IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

TIFFANY C. HUDDLESTUN,
Appellee,

and

BRANDON W. CONTI,
Appellant.

No. 2 CA-CV 2020-0004-FC
Filed November 12, 2020

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NOT FOR PUBLICATION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 Gila County
No. DO201100087
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Collins & Collins LLP, Payson
By Joseph E. Collins
Counsel for Appellee

Sloma Law Group, Phoenix
By Melinda M. Sloma and Richie J. Edwards
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this family law action, Brandon Conti appeals from the trial court's order denying his petition to modify legal decision-making, parenting time, and child support for his two minor children with his former wife, Tiffany Huddlestun. He argues that the court erred by exceeding our mandate from a previous appeal by conducting additional proceedings. He also maintains that even if the court did not exceed the mandate, it erroneously determined there had not been a material change in circumstances and failed to make findings that its decision was in the children's best interests. Conti also appeals the court's order requiring him to reimburse Huddlestun for overpayment of child support, arguing that the court lacked jurisdiction. For the following reasons, we affirm.[1]

Factual and Procedural Background

¶2 We view the record in the light most favorable to upholding the trial court's decision. *Vincent v. Nelson*, 238 Ariz. 150, ¶ 17 (App. 2015). Huddlestun and Conti married in 2006 and had two children together. Under a consent decree dissolving their marriage in 2011, they agreed that both children would "be involved with both parents equally." And in 2014, they agreed to a parenting plan that provided for equal parenting time and joint legal decision-making.

¶3 Both parents later petitioned to modify that plan. After a one-day trial in 2016, the trial court modified the plan to provide that during the school year the children would live with Conti during the week, and if the parents could not agree on schools, Conti would have the final decision. Huddlestun appealed, and we vacated the modification order, concluding that the trial court had failed to find a material change in

[1]Conti has also appealed a post-judgment order denying his motion to compel best-interest findings, but because the appeal of this order raises no issues distinct from the appeal of the order denying Conti's petition, we do not separately address it.

circumstances before altering the plan and its ruling "lack[ed] any explanation of why the modification would be in the best interests of the children." *In re Marriage of Huddlestun & Conti*, No. 2 CA-CV 2016-0188-FC, ¶¶ 1, 9, 15, 17 (Ariz. App. Sept. 28, 2017) (mem. decision). We remanded the matter for the trial court "to determine whether changed circumstances materially affecting the welfare of the children were found, and if so to identify them." *Id.* ¶ 9. In our disposition, we instructed the court "to determine whether there was a change in circumstance materially affecting the welfare of the children. If the court so finds, it shall further state on the record the reasons it found modification to be in the best interests of the children." *Id.* ¶ 17.

¶4 On remand, after a second trial on the parents' requests to modify the plan, the trial court affirmed the existing plan, finding that "there ha[d] not been a substantial change in circumstances." In a separate order, the court ruled that Huddlestun was entitled to reimbursement from Conti for overpayment of child support. This appeal followed. After we stayed the appeal to remedy a jurisdictional defect, the trial court entered final, appealable orders in these matters, and Conti filed an amended notice of appeal of those orders. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Scope of Mandate

¶5 Conti argues the trial court exceeded the mandate following our previous decision by holding "numerous evidentiary hearings and status conferences" and "an entirely new trial" over the course of twenty-two months. Relying on our direction that the court determine whether material changes "were found," Conti maintains that our mandate required the court to make that determination from the existing record, precluding it from holding additional hearings or taking new evidence. "We review de novo whether the trial court followed the appellate court's mandate." *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, ¶ 30 (App. 2009).

¶6 On remand, a trial court must "strictly follow" the mandate of an appellate decision. *Id.* (quoting *Molloy v. Molloy*, 181 Ariz. 146, 149 (App. 1994)). Although a mandate may restrict a court's actions on remand, to the extent it allows for an exercise of discretion, the court is "authorized to take whatever action it deem[s] necessary to give effect to the decision of this court." *State v. Boykin*, 112 Ariz. 109, 113 (1975).

¶7 Here, we instructed the trial court to decide whether there had been a material change in circumstances, and the court followed our instruction and made that determination. We did not restrict the court to the existing record in making that determination despite instructing it to identify material changes that "were found." If we had intended to require the court to consider only the existing record, we would have said so explicitly. The instruction permitted, but did not require, the court to make findings from the existing record. Absent a specific directive to consider only the existing record, the court's decision was a reasonable exercise of its broad discretion over how to give effect to our decision, particularly given that a year and a half had passed since the court had taken evidence regarding the children's circumstances. *See Boykin*, 112 Ariz. at 113; *cf. State v. Dickens*, 187 Ariz. 1, 12 (1996) (court has broad discretion to reopen case to admit evidence), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239 (2012). In sum, the court did not exceed our mandate by conducting additional proceedings and accepting and considering additional evidence on remand.

Material Change in Circumstances

¶8 Conti next argues the trial court abused its discretion in "not considering the weight of the evidence" showing changed circumstances. Before a court may modify a child custody order, it "must ascertain whether there has been a change in circumstances materially affecting the welfare of the child."[2] *Black v. Black*, 114 Ariz. 282, 283 (1977). "The trial court has broad discretion to determine whether a change of circumstances has occurred." *Pridgeon v. Superior Court*, 134 Ariz. 177, 179 (1982). "On review, the trial court's decision will not be reversed absent a clear abuse of discretion, *i.e.*, a clear absence of evidence to support its actions." *Id.* "We do not reweigh evidence or determine the credibility of witnesses." *Clark v. Kreamer*, 243 Ariz. 272, ¶ 14 (App. 2017) (quoting *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 36 (App. 1998)).

¶9 Conti claims the trial court "ignor[ed a] change of circumstance with respect to significant abuse." In particular, he argues that the court did not adequately consider a signed statement by the children's guardian ad litem, which stated that (1) the children had reported they were "fearful" of Huddlestun and her husband and did not want to

[2]The requirement that the trial court determine whether there has been a material change in circumstances is based on our case law, not a statute. *Hendricks v. Mortensen*, 153 Ariz. 241, 243 (App. 1987).

live with her, with one of the children reportedly wanting no contact with her; and (2) there had been a report of physical abuse by Huddlestun's husband. Conti maintains the guardian ad litem's report was corroborated by police reports of "significant domestic violence" in Huddlestun's home. But the guardian ad litem also reported that the allegation of physical abuse had been reported to the Department of Child Safety (DCS) and DCS's investigation had not substantiated the claim of abuse and had been "closed out." Indeed, police never substantiated any claim of reported abuse or domestic violence and the matters were closed with no charges filed. Moreover, the guardian ad litem reported the parties had "utilize[d] the [DCS] Child Abuse Hotline as a means of resolving conflict . . . or gaining ammunition against the other party"—suggesting that reports of abuse may have been false. We do not reweigh the conflicting evidence of whether abuse or domestic violence occurred. *See Clark*, 243 Ariz. 272, ¶ 14.

¶10 Conti also claims Huddlestun had been "credibly accused" in the first trial of abusing one of the children, and suggests that the trial court erred in failing to consider this.[3] But as Huddlestun points out, this accusation was not entered into evidence in the second trial. When the court offered to take judicial notice of the transcript of the first trial, Huddlestun objected, maintaining that she was unaware the court would use evidence from the first trial and was not prepared to address that evidence. The court ruled, without objection from Conti, that it would not take judicial notice of the transcript and "would just consider the testimony heard [in the second trial]" because its recollection of the previous trial was "nonexistent." Conti cites no authority suggesting that the court was required to consider evidence from the first trial in these circumstances. Moreover, the court's ruling did not prevent Conti from independently submitting evidence of this alleged abuse; he simply failed to do so. We find no abuse of discretion here.

¶11 Conti additionally suggests that the trial court did not consider the guardian ad litem's statement that the children's best interests would be served by appointment of a therapist to treat emotional trauma from the conflict between Conti and Huddlestun and their fear of Huddlestun and her husband. Although the court acknowledged that the conflict between the parents was "probably adversely affecting the children," it nonetheless found that circumstances had not materially

[3]In his reply brief, Conti cites the transcript from the first trial, in which Conti's sister-in-law testified that one of the children had reported to her that Huddlestun had hit him in the stomach and pulled his hair.

changed because the parties' conflict "was ongoing even before the Court took over." Conti does not argue that the court's finding was unsupported.

¶12 Nor has Conti shown that the trial court erroneously ignored that Huddlestun had been recently diagnosed with a personality disorder. There was evidence to support a conclusion that the condition was not new—the psychologist who diagnosed Huddlestun opined the condition was based on a "longstanding history" of abuse dating back to her childhood. Conti asserts that Huddlestun "had not previously been diagnosed with any mental health disorder," citing Huddlestun's testimony denying any previous diagnoses. However, the psychologist's report suggests that the diagnosis was not entirely new, but rather "appears to be consistent with her . . . previous diagnoses received in the Army and [from] her therapist." Again, it was for the court to weigh conflicting evidence over whether Huddlestun's mental health represented a material change in circumstances. We cannot conclude that the court abused its broad discretion in failing to find such a change. *See Clark*, 243 Ariz. 272, ¶ 14; *Pridgeon*, 134 Ariz. at 179.

¶13 Finally, Conti argues the trial court ignored evidence that the children had "excessive absences and tardies when attending school while in [Huddlestun]'s care," and did not when in his care. His opening brief does not cite to evidence in the record supporting this contention, however. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (opening brief must contain "appropriate references to the portions of the record on which the appellant relies"). The argument is therefore waived. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶¶ 61-62 (App. 2009) (unsupported argument deemed waived). In sum, Conti has not shown that the court abused its discretion in finding no material change in the children's circumstances.

Best-Interests Findings

¶14 Conti contends that the trial court was required to make findings regarding the children's best interests regardless of whether it found a material change in circumstances and it erred in failing to do so. But our mandate specifically instructed the court to make best-interests findings only if it found a material change in circumstances. Because the court did not find a material change in circumstances, it was not required to make best-interests findings. Although Conti argues case law establishes that a court deciding a contested custody matter must make best-interests findings under A.R.S. § 25-403 even if it does not find a material change in

circumstances,[4] the court did not abuse its discretion in following our mandate. *See Temp-Rite Eng'g Co. v. Chesin Constr. Co.*, 3 Ariz. App. 229, 231 (1966) ("[A]n appellate decision, right or wrong, is controlling in subsequent litigation.").

Child Support

¶15 Conti argues the trial court lacked jurisdiction to order him to reimburse Huddlestun for overpayment of child support because there was no pending petition on that issue. He maintains that A.R.S. § 25-502(C) requires the filing of a petition as a jurisdictional prerequisite for modifying a child support order. But even if such a requirement did exist, it would not have deprived the court of jurisdiction over the issue here, because it did not modify a child support order. Rather, the court recognized that our mandate had vacated the existing child support order in January 2018 but Huddlestun had continued to make monthly payments through August. The court acted within its authority in ordering Conti to return that overpayment. *See* A.R.S. § 25-527(B) ("The court may enter a judgment for reimbursement against the obligee if the court finds that the obligor's obligation to pay support has terminated and that all arrearages and interest on arrearages have been satisfied."), (D) (judgment pursuant to § 25-527(B) "does not constitute a support judgment").[5]

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[4] *See, e.g.*, *Nold v. Nold*, 232 Ariz. 270, ¶ 11 (App. 2013) ("When physical custody is contested, the family court must comply with the requirement in A.R.S. § 25-403 to make specific findings regarding the reasons why its decision is in the children's best interests."); *Hart v. Hart*, 220 Ariz. 183, ¶ 9 (App. 2009) ("In a contested custody case, the court must make specific findings regarding all relevant factors *and* the reasons the decision is in the best interests of the children."). *But see Black*, 114 Ariz. at 283 (in ruling on motion to modify child custody, court is to first determine if material change in circumstances exists; "[o]nly after this initial finding has been made may the trial court then proceed to determine whether a change in custody will be in the best interests of the child"); *Christopher K. v. Markaa S.*, 233 Ariz. 297, ¶ 15 (App. 2013) (When considering petition to modify custody, court "must first determine whether there has been a change in circumstances materially affecting the child's welfare. If the court finds such a change in circumstances, it must then determine whether a change in custody would be in the child's best interests." (citation omitted)).

[5] On the cover page of her answering brief, Huddlestun requests oral argument in this matter. However, a request for argument must be filed in

Disposition

¶16 For the foregoing reasons, we affirm the trial court's orders. Because Conti has not prevailed, we deny his request for attorney fees and costs.

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a "separate request" within ten days of when the reply brief is filed or when it is due, whichever is earlier. Ariz. R. Civ. App. P. 18(a). Because Huddlestun did not file such a separate request here, we deny the request. *See Svendsen v. Ariz. Dep't of Transp., Motor Vehicle Div.*, 234 Ariz. 528, n.8 (App. 2014).