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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Matter of:

T. ANTHONY GUAJARDO, Counsel for Lilia Graves, *Interested Party/Appellant*,

v.

RUSSELL J. GRAVES, *Respondent/Appellee*.

No. 1 CA-CV 15-0387 FC
FILED 9-29-2016

Appeal from the Superior Court in Maricopa County
No. FC2010-001555, FC2010-070394 (Consolidated)
The Honorable Timothy J. Ryan, Judge

AFFIRMED

COUNSEL

Guajardo Johnson and Associates LLC, Phoenix
By T. Anthony Guajardo
Counsel for Interested Party/Appellant

Law Offices of Deborah Varney LLC, Mesa
By Deborah Varney
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Presiding Judge Patricia K. Norris delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Margaret H. Downie joined.

N O R R I S, Judge:

¶1 Appellant T. Anthony Guajardo appeals from an order entered by the family court ordering him to pay as a sanction the attorneys' fees and costs incurred by Respondent/Appellee Russell Graves. *See generally* Arizona Revised Statutes ("A.R.S.") sections 12-349 and 12-350 (2016) and Rules of Family Law Procedure 76(D) and 91(Q). Because the record before us supports the family court's order and Guajardo's arguments on appeal are without any merit, we affirm the family court's order.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2010, the family court entered a decree dissolving Russell's marriage to Lilia Graves. Finding that Lilia had committed acts of domestic violence, was then subject to an order of protection limiting her contact with the parties' two children, had received little benefit from anger management classes, and had failed to complete a court-ordered mental health evaluation, the court awarded Lilia limited supervised parenting time with the children. In February 2013, Lilia, represented by Guajardo, petitioned to modify the parenting time order, alleging she had proven herself to be a "responsible parent." The family court set an evidentiary hearing and ordered Lilia to undergo a psychological evaluation by Marlene Joy, Ph.D. The court later dismissed the petition because Dr. Joy had been unable to evaluate Lilia.

¶3 Shortly thereafter, Lilia filed an amended petition to modify parenting time which, in large part, was identical to her prior petition to modify. She alleged, however, that Dr. Joy had examined her and attached to her petition a copy of an October 2013 report prepared by Dr. Joy. Lilia also alleged she had completed domestic violence treatment and had participated in parenting skill classes. Russell objected to Lilia's amended petition, and argued Dr. Joy's evaluation was incomplete. He also disputed whether Lilia had taken appropriate parenting classes. The court granted Russell's request that Lilia undergo a complete psychological evaluation by Leo Munoz, Ed.D.

¶4 After evaluating Lilia, Dr. Munoz recommended continued supervised parenting time followed by "periodic monitoring and then an assessment prior to allowing independent visitation without supervision." After receiving a copy of Dr. Munoz's report, Russell moved to dismiss Lilia's amended petition, arguing Lilia had failed to show a substantial and continuing change in circumstances. The family court denied Russell's motion, ruling Lilia's underlying allegations, coupled with the report and recommendations of Dr. Munoz, warranted proceeding with the evidentiary hearing ("modification hearing") the court had previously scheduled.

¶5 Following the modification hearing, the family court denied Lilia's amended petition. The court found Lilia had failed to show a substantial and continuing change of circumstances, and questioned why the matter had even proceeded to a hearing given the evidence Lilia presented. The court explained that "permitting unsupervised overnight parenting time would be contrary to the best interests of the children, in light of the circumstances that currently exist being substantially the same as the circumstances that led to supervised parenting time for [Lilia]." The court awarded Russell attorneys' fees and costs under A.R.S. § 25-324 (2016).[1] Although Guajardo has not included the transcript from the modification hearing in the record on appeal, the court's minute entry indicates Russell's counsel argued at the hearing that Guajardo, as Lilia's counsel, should be responsible for all or a portion of the awarded fees and costs. Accordingly, the court authorized Russell to brief that issue.

¶6 Subsequently, Russell applied for fees and costs under A.R.S. § 25-324 and separately asked the court to hold Guajardo jointly and severally responsible for the fees and costs as a sanction pursuant to Arizona Rule of Family Law Procedure 71(A). In requesting sanctions against Guajardo, Russell pointed out Guajardo had failed to file a prehearing statement, submit any exhibits, or prepare for the modification hearing. Guajardo objected to the requested sanctions, arguing his actions had not caused Russell any "disadvantage" at the modification hearing.

¶7 Based on the briefing, the family court held an evidentiary hearing ("fee hearing") to decide whether Guajardo should pay some or all of the fees and costs it intended to assess Lilia under A.R.S. § 25-324. In setting the evidentiary hearing the court referenced A.R.S. §§ 12-349 and

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[1]The Legislature has not made any material changes to the statutes cited in this decision relevant to our resolution of any of the issues on appeal. Thus, we cite to the current version of the statutes.

12-350, as well as A.R.S. § 25-324. Following the fee hearing, the court concluded Russell was entitled to fees and costs under A.R.S. § 25-324 because Lilia had acted unreasonably in requesting a modification of her parenting time, finding she had been unable to "articulate a substantial and continuing change of circumstances warranting modification." The court then assessed the fees and costs incurred by Russell as sanctions against Guajardo, as Lilia's attorney, pursuant to A.R.S. §§ 12-349 and 12-350, Arizona Rule of Family Law Procedure 76(D) and 91(Q), and entered a judgment against Guajardo in the amount of $7,536.61.

DISCUSSION

¶8 Guajardo first argues the family court misapplied A.R.S. § 25-324 when it ordered him to pay $7,536.61 as a sanction because that statute only authorizes a fee/cost award against a party and not the party's attorney. Although we agree A.R.S. § 25-324 does not authorize a court to enter a fee/cost award against a party's attorney, Guajardo's argument is grounded on a misrepresentation of the record. As discussed above, the family court first found that Russell was entitled to an award under A.R.S. § 25-324. It then determined that pursuant to A.R.S. §§ 12-349 and 12-350, and under Rule 76(D) and Rule 91(Q), Guajardo should be responsible for those fees/costs as a sanction. These statutes and rules authorize a court to impose sanctions against an attorney or a party if the attorney or party engages in any of the prohibited acts. Further, both A.R.S. § 12-349(B) and Rule 76(D) expressly authorize a court to make the attorney solely responsible for the fees and costs assessed as a sanction. Thus, we reject Guajardo's argument the court misapplied A.R.S. § 25-324.

¶9 Next, Guajardo argues his conduct, and more precisely, the arguments he raised for Lilia in seeking to modify parenting time, did not justify sanctions under A.R.S. §§ 12-349 and 12-350. Section 12-349 authorizes a court to sanction an attorney or party who brings a claim without substantial justification. "'[W]ithout substantial justification' means that the claim or defense is groundless and is not made in good faith." A.R.S. § 12-349(F). Groundlessness is determined objectively while lack of good faith is a subjective determination. *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22, 335 P.3d 1122, 1129 (App. 2014) (citations omitted). "'Groundless' and 'frivolous' are equivalent terms, and a claim is frivolous 'if the proponent can present no rational argument based upon the evidence or law in support of that claim.'" *Id.* (citation omitted). Based on our review of the record, the family court did not abuse its discretion in sanctioning Guajardo under A.R.S § 12-349. *See Phoenix Newspapers v. Dep't of Corr.*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997); *see also*

Rogone, 236 Ariz. at 50, ¶ 23, 335 P.3d at 1129 (appellate court reviews superior court's findings of fact for clear error).

¶10 The family court found Lilia's efforts to modify parenting time were unreasonable because she had failed to articulate a substantial and continuing change of circumstances, and had failed to overcome and address the concerns it had identified when it originally established parenting time. The court further found Guajardo had made no effort to dismiss the amended petition even though Lilia could not show a change in circumstances, had acted in bad faith by taking positions unsupported by the law and the facts, and had misrepresented certain facts to the court. Finally, the court found that there was no reasonable conflict in any of the facts "determinative" to Lilia's request for modified parenting time and Lilia had failed to prevail on any of her claims. *See* A.R.S. § 12-350(6), (7).

¶11 The record on appeal amply supports the family court's findings. To modify parenting time or legal decision making, the court must first determine there has been a change in circumstances materially affecting the welfare of the children. *See Christopher K. v. Markaa S.,* 233 Ariz. 297, 300, ¶ 15, 311 P.3d 1110, 1113 (App. 2015) (citation omitted). The amended petition relied on Dr. Joy's report, but her report did not support modification and, in fact, recommended parenting classes for Lilia and noted additional parenting time would be a challenge for her based on her "limited availability and fatigue." Dr. Munoz's report also provided no basis for modification and expressly recommended that supervised visitation continue for at least an additional two and a half months. Indeed, in its ruling assessing fees and costs against Guajardo as sanctions, the court explained that at the modification hearing, Dr. Munoz had "made it abundantly clear that" unsupervised parenting time was not in the best interests of the children.

¶12 Guajardo has not included in the record on appeal the transcript from the modification hearing or the transcript from the fee hearing. "An appellant [] has an obligation to provide transcripts and other documents necessary to consider the issues raised on appeal." *Myrick v. Maloney,* 235 Ariz. 491, 495, ¶ 11, 333 P.3d 818, 822 (App. 2014) (citing *Baker v. Baker,* 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995)). Because Guajardo failed to include either transcript in the record on appeal, we must presume the record supports the family court's finding that Lilia presented no evidence of any change in circumstances. *Id.* Given this, and based on the record we have, the court did not abuse its discretion in concluding there was no reasonable basis in fact or law

supporting Lilia's amended petition. Thus, the petition was groundless. *Rogone,* 236 Ariz. at 50, ¶ 22, 335 P.3d at 1129.

¶13 Despite the foregoing, Guajardo argues Lilia's amended petition was not unreasonable or without substantial justification because the family court had denied Russell's motion to dismiss. The family court denied Russell's motion, in part, based on the allegations in Lilia's amended petition. According to the family court, at the modification hearing, however, Lilia failed to offer testimony or exhibits to support her allegations and simply testified that she was a good mother and wanted more time with the children. A reasonable attorney should have known that this testimony could not support a petition to modify, and that Lilia's claim was groundless, brought without substantial justification, and not made in good faith. *See Evergreen W., Inc. v. Boyd,* 167 Ariz. 614, 621, 810 P.2d 612, 619 (App. 1991) (citing *W. United Realty Inc. v. Isaacs,* 679 P.2d 1063, 1069 (Colo. 1984) (claim is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss, are not supported by any credible evidence at trial); *Harris v. Reserve Life Ins. Co.,* 158 Ariz. 380, 383, 762 P.2d 1334, 1337 (App. 1988) (action brought without substantial justification when attorney knew or should have known claim was unjustified).

¶14 Guajardo also argues the family court should not have based its sanction award on Rule 76(D), asserting the court improperly ordered the parties to file separate prehearing statements. Rule 76(C)(1) authorizes a court to order separate prehearing statements, however. ("If not specified by the court, the statement may be joint or separate, except if there has been domestic violence between the parties, the parties shall file separate statements."). Moreover, Rules 76(D) and 91(Q) authorize the court to impose sanctions against an attorney who fails to obey any prehearing order or fails to participate in good faith at a hearing or trial. As noted above, Guajardo failed to file a prehearing statement as ordered by the court and then made "misstatements of fact" regarding this issue.

¶15 In his reply brief on appeal, Guajardo argues the family court should not have imposed sanctions because Lilia was asserting her constitutional rights to the care and control of her children. This argument is not properly before us, as Guajardo did not raise it in his opening brief. *See Duwyenie v. Moran,* 220 Ariz. 501, 503 n.3, ¶ 7, 207 P.3d 754, 756 n.3 (App. 2009) (citations omitted). But, even if Guajardo had properly raised this argument, a parent's constitutional rights to the care and control of her children does not authorize a parent to file frivolous petitions for relief and engage in the litigation misconduct sanctionable under A.R.S. §§ 12-

349 and 12-350. *See generally Hunter Contracting Co., Inc. v. Superior Court*, 190 Ariz. 318, 324, 947 P.2d 892, 898 (App. 1997) ("Arizona constitution does not assure the right to bring a frivolous lawsuit"); *Larsen v. Comm'r of Internal Revenue,* 765 F.2d 939, 941 (9th Cir. 1985) (constitutional right to petition government "does not include the right to maintain groundless proceedings").

ATTORNEYS' FEES AND COSTS ON APPEAL

¶16 Russell requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-349 and 12-350 and Arizona Rule of Civil Appellate Procedure ("ARCAP") 25. Based on our review of the record, and his briefing on appeal, Guajardo filed this appeal without substantial justification. *See* A.R.S. § 12-349(A)(1), (F). By failing to include in the record on appeal transcripts for the modification hearing and fee hearing, Guajardo should have known he had no basis for arguing the evidence failed to support the family court's findings under A.R.S. §§ 12-349 and 12-350 and the Family Law Rules cited above. *See supra* ¶ 8. Guajardo also misrepresented the record on appeal and argued the court had sanctioned him under A.R.S. § 25-324 when it had also sanctioned him under A.R.S §§ 12-349 and 12-350 and the Family Law Rules. *See supra* ¶¶ 7, 10. Further, none of Guajardo's arguments on appeal presented any arguable issue of law and were without merit. A.R.S. § 12-350(7); *Ziegelbauer v. Ziegelbauer*, 189 Ariz. 313, 318, 942 P.2d 472, 477 (App. 1997) (awarding attorneys' fees on appeal because appeal was not supported by the law or record and not taken in good faith). Accordingly, we award Russell reasonable attorneys' fees and costs on appeal as a sanction against Guajardo under A.R.S §§ 12-349 and 12-350, and ARCAP Rule 25, contingent upon his compliance with ARCAP 21.

CONCLUSION

¶17 For the foregoing reasons, we affirm the family court's order directing Guajardo to pay Russell $7,536.61 as a sanction.

AMY M. WOOD • Clerk of the Court
FILED: AA