findings of fact and such findings are clearly erroneous," we may set them aside. *Transamerica Title Ins. Co. v. City of Tucson*, 23 Ariz. App. 385, 387, 533 P.2d 693, 695

(1975); *see also* Ariz. R. Fam. Law P. 82(A). However, "[a] finding of fact cannot be clearly erroneous if there is substantial evidence to support it, even though there also might be substantial conflicting evidence." *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 429, 561 P.2d 750, 753 (App. 1977) (resolution of conflict in evidence left to trier of fact).

**¶28** Enrique challenges the trial court's findings of facts concerning his employment history, the sharing of "childcare and household responsibilities," Andrea's attempts throughout the marriage to end the relationship, and the March 2015 attack on Andrea and C.P. However, only the court's finding about the March 2015 attack bears on the dispositive issue of this appeal: whether the court properly applied § 25-403.03. We do not address Enrique's remaining factual challenges. *See Robson Ranch Mountains, L.L.C.*, 203 Ariz. 120, n.2, 51 P.3d at 348 n.2.

**¶29** The court expressly found:

> 36. In March 2015, [Enrique] went to [Andrea's] home early in the morning on the pretext that the children needed jackets for school. [Andrea] and her boyfriend, [C.P.] were in bed sleeping. She went to the door, wrapped in a blanket, and [Enrique] barged into the home, found [C.P.], and assaulted him, causing a concussion and a head injury that required stitches. . . .
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> 37. The children were in the vehicle during the March 2015 incident and heard everything that happened through the Bluetooth that [Enrique] purposefully left activated. After the assault, [Enrique] dragged an unclothed [Andrea] out of the house to show her to the girls.

Enrique contends he did not *barge* into the home, but "was invited to step inside by [Andrea]." Also, he claims he did not *drag* Andrea out of the house and that she only testified he *pushed* her out of the house,

and, in any event, she testified "the children did not actually see her in a state of undress." Further, he claims it is untrue the children heard the entire assault, because the claim was based on "nothing more than a speculative claim of hearsay from [Andrea]."[7]

**¶30** Andrea testified she opened the door to her house and, as she tried to close it, Enrique "flung the door open and shoved [her] against the wall." Andrea also stated that after the attack Enrique pushed her down the sidewalk leading from the front door, saying her children "deserved to see [her] naked like that." We conclude there was sufficient evidence in the record to support the court's findings.[8]

**Motion for New Trial**

**¶31** Lastly, Enrique argues the court abused its discretion when it denied his motion for new trial. For the reasons and conclusions set forth above, the trial court did not err in denying Enrique's motion for new trial.

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[7]Since, as noted, neither party filed a notice pursuant to Rule 2(B)(1), Ariz. R. Fam. Law P., strict compliance with Arizona Rules of Evidence was not required. *See* Ariz. R. Fam. Law P. 2(B)(2).

[8]From the court's factual findings, it appears the court believed the children heard the entirety of the attack and not merely a retelling of it afterwards. The record contains only Andrea's testimony that after the incident, Enrique called her mother and told her what had happened and that the girls had overheard the conversation. Even if the court erred in this particular determination, it does not detract from the court's findings pursuant to § 25-403.03(D) that Enrique committed an act of domestic violence against Andrea. Accordingly, any error was harmless.

**Attorney Fees**

**¶32** Andrea seeks attorney fees and costs pursuant to A.R.S. §§ 12-349 and 25-324(B), (D), Rule 11, Ariz. R. Civ. P.,[9] and Rules 21 and 25, Ariz. R. Civ. App. P. She has not argued Enrique's appeal was not in good faith, not grounded in fact or based in law, or filed for an improper purpose. *See* § 25-324(B). Andrea also has not "proven by a preponderance of the evidence" that she is entitled to fees pursuant to § 12-349. *See Reynolds v. Reynolds*, 231 Ariz. 313, ¶ 16, 294 P.3d 151, 156 (App. 2013); *Phx. Newspapers, Inc. v. Dep't of Corr., State of Arizona*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997). Neither has she argued Enrique's appeal was "frivolous, or . . . filed solely for the purpose of delay." *See* Ariz. R. Civ. App. P. 25; *Sotomayor v. Sotomayor-Muñoz*, 239 Ariz. 288, ¶ 13, 370 P.3d 1126, 1129 (App. 2016). Having "failed to separately articulate an appropriate statutory basis" for her fee request, we deny it. *See Grubb v. Do It Best Corp.*, 230 Ariz. 1, ¶ 17, 279 P.3d 626, 630 (App. 2012), *quoting Fid. Nat'l Title Co. v. Town of Marana*, 220 Ariz. 247, ¶ 17, 204 P.3d 1096, 1100 (App. 2009).

**Disposition**

**¶33** For the foregoing reasons, we affirm the dissolution decree.

[9]"Rule 11 is not a proper basis for an award of attorney fees on appeal." *Villa de Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, n.10, 253 P.3d 288, 296 n.10 (App. 2011).