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FEB 22 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2010-0104
	DEPARTMENT A
BRANDON MICHAEL VONMENKE,	
	MEMORANDUM DECISION
Petitioner/Appellant,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
DONETTA PAULINE MENKE,	
Respondent/Appellee.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20081860

Honorable Nanette M. Warner, Judge

AFFIRMED

Brandon Michael VonMenke — Tucson
In Propria Persona

B R A M M E R, Presiding Judge.

¶1 Brandon VonMenke appeals from the decree dissolving his marriage to Donetta Menke.[1] He argues the trial court erred in failing to apply the presumption set

[1]We observe that Donetta has not filed an answering brief. "When a debatable issue is raised on [appeal], the failure to file an answering brief generally constitutes a confession of error." *Gibbons v. Indus. Comm'n of Ariz.*, 197 Ariz. 108, ¶ 8, 3 P.3d 1028, 1031 (App. 1999). However, we find no debatable issues.

forth in A.R.S. § 25-403.03(D) against awarding Donetta custody of their child. He also alleges the court failed to make the best interests findings required by A.R.S. § 25-403. Brandon additionally challenges the court's child support determination. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the decree. *See Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). Brandon petitioned for dissolution of his marriage to Donetta, seeking joint custody of their daughter, C.M. At trial, the court heard testimony from a custody evaluator for the Family Center of the Conciliation Court, Brandon's girlfriend Carol L., Brandon, Donetta's sister, Donetta, Donetta's former husband, a friend of Brandon, a neighbor of Brandon and Donetta, and two of Brandon's co-workers. The court interviewed in chambers G.V., Donetta's son from her previous marriage. The court also considered testimony from both parties given at hearings in which Donetta had sought an injunction against harassment by Carol L.

¶3 The trial court determined Donetta was more credible than Brandon, and Brandon was not credible as to his abuse of Donetta. The court found Brandon had committed acts of physical and verbal violence against Donetta and had thrown the family dog in the presence of C.M. Additionally, the court determined Brandon's "greatest acts of domestic violence were those perpetrated against [G.V.]." Consequently, the court determined that because of the domestic violence Brandon had perpetrated, it would not be in C.M.'s best interests for him to be her custodial parent.

The court noted Brandon denied all acts of domestic violence, "despite the weight of the evidence [to the] contrary."

¶4 Because of Brandon and Donetta's inability to cooperate, the trial court determined joint custody was not feasible, observing that Brandon "ha[d] placed more obstacles to joint cooperation and communication regarding [C.M.]'s needs than [Donetta]." After noting the "considerable problems and deficits" of both parents, the court determined it was in C.M.'s best interests for Donetta to have sole legal custody. The court also awarded Donetta primary physical custody of C.M. In a separate child support order, the court ordered Brandon to pay child support to Donetta. This appeal followed.

Discussion

Domestic Violence

¶5 Brandon first argues the trial court did not comply with A.R.S. § 25-403.03(D), asserting it failed to presume that awarding Donetta custody of C.M. would not be in the child's best interests because Donetta was "a perpetrator of domestic violence." We review a court's interpretation of statutes de novo. *Pima County v. Pima County Law Enforcement Merit Sys. Council*, 211 Ariz. 224, ¶ 13, 119 P.3d 1027, 1030 (2005); *LaWall v. Pima County Merit Sys. Comm'n*, 212 Ariz. 489, ¶ 4, 134 P.3d 394, 396 (App. 2006). Section 25-403.03(D) provides:

> If the court determines that a parent who is seeking custody has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child's best interests.

> This presumption does not apply if both parents have committed an act of domestic violence. For the purposes of this subsection, a person commits an act of domestic violence if that person does any of the following:
>
> 1. Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury.
>
> 2. Places a person in reasonable apprehension of imminent serious physical injury to any person.
>
> 3. Engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child's siblings.

¶6 Although Brandon alleges "the Court found that [Donetta] was guilty of domestic violence" pursuant to § 25-403.03(A),[2] he has failed to direct us to that finding. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate argument shall contain "citations to the authorities, statutes and parts of the record relied on"). In fact, the trial court's under advisement ruling, incorporated in the decree of dissolution, contains no finding that Donetta committed any act of domestic violence, let alone a finding she had committed "significant domestic violence" under § 25-403.03(A).[3] Brandon previously had obtained

[2]We note the definition of "domestic violence" in § 25-403.03(D) is more limited than the definition of that term in § 25-403.03(A). Whereas the former provides only three categories of behavior triggering a presumption against custody, the latter allows any significant domestic violence act as defined by the criminal code to preclude joint custody. Therefore, a finding of significant domestic violence under § 25-403.03(A) does not necessarily require a finding of "an act of domestic violence" under the specific definitions in § 25-403.03(D).

[3]Brandon suggests the testimony of Donetta's former husband, a police report, and the order of protection against Donetta and her sister are proof Donetta committed domestic violence. However, Brandon does not argue the trial court erred in failing to

an order of protection against Donetta in which the hearing officer found she had "committed an act of domestic violence against [Brandon] within the last year." That finding, however, does not necessarily meet the definition of "an act of domestic violence" under the more specific requirements of § 25-403.03(D)(1)–(3). The court was required to apply the presumption of § 25-403.03(D) only if it found Donetta had committed an act constituting domestic violence under that section, not merely if there was any prior finding of "an act of domestic violence."[4] The court made no such finding.

¶7 Brandon argues § 25-403.03(D) requires a trial court to apply the presumption "whenever the victim obtains or could have obtained an order of protection against the perpetrator." However, the statute does not define domestic violence as any incident that would entitle the victim to an order of protection, but as a "pattern of behavior" that warrants such protection. § 25-403.03(D)(3). The requirement that the acts constitute a pattern is significant because an order of protection may be granted when a person has "committed an act of domestic violence within the past year or within a longer period of time if the court finds that good cause exists." A.R.S. § 13-3602(E)(2). Therefore, absent the requirement of a pattern, any act of domestic violence would trigger the presumption against custody, rendering superfluous the more rigorous requirements

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find Donetta had committed an act of violence, only that it erred in failing to apply the presumption of § 25-403.03(D).

[4]Moreover, even if the finding in the order of protection had satisfied the definition of domestic violence under § 25-403.03(D), the trial court could not have applied the presumption against Donetta because it also found Brandon had committed multiple instances of domestic violence against her, G.V., and the family dog. *See* § 25-403.03 ("presumption does not apply if both parents have committed an act of domestic violence").

of § 25-403.03(D)(1)–(3). *See State v. Brown*, 204 Ariz. 405, ¶ 16, 64 P.3d 847, 851 (App. 2003) ("[W]e must give meaning to each word or phrase so that none 'is rendered superfluous, void, contradictory or insignificant.'"), *quoting State v. Superior Court*, 113 Ariz. 248, 249, 550 P.2d 626, 627 (1976). In this case, the trial court did not find Donetta had engaged in a pattern of behavior constituting domestic violence. *See* § 25-403.03(D)(3). Because the court did not determine she had "committed an act of domestic violence" against Brandon for purposes of § 25-403.03(D)(1)–(3), the court did not err in failing to apply the presumption.

¶8 Brandon nevertheless argues "[t]he court failed to consider and properly weigh the domestic violence." But it is for the trial court, not this court, to determine how much weight to give the evidence. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009) (trial court in best position to weigh evidence and judge witness credibility). Additionally, we presume trial courts know and follow the law. *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 32, 97 P.3d 876, 883 (App. 2004). Keeping these principles in mind, and granting to the court the deference to which it is entitled, we assume it considered and properly weighed any evidence relating to domestic violence as required by A.R.S. §§ 25-403 and 25-403.03(B).

¶9 Brandon also alleges the trial court "fail[ed] to properly discuss" Donetta's domestic violence in light of the best interests of the child and "failed to make the specific findings" under § 25-403.03(A)–(D). Because he has not provided any citations to the record and has not developed these arguments adequately, we do not address them. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities,

statutes and parts of the record relied on"); *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).[5]

Best Interests

¶10 Brandon argues the trial court failed to make the findings required by § 25-403. Pursuant to § 25-403(A), when determining custody, a court, "in accordance with the best interests of the child," must consider "all relevant factors," including eleven factors listed in the statute. Additionally, in a contested custody case, a court is required to "make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." § 25-403(B). The court made specific findings on the record for each of the factors in § 25-403(A)(1)–(11). And it made additional findings regarding other relevant factors in its determination of C.M.'s best interests. Thus, Brandon's argument that the court did not make the required findings under § 25-403 is not supported by the record.

¶11 To the extent Brandon impliedly argues the trial court abused its discretion because its findings were unsupported by the evidence or weighed improperly, we will uphold a court's findings of fact "unless they are clearly erroneous," *McNutt v. McNutt*, 203 Ariz. 28, ¶ 6, 49 P.3d 300, 302 (App. 2002), because the trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and

[5]We note that despite Brandon's pro se status he is held to the same standards as a qualified attorney. *See Old Pueblo Plastic Surgery, P.C. v. Fields*, 146 Ariz. 178, 179, 704 P.2d 819, 820 (App. 1985).

resolve disputed facts," *Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d at 945. "An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision." *State ex rel. Dep't Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 14, 66 P.3d 70, 73 (App. 2003). That is not the case here. The court made detailed findings, supported by the record before it, and set forth the reasons why its custody decision was in C.M.'s best interests. Because there was sufficient evidence supporting each of the court's challenged findings, we find no abuse of its discretion under § 25-403.

Child Support

¶12 Brandon argues the trial court's child support award was not supported by the evidence. "Child support awards are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State ex rel. Dep't of Econ. Sec. v. Ayala*, 185 Ariz. 314, 316, 916 P.2d 504, 506 (App. 1996). *See also* A.R.S. § 25-320(A) ("[T]he court may order either or both parents . . . to pay an amount reasonable and necessary for support of the child . . . .").

¶13 Brandon contends Donetta is underemployed and the trial court did not properly account for that fact. *See* § 25-320(D)(2) (relevant factors for determining child support include financial resources of custodial parent). He also contends the court failed to consider his "substantial decrease in pay." *See* § 25-320(D)(5) (relevant factors for determining child support include financial resources of noncustodial parent). But Brandon has failed to cite to any information in the record that was before the court and

that it clearly ignored.[6] *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"). Moreover, transcripts of the child support proceedings have not been made part of the record on appeal. In their absence, we will presume they support the court's factual findings and rulings. *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

¶14 The trial court's minute entry following the child support proceedings indicates that the only exhibit identified at the hearing was Donetta's child support worksheet. The court noted it also had reviewed a position statement prepared by Brandon that addressed "unresolved financial issues" including child support, and included copies of a single pay stub and his child support worksheet. The court appears to have reviewed all the information before it and Brandon has directed us to nothing in the record showing the court abused its discretion in determining the amount of his child support obligation. Accordingly, we cannot say the court's child support determination was an abuse of discretion.[7]

[6]Without citation, Brandon directs us to "[s]ee Child Support Worksheet presented with objections to form of judgment." However, the only objection to lodging of judgment on the record before us relates solely to retirement accounts.

[7]Moreover, even were we to find any error in the trial court's domestic violence or best interests findings, or in its child support determination, Brandon has failed to request any relief. Brandon was required to set forth in his conclusion a statement of "the precise relief sought." *See* Ariz. R. Civ. App. P. 13(a)(7). His conclusion contains no such statement. The only statement in his brief that could be construed as such declares that "[t]he many numerous failures of the Court require immediate reversal," and is too ambiguous to constitute a specific request for relief.

Disposition

¶15 For the foregoing reasons, we affirm the trial court's order.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge