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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: TAMARA WALTERS, Petitioner/Appellee, and GREGORY ERWIN GOODMAN, Respondent/Appellant.	2 CA-CV 2008-0153 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20031748

Honorable Frederic J. Dardis, Judge Pro Tempore

AFFIRMED

Tamara Walters — Tucson
In Propria Persona

Kimminau & Gee, PLLC
By Chris J. Kimminau — Tucson
Attorneys for Respondent/Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Gregory Goodman appeals from the trial court's order modifying his parenting time with his children and requiring him to pay a portion of the attorney fees of his former wife, appellee Tamara Walters.[1] He argues the court erred when it reduced the amount of his parenting time, ordered him to pay $10,135 of Walters's attorney fees, and denied his motion to admit testimony of an expert witness about the Jehovah's Witnesses religion. For the following reasons, we affirm the trial court's order.

¶2 On appeal, we view the facts and the reasonable inferences to be drawn from them in the light most favorable to sustaining the trial court's ruling. *See Nace v. Nace*, 104 Ariz. 20, 23, 448 P.2d 76, 79 (1968); *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1, 169 P.3d 111, 112 n.1 (App. 2007). Upon the dissolution of their marriage in 2003, the trial court had awarded Goodman and Walters joint legal custody of their two children. Walters was to be the primary physical custodian with Goodman enjoying a defined parenting schedule. Since then, Goodman and Walters have continuously asked the court to settle disputes over custody and parenting time. In the fall of 2007, the parties again filed cross-petitions to modify parenting time, custody, and child support. The court held a two-day bench trial in June 2008 and issued its ruling one month later. This appeal followed.

[1]Goodman does not contend the court erred in the other portions of its order, awarding sole custody of the children to Walters and modifying Goodman's child support obligation.

PARENTING TIME

¶3 Goodman argues the trial court erred because it reduced the amount of his parenting time with his children in violation of A.R.S. § 25-411(D). We review a trial court's decision about parenting time for an abuse of discretion. *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). Section 25-411(D) provides that a court "shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger seriously the child's physical, mental, moral or emotional health." Goodman contends the court erred when, after finding that spending time with him would not seriously endanger the children's physical, mental, moral, or emotional health, it nonetheless restricted his parenting time based on the "high conflict that has been exhibited in the past" and the need to set forth "a clearly defined parenting schedule."

¶4 Goodman relies on *Hart v. Hart*, 220 Ariz. 183, 204 P.3d 441 (App. 2009), in which this court vacated an order restricting the mother's parenting time. There, the court ordered the parenting time be supervised because "it [wa]s in the children's best interest" without first having determined whether unsupervised time "would endanger seriously the child's physical, mental, moral or emotional health," as required by § 25-411(D). *Hart*, 220 Ariz. 183, ¶¶ 18-19, 204 P.3d at 446. But in *Hart*, the restriction on the mother's parenting time rights was the imposition of supervised rather than unsupervised visitation—a restriction

on the quality and not the quantity of parenting time. No Arizona court has decided whether a reduction in the amount of parenting time constitutes a restriction of parenting time rights.[2]

¶5 This case does not squarely present that question. Here, the trial court made the appropriate findings and correctly applied the law in ordering the modification, even were we to consider the modification a restriction of Goodman's rights. As he points out, the court found that "any parenting time awarded to [him] would not seriously endanger either child's

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[2]Arizona has adopted the Uniform Marriage and Divorce Act (UMDA) in part. *See* A.R.S. § 25-411 (Historical and Statutory Notes); UMDA, 9A Pt. 1 U.L.A. 162 (1998) (General Statutory Note). Those states that have enacted the UMDA and have addressed the question have held a reduction in parenting time is not necessarily a modification restricting parenting time rights. *See In re Marriage of West*, 94 P.3d 1248, 1250-51 (Colo. App. 2004); *Anderson v. Archer*, 510 N.W.2d 1, 4 (Minn. Ct. App. 1993). Those courts have generally held that, in determining whether a reduction in parenting time constitutes a restriction of a parent's rights, a court "should consider the reasons for the change as well as the amount of the reduction." *Dahl v. Dahl*, 765 N.W.2d 118, 124 (Minn. Ct. App. 2009); *accord West*, 94 P.3d at 1251. And, at least one court has found a reduction in the amount of parenting time is categorically not a restriction of parenting time rights. *See Quackenbush v. Hoyt*, 940 S.W.2d 938, 944 (Mo. Ct. App. 1997).

On appeal, Goodman argues his parenting time was substantially reduced as a result of the new schedule: from approximately 143 to 156 days under the previous modification order to approximately 116 to 129 days under the new order. Although the trial court in its latest order stated Goodman would have between 116 and 129 days of parenting time for purposes of calculating the child-support offset amount, we can find nothing in the previous order specifying 143 to 156 days. Actually, the previous order found he was entitled to an adjustment to his child support of a factor of .362, which implies he had had 153 to 162 days of parenting time. *See* A.R.S. § 25-320 app. § 11. Walters disputes that Goodman's time was lessened and contends the offset amount for child-support purposes is not equivalent to the actual parenting time awarded him. The record does not clearly show, nor has Goodman clearly provided, the actual number of days he has been awarded. *See In re Holland*, 203 S.W.3d 295, 300 (Mo. Ct. App. 2006) (parent objecting to reduced parenting time has burden to show reduction restricted her rights).

physical, mental, moral or emotional health." However, it immediately qualified this finding by stating, "This is not to say that the Court is not concerned with the emotional well being of the parties' children." The court then made findings about how the ongoing conflict between Goodman and Walters was "detriment[al] to the children," substantially increased the likelihood they would become emotionally disturbed, and risked "dooming the[] children to a life of conflict and ultimate failure." It enumerated the ways in which the new parenting time arrangement would lessen the conflict and thus ultimately serve the best interests of the children. *See* § 25-411(D) (parenting time modification must be in child's best interest); *cf. Downs v. Scheffler*, 206 Ariz. 496, ¶ 17, 80 P.3d 775, 780 (App. 2003) (noting determination that custody choice would be detrimental to child also requires evaluating child's best interests). Accordingly, the court implicitly found that, without the new parenting time schedule, the children would be in significant danger of suffering emotional harm.[3] *See* § 25-411(D) (to restrict parenting time rights, court must find time would seriously endanger child's mental or emotional health).

[3]"When considering the trial court's express findings, we affirm the trial court's order if the facts at trial support the trial court's findings whether or not each supportive fact is specifically called out by the trial court in its findings." *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 19, 153 P.3d 1074, 1080-81 (App. 2007). By failing to object to the court's findings below, which would have given the court a chance to correct any defect, Goodman waived any argument that the findings were not specific enough. *See Banales v. Smith*, 200 Ariz. 419, ¶¶ 6-8, 26 P.3d 1190, 1191 (App. 2001) (applying preclusion principle to findings under A.R.S. § 25-403).

¶6 Goodman contends, without elaboration, "[t]here is no doubt that a clearly defined parenting schedule could have been formulated that would, at a minimum, have not restricted [Goodman]'s parenting time." However, Goodman did not object to the new arrangement below, nor did he propose a schedule other than a one-week-on, one-week-off arrangement that the court expressly found would not be in the best interests of the children. Goodman does not dispute that finding on appeal.

¶7 Moreover, in determining the new parenting time schedule, the trial court also applied A.R.S. § 25-408(A), which provides that the noncustodial parent is entitled to "reasonable parenting time rights" to allow "frequent and continuing contact" between the parent and child. Goodman contends, summarily and for the first time in his reply brief, that the new schedule does not comply with these requirements. But, by not raising the issue in his opening brief nor providing authority or argument to support it, Goodman has waived this contention. *See* Ariz. R. Civ. App. P. 13(a)(6) (arguments shall contain appellant's contentions with citations to authority); *In re $26,980.00 U. S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) (bald assertion lacking elaboration or citation to authority will not be considered on appeal). We conclude the court did not abuse its discretion in ordering a modification of parenting time.

ATTORNEY FEES

¶8 Goodman argues the trial court erred in ordering him to pay some of Walters's attorney fees. Under A.R.S. § 25-324(A), the court may order one party to pay the other's

reasonable attorney fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." We review such an order for an abuse of the court's discretion. *In re Marriage of Robinson & Thiel*, 201 Ariz. 328, ¶ 20, 35 P.3d 89, 96 (App. 2001).

¶9 The trial court found, "based on the unreasonableness of [Goodman]'s position regarding [Walters]'s religious beliefs and coupling that with his failure to cooperate in disclosing his financial records, as well as reviewing his current financial position, [Walters] is entitled to a partial payment of her attorney fees." Goodman contends his position on the religion issue was not unreasonable and the trial court's contrary finding is not supported by the record. But the court was also viewing Goodman's failure to cooperate in disclosing financial documents as part of his unreasonable position. Goodman does not argue those actions were reasonable. And, in any event, our review of the record reveals sufficient support for the trial court's exercise of its discretion on both points.

¶10 Goodman also contends the attorney fee award is excessive because Walters's counsel only spent about $100 worth of time requesting the production of Goodman's financial documents and "there is no evidence that [Goodman]'s failure to provide such documentation resulted in a delay in the proceedings or an increase in litigation costs to [Walters]." But § 25-324 does not limit the court to awarding fees only in an amount equivalent to the extra legal work directly caused by an unreasonable position. Rather, the court "may order a party to pay a reasonable amount to the other party for the costs and

expenses of maintaining or defending any [custody] proceeding." § 25-324(A). Goodman does not argue the fees are otherwise excessive, and we find no error on this basis.

¶11 Goodman also argues that some of the fees submitted by Walters's counsel were for work performed before these modification proceedings were commenced. However, Walters's counsel explained in her affidavit that some of the fees had been incurred before the filing of the petition for modification, so we presume the court considered this information. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (presuming court considers evidence admitted about party's financial position). Moreover, the trial court only ordered Goodman to pay roughly half of the submitted fees. We cannot say it abused its discretion under the circumstances. Accordingly, we affirm the trial court's award of attorney fees to Walters in the amount of $10,135.

RELIGION TESTIMONY

¶12 Goodman argues the trial court erred when it excluded evidence about a religious dispute. "This court will not disturb the trial court's rulings regarding the exclusion or admission of evidence unless a clear abuse of discretion appears and prejudice results." *Elia v. Pifer*, 194 Ariz. 74, ¶ 22, 977 P.2d 796, 801 (App. 1998). On the first day of trial, Walters stipulated the children would continue to be raised in the Catholic religion, and she moved to preclude both "testimony with respect to Catholicism versus Jehovah's Witnesses" and a treatise about the Jehovah's Witnesses religion—evidence that Goodman planned to introduce at trial. Goodman contended the evidence was "relevant" because the children's

caretaker practiced the Jehovah's Witnesses religion, the children had participated in Bible studies with Jehovah's Witnesses "with no parent there," and "you cannot be exposed to Jehovah's Witness[es], that theology . . . without their purpose being indoctrination." The court reserved ruling until it had heard from the children's caretaker. The caretaker testified that she is a practicing member of Jehovah's Witnesses but has never initiated any discussions about the religion with the children. She also stated that the children had asked her several questions about the religion but that she had never otherwise discussed the topic with them. At the beginning of trial the next day, the court granted Walters's motion and precluded the testimony of Goodman's religion witness.

¶13 Walters testified that she has no intention of changing the children's religion or indoctrinating them into a religion other than Catholicism. She testified that she is studying the Jehovah's Witnesses religion but is not a full member of the church and that she has also studied other religions.

¶14 The trial court ruled that "[b]oth children shall continue to be raised Catholic and attend Catholic school," and it set forth specific guidelines to accomplish this end, such as the children's attending Sunday Mass and participating in Confirmation. The court also ordered the children not to "be 'sequestered' with persons of the Jehovah['s] Witness Faith," not to "attend 'meetings' or other services of the Jehovah['s] Witness Faith," nor to read any "Jehovah['s] Witness Religious treatises, literature, copies of the 'Watchtower' or other written documents." Finally, the court ruled that the children's "[s]tudying of comparative

religions shall be closely monitored and the studying of another religion[] under the guise of being a study of comparative religion when in fact it is proselytizing for that religion is not permitted."

¶15 Goodman has not explained how the proffered expert testimony would have changed the trial court's orders. Rather, the thrust of his argument appears to be that the court erred in believing Walters's assertion that she would abide by its orders. First, assessing the credibility of witnesses is a matter entirely within the discretion of the trial court. *Standage v. Standage*, 147 Ariz. 473, 479, 711 P.2d 612, 618 (App. 1985). Second, Goodman has a remedy if Walters actually does fail to abide by the court's order. *See* A.R.S. § 12-864; Ariz. R. Fam. Law P. 92. At this time, however, Goodman has shown neither error in the court's ruling nor resulting prejudice. *See Elia*, 194 Ariz. 74, ¶ 22, 977 P.2d at 801.

¶16 Affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge