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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KENNETH R. BERKEBILE, Petitioner/Appellant, v. NICOLE E. BOESCH, Respondent/Appellee.	2 CA-CV 2008-0035 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. DO200600010

Honorable Brenda E. Oldham, Judge

AFFIRMED

Kenneth R. Berkebile
Queen Creek
In Propria Persona

Cantor Simon PLLC
By Keith A. Berkshire
Tempe
Attorneys for Respondent/Appellee

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

¶1 Appellant Kenneth Berkebile appeals from the trial court's order granting sole custody of his daughter to her mother, appellee Nicole Boesch, and requiring him to pay $777.80 each month in child support. He argues the court should have awarded joint custody and erred when it calculated his gross monthly income. For the following reasons, we affirm.

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1, 169 P.3d 111, 112 n.1 (App. 2007). In January 2006, Berkebile, who resides in Arizona, petitioned the court to establish paternity and to order that he and Boesch have joint custody of their minor daughter. Boesch, who resides in New Jersey with their daughter, responded to the petition, seeking sole custody of their daughter with supervised long-distance parenting time for Berkebile after he had attended counseling for domestic violence and anger management. The parties both sought an order that Berkebile pay child support in an amount consistent with state child support guidelines. After an evidentiary hearing held in November 2007, the court determined custody and ordered child support as noted above. This appeal followed.

¶3 Berkebile, acting in propria persona, appears to argue the court erred when it awarded sole custody of the parties' daughter to Boesch. We review a child custody order for a clear abuse of discretion. *In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 3, 38 P.3d 1189, 1191 (App. 2002). And we will not reverse its determination unless there is "a clear absence of evidence to support its actions." *Pridgeon v. Superior Court*, 134 Ariz. 177,

179, 655 P.2d 1, 3 (1982). A trial court must determine custody "in accordance with the best interests of the child," A.R.S. § 25-403, considering all relevant factors, including those set forth in § 25-403(A). And, "[i]n a contested custody case, the court shall 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).

¶4 Here, the court complied with § 25-403(B), setting forth its findings on all the relevant factors provided by § 25-403(A). And the record contains evidence supporting those findings, including a report prepared by a conciliation court evaluator who recommended the court grant sole custody to Boesch; a psychological assessment discussing Berkebile's mental health issues; and police reports from New Jersey detailing a domestic violence incident between Berkebile and Boesch, Boesch's reports of harassing telephone calls and contacts from Berkebile and his family, and Berkebile's repeated requests that police conduct welfare checks on his daughter.

¶5 Berkebile essentially contends the trial court erred when it resolved any conflicts in the evidence in favor of Boesch. But it is the trial court's province to weigh the evidence and assess the credibility of the witnesses. *Bender v. Bender*, 123 Ariz. 90, 94, 597 P.2d 993, 997 (App. 1979); *McElwain v. Schuckert*, 13 Ariz. App. 468, 472, 477 P.2d 754, 758 (1970). And Berkebile has not provided us with a transcript of the evidentiary hearing. *See* Ariz. R. Civ. App. P. 11(b)(1) (duty of appellant to order necessary transcripts). Thus, we must presume the court's findings were supported by the evidence

presented at that hearing. *See Walker v. Walker*, 18 Ariz. App. 113, 114, 500 P.2d 898, 899 (1972). We therefore find no abuse of discretion in the court's determination awarding sole custody of the child to Boesch.

¶6 Berkebile next argues the court erred when it attributed $3,268 to him as gross monthly income for purposes of calculating child support "when he actually made 3,000 gross per month." The trial court has broad discretion in ordering child support and we will not disturb its decision absent an abuse of that discretion. *In re Marriage of Robinson*, 201 Ariz. 328, ¶ 5, 35 P.3d 89, 92 (App. 2001). Under A.R.S. § 25-320(D), the trial court must, in most cases, use the guidelines established by the supreme court (Arizona Child Support Guidelines) in determining the amount of child support a parent must pay; the trial court did so here. *See* § 25-320 app. Under the Guidelines, "the court may attribute income to a parent up to his or her earning capacity." § 25-320 app. § 5(E); *see also* § 25-320(L) (presumption that noncustodial parent is capable of full-time employment).

¶7 At the evidentiary hearing, Berkebile submitted pay stubs from his employment showing he earned an hourly wage of $19.00. Based on that hourly wage and a forty-hour work week, the court was entitled to attribute a monthly income to Berkebile of at least $3,290.80.[1] *See McNutt v. McNutt*, 203 Ariz. 28, ¶¶ 14-15, 49 P.3d 300, 303-04 (App.

[1]Berkebile has appended to his opening brief a letter from his employer dated April 2008, stating that his hourly wage had decreased from $20.00 to $14.00. But, in reviewing the trial court's ruling, we cannot consider evidence on appeal that was not considered by the trial court. *Schaefer v. Murphey*, 131 Ariz. 295, 299, 640 P.2d 857, 861 (1982). The proper venue for seeking a modification of the child support order based on a change in

2002) (finding full-time employment under the Guidelines may be more than forty hours a week); *see also Taliaferro v. Taliaferro*, 188 Ariz. 333, 336-37, 935 P.2d 911, 914-15 (App. 1996) (husband receiving disability benefits was nonetheless "capable of gainful employment" and thus attributed gross monthly income based on earning capacity). We find no abuse of discretion.

¶8 Finally, Boesch asks us to award her reasonable attorney fees and costs incurred on appeal pursuant to A.R.S. §§ 25-809(G), 12-349, and Rule 25, Ariz. R. Civ. App. P. Section 25-809(G) allows us to award "costs and expenses," including attorney fees, "[a]fter considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." But Boesch has not presented any evidence of her current financial status, and, to the extent we have information on Berkebile's financial resources, that information suggests that the imposition of attorney fees on him would be a hardship. *See Gerow v. Covill*, 192 Ariz. 9, ¶ 45, 960 P.2d 55, 64-65 (App. 1998) (denying request for fees on appeal when husband provided no evidence of financial resources or other evidence supporting claim). And, although Berkebile's arguments demonstrate a lack of legal sophistication as to the type of claims that might

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income is the trial court, not this court. *See Platt v. Platt*, 17 Ariz. App. 458, 459, 498 P.2d 532, 533 (1972) (trial court has jurisdiction to modify support order upon proper showing). Similarly, this is not the proper venue to address Berkebile's request, to the extent we understand it, for "the amount owed for back pay medical bills in the amount of $1,031.94." *See* A.R.S. § 12-2101 (specifying judgments and orders that are appealable).

entitle a litigant to appellate relief, we cannot say those arguments are unreasonable from the perspective of a father seeking more access to his child.

¶9 Section 12-349 provides for an award of fees and expenses for "[u]njustified actions." In the same vein, Rule 25 provides that, if "any party has been guilty of an unreasonable infraction of these rules," this court can impose attorney fees and costs on the offending party as a penalty. Although we have rejected Berkebile's claims, we find nothing about them that would cause us to question his motives in bringing them—and a litigant's mere failure to prevail on appeal does not itself compel the conclusion that the appeal was an unjustified action. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶¶ 34, 35, 972 P.2d 676, 684 (App. 1998) (finding husband did not take unreasonable position on appeal and declining to award appellate attorney fees despite affirming trial court's award of fees to wife based in part on unreasonableness of husband's position at trial).

¶10 Boesch specifically complains that Berkebile should be sanctioned pursuant to Rule 25 because he filed his brief with "prohibited exhibits and attachments" in violation of Rule 13, Ariz. R. Civ. App. P. But we decline to impose the harsh sanction of attorney fees solely because a pro se litigant has committed a relatively minor violation of our procedural rules.[2] *See Ziegelbauer v. Ziegelbauer*, 189 Ariz. 313, 314 n.1, 942 P.2d 472, 473 n.1 (App. 1997) (disregarding appellant's statement of facts for failure to comply with

[2]Berkebile gained no advantage from the improperly presented exhibits because, in conformity with our rules, we have declined to consider them.

Rule 13(a)(4)); *Price v. Price*, 134 Ariz. 112, 114, 654 P.2d 46, 48 (App. 1982) (sanctions under Rule 25 should only be imposed "with great caution").

¶11 We affirm the trial court's order granting sole custody of the parties' daughter to Boesch and ordering Berkebile to pay $777.80 per month in child support.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge