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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 08-0022
	)	
DEREK SKAINS,	)	DEPARTMENT E
	)	
Petitioner/Appellee,	)	<b>MEMORANDUM DECISION</b>
	)	(Not for Publication
v.	)	- Rule 28, Arizona
	)	Rules of Civil
PATRICIA D. SKAINS,	)	Appellate Procedure)
	)	<b>FILED 1-13-09</b>
Respondent/Appellant.	)	
	)	

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Appeal from the Superior Court in Maricopa County

Cause No. FC 2005-001522

The Honorable Larry Grant, Judge

**AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH  
INSTRUCTIONS**

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**N O R R I S**, Judge

¶1 Patricia D. Skains ("Mother") appeals from a decree of  
dissolution. We hold the family court abused its discretion by

awarding joint custody without considering the evidence of domestic violence and by awarding Derek Skains ("Father") parenting time with one child who was included in a valid order of protection which prohibited Father from contacting that child. Accordingly, we reverse and remand the custody and parenting time orders and, on remand, the court shall recalculate child support in accordance with its new custody and parenting time orders pursuant to the Child Support Guidelines and reconsider whether Mother should have been awarded retroactive child support for the months of April 2006 through October 2006. We also reverse and remand for reconsideration of the allocation of tax exemptions. Additionally, we reverse the attorneys' fees awarded in the decree and instruct the court on remand to rule on Mother's request for additional attorneys' fees. In all other respects, the decree is affirmed.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶12 Father filed for dissolution in February 2005. The parties have three minor children: Ma.S., C.S., and Mc.S. In April 2005 Mother requested temporary child support. At that time, all three children lived with Father. In July 2005, however, the oldest child (Ma.S.) began living with Mother full-time, and the two younger children (C.S. and Mc.S.) took up temporary residence with Mother. At an August 2005 return

hearing, the family court awarded Father temporary custody of C.S. and Mc.S. and awarded Mother temporary custody of Ma.S. The court specifically declined to order temporary child support at that time, but did order Father to pay for day care costs for C.S. and Mc.S. in addition to the soccer expenses for Ma.S. and C.S. Father had previously been ordered to pay. The court also ordered Father to pay Mother \$800 per month in temporary spousal maintenance. Subsequently, the court denied Mother's request that it reconsider its orders awarding temporary custody of C.S. and Mc.S. to Father and denying temporary child support to Mother.

¶13 A custody evaluator issued a report in January 2006 which recommended joint legal custody of all three children, shared physical custody of C.S. and Mc.S., and sole physical custody of Ma.S. to Mother. The report included a parenting time access schedule for C.S. and Mc.S., and the evaluator recommended Ma.S. spend one evening with Father and her siblings every other week. In their joint pretrial statement, and again on the first day of trial in March 2006, the parties accepted the evaluator's recommendations and agreed to prepare a corresponding parenting plan to be incorporated into the decree of dissolution. The court accepted this stipulation from the parties. Several days later, however, Father physically

attacked Mother in front of the children. As a result, Mother obtained a modified order of protection against Father on March 24, 2006, which prohibited Father from having contact with C.S. Thereafter, C.S. began living with Mother full-time.

¶14 There were two more days of trial held in July and August 2006. When Mother attempted to establish why C.S. was now living exclusively with her and introduce evidence of domestic violence, the family court sustained Father's objections on the basis the parties had already agreed to the custody and parenting time arrangements recommended by the custody evaluator. At the conclusion of the trial, the court issued a minute entry order entitled "Judgment/Decree." This order, entered on August 29, 2006, ("August 2006 Order") dissolved the marriage, allocated debts, divided personal property, and ordered Father to pay certain soccer expenses for the children. The court also accepted the parties' prior agreement to adopt the evaluator's recommendations regarding custody and parenting time. The court took several issues, including child support, under advisement, but signed the order "as a formal written Decree of Dissolution of Marriage and Judgment of the Court pursuant to Rule 81, Arizona Rules of Family Law Procedure."

¶15 On October 16, 2006, the family court entered another minute entry order ("October 2006 Order") addressing spousal maintenance, child support, business valuation, home sale proceeds, and attorneys' fees. The court awarded Mother attorneys' fees in an amount to be determined, and ordered Father to pay Mother \$2,157.25 per month in child support beginning November 1, 2006 ("Child Support Order"). The court declined, however, to award spousal maintenance.

¶16 Father then moved to amend and/or clarify the October 2006 Order. He asked for a ruling on life insurance policies that were not included in the prior orders and for clarification on the allocation of soccer expenses. Mother, in turn, moved for reconsideration. She claimed the court had miscalculated Father's parenting time credit and the allocation of tax exemptions and had failed to award her retroactive child support from May 1, 2005, through March 31, 2006. Neither party responded to the other's motion.

¶17 On November 23, 2006, the family court entered a single minute entry order ("November 2006 Order") resolving both motions. First, the court granted Father's motion regarding the life insurance policies and clarified its ruling regarding soccer expenses. Second, treating Mother's motion for reconsideration as a motion for clarification, the court awarded

Mother past child support from May 1, 2005, through March 31, 2006, in the amount of \$1,138 per month; increased the amount of child support awarded Mother in its previous Child Support Order to \$2,744 per month and made that award retroactive to May 1, 2006; granted Mother's request regarding the allocation of tax exemptions; and awarded Mother \$34,975 in attorneys' fees.

¶18 Father moved to vacate the November 2006 Order, arguing the court should not have granted Mother any relief without first allowing him an opportunity to respond, and requested the court allow him to prepare and lodge an appropriate final and comprehensive decree of dissolution. The court granted Father's motion in March 2007, vacating the November 2006 Order and ordering Father to prepare and submit a proposed decree of dissolution. Mother subsequently objected to the proposed decree Father lodged with the court, and Father responded. In November 2007, the court overruled Mother's objections and signed the proposed decree submitted by Father ("November 2007 Order"), again without a hearing or oral argument. The November 2007 Order reinstated the court's findings and rulings regarding child support, allocation of tax exemptions, and attorneys' fees as contained in the October 2006 Order.

¶9 Mother timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 and -2101(B) (2003).

## DISCUSSION

### *I. Award of Joint Custody and Parenting Time with C.S.*

¶10 Mother argues the family court abused its discretion by awarding joint legal custody of the three minor children even though Father had been found to have committed an act of domestic violence. Mother also claims the award of parenting time to Father with C.S. conflicts with an order of protection. We review the family court's decisions regarding child custody and parenting time for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003); *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6, 33 P.3d 506, 509 (App. 2001).

¶11 The act of domestic violence occurred after the custody evaluator had recommended and the parties had stipulated to joint legal custody and parenting time - a stipulation accepted by the family court on the first day of the trial. See *supra* ¶ 3. Shortly thereafter, another division of the superior court entered the modified order of protection prohibiting Father from having contact with C.S. At that time, the trial in

the dissolution proceedings had yet to conclude; two more trial dates remained. Although Mother did not file a petition to modify custody, the family court thwarted her attempts to raise the domestic violence incident during the remainder of trial. The court would not allow Mother to raise the domestic violence incident because it concluded the parties had already stipulated to custody and parenting time in accordance with the recommendations of the custody evaluator on the first day of trial.

¶12 Father moved to vacate the order of protection for C.S. before the family court entered the November 2007 Order which granted Father parenting time with C.S. The court entered the November 2007 Order and considered the motion to vacate on the same day. The court ultimately denied Father's motion to vacate.

¶13 Although Mother did not formally request modification of custody and parenting time for C.S. when she responded to Father's motion to vacate, it is clear from that pleading there had been a substantial and continuing change in circumstances after the parties had agreed to the recommended joint legal custody and parenting plan on the first day of trial. Mother's response details the reasons why she believed parenting time with Father was not in C.S.'s best interests. The minute entry

order rejecting Father's motion to vacate noted Mother's arguments and, indeed, referred to the requirements of A.R.S. § 25-403.03 (Supp. 2008).

¶14 Under these circumstances, the family court abused its discretion by failing to consider the changed circumstances and the children's best interests before entering a decree awarding Father joint legal custody of the three children and parenting time with C.S. The court was aware of the circumstances giving rise to the order of protection, or should have been, and, in fact, rejected Father's efforts to vacate the order of protection on the same day it entered the November 2007 Order. The record does not reflect the court considered the evidence of domestic violence, contrary to the command of § 25-403.03.<sup>1</sup> This evidence, if accepted by the court, would have created a rebuttable presumption that joint custody and parenting time were not in the children's best interests. See A.R.S. § 25-403.03(D).

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<sup>1</sup>Section 25-403.03(A) states that "joint custody shall not be awarded" if the court finds significant domestic violence, and subsection B of the statute directs the court to consider domestic violence as being contrary to the best interests of the child. See A.R.S. § 25-403.03(B). A finding of domestic violence creates a rebuttable presumption that an award of custody to that parent is not in the child's best interests. See A.R.S. § 25-403.03(D). A parent found to have committed domestic violence has the burden of proving parenting time will not endanger or significantly impair the child's emotional well-being. See A.R.S. § 25-403.03(F).

¶15 The court must consider the best interests of the children in awarding custody and parenting time. See *Downs v. Scheffler*, 206 Ariz. 496, 499, ¶ 7, 80 P.3d 775, 778 (App. 2003) (citing *Hays v. Gama*, 205 Ariz. 99, 102, ¶ 18, 67 P.3d 695, 698 (2003)). The order awarding joint legal custody and granting Father parenting time with C.S. without an analysis of the domestic violence alleged in this case suggests the court did not consider the children's best interests. Accordingly, we vacate the award of joint custody and the award of parenting time with C.S. On remand, the court shall consider § 25-403.03 and all other applicable statutory provisions in determining what custody and parenting time orders are in the best interests of the children.

## II. Child Support Issues

### A. Temporary Child Support

¶16 Mother next argues the family court abused its discretion by failing to award her temporary child support from May 2005 through March 2006 and, in an increased amount, from April 2006 through October 2006.

¶17 As discussed above, before trial the family court declined to award Mother temporary child support. See *supra* ¶ 2. In its October 2006 Order, the findings and rulings of which were readopted in its November 2007 Order, the court did not

make any specific findings regarding temporary child support. However, in its Child Support Order, the court specifically omitted any amounts for "arrears" or "past care and support." This suggests the court rejected Mother's claim that Father should have been paying temporary child support from the time she filed her petition requesting temporary child support until the date a permanent order of child support went into effect.

¶18 "Child support awards are highly discretionary, and appellate courts review them deferentially." *In re Marriage of Pacific*, 168 Ariz. 460, 463, 815 P.2d 7, 10 (App. 1991) (citing *In re Marriage of Berger*, 140 Ariz. 156, 680 P.2d 1217 (App. 1983)). The parties did not request that the family court make findings of fact or conclusions of law pursuant to Rule 82 of the Arizona Rules of Family Law Procedure. Therefore, we assume the court found every fact necessary to sustain its decision, and we will uphold the judgment if any reasonable evidence supports it. See *Pizziconi v. Yarbrough*, 177 Ariz. 422, 426, 868 P.2d 1005, 1009 (App. 1993).

¶19 The court did not abuse its discretion in denying Mother's request for temporary child support for the months of May 2005 through March 2006. During that time, Father had temporary physical custody of two of the three children and the court had ordered him to pay their day care expenses of \$868 per

month. Additionally, the record reflects Father was paying \$205.35 per month to provide all three children with health insurance and another \$417 per month in out-of-pocket medical and dental expenses. The record also reflects the court had ordered Father to pay the mortgage on the family home "as a form of 'family support.'" The court also ordered Father to pay the expenses for Ma.S. and C.S. to continue to participate in soccer. Thus, Father assumed and paid a significant share of the children's living expenses from May 2005 through March 2006 - the period during which two of the three children lived with him.

¶20 As a result of Father's act of domestic violence and the order of protection for C.S., *see supra* ¶ 3, by April 2006 Mother effectively had exclusive physical custody of Ma.S. and C.S. and shared physical custody of Mc.S. Mother argues this informal change in custody warranted an increased award of temporary child support for the months of April 2006 through October 2006.

¶21 Because we have vacated the awards of joint custody and parenting time and have remanded on these issues, we also vacate the court's denial of Mother's request for retroactive temporary child support for the period from April 1, 2006, through October 31, 2006, when Mother had exclusive custody of

both Ma.S. and C.S. When the court assesses the effect of Father's domestic violence on its awards of custody and parenting time, it shall also reconsider whether Mother should have been awarded retroactive temporary child support for the period of time C.S. lived with her after Mother had obtained an order of protection for C.S. against Father. Even if the family court decides Father's domestic violence does not alter its determination of custody and parenting time, the court must still consider whether Mother is entitled to an award of retroactive temporary child support for the months of April 2006 through October 2006 based on the change in circumstances whereby Mother had two of the children, rather than just one, living with her full-time.

*B. Child Support Calculation*

¶122 Mother also asserts the family court abused its discretion by finding Father's monthly income for the purpose of calculating child support was \$12,500. She contends the undisputed evidence established his monthly income was actually \$16,124.05.

¶123 Mother derives the \$16,124.05 figure from Father's June 2006 Affidavit of Financial Information ("AFI"). In his AFI, Father listed his average gross monthly income from self-employment as \$13,947.05 and stated he earned on average an

additional \$2,177 per month in oil and gas royalties. The parties subsequently filed a Joint Pretrial Statement in which they agreed Father's gross monthly income, after deducting business expenses, was between \$10,000 and \$12,500.<sup>2</sup> Testimony at trial supported this stipulated amount. If the court added the royalties disclosed in Father's AFI to the low end of the gross monthly income range provided in the Joint Pretrial Statement, it would have arrived at a monthly income of \$12,177 - an amount below the \$12,500 in gross monthly income attributed to Father by the family court in its child support calculations. Under these circumstances, we see no abuse of discretion.

¶24 Mother also claims error in the use of one child support worksheet which averaged Father's parenting time for Mc.S. with his parenting time for Ma.S. and C.S., even though Father had no parenting time with Ma.S. and should not have been awarded parenting time with C.S., and used the resulting average number of days to calculate the parenting time credit for each of the three children. Because we must remand this matter for the court to reconsider custody and parenting time, *see supra* ¶ 15, we need not address this argument. On remand, the court shall recalculate child support pursuant to the Child Support Guidelines.

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<sup>2</sup>The parties also stipulated in the Joint Pretrial Statement that Mother's gross monthly income was \$4,465.

### *III. Tax Exemptions*

¶125 Mother next argues the court improperly allocated the tax exemptions for the parties' three children according to the parties' proportionate share of income. We need not address this argument because we must remand this matter for a redetermination of custody and parenting time. On remand, the court should redetermine the allocation of the tax exemptions pursuant to the Child Support Guidelines.

### *IV. Mother's Attorneys' Fees Incurred after November 2006*

¶126 In the November 2006 Order, the court awarded Mother \$34,975 in attorneys' fees based on the significant financial disparity between the parties. Although the court vacated that order, it re-awarded Mother the same amount in fees in its November 2007 Order. Mother contends the court abused its discretion by failing to include additional attorneys' fees she incurred between the November 2006 Order and the November 2007 Order.

¶127 As an initial matter, we disagree with Father's argument Mother waived this issue by not raising it in the family court. In her objection to Father's proposed decree, Mother requested an award of the attorneys' fees she had incurred responding to the issues which had arisen following entry of the November 2006 Order. Mother also requested these

additional attorneys' fees in her reply in support of her objection.

¶128 Based on our review of the record, it appears the court did not rule on Mother's request for additional attorneys' fees. Accordingly, Father's reliance on *In re Marriage of Pownall*, 197 Ariz. 577, 5 P.3d 911 (App. 2000), is misplaced. In that case, we rejected a husband's argument the trial court had abused its discretion in awarding wife fees because the court had not made any findings as to the reasonableness of the husband's position. We held husband had waived this argument because he had "fail[ed] to object below to the lack of findings of fact." *Id.* at 583, ¶ 27, 5 P.3d at 917. Here, Mother's objection is to the court's failure to address her request for additional fees, not its failure to make findings of fact.

¶129 On remand, the court shall consider Mother's request that she be awarded attorneys' fees she incurred after the court vacated the November 2006 Order.

V. *Entering the November 2007 Order without a Hearing*

¶130 Mother lists as a separate issue on appeal the following:

Did the Trial Court err and abuse its discretion in vacating the [November 2006 Order] and reinstating the [October 2006 Order] in the [November 2007 Order] without oral argument or a hearing on Father's Motion for Clarification and Mother's Motion

for Reconsideration, when, in fact, both parties and their attorneys requested and agreed that there should be a hearing on them?

Mother does not address this issue as a separate argument on appeal, although she does refer to the court's failure to hold a hearing or oral argument in the "Statement of the Case" section of her opening brief and again in her discussion of the joint custody award.

¶131 Because Mother failed to develop this issue on appeal, we will not address it. See ARCAP 13(a)(6) (arguments shall contain appellant's contentions, citations to authority, and standard of review); *In re U.S. Currency in Amount of \$26,980.00*, 199 Ariz. 291, 299, ¶ 28, 18 P.3d 85, 93 (App. 2000) (bald assertion offered without elaboration or citation to legal authority will not be considered on appeal).

#### VI. *Community Debts*

¶132 Mother argues the family court mischaracterized the debt on Father's business credit cards as a community debt. In the "Statement of Facts" section of her opening brief she essentially challenges the court's finding that Mother knew or should have known about these debts. Based on the record, the court did not abuse its discretion in characterizing this credit card debt as a community obligation and rejecting Mother's testimony she did not know about the debts.

¶133 Father testified the debts existed "as of the date the divorce was filed" and had been incurred during the marriage. The court obviously relied on this testimony in concluding "there was nothing to indicate that these debts were anything other than community debts that were incurred during the community." The court also stated it disbelieved Mother's testimony that she did not know about the debts. This court "will defer to the [family] court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998).

#### *VII. Father's Withdrawal of Retirement Funds*

¶134 Mother alleges the court abused its discretion by failing to award her one-half of the funds Father withdrew from his retirement account without her knowledge. Father contends he made these withdrawals before filing for dissolution to pay for family expenses and, thus, Mother is not entitled to any reimbursement.

¶135 Mother argues the evidence showed the withdrawals were made *after* Father opened his business. This is true. However, Father made those withdrawals while the parties were still married and before he filed for dissolution. Further, Mother did not establish Father withdrew the funds for a non-community

purpose. Based on the evidence, the court did not abuse its discretion in accepting Father's testimony that the withdrawals were for community expenses. See *Gutierrez*, 193 Ariz. at 347, ¶ 13, 972 P.2d at 680. Therefore, we find no abuse of discretion.

#### *VIII. Distribution of Personal Property*

¶136 The court ordered that personal property as listed on "attachment 4" to the parties' joint pretrial statement be distributed to them as specified on the attachment. It also ordered "if there are any additional items of personal property that are not contained on that list, Counsel shall meet and confer for the purpose of determining the balance of the distribution of that property."

¶137 Mother argues Father's lawyer has refused to meet and asserts she has yet to receive certain items of personal property. These issues are not properly before us. First, Mother did not raise these issues in the family court before it entered the November 2007 Order. Second, the thrust of Mother's argument is Father, through his attorney, has failed to comply with the court's directives to counsel. If in fact Father, through his attorney, has failed to comply with the court's orders, Mother can raise non-compliance through an appropriate post-decree proceeding. We express no opinion as to the merits

of Mother's argument regarding the distribution of personal property.

#### *IX. Life Insurance Policies*

¶38 The court awarded Father the \$1,000,000 policy on his life and awarded Mother the \$250,000 policy on her life. Mother contends she should have been awarded the policy on Father's life because she will need the additional funds if Father dies before the children are emancipated. Mother also claims Father should reimburse her for the premiums she paid on his life insurance policy. The award of life insurance in a dissolution proceeding is based upon its cash value. *Wisner v. Wisner*, 129 Ariz. 333, 338, 631 P.2d 115, 120 (App. 1981). Mother conceded that neither policy had any cash value. For this reason, we find the distribution was equitable and not an abuse of discretion.

¶39 Mother does not point us to anything in the record suggesting that she paid the premiums on Father's life insurance policy during the litigation. Accordingly, we cannot say the family court abused its discretion in failing to order Father to reimburse Mother.

¶40 Mother also asserts the court violated a stay when it entered an order to enforce the provisions of the November 2007 Order relating to the transfer of the insurance policies. The

order with which Mother takes issue was entered after the November 2007 Order and was not included in Mother's notice of appeal. Thus, this issue is not properly before us in this appeal.<sup>3</sup>

*X. Attorneys' Fees and Costs on Appeal*

¶41 Mother has substantially prevailed on appeal. Thus, we consider her the successful parent for purposes of being entitled to costs on appeal. Therefore, contingent upon her compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure ("ARCAP"), we award Mother her reasonable costs on appeal.

¶42 Father requests an award of his attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-2106 (2003) and 25-324 (Supp. 2008) and ARCAP 25. Mother's appeal was not frivolous. Therefore, Father is not entitled to fees or costs pursuant to A.R.S. § 12-2106 or ARCAP 25. We also deny Father's request for fees pursuant to A.R.S. § 25-324 based on the parties' unequal financial resources.

**CONCLUSION**

¶43 The family court abused its discretion by awarding joint custody to Father without considering the evidence of

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<sup>3</sup>We also note the record does not reflect any stay was in place that would have prohibited the court from entering an order regarding the transfer of insurance policies.

domestic violence and by awarding Father parenting time with C.S., when a valid order of protection prohibited Father from contacting C.S. For these reasons, we reverse the custody and parenting time orders and remand these issues for reconsideration in accordance with A.R.S. §§ 25-403(A) (2007) and -403.03. On remand, the court shall also recalculate child support and the allocation of tax exemptions in accordance with its current custody and parenting time orders, pursuant to the Child Support Guidelines, and reconsider whether Mother should be awarded retroactive temporary child support for the months of April 2006 through October 2006. We also reverse the attorneys' fees awarded in the November 2007 Order and instruct the court on remand to rule on Mother's request for additional attorneys' fees. In all other respects, the decree is affirmed. We award Mother costs on appeal. See *supra* ¶ 41.

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PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

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DONN KESSLER, Judge

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JOHN C. GEMMILL, Judge