

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

NIKKI HERNANDEZ,
Appellant,

and

JOSEPH HERNANDEZ,
Appellee.

No. 2 CA-CV 2020-0012-FC
Filed July 6, 2021

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NOT FOR PUBLICATION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. S0400DO20080163
The Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED

COUNSEL

David Alan Dick and Associates, Chandler
By David Alan Dick
Counsel for Appellant

Owens & Perkins P.C., Scottsdale
By Laura V. Babione
Counsel for Appellee

IN RE MARRIAGE OF HERNANDEZ
Decision of the Court

MEMORANDUM DECISION

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

STARING, Vice Chief Judge:

¶1 Nikki Hernandez appeals from the trial court's order modifying legal decision-making and parenting time with respect to her minor child, J.H. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's ruling. See *Downing v. Downing*, 228 Ariz. 298, ¶ 2 (App. 2011). Nikki and Joseph Hernandez were married in 1995, and they have one child together, J.H., who was born in December 2004. Nikki and Joseph's marriage was dissolved in 2009. Nikki was designated J.H.'s primary custodian, and Joseph was given "frequent and liberal visitation rights . . . in accordance with the parties' previous practice." Further, Nikki and Joseph were ordered to share joint legal custody of J.H., and Joseph was ordered to pay monthly child support.

¶3 In 2018, Joseph filed a petition to modify legal decision-making, parenting time, and child support. Before a hearing concerning temporary orders, Joseph requested that he be "named Primary Residential Parent with Sole Legal Decision Making with Mother having supervised visitation until she proves to be drug free for six months" and also requested "parenting time as this court sees fit." The trial court subsequently entered temporary orders granting Joseph sole legal decision-making, directing that J.H. would reside with Joseph, and granting Nikki supervised visitation. Following a trial on Joseph's petition and consideration of J.H.'s best interests, including his "worsening medical health" due to his "morbidly obese state," the court determined that Joseph would be J.H.'s primary residential parent, granted him sole legal decision-making authority, and granted Nikki two four-hour supervised visits with J.H. per week. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A).¹

¹Although this court suspended the appeal and revested jurisdiction in the trial court, and that court amended its subsequent ruling on child

IN RE MARRIAGE OF HERNANDEZ
Decision of the Court

Discussion

¶4 Nikki raises at least four primary issues on appeal. However, the majority of her opening brief consists of arguments that she does not support with binding legal authority; they are therefore waived. *See* Ariz. R. Civ. App. P. 13(a)(7)(A); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) (failure to comply with Rule 13(a)(7) may constitute abandonment and waiver of claim);² *Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143 (App. 1987) (“It is not incumbent upon th[is] court to develop an argument for a party.”).³ Nonetheless, Nikki points to a legal standard for the sufficiency of a trial court’s factual findings, *see* Ariz. R. Fam. Law P. 82(a)(5); *City of Tucson v. Citizens Utils. Water Co.*, 17 Ariz. App. 477, 480 (1972); *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 429 (App. 1977), and

support pursuant to Rule 78(c), Ariz. R. Fam. Law P., that procedure appears to have been unnecessary in light of Division One’s recent decision in *Choy Lan Yee v. Yee*, 251 Ariz. 71, ¶ 1 (App. 2021). Assuming without deciding that *Yee* is correctly decided, the effect of that decision would be – given the appealed order’s setting determination of child support for a separate time – to render Nikki’s notice of appeal premature and to leave her without the opportunity to timely appeal. *See id.*; *see also Maria v. Najera*, 222 Ariz. 306, ¶ 5 (App. 2009) (appealable order must dispose of all claims and parties). Rule 9(c), Ariz. R. Civ. App. P., however, provides that a premature notice of appeal is nonetheless effective when, as here, the court has “announce[d] an order or other form of decision” that was not subject to change, but has not yet entered its final, appealable order.

²*Krasner* discusses Rule 13(a)(6). However, Rule 13 has since been amended, and the pertinent requirements are now found in Rule 13(a)(7).

³Nikki does provide standards of review relevant to some of her arguments; however, this is not sufficient. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (arguments must include citation to legal authority). And, although we are able to interpret one of her citations as referring to Rule 49(i), Ariz. R. Fam. Law P. (trial court may not allow testimony of witness who was not disclosed at least sixty days before trial), Nikki only points us to her claims made at trial that witnesses other than the one complained of on appeal had not been disclosed. *See* Ariz. R. Civ. App. P. 13(a)(7)(B); *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, ¶ 19 (App. 2000) (we consider only those arguments, theories, and facts properly presented below).

IN RE MARRIAGE OF HERNANDEZ
Decision of the Court

makes several arguments regarding “substantial evidence” in this context. Thus, we address these arguments.⁴ See *Krasner*, 221 Ariz. 288, ¶ 62.

¶5 We will uphold the trial court’s factual findings unless they are clearly erroneous. See Ariz. R. Fam. Law P. 82(a)(5); *Schickner v. Schickner*, 237 Ariz. 194, ¶ 13 (App. 2015). “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*, 114 Ariz. at 429. “Evidence is substantial if it allows ‘a reasonable person to reach the trial court’s result.’” *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, ¶ 11 (App. 2009) (quoting *Davis v. Zlatos*, 211 Ariz. 519, ¶ 18 (App. 2005)). Further, we do not reweigh the evidence on appeal. See *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16 (App. 2009). And, not only do we presume the court considered all admitted evidence, see *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18 (App. 2004), but “[w]e must give due regard to the trial court’s opportunity to judge the credibility of the witnesses,” *Hurd*, 223 Ariz. 48, ¶ 16.

¶6 Nikki claims there was no substantial evidence supporting the trial court’s findings that she: did not cooperate with Joseph in seeking medical care for J.H., prevented Joseph from exercising his parenting time, failed to act in J.H.’s best interests and “had mental health or drug issue[s] which must [have caused her] failure to act,” presented a danger to J.H., and “was using drugs.” Nikki also challenges the court’s finding that J.H. had a “good relationship” with his father.

Lack of Cooperation

¶7 In its order modifying the parties’ parenting time and legal decision-making authority, the trial court found Nikki was “unable to work cooperatively with [Joseph] regarding [J.H.]’s needs.” Specifically, it stated she had “routinely excluded [Joseph] from important medical decisions about [J.H.] and/or misle[d] medical professionals about [his] involvement in [J.H.]’s life.” The court concluded Nikki had “disregarded [Joseph]’s authority” by continuing to supply J.H. with foods that had been restricted from his diet for health reasons.

⁴Nikki also argues substantial evidence did not support the trial court’s conclusions regarding J.H.’s best interests; however, she again does not provide legal authority relevant to those determinations. Instead, she cites § 25-403(A)(6) for the proposition that Joseph “violat[ed]” this subsection. Thus, these claims are waived. See Ariz. R. Civ. App. P. 13(a)(7)(A); *Krasner*, 221 Ariz. 288, ¶ 62.

IN RE MARRIAGE OF HERNANDEZ

Decision of the Court

¶8 On appeal, Nikki claims J.H. was “genetically and behaviorally likely to have weight issues,” despite her action or inaction. Further, she points to instances in which she sought medical care for J.H., and she claims Joseph “was not involved” in J.H.’s life and only sought help for him by “repeatedly call[ing]” the Department of Child Safety (DCS). Joseph counters that Nikki “tried to trick [him] into signing [a] consent form” for J.H. to have gastric bypass surgery in Mexico. Further, he claims Nikki missed and arrived late to appointments with DCS and “failed to follow through with the communication chain DCS set up.” And, he asserts Nikki denied him contact with J.H. and did not “properly update” him regarding J.H.’s health.

¶9 Contrary to Nikki’s argument, substantial evidence supports the trial court’s finding that she was unable to cooperate with Joseph regarding J.H.’s medical care. *See Lewis*, 114 Ariz. at 429. At trial, Joseph testified that Nikki had falsely informed the staff at a hospital where J.H. was to have surgery performed that she had “full custody” and “full decision making” with respect to J.H., resulting in the staff refusing to “answer [his] calls or give [him] any information.” Further, Joseph explained that immediately after the hospital determined J.H. “needed to lose 65 pounds” in order to receive the “lifesaving” surgery, Nikki, despite Joseph’s objection, ordered J.H. three entrees at a restaurant.

Exercising Parenting Time

¶10 The trial court also found that “[e]vidence presented at trial indicated [Nikki] obstructed [Joseph]’s access to [J.H.]” Nikki claims this “was contrary to the evidence” because Joseph “did not exercise equal co-parenting time” and “was not involved in [J.H.]’s life.” In response, Joseph asserts that “for a full year,” Nikki denied him any contact with J.H. Indeed, Joseph’s wife, M.H., confirmed at trial that Joseph had been asking for but had been denied parenting time. And, during Nikki’s cross-examination of Joseph, the following exchange occurred:

Q. So if [J.H.] talked to the court and he said he wanted to live with mom, you would be happy with that?

A. No. I would not be happy if he lived with mom.

....

IN RE MARRIAGE OF HERNANDEZ
Decision of the Court

Q. Isn't it true you did not exercise equal co-parenting time at any year during those ten years, did you?

A. No. I was there and I was trying. She would not answer her phones. Like I said, every time I would try to arrange something with [J.H.] and we would arrange something, they would never be there.

Q. So, Mr. Hernandez, you claim to the court you've been denied co-parenting time for ten years but you filed nothing?

A. I have been trying to work with her this whole entire time.

Again, substantial evidence supports the court's finding. *See Lewis, 114 Ariz. at 429.*

Failure to Act in Best Interests

¶11 Further, in its order, the trial court stated:

[Nikki] has challenges with establishing and keeping boundaries with her son as well as with recognizing her son's grievous medical condition due to morbid obesity.

These factors call in to question whether [she] suffers from a mental health or substance abuse issue which impaired her ability to recognize or appropriately address [J.H.]'s well-being. Ultimately, no party provided evidence to definitively indicate [Nikki] has been diagnosed with either a mental health issue or a substance abuse issue.

¶12 Nikki challenges the trial court's findings as to whether she "act[ed] appropriately regarding [J.H.]'s weight issue," asserting that "[n]ot once was a dependency filed against [her]" and "[t]estimony even showed that [she] was the person who started efforts to get [J.H.] his stomach surgery." Nikki also asserts she paid for and facilitated "over 40 medical care appointments for" J.H. Finally, Nikki argues DCS records demonstrated that she did not have any mental health issues and that she

IN RE MARRIAGE OF HERNANDEZ
Decision of the Court

was able to adequately care for J.H. In response, Joseph argues “[t]he evidence suggests that [Nikki] abuses pain medication and has for years” and claims she is unable to adequately address J.H.’s medical condition.

¶13 The trial court’s statement does not indicate it found that drug abuse or mental health issues contributed to Nikki’s deficiencies in her care for J.H. Indeed, the court noted the lack of evidence establishing that Nikki suffered from such issues. However, as stated above, testimony established that despite a doctor’s order for J.H. to lose weight to prepare for “lifesaving” surgery, Nikki provided him with three entrees at a restaurant. Moreover, Joseph confirmed Nikki “would not be able to control what [J.H.] wanted to eat” and testified that he had previously filed for “emergency custody” because of J.H.’s health, claiming “nothing was getting done” and he “wasn’t making his appointments.” Again, substantial evidence supports the court’s findings.⁵ See *Lewis*, 114 Ariz. at 429.

Drug Use

¶14 Nikki claims “[t]here was not substantial evidence that [she] was using drugs,” but she later clarifies her argument, stating the trial court’s finding that she was a danger to J.H. based on her drug abuse was “inconsistent with 3 drug tests and [her d]octor’s statements.” But the court merely noted that whether she suffered from a substance abuse issue was “call[ed] into question” and ultimately concluded that “no party provided evidence to definitively indicate [she] ha[d] been diagnosed with . . . a substance abuse issue.” Moreover, the court plainly stated: “The Court finds [Nikki] *may* have abused substances . . .” (Emphasis added.) Because the court did not definitively find Nikki “was using drugs” or that such use caused her to be a danger to her son, we do not address this argument further.

Relationship with Joseph

¶15 The trial court found J.H. “currently has a good relationship with [Joseph], the primary residential parent.” However, Nikki claims Joseph “was in a less than stable relationship wherein he fought a lot with

⁵To the extent the court found Nikki presented a “danger” to J.H. based on her “history of failing to address [his] medical needs to the degree [he] was place[d] at risk of death or serious physical injury,” the testimony above, along with a doctor’s statement that J.H.’s weight “was a serious danger to his health and . . . future,” constitutes substantial evidence supporting that finding.

IN RE MARRIAGE OF HERNANDEZ
Decision of the Court

his wife” and “in spite of being an alcoholic . . . continued to drink [a]lcohol.” She also asserts J.H. stated that M.H. did not want him living with his father and that “he was miserable and cries frequently” at his father’s house. Finally, Nikki asserts J.H. “made multiple comments about being suicidal and not wanting to live if he [had to] live with his . . . [f]ather.”

¶16 At trial, Joseph and M.H. testified that on the day J.H. went to live with them, he hugged them and told them it was “time for a change.” Moreover, Joseph testified that he and M.H. “set up a plan” for J.H., which included walking with him regularly, preparing portioned meals for him, and M.H. serving as his “learning coach” for his online schooling. J.H. eventually walked with Joseph “[a]ll the time.” Moreover, M.H. testified that J.H. had begun “to almost like the structure of having a bedtime and getting up and doing school work.” Thus, substantial evidence supports the trial court’s finding that J.H. had a good relationship with Joseph. *See Lewis*, 114 Ariz. at 429.

Attorney Fees

¶17 Below, the trial court entered judgment against Nikki “for fees and costs incurred in this matter.” On appeal, Joseph requests attorney fees pursuant to A.R.S. § 25-324. Considering the parties’ financial resources and the reasonableness of their positions, in our discretion, we deny attorney fees. However, as the prevailing party, Joseph is entitled to his taxable costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.

Disposition

¶18 For the foregoing reasons, we affirm the trial court’s order.