IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MONICA NELSON,
Petitioner/Appellee,

v.

CRISTIAN ROBLES,
Respondent/Appellant.

No. 2 CA-CV 2022-0054-FC
Filed November 9, 2022

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NOT FOR PUBLICATION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. SP20141400
The Honorable Patricia A. Green, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Cattani concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this domestic-relations action, Cristian Robles appeals from the trial court's ruling granting Monica Nelson's request to relocate their minor child to Nevada, modifying the parenting plan, and awarding Nelson sole legal decision-making authority. Robles argues the court erred by disregarding his evidence against relocation and by sua sponte modifying legal decision-making. For the following reasons, we vacate the portion of the order awarding sole legal decision-making authority to Nelson but otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the trial court's ruling. *See In re Marriage of Downing*, 228 Ariz. 298, ¶ 2 (App. 2011). Robles and Nelson, who never married, have one minor child, born in 2013. In 2016, the parties agreed to joint legal decision-making and a "relatively equal" parenting-time schedule. In 2017, Nelson filed a petition to modify parenting time. In the court's order granting the petition, Nelson was designated the primary residential parent during the school year and Robles had visitation on alternating weekends and a mid-week visit for weeks during which he did not have weekend visitation. During the summer, the primary residential parent and schedule was reversed.

¶3 In May 2021, Nelson petitioned to enforce the 2018 parenting plan, arguing that Robles had "refused to return [the child] to [her] as the primary residential parent" at the start of the 2020 school year and "restricted [her] parenting time," in violation of the trial court's 2018 order. Robles failed to appear at two scheduled evidentiary hearings on this petition, and the court ultimately found Robles in contempt for not following the 2018 parenting plan.

¶4 In August 2021, after Nelson notified Robles of her intent to move to Nevada, Robles filed a petition to modify parenting time and prevent relocation. Nelson and Robles both testified at the trial in January 2022. In its under-advisement ruling, the trial court granted relocation,

modified the parenting plan to one that "maximizes each parent's parenting time," and awarded Nelson sole legal-decision making. It ordered that Robles would have the child over the entire summer and spring breaks, and half of winter break, with an alternating-year holiday schedule. Robles appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1) and 12-2101(A).

Discussion

¶5 Robles argues the trial court erred by "rel[ying] exclusively on case history and [Nelson]'s trial evidence" in denying his request to prevent Nelson from relocating their child to Nevada and modifying parenting time. He also argues the court improperly modified legal decision-making. We review a court's orders concerning legal decision-making, parenting time, and relocation for an abuse of discretion. *See Layne v. LaBianca*, 249 Ariz. 301, ¶ 5 (App. 2020). An abuse of discretion occurs when the record does not provide substantial support for the court's decision or the court commits an error of law. *Files v. Bernal*, 200 Ariz. 64, ¶ 2 (App. 2001).

¶6 In deciding whether to permit relocation or modify parenting time, the primary consideration for the trial court is the child's best interests. Section 25-403(A), A.R.S., requires a court to consider eleven factors "that are relevant to the child's physical and emotional well-being" in deciding whether to modify parenting time. And in considering whether to authorize a child's relocation to another state, a court must consider seven relocation-specific best-interests factors in addition to the § 25-403 factors. A.R.S. § 25-408(I). The parent seeking relocation has the burden of proving relocation is in the child's best interests. § 25-408(G). And the parent seeking to modify legal decision-making or parenting time likewise bears the burden of proof. *Pollock v. Pollock*, 181 Ariz. 275, 277 (App. 1995).

¶7 Robles argues the trial court did not "weigh or consider" his testimony establishing it was in the child's best interests to remain in Tucson. But the court expressly stated it had "considered the evidence, including the demeanor of the witnesses, reviewed the exhibits as well as the case history, and considered the parties' arguments." And contrary to Robles's argument, the court made detailed findings, not only concerning Robles's testimony that he claims the court failed to consider or adequately weigh, but as to each best-interests factor it deemed applicable.

¶8 The thrust of Robles's arguments is that the trial court "relied exclusively" on Nelson's evidence or ignored his evidence against

relocation when determining the child's best interests. Robles describes an "almost-year long period preceding the relocation in which [he] served as Child's primary caretaker," as supporting his position. However, the court found that this time period "demonstrated [Robles's] desire to control, and to place restrictions and conditions on, [Nelson]'s relationship with the child." The record supports the court's finding. Robles testified that he had violated the parenting-time order during this time by "add[ing] a requirement" to the order and "withhold[ing] the child," which he acknowledged was improper.

¶9 Robles also argues the trial court disregarded his testimony concerning the child's "alleged feelings about his move to Las Vegas and toward [Robles]," but the record does not support his contention. After Nelson objected to Robles's testimony, the court explained: "[A]s a general rule, sir, parents don't get to tell the Court what the children ha[ve] said unless it's under certain circumstances. So, I'm going to let what you've said thus far stand, but keep that in mind going forward." And although the court's ruling indirectly referenced Nelson's testimony about what the child had told her, Robles never objected below.

¶10 Robles next argues the trial court should not have considered Nelson's testimony that she and the child were fearful of him.[1] He characterizes this as the "main, and possibly sole, reason" for Nelson's

[1]Robles also challenges the trial court's finding regarding domestic violence or child abuse under § 25-403(A)(8). He argues "the court misconstrued the 2013 and 2015 procedural history to infer that there had been domestic violence to support the relocation." But the court made no such finding, because if it did, the court would have been required to place restrictions on Robles's parenting time. *See* A.R.S. § 25-403.03(F) ("court shall place conditions on parenting time that best protect the child and the other parent from further harm" if court finds parent has committed act of domestic violence). Additionally, we presume trial courts know and follow the law. *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 32 (App. 2004). In any event, when determining whether a person has "committed an act of domestic violence," the court must "consider all relevant factors." § 25-403.03(C) (non-exhaustive list of factors). Therefore, the court did not err by considering the minute entry from 2015 that noted Nelson had "credibly described [Robles's] efforts to limit the time she could spend . . . with her family." Likewise, the court did not err by considering the order of protection Nelson had obtained against Robles in 2013. *See* § 25-403.03(B) ("The court shall consider a perpetrator's history of causing or threatening to cause physical harm to another person.").

relocation to Nevada. But Nelson testified several times that the purpose of the relocation was "not to alienate" but "to improve [the child]'s life." This was supported by Nelson's testimony that she was willing to drive the child to see Robles once a month and pay a portion of his travel expenses.

¶11 Robles also contends that the trial court failed to consider that the child would be "separated from his family community to relocate to a place where he has no family community." But the court noted in its ruling that Robles, his mother, and "all of [Nelson's] family reside in the Tucson area." As discussed above, neither the record nor the court's ruling supports Robles's assertion that the court selectively considered evidence supporting relocation.

¶12 Although Robles maintains he is not asking us to reweigh the evidence, we disagree. He argues the trial court "did not properly weigh" the evidence concerning the child's feelings about moving to Nevada because it only "credited [Nelson]'s testimony" and "disregarded [his] testimony on the same."[2] He also contends the court erred by "placing substantial weight" on evidence supporting its finding that he "alone disobey[ed]" the parenting plan. His contentions appear to be an invitation for us to reweigh conflicting evidence, something we will not do. *Lehn v. Al-Thanayyan*, 246 Ariz. 277, ¶ 20 (App. 2019) ("[W]e do not reweigh the evidence but defer to the family court's determinations of witness credibility and the weight given to conflicting evidence.").

¶13 In sum, the record supports the trial court's determination that Nelson's relocation to Nevada was motivated by "what she believes is in the child's best interest"; would have a positive impact on the child's emotional, physical, and developmental needs; and would allow each parent a realistic opportunity for parenting time.[3] The court, therefore, did

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[2]To the extent Robles argues the trial court erred by not appointing a court advisor "to better understand" the child's best interests, it was not required to do so. *See* Ariz. R. Fam. Law P. 10.1(a) (decision to appoint advisor is discretionary). Furthermore, Robles never requested a court-appointed advisor.

[3]For the first time in his opening brief, Robles argues, "The relocation also will not grant [him] a realistic opportunity for parenting time during the school year" due to it being a financial burden. He has waived this argument by failing to raise it below. *See Hyman v. Arden-Mayfair, Inc.*, 150 Ariz. 444, 446 (App. 1986). Even considering its merits, Robles's argument

not abuse its discretion in granting relocation and modifying parenting time.

¶14 Next, Robles argues, and Nelson agrees, the trial court improperly awarded Nelson sole legal decision-making. Modification of a judgment is initiated by a petition to modify, which must refer to the "provisions [of the judgment] the applicant wishes to modify," Ariz. R. Fam. Law P. 91(b), with "detailed facts supporting the modification," Ariz. R. Fam. Law P. 91.3(a)(2). Additionally, the party seeking modification must comply with A.R.S. § 25-411. Here, because neither party requested modification of legal decision-making, the court abused its discretion by entering such an order. We therefore vacate this part of the court's ruling.

Attorney Fees on Appeal

¶15 Robles requests attorney fees and costs on appeal pursuant to A.R.S. §§ 25-324, 25-408(J), and 25-411(M). Nelson also requests attorney fees under § 25-324. Reasonable attorney fees may be awarded pursuant to § 25-324(A) after considering the parties' financial resources and the reasonableness of their positions. Under § 25-408(J), a court shall assess attorney fees and costs if it finds "the parent has unreasonably denied, restricted or interfered with court-ordered parenting time." And a court shall assess attorney fees and costs against the parent seeking modification "if the court finds that the modification action is vexatious and constitutes harassment." § 25-411(M).

¶16 In our discretion, we decline to award either party attorney fees under § 25-324(A). Likewise, the record does not support awarding Robles his attorney fees under §§ 25-408(J) or 25-411(M). As the substantially prevailing party, however, Nelson is entitled to her costs on appeal upon compliance with Rule 21(b), Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.

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is unfounded. During trial, when asked what he proposed for transportation, he stated that "we could do the same thing that [Nelson]'s requesting, but vice versa." He testified that although his car could not make the trip from Tucson to Nevada, he could travel by plane. And, as noted above, Nelson offered to help pay for some of the travel-related expenses. We therefore cannot say the court erred by finding "relocation will allow a realistic opportunity for parenting time with each parent."

Disposition

¶17 For the foregoing reasons, we vacate the portion of the trial court's ruling awarding sole legal decision-making authority to Nelson but otherwise affirm.