

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF:

MARIA ANTONIA OLVERA N.K.A. ZAMORA,
Appellee,

and

JAVIER OLVERA,
Appellant.

No. 2 CA-CV 2015-0039
Filed September 28, 2015

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NOT FOR PUBLICATION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. D20012721
The Honorable Laurie B. SanAngelo, Judge Pro Tempore

AFFIRMED

COUNSEL

Willman Law Firm, Tucson
By Paul E. Willman
Counsel for Appellee

Javier Olvera, Tucson
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 In this post-dissolution child custody modification proceeding, appellant Javier Olvera challenges the trial court's order concerning parenting time. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Maria Zamora and Javier Olvera dissolved their marriage in 2001. In the decree of dissolution, sole legal and physical custody of their minor children was awarded to Zamora, with "reasonable visitation" for Olvera. In April 2013, Olvera filed a motion seeking joint legal decision-making with equal parenting time.¹ The parties were ordered to participate in mediation and eventually resolved all issues but that of a regular parenting time schedule. The court approved the parenting plan and held a trial to determine parenting time. After a bench trial, the court ordered that Olvera have parenting time every other weekend from Saturday morning at 9:00 a.m. until Sunday evening at 6:00 p.m., and, on the weeks Olvera does not have weekend parenting time, two hours on Wednesday evening. Olvera filed a motion for reconsideration, then several days later filed a notice of appeal. The trial court properly refused to consider Olvera's motion for reconsideration. *See In re Marriage of Johnson & Gravino*, 231 Ariz. 228, ¶ 6, 293 P.3d 504, 506 (App. 2012) (notice of appeal perfects appeal and deprives trial court of jurisdiction); *see also Munger Chadwick, P.L.C. v. Farwest Dev. & Constr. of the Sw., LLC*, 235 Ariz. 125, ¶ 4, 329 P.3d 229, 230 (App.

¹Although Olvera's motion referred to "joint physical custody," it appeared from the context of the motion that Olvera was actually seeking joint legal decision-making. *See* A.R.S. § 25-401(2), (3). The parties agreed to joint legal decision-making in mediation.

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2014) (motion for reconsideration does not extend time for appeal). We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101.

Factual Findings

¶3 Olvera initially argues the trial court erred in several of its factual findings: first, that Zamora had no history of denying Olvera parenting time or preventing his access to the children; second, that Olvera had an inconsistent relationship with his children; and third, that Olvera had a history of domestic violence. On review, we view the facts in the light most favorable to upholding the trial court’s decision. *See Vincent v. Nelson*, 719 Ariz. Adv. Rep. 35, ¶ 17 (Ct. App. Aug. 20, 2015). We will not disturb the trial court’s factual findings unless they are clearly erroneous. *See Walsh v. Walsh*, 230 Ariz. 486, ¶ 9, 286 P.3d 1095, 1099 (App. 2012).

¶4 Olvera essentially claims the trial court erred in determining which witnesses to find credible. But it is the role of the trial court to judge the credibility of witnesses, and we will not reverse the trial court’s findings of fact simply because conflicting evidence exists. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). We therefore find no basis to disturb the trial court’s findings of fact.

Domestic Violence

¶5 Olvera next claims the court erred in considering domestic violence in its order regarding parenting time. “We review an order modifying parenting time for an abuse of discretion” *Baker v. Meyer*, 237 Ariz. 112, ¶ 10, 346 P.3d 998, 1002 (App. 2015). Olvera’s contention is based on A.R.S. § 25-403.03(A), which states that a court shall not award joint legal decision-making if one parent has a “significant history” of domestic violence, and § 25-403.03(D), which creates a rebuttable presumption against an award of sole or joint legal decision-making to a parent who has committed domestic violence against the other parent. Olvera contends the evidence does not support a finding that he has a “significant history” of domestic violence under § 25-403.03(A) or a history of domestic violence as it is defined in § 25-403.03(D).

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¶6 Section 25-403.03(A) creates a bar against an award of joint legal decision-making if the trial court finds one parent has a “significant history” of domestic violence. Because the court approved of Zamora and Olvera’s agreement to share legal decision-making, it presumably agreed with Olvera that he did not have such a history. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 32, 97 P.3d 876, 883 (App. 2004) (presumption that trial courts know the law and apply it to their decisions). Section 25-403.03(D) creates a rebuttable presumption against awarding legal decision-making to a parent who has committed an act of domestic violence against the other parent, and defines domestic violence “[f]or the purposes of this subsection.” Because the definitions in subsection (D) are expressly limited to the purposes of subsection (D), and do not concern parenting time, the trial court did not need to find Olvera had committed an act of domestic violence, as it is defined in that subsection, to find domestic violence as a factor relevant to the determination of parenting time.

¶7 Sections 25-403.03(B) and (C), in contrast, require a court to consider domestic violence in determining what is in the best interests of a child, and list the factors a court should consider in deciding whether a person has committed such an act. These subsections are not expressly limited to a determination of legal decision-making.

¶8 Section 25-403(A), A.R.S., lists the factors a court must consider in determining what is in the best interests of a child. Section 25-403(A)(8) notes that the court must consider “[w]hether there has been domestic violence . . . pursuant to § 25-403.03.” But § 25-403 pertains to both legal decision-making and parenting time. The provision in subsection (A)(8) directing courts to look to § 25-403.03 does not overcome the express limitations of § 25-403.03(A) and (D) to legal decision-making. The trial court, therefore, did not abuse its discretion by failing to apply the standards in § 25-403.03(A) and (D).

Witness Sequestration

¶9 Olvera next complains the trial court abused its discretion in allowing the testimony of Janet and Erika Olvera

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because they violated the invocation of Rule 615, Ariz. R. Evid., excluding witnesses from the court during the testimony of other witnesses. We will not reverse a trial court's ruling on sequestration of witnesses absent a showing of prejudice. See *Plowman v. Ariz. State Liquor Bd.*, 152 Ariz. 331, 338, 732 P.2d 222, 229 (App. 1986). At trial, Olvera asserted he had seen Janet and Erika, who had been excluded from the courtroom under the rule, talking to Zamora's mother about the testimony given during the trial. The court questioned Janet about the conversation and ultimately did not decide on whether the rule had been violated. Instead, the court allowed Janet to testify, so long as she did not address "areas where there's been previous testimony."

¶10 Olvera did not object to any of Janet's testimony on the grounds that it addressed testimony previously given. On appeal, he has not pointed to any prejudice that could have resulted from the conversation between Mrs. Zamora, Janet, and Erika. In the absence of any showing of prejudice, we will not reverse the trial court's decision to allow Janet and Erika to testify.

Best-Interest Factors

¶11 Olvera finally asserts "[t]he trial court's order is deficient and does not contain specific findings . . . why it is in the children's best interest to award [him] a total of 50 days out of 365 days of the year." Olvera relies on § 25-403(B), which requires the court 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."

¶12 The trial court's ruling includes specific factual findings regarding all eleven of the factors listed under § 25-403(A). Olvera appears to argue that the court was required to give some explanation for the exact amount of parenting time it awarded. He has not cited any authority for such a proposition, and we therefore deem this argument waived. See *Ritchie v. Krasner*, 221 Ariz. 288,

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¶ 62, 211 P.3d 1272, 1289 (App. 2009) (failure to support argument with citations to relevant authority may constitute waiver).²

Attorney Fees and Costs

¶13 Zamora has requested her attorney fees and costs pursuant to A.R.S. § 25-324, claiming Olvera was unreasonable in filing this appeal. To the extent her claim is pursuant to § 25-324(A), that subsection requires a court to consider both the reasonableness of the positions taken by the parties and the relative financial resources of each party. *See Leathers v. Leathers*, 216 Ariz. 374, ¶ 22, 166 P.3d 929, 934 (App. 2007). Because Zamora has not provided this court with any information regarding her financial position, nor can we find such information within the trial court record, we deny her request for attorney fees. *See Patterson v. Patterson*, 226 Ariz. 356, ¶ 13, 248 P.3d 204, 208 (App. 2011). To the extent her claim is pursuant to § 25-324(B), even assuming arguendo that subsection is applicable on appeal, it requires a showing that an action is either filed in bad faith, filed without a factual or legal base, or filed for an improper purpose. We do not believe any of these apply to this appeal. Zamora notes that “Olvera filed this appeal . . . because he just didn’t like the [r]uling of the trial court.” But dissatisfaction with the trial court’s ruling is not an improper purpose; it is precisely the purpose for which an appeal exists.

¶14 However, under A.R.S. § 12-341, recovery of costs by “[t]he successful party to a civil action” is mandatory. We therefore grant Zamora her costs on appeal, subject to her compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶15 For the foregoing reasons, the trial court’s order modifying parenting time is affirmed.

²Olvera also attempts to raise the issues argued in his motion for reconsideration. That motion was not ruled on by the trial court, and therefore is not before us.