IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

BRIAN T. NIEBEL,
Petitioner/Appellant,

and

AUBREY J. NIEBEL,
Respondent/Appellee.

No. 2 CA-CV 2016-0225-FC
Filed July 7, 2017

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NOT FOR PUBLICATION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 Pima County
No. D20153785
The Honorable Lisa Bibbens, Judge Pro Tempore

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 In this dissolution-of-marriage action, Brian Niebel appeals from the trial court's under-advisement ruling in favor of his former wife, Aubrey Niebel. He argues the court erred in finding that relocation of the parties' minor child to North Carolina with Aubrey was in the child's best interests. He also contends the court erred in awarding Aubrey sole legal decision-making authority for the child. Finding no error, we affirm.

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). In September 2010, Brian and Aubrey were married in North Carolina. Their son C. was born in November 2012. In February 2013, Brian moved to Sierra Vista, Arizona. Although Aubrey and C. initially remained in North Carolina, they moved to Sierra Vista in December 2014. Aubrey agreed to the move "to work on [their] marriage" and because Brian had assured her that she could return to North Carolina if "it didn't work out." Brian also promised Aubrey that she could finish her education to obtain her nursing degree in Arizona; however, because of financial constraints, she was not able to do so.

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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.

¶3 In September 2015, Aubrey and C. moved to Tucson, Arizona, where Aubrey obtained a job. Brian followed two months later. Shortly thereafter, both Aubrey and Brian filed separate petitions for dissolution of marriage, and the cases were consolidated. In her petition, Aubrey requested to relocate to North Carolina with C. Following a trial, the court issued its under-advisement ruling, granting Aubrey's request to relocate and awarding her sole legal decision-making authority for C.[2] This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A) and 12-2101(A)(1).

Relocation

¶4 Brian first argues the trial court erred in finding Aubrey's relocation to North Carolina was in C.'s best interests. We review relocation decisions for an abuse of discretion. *Murray v. Murray*, 239 Ariz. 174, ¶ 5, 367 P.3d 78, 80 (App. 2016).

¶5 Pursuant to A.R.S. § 25-408(G), "The court shall determine whether to allow the parent to relocate the child in accordance with the child's best interests. The burden of proving what is in the child's best interests is on the parent who is seeking to relocate the child." In making the best-interests determination, the court must consider all of the relevant factors enumerated in A.R.S. §§ 25-403(A) and § 25-408(I). In this case, in its thorough, nineteen-page ruling, the trial court explicitly addressed each of the required statutory factors. The court concluded that Aubrey "met her burden of showing that moving to North Carolina with C[. was] in the child's best interests" and therefore granted her request to relocate.

¶6 On appeal, Brian contends the trial court erred in concluding that several of the statutory factors weighed in favor of the relocation to North Carolina. With regard to each of the challenged factors, Brian maintains the court's "finding is contrary to the evidence, clearly erroneous, and constitutes an abuse of

[2] Although attorney fees remained pending, the trial court certified the under-advisement ruling as final and appealable pursuant to Rule 78(B), Ariz. R. Fam. Law P. *See Natale v. Natale*, 234 Ariz. 507, ¶ 11, 323 P.3d 1158, 1161 (App. 2014).

discretion." He points to testimony that he alleges refutes the findings. However, Brian's arguments amount to a request that we reweigh the evidence, which we will not do. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). Instead, we review the record for substantial evidence supporting the ruling. *Id.*; *see Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999). We briefly address each of the statutory factors Brian challenges.

¶7 Brian first disputes the trial court's findings with respect to § 25-403(A)(1), "the past, present and potential future relationship between the parent[s] and the child." As the court noted, from February 2013 through December 2014, Brian only saw C. on two occasions: in July 2013 and for Christmas 2013. Brian did not see his son at all in 2014, until he flew to North Carolina at the end of the year to drive Aubrey and C. to Sierra Vista to live with him. Brian nonetheless tries to justify his limited contact with C. during those years by explaining that he "was under the impression that [Aubrey and C.] would be moving to Arizona shortly after he moved." But the focus of this statutory factor is the parent-child relationship, not the parent's reasoning behind it. *See* § 25-403(A)(1). In any event, the record does not show that Brian sought additional contact with C. when he did not move to Arizona as Brian allegedly expected.

¶8 In addition, despite Brian's assertion that he "has been an active part of [C.'s] life" since Aubrey and C. moved to Arizona, the evidence shows otherwise. For example, as the trial court pointed out, Brian "refused to provide care for C[.] on one occasion [Aubrey] had asked for assistance" because it was during her court-ordered parenting time and he thought she "did not want to care for their son in order to preserve her leave time for work." But Aubrey explained that she had exhausted her paid leave because she had "been taking the time off to provide care for C[.] when he's sick." While the dissolution was pending, Brian also did not accept Aubrey's offers for additional parenting time.

¶9 Next, Brian disputes whether § 25-403(A)(2), "[t]he interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest," weighed in favor of the relocation. Specifically, he argues the trial court's "reliance" on

Aubrey's assertion that she will foster a relationship between C. and Brian's son B. from a prior marriage, who also resides in North Carolina, is "misplaced." He points out that Aubrey has never met B.'s mother. But Aubrey explained that she had encouraged Brian to reach out and re-establish a relationship with B. She also testified, "I'm not a shy person, and . . . I have [B.'s mother's] contact information and I intend to contact her when everything is finalized."

¶10 Brian also argues that § 25-403(A)(3), "[t]he child's adjustment to home, school and community," does not weigh in favor of the relocation. He contends that C. has "adjusted well" to Arizona and not being with Aubrey while at his home. But both parties testified that C. has had problems during parenting-time transitions. Aubrey explained that "sometimes [C.] doesn't want to leave mommy, sometimes he doesn't want to leave daddy." The trial court also pointed out that C. has had behavioral issues at daycare.

¶11 Brian additionally questions why the trial court, in discussing this factor, noted he had "inaccurately asserted" that Aubrey had not listed him as the father on C.'s emergency contact form at daycare. The court made this observation in the context of C.'s adjustment to and behaviors at daycare. Brian testified that he "was not allowed to get any [information] because the [daycare's computer] system stated that [he] was listed as a roommate." Aubrey, however, provided a copy of the form showing Brian listed as the father; she explained that any confusion was the result of an order of protection that initially included C. as a protected party.

¶12 Brian next challenges the trial court's finding that Aubrey proposed the relocation in good faith under § 25-408(I)(2). He argues that Aubrey does not have C.'s "best interests at heart." Substantial evidence supports the court's finding. *See Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262. The parties were married and C. was born in North Carolina. Aubrey has a "support system" there, including her parents who will help care for C. In addition, Aubrey's parents offered to let her and C. live with them while Aubrey works on her nursing degree. Aubrey testified that obtaining the degree would financially benefit both her and C. In contrast, Aubrey explained that she and C. are "completely alone" in Arizona. Even Brian recognized that his "family mostly lives in Michigan." The court expressly found

Aubrey's testimony credible—a determination to which we will defer. *See id.*

¶13 Brian also disputes the trial court's findings with respect to § 25-408(I)(3), "[t]he prospective advantage of the move for improving the general quality of life for the custodial parent or for the child." For this factor, the court noted that Aubrey's "lack of family and financial support . . . in Arizona is problematic" and that Brian had "failed to offer reasonable and appropriate financial and parenting support." As an example, the court pointed out that Brian "deliberately fail[ed]" to disclose his new employer and income at a prior hearing, causing the court to issue an income-withholding order to his former employer and delaying Aubrey from receiving child support. Brian, however, argues that he did not "deliberately mislead" the court because, as he testified, his concern at the time of the hearing was parenting time. But the purpose of that hearing was temporary orders, and child support was squarely at issue. Moreover, the same judge presided over both the trial and the temporary-orders hearing, and she was therefore in a position to make a credibility determination during both proceedings. *See Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262.

¶14 Contrary to Brian's argument otherwise, the record also supports the trial court's finding that Brian "has allowed his anger or other negative feelings toward [Aubrey] to impede his ability to remain focused on the best interests of C[.], at times." *See id.* As discussed above, Brian refused to care for C. on at least one occasion because he did not want to "help [Aubrey] save [her] leave" from work. Aubrey is also the one who consistently takes time off from work to care for C. when he is sick or the daycare is closed.

¶15 Brian additionally asserts the trial court erred in finding that "the relocation will allow a realistic opportunity for parenting time with each parent," under § 25-408(I)(5). He maintains that his "ability to exercise his parenting time will simply depend on how much money he has" and that "[i]t seems very unlikely that he will have the discretionary cash available to fly to North Carolina to see C[.] on a consistent basis." But Aubrey proposed splitting at least some of the costs by rotating which parent flies to or from North Carolina with C. In addition, Brian currently owns two properties in

North Carolina, one of which is within ten miles of where Aubrey plans to move. Although that house is listed for sale, it has been on the market for two years, and, consequently, the court concluded that "it is uncertain when it may sell, and until that time [Brian] may stay in his residence when he spends time with C[.]" In addition, as the court noted, the parenting plan adopted upon relocation "provides substantially more parenting time than [Brian] has often historically exercised with his son."

¶16 Brian next maintains the trial court erred in finding that relocating to North Carolina will not "affect the emotional, physical or developmental needs" of C., pursuant to § 25-408(I)(6). The court explained that, with regard to this factor, the relocation would likely decrease the conflict between Aubrey and Brian, which would benefit C., and that C. has not yet started school and removing him from his current daycare would not be "unduly disruptive." Brian nevertheless argues that the court "is simply guessing that the child will be fine."

¶17 Although no court can predict a child's future with certainty, the trial court here made its finding based upon the evidence presented, as it was required to do. *See Sholty v. Sherrill*, 129 Ariz. 458, 461, 632 P.2d 268, 271 (App. 1981) (although counselor testified that children's emotional well-being would be adversely affected by visitation, weight to be given to this testimony is determined by trial court as trier of fact). And substantial evidence supports the court's finding. *See Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262. Aubrey testified that C. has adjusted well with each prior move—from North Carolina to Sierra Vista and from Sierra Vista to Tucson—and that she had no concerns about "his ability to adjust if he relocates to North Carolina." In addition, as discussed above, Aubrey and C. will receive both increased financial and emotional support from her family after the move.

¶18 Lastly, Brian challenges the trial court's determination that § 25-408(I)(8), "[t]he potential effect of relocation on the child's stability," weighed in favor of the relocation. Again, however, substantial evidence supports the court's determination. *See Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262. The record clearly establishes that Aubrey has been C.'s primary caregiver since birth. C. would be

moving with Aubrey to the state where he was born, where they previously lived, and where Aubrey's family still resides. They will have financial assistance, as well as a "support system." Aubrey will be able to finish her schooling, and C. will have family members to help care for him.

¶19 In sum, the trial court's extensive findings related to the statutory factors for relocation are supported by substantial evidence. *See id.* Accordingly, we cannot say the court abused its discretion in granting Aubrey's request to relocate to North Carolina with C. *See Murray*, 239 Ariz. 174, ¶ 5, 367 P.3d at 80.

Sole Legal Decision-Making

¶20 Brian also challenges the trial court's order awarding Aubrey sole legal decision-making authority for C. We review legal decision-making determinations for an abuse of discretion. *Nold v. Nold*, 232 Ariz. 270, ¶ 11, 304 P.3d 1093, 1096 (App. 2013).

¶21 In determining legal decision-making, the trial court must consider "all factors that are relevant to the child's physical and emotional well-being, including" the factors identified in § 25-403(A). In addition, the court must consider:

> 1. The agreement or lack of an agreement by the parents regarding joint legal decision-making.
>
> 2. Whether a parent's lack of an agreement is unreasonable or is influenced by an issue not related to the child's best interests.
>
> 3. The past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint legal decision-making.
>
> 4. Whether the joint legal decision-making arrangement is logistically possible.

A.R.S. § 25-403.01(B).

¶22 Here, the trial court addressed each of the statutory factors. It then found that awarding sole legal decision-making authority to Aubrey was in C.'s best interests based on:

> the current level of disagreement and conflict between the parties; their inability to reach agreements for the benefit of [C.]; [Brian's] derogatory manner of communicating with [Aubrey] at times; . . . [Aubrey's] demonstrated history throughout C[.]'s life of being either the primary or exclusive legal decision-maker for C[.]; and her history of making sound decisions on C[.]'s behalf.

¶23 On appeal, Brian argues the trial court erred in determining that § 25-403.01(B)(3)—"[t]he past, present and future abilities of the parents to cooperate in decision-making about the child"—weighed in favor of awarding Aubrey sole legal decision-making authority. Specifically, he challenges the court's finding that he had "behaved in a manner [that] impeded the parties' ability to reach decisions in the best interests of C[.], and that he would object to [Aubrey's] proposed resolution, yet provide no reasonable, well-considered, or available alternative." Brian again essentially asks this court to reweigh the evidence, which we will not do. *See Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262.

¶24 Brian is correct that the record contains evidence of only one appointment that Aubrey had scheduled and Brian then cancelled, despite the trial court's suggestion that this happened more than once. Even so, the court's finding concerning Brian's behavior is amply supported by the record. *See id.* In addition to the one cancelled appointment, Aubrey requested that the Blake Foundation evaluate C., based on her concerns, as well as those of his daycare teachers, over his behavioral issues. She testified that Brian had objected to the evaluation because the daycare workers, whom Brian was "not happy with," would have to participate in the evaluation. Although Brian "mentioned" Casa de los Niños as an alternative, Aubrey explained that he did not follow-up to determine what services Casa de los Niños offered. Consequently, no evaluation was

ever done. Moreover, when Brian expressed concerns about C.'s daycare, he offered no alternative options until the middle of trial. Aubrey described Brian's behavior as "counterparenting."

¶25 Accordingly, substantial evidence supports the trial court's ruling. *See id.* We find no abuse of discretion in the court's order awarding Aubrey sole legal decision-making authority for C. *See Nold*, 232 Ariz. 270, ¶ 11, 304 P.3d at 1096.

Disposition

¶26 For the reasons stated above, we affirm. Aubrey has requested her attorney fees on appeal pursuant to A.R.S. § 25-324. We have considered the financial resources of both the parties, as well as the reasonableness of their positions on appeal. *See Leathers v. Leathers*, 216 Ariz. 374, ¶ 22, 166 P.3d 929, 934 (App. 2007). In our discretion, we grant Aubrey's request for reasonable attorney fees upon compliance with Rule 21(b), Ariz. R. Civ. App. P. Aubrey is also entitled to her costs on appeal as the prevailing party. *See* A.R.S. § 12-341.