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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

CHERINE YVONNE EVERS, *Petitioner/Appellant*,

v.

LUIS ALEJANDRO ARMENTA, *Respondent/Appellee*.

No. 1 CA-CV 15-0067 FC
FILED 2-2-2016

Appeal from the Superior Court in Maricopa County
No. FC2011-090889
The Honorable Shellie F. Smith, Judge Pro Tem

AFFIRMED

APPEARANCES

Cherine Yvonne Evers, Tempe
Petitioner/Appellant

Luis A. Armenta, Phoenix
Respondent/Appellee

MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Margaret H. Downie joined.

G E M M I L L, Judge:

¶1 Cherine Evers (“Mother”) appeals the Maricopa County Family Court’s ruling awarding Luis Armenta (“Father”) joint custody and legal decision-making regarding their minor child. For the following reasons, we affirm.

BACKGROUND

¶2 Mother and Father have one child in common, A.E., born in 2006. Mother and Father were not married and not in a relationship at the time of A.E.’s birth. Father became an active part of A.E.’s life in 2011 when paternity was established and he filed a petition to determine custody, parenting time, and child support. Mother was awarded primary physical custody of A.E. and final legal decision-making with the right of refusal. Father was awarded parenting time on alternating weekends and during some weekdays.

¶3 In January 2014, Father filed a petition to modify the parenting time and legal-decision making order to provide for joint legal decision-making and equal parenting time. Dr. Connie Pyburn, a child psychologist, was appointed as a custody evaluator. Dr. Pyburn conducted home visits with Mother and Father, interviewed the parties and collateral witnesses, and administered psychological evaluations. Dr. Pyburn summarized the findings from these interviews and evaluations in a Comprehensive Family Assessment Evaluation Report (“the Report”) that was submitted to the family court.

¶4 The Report indicates that Mother and Father have a high-conflict, tumultuous relationship. The parties are often disrespectful to one another and argue frequently regarding drop-off times and communication with A.E. during their respective parenting times. Nonetheless, A.E. is well-bonded with both parents and enjoys spending time with each. Accordingly, Dr. Pyburn recommended a “5-2-2-5” parenting plan, in

EVERS v. ARMENTA
Decision of the Court

which both parents share equal time with A.E. and all exchanges between the parents occur at A.E.'s school.

¶5 After an evidentiary hearing, the family court granted Father's petition to modify. In its ruling, the family court explained in detail its findings regarding A.E.'s best interests by addressing each of the factors required to be considered by Arizona Revised Statutes ("A.R.S.") section 25-403. The family court adopted Dr. Pyburn's recommended parenting time plan and awarded the parents joint legal decision-making.

¶6 Mother timely appeals the family court's ruling. This court has jurisdiction under A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶7 Mother's arguments on appeal distill into three main contentions regarding the family court's ruling. First, Mother argues that the Report was based on insufficient and inaccurate information and demonstrated bias against Mother. Second, Mother asserts the family court relied exclusively on Dr. Pyburn's findings as summarized in the Report and did not consider other relevant evidence. Finally, Mother asserts the family court failed to give adequate weight to concerns about domestic violence. We address each argument in turn, reviewing the family court's ruling for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7 (App. 2003).

I. Alleged Bias in Dr. Pyburn's Findings

¶8 Mother contends the family court improperly relied on the Report because it contained insufficient information and was biased against her. Mother points to several aspects of Dr. Pyburn's methodology and findings to support her argument, including: Dr. Pyburn interviewed most of Father's witnesses in person while interviewing most of Mother's witnesses over the phone; Dr. Pyburn, at Father's suggestion, contacted Mother's stepfather and did not inform Mother of her intention to do so; references in the report to Mother's criminal record without accompanying references to Father's criminal record; and differences in Dr. Pyburn's

EVERS v. ARMENTA
Decision of the Court

interpretation of Mother's and Father's Minnesota Multiphasic Personality Inventory (MMPI) test scores.¹

¶9 Because the family court is in the best position to “judge the credibility of witnesses and resolve conflicting evidence,” we defer to its factual findings when there is competent evidence to support them. *See Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 18 (App. 2015). Similarly, we defer to the trial court's determination of the “weight to give conflicting evidence.” *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13 (App. 1998).

¶10 The family court did not abuse its discretion by relying on the Report. First, Mother has not shown that Dr. Pyburn's methods of contacting witnesses prejudiced her in any way. Dr. Pyburn was still able to interview several character witnesses who vouched for Mother's fitness and quality as a parent, and the Report does not mention or rely on any interview she conducted with Mother's stepfather.

¶11 Second, as to Mother's contentions that the report was biased, the report and testimony before the court consistently related both favorable and unfavorable factors regarding both parents. Dr. Pyburn testified that A.E. is “strongly bonded” to Mother, and not as strongly bonded to Father. Dr. Pyburn mentioned that Father graduated from high school while taking gifted classes, but also mentioned that Mother has a master's degree in divinity and theology. Dr. Pyburn further observed that both parents' MMPI tests showed an over-reporting of virtue that indicated a risk of invalidity. And, to the extent that the Report shows a discrepancy in its treatment of Father and Mother, including in its interpretation of test scores, Dr. Pyburn testified that such discrepancies were based upon her professional experience and observations after interacting with both parties. The family court, relying on the Report and the testimony in court, did not err when it impliedly determined Dr. Pyburn was not inappropriately biased against Mother. Rather, this was a reasonable finding, based on the facts and testimony presented to the court. Accordingly, we discern no abuse of discretion.

¹ Mother also argues Dr. Pyburn inappropriately testified in proceedings before conducting or completing her interviews with Mother. The record does not support this contention. Mother raised these concerns in a motion to continue, which the family court granted. The hearing was rescheduled several times before it ultimately took place in October 2014. Dr. Pyburn filed the Report in April 2014, after her interviews and home visits with Mother were completed and well before anyone testified in this matter.

EVERS v. ARMENTA
Decision of the Court

¶12 Furthermore, Mother had the opportunity to – and did – question Dr. Pyburn during the evidentiary hearing regarding alleged misconduct and prejudice against Mother. Mother also offered into evidence her “Allegations of Ethical Impropriety of Court Appointed Custody Evaluator,” a document containing Mother’s detailed accusations about the bias and insufficiency of Dr. Pyburn’s report and methods. The family court, having “considered the sworn testimony of the witnesses, [and] the admitted exhibits,” nonetheless found Dr. Pyburn’s findings persuasive, and did not make any findings that indicated bias in her evaluation. Because sufficient evidence was presented to support the findings and conclusions of the court, the family court did not err by relying on the Report in its ruling.

II. Custody Evaluator’s Report

¶13 Mother also argues that the court failed to consider all relevant evidence in making its decision. She asserts the family court “put a rubber stamp” on Dr. Pyburn’s finding and erroneously disregarded all other testimony. Absent evidence to the contrary, we assume the family court “fully consider[s]” the evidence before it when making its decisions. *See Fuentes v. Fuentes*, 209 Ariz. 51, 55–56, ¶ 18 (App. 2004).

¶14 Although the family court assigned significant weight to Dr. Pyburn’s report and testimony, it did not, as Mother asserts, adopt the report verbatim.² *See Christopher K. v. Markaa S.*, 233 Ariz. 297, 301–02, ¶ 21 (App. 2013) (explaining that a court cannot “simply adopt[]” the findings of a custody evaluator and, in so doing, “effectively delegate[] the best-interests determination to the custody evaluator”). Rather, the family court specifically “considered the sworn testimony of the witnesses, [and] the admitted exhibits including the Comprehensive Family Assessment by Dr. Connie Pyburn filed April 1, 2014.” In so doing, the family court made independent findings, supported by the evidence presented, regarding

² Mother quotes a portion of the family court’s December 2 minute entry in an attempt to prove that the court adopted verbatim Dr. Pyburn’s recommendations. That minute entry, however, actually encourages the *parents* to adopt Dr. Pyburn’s recommendations regarding high-conflict parenting classes and counseling for A.E.: “The Court also suggests that the parents attend co-parenting counseling and adopt the recommendations set forth in Dr. Pyburns’ evaluation.”

EVERS v. ARMENTA
Decision of the Court

A.E.'s best interests. Accordingly, the court did not abuse its discretion and we discern no error.

III. Domestic Violence Concerns

¶15 Finally, Mother argues the family court improperly ignored Father's acts of domestic violence against her. In 2011 and 2012, Mother petitioned for and received orders of protection against Father. The 2012 protective order followed an alleged misdemeanor assault against Mother for which Father was apparently later convicted and placed on one year of probation. Mother argues Father is a "habitual domestic violence offender" and that an award of joint custody is therefore inappropriate.

¶16 When assessing a child's best interests for the purposes of a custody determination, A.R.S. § 25-403(A)(8) requires the family court to consider whether there has been domestic violence as defined by A.R.S. § 25-403.03. Under A.R.S. § 25-403.03,

[J]oint legal decision-making shall not be awarded if the court makes a finding of the existence of significant domestic violence pursuant to § 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence.

If the court makes a finding of significant domestic violence, it is then the burden of the offending parent to rebut the presumption that joint custody should not be awarded. A.R.S. § 25-403.03(E).

¶17 During the evidentiary hearing, Mother offered into evidence the protective orders against Father and evidence of his assault conviction. After considering this and all other relevant evidence, the family court determined that because there were no "recent incidents of domestic violence" and "no alleged acts of child abuse," there was no significant domestic violence pursuant to A.R.S. § 25-403.03.

¶18 Father's assault conviction and Mother's order of protection must be taken seriously and carefully considered by the family court. Here, the family court acted within its discretion when it concluded, after hearing from both parties, that a single instance of domestic violence occurring more than a year before the current proceedings did not constitute a significant history of domestic violence. *See Canty v. Canty*, 178 Ariz. 443, 445 (App. 1994) (explaining that previous incidents of domestic violence do

EVERS v. ARMENTA
Decision of the Court

not “automatically tip the scales against the offending spouse”). Because the family court’s findings concerning A.R.S. § 25-403.03 were supported by the record, Father was not required to rebut a presumption against the propriety of joint custody.

CONCLUSION

¶19 Based on our review of this record, there was sufficient evidence before the family court to support the grant of joint legal decision-making authority and equal parenting time. We discern no abuse of discretion and affirm the family court’s ruling.



Ruth A. Willingham · Clerk of the Court
FILED : ama