IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

COLLEEN FITZPATRICK,
Appellee,

and

AARON ALBRECHT,
Appellant.

No. 2 CA-CV 2022-0109-FC
Filed June 27, 2023

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NOT FOR PUBLICATION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 Pinal County
No. S1100DO201400036
The Honorable Joseph R. Georgini, Judge

AFFIRMED

COUNSEL

The Sampair Group PLLC, Glendale
By Patrick S. Sampair
Counsel for Appellee

Hoffman Legal LLC, Phoenix
By Amy Wilkins Hoffman
Counsel for Appellant

MEMORANDUM DECISION

Judge Sklar authored the decision of the Court, in which Vice Chief Judge Staring and Judge O'Neil concurred.

S K L A R, Judge:

¶1 Aaron Albrecht appeals the trial court's order granting a petition to prevent the relocation of three children he shares with his former wife, Colleen Fitzpatrick. He also appeals the court's denial of his motion to alter or amend that order. Finally, he appeals a subsequent order modifying parenting time, legal decision-making, and child support. For the reasons that follow, we conclude that the court erred by failing to make all the findings required by A.R.S. §§ 25-403(A) and 25-408(I) when it granted the petition to prevent relocation and denied the Rule 83 motion. However, we also conclude that the court cured that error by making the appropriate findings in its subsequent modification order. We find no reversible error in that modification order, which we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We view the evidence in the light most favorable to upholding the trial court's orders. *See Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1 (App. 2007). Albrecht and Fitzpatrick were married in 2009 and had three children. In 2014, their marriage was dissolved. In June 2021, the court approved an agreement entered under Rule 69 of the Arizona Rules of Family Law Procedure. That agreement gave Albrecht sole legal decision-making authority, designated Albrecht as the primary residential parent, granted Fitzpatrick six hours of supervised parenting time every Saturday, and ordered Fitzpatrick to pay Albrecht child support of $796 per month. The court concluded that this agreement was in the children's best interests.

¶3 Also in June 2021, Albrecht notified Fitzpatrick of his intent to relocate with their children, to Iowa, where he had secured better employment and had family nearby. In July 2021, Fitzpatrick filed a petition to prevent relocation under A.R.S. § 25-408. In August 2021, while the petition was pending, Albrecht moved with the children to Iowa.

¶4 In November 2021, the trial court held a hearing on Fitzpatrick's petition. At the hearing, Albrecht admitted that after

relocating, he had not complied with the Rule 69 Agreement's parenting-time arrangement. Although Fitzpatrick was entitled to parenting time every Saturday, she had been unable to see her children since August 2021.

¶5 In January 2022, before the trial court ruled on the petition to prevent relocation, Fitzpatrick also filed a petition to modify legal decision-making, parenting time, and child support. She argued that Albrecht had failed to comply with the parenting time provisions of the Rule 69 Agreement. The court set an evidentiary hearing on that petition, for March 2022.

¶6 Meanwhile, the trial court in February 2022 issued its ruling on Fitzpatrick's petition to prevent relocation. It granted that petition and affirmed the Rule 69 Agreement. Later that month, Albrecht filed a timely motion under Rule 83 to alter or amend that ruling.

¶7 At the March 2022 hearing, the trial court heard testimony on Fitzpatrick's petition to modify. It took that petition under advisement and, in an unsigned minute entry filed March 17, summarily denied Albrecht's Rule 83 motion.

¶8 After considering the evidence on Fitzpatrick's petition to modify, the trial court issued a signed ruling modifying legal decision-making, parenting time, and child support on May 23, 2022. The court ordered (1) the parents would share joint legal decision-making; (2) the children would be returned to Fitzpatrick in Arizona immediately after the school semester then in progress; (3) Albrecht would receive 60 days of parenting time in subsequent summers, along with parenting time for half of each Christmas break, every odd spring break, and every even fall break; and (4) Albrecht would pay Fitzpatrick $876 in child support per month. That ruling also reiterated—for the first time in a signed order—the denial of Albrecht's Rule 83 motion.

¶9 Albrecht filed a notice of appeal from that order on June 20, 2022. Two days later, he filed an amended notice of appeal, which also listed the February order granting Fitzpatrick's petition to prevent relocation and affirming the Rule 69 Agreement, as well as the March minute entry in which the court had denied his Rule 83 motion.

JURISDICTION

¶10 Although neither party raises the issue on appeal, we have an independent obligation to ensure we have jurisdiction. *Deal v. Deal*, 252

Ariz. 387, ¶ 6 (App. 2021). A timely notice of appeal is a prerequisite to appellate jurisdiction. *In re Marriage of Thorn*, 235 Ariz. 216, ¶ 5 (App. 2014). Albrecht timely filed his notice of appeal from the trial court's May modification order. *See* Ariz. R. Civ. App. P. 9(a) (notice of appeal must be filed no later than 30 days after entry of judgment from which appeal is taken).

¶11 Albrecht filed his amended notice of appeal from the February order preventing relocation and affirming the Rule 69 Agreement long after thirty days had passed. However, Albrecht's Rule 83 motion extended the time to file a notice of appeal until a "signed written order disposing of the last such remaining motion" was entered. Ariz. R. Civ. App. P. 9(e)(1)(C). As noted, although the trial court orally dismissed that motion in March, that dismissal was not embodied in a signed final order until May 23. The thirty days began to run that day, so Albrecht's amended notice of appeal was timely as to both the February order preventing relocation and the March denial of Albrecht's Rule 83 motion. We therefore have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1). *See also* Ariz. R. Fam. Law P. 78(a).

PETITION TO PREVENT RELOCATION

¶12 On appeal, Albrecht first argues that the trial court erred in granting the petition to prevent relocation because it did not make the best-interests findings listed in A.R.S. § 25-403. We review the court's order for an abuse of discretion but construe the applicable statutes de novo. *See Murray v. Murray*, 239 Ariz. 174, ¶ 5 (App. 2016). A trial court abuses its discretion when the record, viewed in the light most favorable to upholding the court's decision, is devoid of competent evidence to support its decision or when it commits an error of law while reaching a discretionary conclusion. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 19 (App. 2009).

¶13 Section 25-408 governs Fitzpatrick's petition to prevent relocation. Under this statute, a parent may not relocate a child out of state without providing forty-five days' advanced written notice to a parent who shares joint legal decision-making or parenting time. § 25-408(A)(1). Once notice is provided, the other parent may petition to prevent the child's relocation. § 25-408(C). The court's decision must be made in accordance with the child's best interests. § 25-408(G). In analyzing the child's best interests, the court must consider all relevant factors, including those listed in subsection (I).

¶14 Section 25-408(I) lists seven factors and incorporates by reference the best-interests factors listed in Section 25-403(A). § 25-408(I)(1). Where a petition to relocate involves a dispute over legal decision-making or parenting time, the trial court must make specific findings on the record as to each relevant factor. *See* § 25-403(B); *see also Hurd*, 223 Ariz. 48, ¶¶ 3-4, 9, 20 (in deciding relocation request where custody and parenting time are contested, "family court must make specific findings on the record as to all relevant factors and the reasons its decision is in the children's best interests").

¶15 In granting Fitzpatrick's petition to prevent relocation, the trial court made detailed findings as to Section 25-408(I)'s seven factors. It did not, however, make findings concerning Section 25-403(A)'s best-interests factors. Rather, it concluded that no such findings were required because "neither legal-decision making nor parenting time [was] at issue" and "neither party [was then] challenging the findings or validity of the Rule 69 Agreement." Nevertheless, the court incorporated by reference the best-interests finding it had made in approving the Rule 69 Agreement.

¶16 We agree with Albrecht that the Rule 69 Agreement did not excuse the trial court from making findings under Section 25-403. The court approved that agreement before it learned of the contemplated relocation and before Fitzpatrick filed the petition to prevent relocation. The best-interests analysis changed in the interim, given the children's move to Iowa. *See, e.g.*, § 25-403(A)(2) (requiring court to consider relationships between child and parents, siblings, and others who may significantly affect child's best interests), (A)(3) (requiring court to consider child's adjustment to home, school, and community).

¶17 Moreover, the record does not reflect that the trial court actually made findings under Section 25-403 in approving the Rule 69 Agreement. Rather, it simply concluded that the agreement was in the children's best interests. While no findings were necessary at that time because there were no contested issues, *see* § 25-403(B), the relocation dispute rendered findings necessary.

¶18 Finally, we disagree with Fitzpatrick's assertion that findings under Section 25-403 were unnecessary because she had not contested parenting time or legal decision-making. Although she did not expressly do so, her objection necessarily implicated parenting time. *See Murray*, 239 Ariz. 174, ¶ 8 ("As a practical matter, Mother's intended move to Nebraska with the children necessarily would have required a change in the

parenting-time arrangements . . . .”). Once the children were moved to Iowa, it would have been effectively impossible for Albrecht to comply with the Rule 69 Agreement and provide Fitzpatrick six hours of weekly supervised parenting time.

¶19 In fact, the trial court could have prohibited the relocation because it would have effectively modified Fitzpatrick’s parenting time less than one year after the Rule 69 Agreement was approved. *See* A.R.S. § 25-411(A); *Murray*, 239 Ariz. 174, ¶ 10. But Fitzpatrick did not make that request, and the court instead analyzed the issue under Section 25-408. Once it chose to do so, it was required to make factual findings under Section 25-403. It erred by not making them.

¶20 Having concluded that the trial court erred, we need not consider whether the denial of Albrecht’s Rule 83 motion was also error. That motion made the same arguments concerning the lack of findings under Section 25-403 that we have accepted here. However, as we explain next, the error does not require remand in light of the court’s subsequent order on the petition to modify.

PETITION TO MODIFY

¶21 Albrecht also appeals from the trial court’s order modifying legal decision-making, parenting time, and child support. In substance, Albrecht argues that the court erred by: (1) failing to make the relocation findings required under Section 25-408, which in his view would have required prohibiting the relocation, given that Fitzpatrick was living in Flagstaff; (2) giving insufficient weight to Fitzpatrick’s failures to promptly notify the court about her move to Flagstaff and the existence of certain orders of protection; and (3) disregarding evidence of domestic violence and child abuse.

Potential Relocation to Flagstaff

¶22 Fitzpatrick had lived in Queen Creek, but she moved to Flagstaff after Albrecht relocated the children to Iowa. She still lived in Flagstaff at the time of the March 2022 hearing. As a result, Albrecht argues that granting the modification entailed a relocation that required findings under Section 25-408(I).

¶23 In its May 2022 modification order, the trial court found that Fitzpatrick had not actually relocated to Flagstaff. It reasoned that she had not changed her domicile because she did not intend to remain in Flagstaff indefinitely. However, Section 25-408 makes no reference to a parent’s

domicile, and our case law does not predicate a relocation on a parent's domicile change. *See, e.g.*, *Woyton v. Ward*, 247 Ariz. 529, ¶ 8 (App. 2019) ("By its terms, [§ 25-408(A)] does not limit the court's authority to determine relocation issues or define what constitutes a 'relocation' under § 25-408.").

¶24 Rather, in determining whether a relocation analysis is required, courts must look to whether the child will be moved. *See* § 25-408(C) ("[T]he nonmoving parent may petition the court to prevent relocation *of the child*." (emphasis added)); *see also Berrier v. Rountree*, 245 Ariz. 604, n.2 (App. 2018) (Section 25-408(C) does not restrict types of relocations court may decide upon petition from parent seeking to prevent relocation). That should have been the basis for the court's determination of whether a relocation analysis was required. The court erred by making Fitzpatrick's domicile the determinative factor.

¶25 Nevertheless, we will affirm a trial court's decision if it is correct for any reason. *See In re Marriage of Gibbs*, 227 Ariz. 403, ¶ 16 (App. 2011). And competent evidence supports the trial court's conclusion that Fitzpatrick will not relocate the children to Flagstaff, given her testimony that her move was temporary. The court also reasonably credited Fitzpatrick's testimony that she was willing to return to the San Tan Valley area and would live with her children in whatever setting is in their best interests. Importantly, the court also found that it was not in the children's best interest to reside in Flagstaff and that they must be returned to an environment similar to their prior surroundings. As a result, the court was not required to undertake a relocation analysis. Nor must we address Albrecht's argument that in undertaking that analysis, the court should have directly prohibited the children from relocating to Flagstaff.

¶26 Albrecht also argues that the trial court's findings and orders concerning the children's residence are "conflicting and concerning." We agree that the language could have been clearer. It did not always clearly delineate between factual findings, which describe events that have already occurred, and orders, which prescribe how parties must conduct themselves in the future. But here, the court's intent is clear. Fitzpatrick is prohibited from residing with the children in Flagstaff, and she must return them to an environment "similar to their previous surroundings."

¶27 Albrecht further criticizes the trial court for relying on insufficient evidence that Fitzpatrick could comply with the orders. But she testified that she had acquired property in the city of Maricopa and had been considering nearby schools. Fitzpatrick also testified that she would

rent a house if needed. From this testimony, the court could reasonably conclude that she could return the children to a similar environment. The court did not abuse its discretion in its conclusions concerning the potential relocation.

Misleading the Trial Court

¶28 Albrecht also argues that the evidence does not support the trial court's finding that Fitzpatrick had not intentionally misled the court. Whether a party has misled the trial court is one factor in the best-interests analysis. § 25-403(A)(7). Albrecht notes that although Fitzpatrick had moved to Flagstaff in November 2021, she did not inform the court of the move until the March 2022 evidentiary hearing. Albrecht also points to statements in the modification order expressing concern over Fitzpatrick's lack of disclosure regarding dueling orders of protection that she and an ex-boyfriend had obtained against each other.

¶29 We do not reweigh the evidence. Rather, we must uphold the trial court's factual findings if, viewing the record in the light most favorable to upholding the court's decision, they are supported by competent evidence. *See Hurd*, 223 Ariz. 48, ¶ 19. Here, the court was in the best position to determine whether Fitzpatrick's actions misled it. And it took Fitzpatrick's lack of candor into consideration when making the best-interests findings. We see no reason to disturb its conclusion.

Domestic Violence and Child Abuse

¶30 Finally, Albrecht argues that the trial court erred by finding no "evidence of substantial domestic violence." We review for an abuse of discretion and defer to the court's factual findings unless clearly erroneous. *Hurd*, 223 Ariz. 48, ¶ 11; Ariz. R. Fam. Law P. 82(a)(5).

¶31 Albrecht points to three instances of alleged domestic violence concerning discipline of the children. First, he argues that Fitzpatrick had spanked the children with a spatula. But Fitzpatrick denied the incident, and the Department of Child Safety determined that the allegations were unsubstantiated. Next, Albrecht accuses Fitzpatrick of having required the children to take cold showers as punishment. However, Fitzpatrick again denied such behavior, explaining that her water heater had broken down and was being replaced, evidence of which she had provided to the investigating officer. Finally, Albrecht refers to a police report of an incident where Fitzpatrick was observed hitting the children, pulling their hair, and yelling at them in a parking lot. At least some of

these asserted incidents led to an indictment. However, the charges were eventually dismissed due to lack of evidence.

¶32 In addition, Albrecht cites an order of protection that a former boyfriend obtained against Fitzpatrick after she had obtained one against him. In seeking the order of protection, Fitzpatrick's former boyfriend alleged that she had threatened to kill him and his son. However, these dueling orders of protection were issued ex parte and were both dismissed upon mutual agreement without a decision on the merits.

¶33 Given the factual record, we conclude that the trial court's finding concerning domestic violence was supported by competent evidence. The court acted within its discretion by giving considerable weight to the dismissal of the charges. Although Albrecht identifies contrary evidence and correctly points out that a court may find domestic violence even absent a conviction, we do not second guess the court's weighing of the evidence. *Hurd*, 223 Ariz. 48, ¶ 16. We must also "give due regard to the trial court's opportunity to judge the credibility of the witnesses," including the court's determination that Fitzpatrick had credibly testified about allegations that she had threatened another child. *Id.*

¶34 We also reject Albrecht's argument that the trial court's findings were too abbreviated in light of the statutory framework concerning domestic violence and child abuse. *See* A.R.S. § 25-403.03; *see also Christopher K. v. Markaa S.*, 233 Ariz. 297, ¶ 1 (App. 2013) ("[W]hen physical discipline of a child is at issue in a custody proceeding, the court must determine expressly whether the discipline rises to the level of domestic violence."). That framework provides factors to consider in determining whether a parent has committed an act of domestic violence. It also imposes presumptions and other safeguards when a court determines that domestic violence has occurred. *See* § 25-403.03.

¶35 Here, however, the trial court reasonably concluded that Fitzpatrick had committed no "substantial domestic violence." It explained that although Albrecht had "continue[d] to repeat that [Fitzpatrick] 'has a history of child abuse,' his repeated reiteration does not make it true." The court also raised concerns that Albrecht "manufactured allegations" against Fitzpatrick "in an attempt to excise her from the children's life." Taken together, these conclusions demonstrate that the court rejected Albrecht's accusations of domestic violence. Because it found no instances of domestic violence, it did not need to conduct any further analysis under § 25-403.03.

Appropriateness of Remand

¶36 Based on our analysis, the trial court did not abuse its discretion in granting Fitzpatrick's petition to modify. Albrecht argues that even in view of this conclusion, remand is appropriate because of the court's failure to make findings under Section 25-403 in prohibiting the relocation. We disagree.

¶37 In its modification order, the trial court implicitly reaffirmed its prior ruling denying the relocation. It did so by awarding Fitzpatrick most of the parenting time and finding that the children should be returned to an environment similar to their prior surroundings. Its analysis properly considered the factors set forth in Section 25-403, including factors relevant to the children's life in Iowa. Were we to remand, that is precisely the analysis we would order the court to conduct. We see no purpose in remanding so the court can make findings it has already made, and in which we have found no reversible error.

ATTORNEY FEES

¶38 Both parties request their attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P. Having considered the financial resources of both parties and the reasonableness of the positions they have taken throughout the proceedings, we deny both parties' requests for attorney fees in our discretion. *See* A.R.S. § 25-324(A). Nevertheless, as the prevailing party on appeal, Fitzpatrick is entitled to her costs upon compliance with Rule 21(b).

DISPOSITION

¶39 For the foregoing reasons, we affirm the trial court's order modifying legal decision-making and parenting time. We also affirm the child support order that follows from the parenting time modification.