IN RE THE MARRIAGE OF LAYTON

2020 | Cited 0 times | Court of Appeals of Arizona | February 20, 2020

IN THE ARIZONA COURT OF APPEALS DIVISION TWO

IN RE THE MARRIAGE OF

BENJAMIN LEE LAYTON, Petitioner/Appellee,

and

CATHERINE SOFIA JOYCE LAYTON, Respondent/Appellant.

No. 2 CA-CV 2018-0152-FC Filed February 20, 2020

Appeal from the Superior Court in Pima County No. D20163154 The Honorable Jane A. Butler, Judge Pro Tempore

AFFIRMED

COUNSEL

Benjamin Layton, Bothell, Washington In Propria Persona

Tiffany & Bosco P.A., Phoenix By Kelly Mendoza and Gianni Pattas Counsel for Respondent/Appellant MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Catherine Layton appeals from ruling granting joint legal decision-making authority and unsupervised parenting time to Benjamin Layton. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the In re Marriage of Downing, 228 Ariz. 298, ¶ 2 (App. 2011). Catherine and Benjamin were married in October 2010, and have one child together, A.L., born in October 2013. In 2001, Benjamin pled guilty to one count of sexual conduct and one count of sexual abuse, both involving a minor under the age of fifteen. He was released from lifetime probation in 2016, but remains a lifetime registered sex offender. 1

¶3 In June 2016, Benjamin helped Catherine and A.L. move to Washington, and he also planned to relocate there. In September of that year, Catherine sought an order of protection against Benjamin, and in October, Benjamin filed for divorce. In June 2017, during the dissolution proceedings, Catherine filed a motion asking the trial court to release which the court denied.

¶4 In August 2018, following a three-day bench trial, the trial court entered a decree of dissolution. In its detailed, sixteen-page ruling, the court made findings pursuant to A.R.S. §§ 25-403(A), 25-403.01, 25-403.03, and 25-403.05, designated Catherine as the primary residential parent, and granted Benjamin joint legal decision-making and unsupervised parenting time. Although the court noted the presence of relevant allegations of domestic violence, it ultimately concluded the allegations were unsubstantiated. And, the court specifically found that the -offender status would not create

1 -offender status and the circumstances of the offenses before the marriage. a danger for A.L. if Benjamin were granted unsupervised parenting time. Catherine appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶5 On appeal, Catherine argues the trial court violated her procedural due process rights by using information obtained from an in camera in its determination of legal decision-making and parenting time. She also maintains the court abused analysi best interests, finding no domestic violence in the

ant risk to A.L. despite -offender status.

Due Process

¶6 Catherine argues she was denied procedural due process never probationary file that the family court relied on in making its ruling, and

because beyond the purpose of reviewing [the] probationary records for the sole purpose of determining what [Benjamin] told probation officers as to who was the primary parent of [A.L. Although Catherine did not raise this argument below, in our discretion, we may consider constitutional arguments not properly raised before the trial court. See Ramsey v. Yavapai Family

Advocacy Ctr., 225 Ariz. 132, ¶ 19 (App. 2010).

¶7 In her June 2017 n records, Catherine asserted:

[Benjamin] is a lifetime registered sex offender for dangerous preparatory crimes against at least three children. The details of his initial offenses, his presentence evaluation, and his participation in services are of fundamental importance to his fitness to parent a minor child. Without this information, there is simply no way this Court can make an informed decision on this case.

. . . In the event the Court deems this information too sensitive to be released to the parties, the Court could order the file delivered to the Division for in camera inspection, or order that the names of any minor children be redacted prior to disclosure of the file.

motion.

¶8 On the first day of trial, Catherine renewed her request for the records to be released, is asking for unsupervised contact with [A.L.] and given that he failed a polygraph . . . I

because the parties disputed who had been A.L. the records would allow the trial redibility.

In response, the court stated: camera inspection, and I will report to both sides about what, if anything,

[Benjamin] said to the probation officers about who was the primary caregiver of [A.L.]. Counsel for both parties responded affirmatively. In its ruling, the court stated it had reviewed and noted s reported behavior between June 2013 and March

¶9 due process rights because both parties agreed to an in camera review of

his probation records, the court did not rely solely on the records in making its ruling 2 We agree.

¶10 The trial camera review as to the failed polygraph and ultimately designated

Catherine as A.L. s primary residential parent. And, although Catherine appears to argue the court was only permitted t probation records for the limited purpose of determining what he had said

about being A.L. asked the court to review without limitation in her pretrial motion and

2 Although Benjamin fails to cite to the record in support of his argument that both parties agreed to the in camera review as required by Rule 13(a)(7)(B) and (b)(1), Ariz. R. Civ. App. P., in our discretion we consider his arguments. See Varco, Inc. v. UNS Elec., Inc., 242 Ariz. 166, n.5 (App. 2017); see also

Nold v. Nold, 232 Ariz. 270, ¶ 10 (App. 2013) (noting waiver a discretionary doctrine). at trial argued for release of the records to determine why Benjamin failed his polygraph test. Catherine cannot now complain about the scope of the review. See Schlecht v. Schiel, 76 Ariz. 214, 220 (1953) (error, one who deliberately leads the court to take certain action may not

), abrogated in part on other grounds as recognized in A Tumbling- , 197 Ariz. 545, ¶ 23 (App. 2000). Therefore, her procedural due process argument fails.

Legal Decision-Making and Parenting Time

¶11 Catherine argues the trial court abused its discretion by [A.L.] best interests and violence did not exist and finding that there was no significant risk to [A.L.]

despite [Benjamin] being a registered sex offender Intertwined with Catheri that several factual inaccuracies.

¶12 We review the trial l decision-making and parenting-time decisions for an abuse of discretion. Nold v. Nold, 232 Ariz. 270, n.2 & ¶ 11 (App. 2013). A court abuses its discretion when it commits an error of law in reaching a discretionary decision, reaches a conclusion without considering the evidence, commits another substantial error of law, or makes a finding lacking substantial evidentiary support. Flying Diamond Airpark, LLC v. Meienberg, 215 Ariz. 44, ¶ 27 (App. 2007); State ex rel. Dep t of Econ. Sec. v. Burton, 205 Ariz. 27, ¶ 14 (App. 2003) (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). We will not reweigh conflicting evidence, and we will affirm if substant s decision. Hurd v. Hurd, 223 Ariz. 48, ¶ 16 (App. 2009). Trial courts are given broad discretion to determine what is in a child s best interest because they are in the best position to make that fact-based determination. Porter v. Porter, 21 Ariz. App. 300, 302 (1974).

¶13 -by-point under §§ 25-403(A), 25-403.01(B), 25-403.03, and 25-403.05. We first address her § 25-403(A). 3

3 under § 25-403(A)(8) in our discussion of domestic violence under

§ 25-403.03. Best Interests of Child

¶14 Under § 25-403(A), the trial court shall determine legal decision-making and parenting time in accordance with the best interests enumerates eleven factors for the court to consider siblings; whether the child is adjusting to home and school; the wishes of

of domestic violence or child abuse. In a contested case, the court must

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). several of the enumerated statutory factors.

Relationship Between Child and Parents

¶15 Evaluating the past, present, and potential future relationship between A.L. and her parents under § 25-403(A)(1), the trial court found s with A.L. to be affectionate and appropriate. On appeal, Catherine argues the court did not take into account the fact that she or a third party had been present for the Benjamin spent with A.L.

A.L. was only supervised after their relocation to Washington because, before their move, Benjamin required a chaperone around minor children as a condition of his probation.

¶16 To the extent Catherine asks this court to reweigh the evidence, we will not do so. See Hurd, 223 Ariz. 48, ¶ 16. And, not only do we presume the trial court considered all admitted evidence, Fuentes v. Fuentes, 209 Ariz. 51, ¶ 18 must give due regard to , Hurd, 223 Ariz. 48, ¶ 16. Benjamin testified that during his Skype visits with A.L., the time they spend together, and that during his in-person visits with A.L. He also testified allegations that he had

abused A.L. when she was eleven months old were false and unsubstantiated. A.L. was affectionate and appropriate, and the court was not precluded from so finding even if a substantial amount of the time he spent with A.L. had been supervised. See id.

¶17 The trial court found Catherine did not provide evidence as to A.L. me, school, and community, and noted Benjamin since [Catherine] . . . moved [A.L.] to Washington State and refuses [Benjamin] unsupervised contact with [A.L.], or to let [him] know where she and [A.L.] live, or where [A.L. Catherine argues this statement is incorrect and the court failed to

A.L. in which he could have made observations as to her surroundings. However, regardless of the reason such evidence was not provided, the court was unable to make a finding under § 25-403(A)(3). Thus, we need not consider this argument.

¶18 Under § 25-403(A)(5), the trial court must consider the mental and physical health of all individuals involved. As to her own mental health, Catherine argues the court inaccurately found she she two therapists in New Jersey, and three in Arizona, all for de The

initial client questionnaire from a therapist Catherine saw in 2016 in which Catherine indicated she had seen two therapists in New Jersey and three in Arizona Catherine contends her participation in therapy for

problems related to depression does not necessarily mean she saw all of the therapists for depression.

¶19 But, the trial court made a reasonable inference about mental health based on the information provided in the questionnaire, despite testimony that Catherine sought treatment for stress in addition to depression, as well as testimony that she did not see

three therapists in Arizona. See Summers v. Gloor, 239 Ariz. 222, n.1 (App. therefrom in the light most favorab s

credibility, Gutierrez v. Fox, 242 Ariz. 259, ¶ 49 (App. 2017), and uphold its factual findings unless clearly erroneous, Ariz. R. Fam. Law P. 82(a)(5). Because the questionnaire was sufficient s finding, and because we do not reweigh the evidence on appeal, we find no error. See Hurd, 223 Ariz. 48, ¶ 16; see also Lewis v. Midway Lumber, Inc., 114 Ariz. 426, 429 (App. 1977) (substantial evidence to support it, even though there also might be

substantial conflicting evidence

¶20 Catherine argues the trial probation file and proceeds to note all of [his] diagnos[es] like [they are] a

laundry list but does not delve into what this means or how it affects [his] contrary to

under its discussion h, in addition to listing his diagnoses, the court acknowledged his convictions for sexual offenses and subsequent participation in therapy. Substantial

See Hurd, 223 Ariz. 48, ¶ 16.

Likelihood of Parent Allowing Contact

¶21 As to which parent is more likely to allow A.L. frequent, meaningful, and continuing contact with the other parent under § 25-403(A)(6) preventing [Benjamin] from having unsupervised contact with [A.L.],

[Catherine] is not acting in good faith to protect [A.L.] from witnessing domestic violence or being the victim of domestic violence or child abuse. Rather, she is prohibiting [Benjamin] from having meaningful parenting time with [A.L. In support of its finding, the court noted A.L.] to Washington, her insistence that all parenting time

r FaceTime visits with [A.L. A.L.] with

¶22 ignores the evidence presented and is directly contrary to its finding that

Catherine and legal decision-making under § 25-403.01(B) was not unreasonable. She points to

evidence of domestic violence and sex-offender status, and claims she did A.L. unless they became inappropriate or Benjamin encouraged A.L. to misbehave. Catherine also claims she did not return the mail Benjamin sent to A.L., and challenges the failure to note her financial reasons for wanting to move back to Tucson after Benjamin had moved to Washington. ¶23 Contrary even though the trial court may not have referred to certain evidence in its ruling, this does not establish the court failed to consider it. Not only do we defer to the trial cou redibility determinations, Gutierrez, 242 Ariz. 259, ¶ 49, but we presume the court considered all admitted evidence, Fuentes, 209 Ariz. 51, ¶ 18. And, as noted, we will not reweigh such evidence on appeal. Hurd, 223 Ariz. 48, ¶ 16. Benjamin testified that he was worried Catherine would not let him see or talk to A.L. based on statements Catherine had made, and that she had interrupted his Skype sessions with A.L. He also testified he was unable to send cards or gifts to A.L. Thus, substantial evidence as to this factor. See id. And, because the A.L. in regard to decision-making and parenting time was supported by substantial evidence, Catherine has shown no abuse of discretion. See id.; see also Burton, 205 Ariz. 27, ¶ 14.

Factors Specific to Legal Decision-Making

¶24 Catherine also challenges the under A.R.S. § 25-403.01(B). decision-making that , in addition to the best-interest factors enumerated under § 25-403(A), a court must consider: whether the parents have agreed to joint legal decision-making; whether a lack of agreement is due to unreasonableness o abilities of the parents to cooperate in decision-

possibility of the arrangement. § 25-403.01(B).

¶25 Here, the trial court found that the lack of agreement as to legal decision-making was not unreasonable because of Benjamin registered sex-offender status. In its discussion of this factor, the court

noted Benjamin and his therapist both had testified Benjamin was A.L. maternity

leave and should therefore continue to have unsupervised liberal parenting time with [A.L. Catherine challenges this statement, asserting the court ignored testimony of various witnesses indicating Benjamin was not A.L. primary caregiver. But, as noted, we presume the court considered all

admitted evidence. Fuentes, 209 Ariz. 51, ¶ 18. And, we do not reweigh evidence, and we nation of witness credibility. Hurd, 223 Ariz. 48, ¶ 16. ultimate finding under this factor that the lack of agreement was not unreasonable does not undermine position.

¶26 abilities to cooperate in decision-making for A.L., Catherine argues the trial -parenting relationship as [Benjamin] was emotionally abusive and controlling of threatened her life, A.L. own life, and testimony about his

However, the court also heard testimony that Catherine and Benjamin were able to negotiate and speak civilly with each other, focusing on the best interests of A.L. As noted, we do not reweigh conflicting evidence, and we give deference to the credibility assessments. Id. finding that Catherine and Benjamin were able to cooperate in decision-

making for A.L. See id.

¶27 Catherine also legal decision-making is logistically possible because, as of August 2018, it

was unclear if Benjamin had moved to Washington, the Best Interest Attorney noted that the parties do not communicate well, and evidence was presented that Catherine had post-traumatic stress syndrome related to her past and to her current situation with [Benjamin]. But, as discussed above, evidence was presented that Catherine and Benjamin were able to negotiate and speak finding that joint legal decision- making is logistically feasible. See id.

¶28 Although the record contains contradictory evidence, Catherine has not demonstrated the trial court reached its conclusions without considering the evidence or made its findings without substantial support. Thus, the court did not abuse its discretion in granting Benjamin joint legal decision-making authority. See Nold, 232 Ariz. 270, ¶ 11; see also Hurd, 223 Ariz. 48, ¶ 16.

Domestic Violence Findings

¶29 Catherine argues the trial court erred in finding there had

A.R.S. § 25- Under § 25-403(A)(8), a trial court must consider [w]hether there has been domestic violence or child abuse pursuant to § 25- th parents participate in decision- A.R.S. § 25-103(B), a court cannot award joint legal decision-making if it

makes a finding of significant domestic violence pursuant to A.R.S. § 13- 3601 or if it finds by a preponderance of the evidence that there is a significant history of domestic violence, § 25-403.03(A). And, i]f the court determines that a parent . . . has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed the act of domestic violence is contrary § 25-403.03(D). The court must also consider a history of threatening to cause physical harm. § 25-403.03(B).

¶30 Here, the trial court found there had been no domestic violence under §§ 25-403(A)(8) or 25- , nor

an investigation conducted by the King County Court in Washington found Catherine asserts the court mischaracterized the Washington domestic violence assessment and improperly relied on because, min] committed domestic violence on numerous occasions. 4

¶31 , the trial court did not rely solely on the Washington assessment or definition, and found no domestic violence under Arizona law. In its ruling, the court noted evidence that Benjamin had not abused, controlled, threatened, or harmed Catherine, that well as the lack of evidence of violence or physical harm. Thus, substantial

evidence supports to determinations of witness credibility and its weighing of conflicting evidence. See Gutierrez, 242 Ariz. 259, ¶ 49; Hurd, 223 Ariz. 48, ¶ 16. The court did not abuse its discretion in finding there had been no domestic See Burton, 205 Ariz. 27, ¶ 14.

4 Catherine also argues the trial court incorrectly stated in its ruling that she had applied for an order of protection in Washington on October 26, 2016, but that she in fact had applied for and received the order on September 28, 2016. Based on the record before us, Catherine is correct. However, she does not argue how this could have changed the outcome as to whether there had been domestic violence or child abuse in light of the lack of other evidence on this point. See Creach v. Angulo, 186 Ariz. 548, 550 but the error must have been prejudicial to the substantial rights of the Presumption Against Registered Sex Offenders

¶32 Catherine next argues the trial court abused its discretion in finding no significant risk to A.L. given that Benjamin is a registered sex offender. Under § 25-403.05(A), a court cannot grant a registered sex offender sole or joint legal decision-making or unsupervised parenting time unless the court makes a written finding that there is no significant risk to the child. In this case offender and ultimately concluded in writing that he does not pose a

significant risk to A.L. Catherine challenges this finding, arguing the court ignored controverting evidence and discounted concerning factors. However, testified that he had participated in group therapy for approximately ten years as a condition of his probation and that he was voluntarily participating in individual therapy at the time of trial in this case. The therapist described Benjamin significant progress during the time she worked with him, stating he had avoid reoffending and had been utilizing those skills in parenting A.L. She

also testified he was and opined he did not pose a threat to A.L. And, after complying with all of the conditions of his probation,

terminated in 2016. Thus, substantial evidence enjamin does not pose a significant risk to A.L. See Hurd, 223 Ariz. 48, ¶ 16.

¶33 Finally, additional counts relating to two other victims, and Catherine challenges

State did not move forward with prosecution on these two counts, it can be inferred that the charges She asserts [t]here are a myriad of reasons why it could be decided not to move forward in prosecuting a charge such as that it is part of [a] plea agreement to dismiss certain counts, [or]

wanted to spare their children going through a trial,

agreement reached specifically notes the other two children as victims that there are other reasons the state may have chosen not to prosecute the two additional counts, we find no error in light of the substantial evidence relied on by the court as to why Benjamin did not pose a significant risk to A.L. See id. The court did not abuse its discretion by awarding Benjamin joint legal decision- making and unsupervised parenting time. See id. ¶¶ 11, 16; see also Burton, 205 Ariz. 27, ¶ 14. Credibility Determination

¶34 Catherine as a child and seemingly uses this erroneous finding to imply that [she] is

parents] who abused and [A.L. And, notwithstanding her allegations of childhood abuse from

¶35 d appears to be based on the same initial client

questionnaire discussed above in which she checked a box indicating that or .) When asked about the physical and emotional abuse she experienced growing up, Catherine explained her mother and father would leave her for months at a time, she was spanked as a child, and when she would give her mother . . . im of physical and emotional abuse at the hands

¶36 Although the trial court may have erred in concluding Catherine was molested as a child, the court does not appear to have relied solely on this finding in its assessment credibility. Thus, even if the court erred as to this particular determination, it does not undermine the decision to grant joint legal decision-making and unsupervised parenting time to Benjamin in light of the extensive evidence presented at trial and discussed in the ruling. See Creach v. Angulo, 186 Ariz. 548, 550 (App. 1996) (to justify reversal, error must be prejudicial). We do not second- See Shella H. , 239 Ariz. 47, ¶ 15 (App. 2016); of Econ. Sec., 227 Ariz. 231, ¶ 13 (App. 2011) (trial court in best position to judge credibility of witnesses). The ruling reflected that it considered each of the factors in §§ 25-403(A), 25-403.01(B), 25-403.03, and 25-403.05 and made the required findings on the record. Because substantial evide decision, we find no abuse of discretion and affirm the legal decision-making and parenting-time rulings. See Hurd, 223 Ariz. 48, ¶ 16; see also Burton, 205 Ariz. 27, ¶ 14.

Attorney Fees

¶37 Both parties request an award of attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and Rule 21(a), Ariz. R. Civ. App. P. 5 Section 25-324(A) provides that this court may order one party to pay the resources of both parties and the reasonableness of the positions each party

And § 25-324(B) requires this court to award attorney fees and costs to the other party if:

¶38 In our discretion, we requests pursuant to subsection (A), and because neither party has

established a basis for an award under subsection (B), we deny those requests as well. As the successful party on appeal, however, we award Benjamin his costs on appeal pursuant to A.R.S. § 12-341 upon his compliance with Rule 21.

Disposition

¶39 For the foregoing reasons, we affirm the trial granting Benjamin joint legal decision-making authority and unsupervised

parenting time.

5 Benjamin also asks this court to impose sanctions on Catherine pursuant to Rule 11(c), Fed. R. Civ. P. However, as Catherine notes, the Federal Rules of Civil Procedure do not apply in state courts. Moreover, federal rule, it is not a proper basis for sanctions on appeal. Cf. Villa De

, 227 Ariz. 91, n.10 (App. 2011); see also procedure . . (providing basis for sanctions on appeal).