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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: PETER CRUZ, Petitioner/Appellee, and AMY LYNN SMITH-FRAZIER, fka AMY CRUZ, Respondent/Appellant.	2 CA-CV 2010-0013 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO200900494

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Law Offices of Joseph Mendoza, P.L.L.C.
By Joseph Mendoza
Sierra Vista
Attorney for Petitioner/Appellee

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

¶1 Appellant Amy Smith-Frazier appeals from the trial court's judgment enforcing a North Carolina court's modified custody order that gave appellee Peter Cruz primary custody of the parties' son.[1] She argues she was denied due process by lack of notice of the North Carolina custody hearing. She also argues her due process rights were violated when the Arizona trial court failed to hold a timely hearing after the execution of a warrant Cruz had obtained to take physical custody of their son. She contends the trial court erred in finding the North Carolina court retained exclusive, continuing jurisdiction over the case. Finally, she contends the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) violates her fundamental right to travel by treating her differently for having lived in Arizona for less than six months than if she had lived here longer. For the reasons that follow, we affirm the judgment.

Factual and Procedural Background

¶2 "We view the record in the light most favorable to upholding the trial court's decision." *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 2, 207 P.3d 754, 755 (App. 2009). Cruz and Smith-Frazier's son, C., was born in 1999 during their marriage. The original custody order was entered in 2004 in Franklin County, North Carolina, upon the dissolution of the parties' marriage. That order gave primary custody to Smith-Frazier,

[1]Although Smith-Frazier only named the order denying her motion to reconsider, alter, or amend the judgment in her notice of appeal, we conclude that was sufficient to constitute an appeal from the final judgment. Cruz has not filed an answering brief and thus has not argued he suffered prejudice from Smith-Frazier's failure to specify the judgment appealed from in her notice of appeal. *See McKillip v. Smitty's Super Valu, Inc.*, 190 Ariz. 61, 64, 945 P.2d 372, 375 (App. 1997) (in absence of prejudice to appellee, we will proceed with appeal when appellant made obvious good faith attempt to appeal from underlying judgment, despite lack of designation of judgment in notice of appeal).

who remained in North Carolina with C., and parenting time to Cruz, who relocated to Houston, Texas.

¶3 In March 2008, Smith-Frazier moved from her home in Franklin County to a recreational vehicle park in Rowan County, North Carolina. However, she still owned the Franklin County home and told Cruz she would continue to reside there part of the time. She did not inform the Franklin County court that she had moved nor did she arrange for the postal service to forward her mail. Cruz continued to send child support payments to the Franklin County address and Smith-Frazier apparently received them.

¶4 In July 2008, Cruz had parenting time with C. in Houston. When C. returned to North Carolina from the visit, he made statements and exhibited behavior to his stepfather that, Smith-Frazier contends, suggested Cruz had touched C.'s penis in a sexual manner. Following a visit to a hospital emergency room where she reported the alleged abuse, Smith-Frazier withheld contact between C. and Cruz by changing her cellular telephone number and electronic mail address.[2]

¶5 Shortly after Cruz's scheduled December 2008 parenting time with C. did not take place, presumably because Cruz could not contact Smith-Frazier, Cruz filed a motion in the Franklin County court to modify custody and to hold Smith-Frazier in

[2]Because of the emergency room visit, the Department of Social Services had Smith-Frazier sign a "safety assessment" that advised her not to allow visits between Cruz and C. until she had been notified by the Department or a law enforcement agency. It is unclear from the record whether either agency gave her further instructions. However, it is clear that she never sought further assistance from any agency or the court in dealing with the allegations. Because Smith-Frazier has not made any arguments that require this court to consider substantively the allegations of sexual abuse, we have not set forth in further detail the facts in the record surrounding those allegations.

contempt of court for violating the original custody order. In February 2009, the court issued an order modifying custody, finding Smith-Frazier no longer fit to have custody of C., and awarding legal and physical custody to Cruz. The terms of the order also required Smith-Frazier to appear and show cause why she should not be held in contempt for failing to obey the prior custody order. The court set March 19, 2009, for a review hearing and a hearing on the order to show cause. The document attached to the order, dated February 6, 2009, and entitled "Sheriff's Return" shows that Smith-Frazier was not served with a copy of the order because she could not be found and was believed to be living in another state. Apparently, because Smith-Frazier could not be served with notice, the hearing was postponed until September 2009.[3]

¶6 In March 2009, Smith-Frazier moved with C. to Cochise County, Arizona, without notifying Cruz. Nor did she notify the Franklin County court of her change of address. Around the time of the custody hearing in February, C. had been reported as "endangered missing" and his picture and information were registered with the National Center for Missing and Exploited Children. Based on information from a postal worker in Tombstone, Arizona, Cruz eventually discovered Smith-Frazier's whereabouts, and at the end of April 2009, he registered the Franklin County custody order in Cochise County Superior Court. Cruz also filed an "expedited petition for enforcement of a foreign custody order and application for issuance of a warrant to take custody." The court

[3]Our record contains no information about whether the September review hearing took place and if so, whether Smith-Frazier attended. The last document in our record that appears to have been filed in North Carolina was Cruz's motion to transfer the case to Texas in August 2009.

issued the warrant; it was executed the following day. Cruz then took C. to reside with him in Houston.

¶7 On May 8, Smith-Frazier filed a motion in the Arizona trial court requesting that the court vacate the order issuing the warrant and that it schedule an emergency hearing to contest the registration of the North Carolina order. Shortly thereafter, she filed an emergency petition for modification of custody. In her opposition to the registration of the North Carolina order, she contended she had never been properly served with the original motion to modify custody or the notice of hearing, and thus, "the North Carolina order lacks jurisdiction and is void." She argued the trial court violated A.R.S. § 25-1061(B) when it issued the warrant and then failed to hold a hearing the next day, claiming the warrant was therefore "extinguished upon its entry" and "invalid." In her petition for custody, she argued Arizona should take emergency jurisdiction of the case to protect C. from "sexual molestation by his father."

¶8 After two days of hearings and a telephonic conference between the Franklin County, North Carolina judge and the Arizona trial court,[4] the court denied the emergency petition for modification of custody. It also denied Smith-Frazier's motion to vacate the order in which the court had issued the warrant and found the North Carolina order had been properly registered, according it the full faith and credit of the law. After the trial court also denied Smith-Frazier's post-hearing motion to reconsider, alter, or amend the judgment, this appeal followed.

[4]*See* A.R.S. § 25-1010(A) ("A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.").

Discussion

Notice of the North Carolina Custody Hearing

¶9 Smith-Frazier challenges the trial court's finding that she had been given proper notice of the February 5, 2009, custody hearing in North Carolina and contends that her due process rights were violated by the lack of notice. We will uphold a trial court's findings of fact if there is reasonable evidence to support them. *Johnson v. Johnson*, 131 Ariz. 38, 44, 638 P.2d 705, 711 (1981). In general, we review a trial court's child custody decisions for an abuse of discretion. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 11, 219 P.3d 258, 261 (App. 2009). But we review de novo questions of statutory or constitutional interpretation. *Egan v. Fridlund-Horne*, 221 Ariz. 229, ¶ 8, 211 P.3d 1213, 1216 (App. 2009). "The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom." *Goats v. A.J. Bayless Markets, Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971).

¶10 Although the trial court determined that in this case North Carolina would be the correct forum to challenge notice, the UCCJEA provides, among the bases for challenging the validity of a foreign decree registered in Arizona, that the person contesting the registration "was entitled to notice, but notice was not given in accordance with the standards of [A.R.S.] § 25-1008, in the proceedings before the court that issued the order for which registration is sought." A.R.S. § 25-1055(D)(3). Section 25-1008(A) provides:

> Notice required for the exercise of jurisdiction if a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

¶11 Because North Carolina had made the initial custody determination, it had continuing, exclusive jurisdiction over the matter. *See* N.C. Gen. Stat. § 50A-202(a). Thus, in February 2009, at the time the Franklin County court issued the modified custody order, Smith-Frazier already had submitted to the jurisdiction of the court for a custody determination and was subject to its continuing jurisdiction. And as explained below, "notice was . . . given in accordance with the standards of § 25-1008"; thus, Smith-Frazier has failed to meet her burden under § 25-1055(D)(3) to contest the validity of the registered order.

¶12 As stated, the evidence in the record suggests that Smith-Frazier was given proper notice and was thereby afforded due process in the modification proceeding.[5] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Pioneer Fed. Sav. Bank v. Driver*, 166 Ariz. 585, 588, 804 P.2d 118,

[5]Smith-Frazier has not included in the record on appeal any of the documents relating to service from the North Carolina court that would be necessary for a full determination of this issue. Thus, we presume those missing items would support the court's ruling. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (appellant responsible for making certain record contains all necessary items for this court to decide issues raised).

121 (App. 1990); *see also* § 25-1008(A) ("Notice must be given in a manner reasonably calculated to give actual notice . . . .").

¶13 The Franklin County court informed the Arizona court that notice of the hearing had been mailed to the address the court had on record for Smith-Frazier. Smith-Frazier testified that even after her move from Franklin County to Rowan County, she had regularly received mail at the Franklin County address. She had apparently also received the child support payments that had been sent to that address. She conceded she had likely received something sent "by a lawyer or by the court in North Carolina concerning the hearing of February 5, 2009" in a batch of mail given to her mother by people staying at the Franklin County residence a few weeks before the May 2009 hearing in Arizona. And, because she could not be served with notice of the March 2009 review hearing, the court postponed it until September.

¶14 These facts, coupled with the evidence of her subsequent move to Arizona, suggest she was attempting to avoid the orders of the North Carolina court and fully supports the trial court's finding that "[i]f she did not know of the hearing, it was because she placed herself in the position of not being able to know." The trial court stated it "ha[d] reason to doubt [Smith-Frazier]'s credibility" on her claim she did not know about the February 2009 hearing.[6] And we defer to the trial court with respect to its

[6] A child custody proceeding more than any other court hearing challenges the trial judge to view and weigh the various personalities, motives and abilities of all the parties. The trial judge observes the body movements, the facial expressions, the voice inflections, the reactions to the testimony and the overall demeanor of all parties and witnesses. These

determinations of witness credibility. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998). Accordingly, Smith-Frazier failed to establish she had not received notice of the North Carolina custody hearing.[7] And, the trial court did not abuse its discretion in so concluding. Consequently, Smith-Frazier has failed to show her due process rights were violated by a lack of notice.

Exclusive, Continuing Jurisdiction

¶15 Smith-Frazier contends the trial court erred when it relied on *Melgar v. Campo*, 215 Ariz. 605, 161 P.3d 1269 (App. 2007), in rendering its decision. Specifically, she argues "the court[']s findings of fact and conclusions do not conform to *Melgar* in that the court . . . did actually hear from a North Carolina judge that did not want exclusive, continuing jurisdiction and who also stated that no one, parents or child, . . . resided in North Carolina any longer."

> observations, together with the transcribed testimony, make up the fabric from which a judge will cut his decision. Our observations are limited to the transcript and we must therefore be very careful in attempting to second guess the front line trial court from our rather limited appellate vantage point.

Smith v. Smith, 117 Ariz. 249, 253, 571 P.2d 1045, 1049 (App. 1977).

[7]Smith-Frazier contends the trial court made other clearly erroneous findings: that North Carolina law required her to inform the Franklin County court of her change of address and that she and C. left Rowan County on March 7, 2009, and "headed west." However, even without either of these findings, the court's legal conclusions were reasonably supported by the evidence. Thus, if any error occurred, it was harmless. *See Creach v. Angulo*, 189 Ariz. 212, 214-15, 941 P.2d 224, 226-27 (1997) (error harmless unless prejudice to party's substantial rights apparent from record).

¶16 Pursuant to A.R.S. § 25-1033, an Arizona court can modify a custody order from another state under certain limited circumstances, including when Arizona is the child's home state and the other state court determines that it no longer has exclusive jurisdiction or "that the child, the child's parents and any person acting as a parent do not presently reside in the other state." In *Melgar*, we held an Arizona court could not modify a North Carolina custody order when North Carolina had made the initial custody determination, a party remained in North Carolina at the commencement of the proceeding, and the court had not relinquished exclusive, continuing jurisdiction. 215 Ariz. 605, ¶¶ 18-19, 161 P.3d at 1273. Similarly, here, after conferring with the North Carolina court, the trial court found that neither the parties' residences nor any determinations by the North Carolina court under § 25-1033 would allow Arizona to exercise anything other than temporary emergency jurisdiction under A.R.S. § 25-1034.[8] Specifically, the trial court stated that the judge in North Carolina "was [not] in a position to give a definitive answer on the question of where the case ought to be. He did express concern about the fact that apparently no one is in North Carolina any longer."

¶17 Contrary to Smith-Frazier's assertion, these statements by the North Carolina court do not constitute a determination that no one resides in North Carolina for

[8]Under § 25-1034(A), Arizona has temporary emergency jurisdiction over a custody determination from another state "if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." The court declined to exercise emergency jurisdiction here because it found Smith-Frazier had not proven the allegations of abuse by a preponderance of the evidence. Smith-Frazier has not challenged that finding.

the purposes of relinquishing jurisdiction under § 25-1033(2). As *Melgar* illustrates, when a party resides in a state at the time a custody proceeding commences, then under the UCCJEA, the party wishing to modify the original decree "must either return to the court with exclusive, continuing jurisdiction to modify the order or get that court to relinquish jurisdiction." *Melgar*, 215 Ariz. 605, ¶ 11, 161 P.3d at 1271. Relocations by the parties do not affect the situation, as explained by the commentary to § 202 of the UCCJEA:

> Jurisdiction attaches at the commencement of a proceeding. If State A had jurisdiction . . . it would not be lost by all parties moving out of the State prior to the conclusion of [the] proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207.[9]

9 U.L.A. 675 (1999). Smith-Frazier has never asked the North Carolina court to relinquish its jurisdiction, nor did the informal statements of the North Carolina court constitute a relinquishment of its jurisdiction. Accordingly, the trial court correctly concluded Arizona did not have jurisdiction to modify the North Carolina custody order.

¶18 Moreover, the move by Smith-Frazier and C. to Arizona occurred after Smith-Frazier had violated orders of the North Carolina court, which arguably precluded Arizona from exercising jurisdiction in any event.[10] *See* A.R.S. § 25-1038(A) (generally

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[9]This provision, which concerns inconvenient fora, is codified in North Carolina as N.C. Gen. Stat. § 50A-207 and in Arizona as A.R.S. § 25-1037.

[10]A party's unjustifiable conduct, however, does not prevent a court from exercising emergency jurisdiction if the grounds under § 25-1034 have been proven. *See* A.R.S. § 25-1038(A).

prohibiting state from exercising jurisdiction if it has jurisdiction only due to one party's "unjustifiable conduct"); *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 9, 207 P.3d 754, 756-57 (App. 2009) (finding Arizona had not lost its status as home state through father's "unauthorized—and arguably criminal—conduct in removing [the child] from the state"); 9 U.L.A. at 657 (noting purposes of UCCJEA include deterring abductions of children). The trial court did not err when it found North Carolina, and not Arizona, had exclusive, continuing jurisdiction over the case.

Registration of the North Carolina Order

¶19 Smith-Frazier contends the court abused its discretion when it found Cruz had "adhered" to A.R.S. § 25-1055 in registering the North Carolina order. She specifically contends she had not been given notice of the February 2009 hearing or order and thus, the registration fails under § 25-1055(D). But we have already determined Smith-Frazier has not sustained her burden of establishing the registered order was invalid because of a lack of notice under § 25-1055(D)(3).[11]

¶20 Smith-Frazier also contends Cruz did not comply with the requirement in § 25-1055(A)(2) that "[t]wo copies, including one certified copy, of the determination

[11]Contrary to the plain language of the statute, Smith-Frazier appears to contend Cruz had the burden of showing she had been provided notice. But the statute states a court will confirm a registered order "unless the person contesting registration establishes any of the following [grounds for relief]," including showing that proper notice was not given "in the proceedings before the court that issued the order for which registration is sought." § 25-1055(D)(3). Thus, to the extent she alleges there are documents missing from the trial court record that would have established her lack of notice, she was required to present those documents to the trial court for its consideration. *See* § 25-1055(D).

sought to be registered" be sent to the court. However, Smith-Frazier did not raise this objection to the registered order before the trial court when the situation could have been cured. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc*., 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238-39 (App. 2007) (arguments raised for first time on appeal generally waived). Nor has she explained how the failure to follow this procedure has caused her prejudice. *See Creach v. Angulo*, 189 Ariz. 212, 214-15, 941 P.2d 224, 226-27 (1997) (error is harmless unless prejudice to substantial rights of party is apparent from record).[12] Thus, we do not address this argument further.

Hearing on the Issuance of a Warrant

¶21 Smith-Frazier argues her due process rights were violated when the court failed to hold a hearing the day after the warrant to take physical custody of C. was executed. To support her argument, she relies solely on the principle that "[a] parent's right to custody and control of his or her children is a fundamental interest guaranteed by the United States and Arizona Constitutions." *In re Maricopa County Juv. Action No. JD-6123*, 191 Ariz. 384, 391, 956 P.2d 511, 518 (App. 1997). She contends that the court's failure to conduct a hearing resulted in her loss of custody of her son. However, she does not argue the basis for the issuance of the warrant was not proven or that the warrant was otherwise invalid and that she would have established the invalidity of the warrant had there been a hearing. Section 25-1061(A), A.R.S., provides that a petitioner

[12]Smith-Frazier also contends "the application for the warrant did not contain language that the custody determination had been registered and confirmed, which is required under A.R.S. § 25-1061(B)," without showing how this technical violation caused her to suffer harm. *See Creach*, 189 Ariz. at 214-15, 941 P.2d at 226-27.

seeking enforcement of a child custody order can "file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state." There was ample evidence supporting the court's finding C. was likely to be removed from the state by Smith-Frazier, and she does not argue otherwise.

¶22 In the emergency petition she filed below, Smith-Frazier had argued "[i]f a hearing [had been] held the child would have been protected because the mother would have brought forth clear and convincing evidence that th[e] child was molested by the father." She does not repeat this contention in her appellate brief. And, because the trial court denied her petition following the hearing at which she presented evidence of the purported molestation, any error in failing to hold the hearing sooner was harmless. *See Creach*, 189 Ariz. at 214-15, 941 P.2d at 226-27.

Constitutional Right to Travel

¶23 Finally, Smith-Frazier argues the UCCJEA violates her "constitutional right to freely travel among the states,"[13] an argument she raises for the first time on appeal. Because arguments not raised before the trial court are generally waived on appeal, *Airfreight Express Ltd.*, 215 Ariz. 103, ¶ 17, 158 P.3d at 238-39, and because the argument is based on the erroneous assumption A.R.S. § 25-1033 would have provided Arizona jurisdiction if only she and C. had lived in this state for four months longer at the time she filed her emergency petition, we do not address this argument further.

[13]Cruz has failed to file an answering brief, which we can treat as a confession of error on appeal "[w]here debatable issues are raised." *Bugh v. Bugh*, 125 Ariz. 190, 191, 608 P.2d 329, 330 (App. 1980). We decline to do so here.

Disposition

¶24 For the foregoing reasons, the judgment is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge