IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

JOHN BEILMAN, *Petitioner/Appellant*,

v.

JANELL ROESENER, *Respondent/Appellee*.

No. 1 CA-CV 17-0067 FC
FILED 11-14-2017

Appeal from the Superior Court in Maricopa County
No. FC2011-003365
The Honorable Michael J. Herrod, Judge

AFFIRMED

COUNSEL

Gillespie, Shields, Durrant, & Goldfarb, Phoenix
By DeeAn Gillespie Strub, Mark A. Shields
Counsel for Petitioner/Appellant

The Murray Law Offices, Scottsdale
By Stanley D. Murray
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 John Beilman ("Father") appeals the family court's dismissal of his amended petition to modify legal decision-making authority, primary physical residence, parenting time, and child support. He also appeals the family court's award of Janell Roesener ("Mother")'s attorneys' fees under A.R.S. § 25–324. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In November 2011, Father and Mother entered a dissolution of marriage consent decree. The parties had a one-year-old child at the time. Father and Mother had entered a joint custody parenting plan, which allowed Mother to relocate with the child to California. The parenting plan required the parties to first seek mediation or the assistance of a parenting coordinator ("PC") before initiating any court action.

¶3 In January 2014, after Mother and the child had relocated to California, Father made his first mediation request. Father did not appear, however, on the scheduled date for mediation. The mediation was rescheduled, but no agreement was reached. Afterwards, Father filed his first petition to modify parenting time and child support in July 2014.

¶4 Father alleged that material changes in circumstances existed that made a modification of the parenting plan appropriate. Father expressed concerns about Mother's care for the child, the living conditions of Mother's home, and Mother's causing extreme emotional distress for the child. Father also stated that having the child move back to Arizona to reside with him would be in her best interests and requested equal parenting time. Father's petition did not allege that Mother had not allowed him to participate in joint legal decision-making or that he had been denied any parenting time.

¶5 Mother moved the court to decline jurisdiction and to dismiss Father's petition. She argued that Father's petition did not satisfy Arizona Rule of Family Law Procedure ("ARFLP") 91 because it did not contain

specific and detailed facts to show a substantial and continuing change in circumstances to support a request for modification; thus, it failed to establish "adequate cause" for modification under A.R.S. § 25–411(L). She also requested attorneys' fees pursuant to A.R.S. § 25–324. In December 2014, the family court dismissed Father's petition because it did not establish adequate cause for hearing the petition. The court awarded Mother $8,721.87 in attorneys' fees and costs. Father did not appeal the decision or the award.

¶6 In December 2015, Father filed his second mediation request. Shortly after, Mother moved to appoint a PC because the parties were having difficulty communicating with each other on matters concerning the child. Mediation did not resolve the issues, but the parties did agree to the appointment of a PC in March 2016. A few days later, Father filed his second petition to modify, which he later amended in June 2016.

¶7 Father alleged that a substantial and continuing change in circumstances had occurred since his last petition in 2014. Father stated that Mother had violated several provisions of the parenting plan, including alienating the child from Father by making derogatory comments about him, taking away from the child Father's gifts and pictures, and failing to inform Father of school activities. Father also alleged that Mother physically and emotionally abused the child. For physical abuse, he cited an incident where the child stated, "I don't want to go back to that naughty, naughty spanking house" and another incident where Mother prematurely extracted the child's tooth by a few days. Additionally, Father's examples for emotional abuse included Mother's use of profanity aimed at the child, telling the child that her last name was not Beilman, and not allowing the child to talk about Father in Mother's home. As with the previous petition, however, Father did not allege that Mother had prevented him from participating in joint legal decision-making or that he had been denied any parenting time. Mother then moved the court to decline jurisdiction and to dismiss the petition in August 2016.

¶8 In her motion to dismiss, Mother highlighted that Father's petition failed to comply with ARFLP 91 by not stating detailed relevant facts showing a substantial and continuing change in circumstances. Mother also argued that the petition contained an irrelevant and unverified transcript of a conversation between two people, and its reliance on hearsay statements from a child between three and six years old failed to establish adequate cause under A.R.S. § 25–411(L). She also noted that Father could have addressed his concerns through the PC rather than requesting modification.

¶9 In Father's response to Mother's motion to dismiss, he raised an additional issue of the PC's report supposedly finding that the current parenting plan was not working properly and not addressing the child's best interests. He further argued that the PC's report supported his view that Mother attempted to minimize and create obstacles for his parenting time. In August 2016, the PC amended her report and addressed various issues ranging from communication between the parents, communication between each parent and the child, vacation and holiday custody, and extracurricular activities during Father's parenting time. The PC made recommendations to address each issue, and the family court adopted the recommendations. Under extracurricular activities, the PC noted that Father is receiving less parenting time than the plan anticipated "because of his job, the fact that Mother relocated to San Diego, and the minor child's school schedule." Despite this comment, the PC found that Father must avoid taking the child if it conflicted with her activities and did not recommend any changes on this issue.

¶10 The family court subsequently dismissed Father's petition because it failed to show a substantial change in circumstances. The court noted that none of Father's allegations in his petition stated that he had been denied legal decision-making or parenting time, which were the "heart of the Decree." Additionally, the court stated that Father "provide[d] no expert opinion or other support for his psychological theory other than mere assertion." Moreover, the court stated that although Father alleged that the PC reported sufficient concern with the parenting plan to support the petition to modify, "when read in context, the concern of the PC only refer[red] to the application of the vacation provision," which was already resolved. The court found that the parties presented no evidence concerning substantial disparity of financial resources, but it did find that Father was unreasonable in litigation because his petition did not state sufficient facts to support the relief requested. The court further found that Father's petition was "based on the administrative portions of the Court's previous order, rather than the substantive provisions of the previous order." Thereafter, the court awarded Mother attorneys' fees incurred in her motion to dismiss pursuant to A.R.S. § 25–324.

¶11 Mother requested $12,739 in attorneys' fees, but Father objected, arguing that the fees were excessive. Father noted that his second petition to modify was filed on March 18, 2016, yet Mother requested fees from January 4, 2016, through March 18, 2016. Furthermore, he contended that multiple time entries were not related to the motion to dismiss. He also claimed that the court could not award fees under A.R.S. § 25–324 because the record did not have any evidence of the parties' financial resources

within the past five years. The court awarded Mother a reduced amount of $8,500. Father timely appealed.

DISCUSSION

1. Motion to Dismiss

¶12 Father argues that the family court erred by granting Mother's motion to dismiss. We review child custody determinations under an abuse of discretion standard. *Owen v. Blackhawk*, 206 Ariz. 418, 420 ¶ 7 (App. 2003). In considering a motion to modify custody, the family court "must first determine whether there has been a change in circumstances materially affecting the child's welfare," and only if such change exists, then evaluate whether modification "would be in the child's best interests." *Christopher K. v. Markaa S.*, 233 Ariz. 297, 300 ¶ 15 (App. 2013). The court's determination whether a change in circumstances has occurred "will not be reversed absent a clear abuse of discretion, *i.e.*, a clear absence of evidence to support its actions." *Pridgeon v. Superior Court (LaMarca)*, 134 Ariz. 177, 179 (1982). The party seeking modification of custody has the burden of proving a change in circumstances that materially affects the child's welfare. *Marley v. Spaulding*, 10 Ariz. App. 213, 215 (1969).

¶13 ARFLP 91(D) requires any petition to modify custody to comply with A.R.S. § 25–411. Under A.R.S. § 25–411(A), six months after the entry of a joint legal decision-making order, a parent may petition to modify an order regarding custody based on the other parent's failure to follow the order's provisions. The family court "shall deny" a petition to modify "unless it finds that adequate cause for hearing the motion is established by the pleadings." A.R.S. § 25–411(L). Adequate cause for modification exists when "the facts alleged to constitute a change in circumstances" materially affect the welfare of the child. *Pridgeon*, 134 Ariz. at 180. The family court has wide discretion in assessing adequate cause. *Siegert v. Siegert*, 133 Ariz. 31, 33 (App. 1982). We will reverse the family court's decision only if "no reasonable judge would have denied the petition without a hearing." *Id.*

¶14 Here, Father's petition primarily alleged that Mother alienated the child from him and emotionally and physically abused the child. But these allegations did not warrant a modification of the parenting plan because the facts used to support these allegations did not show a change in circumstances materially affecting the welfare of the child. Father's petition concerned the parenting plan's general provisions about the parents' duties in co-parenting the child, and did not allege that Mother had denied Father participation in legal decision-making or parenting time.

Although Father briefly raised in his response to Mother's motion to dismiss that he was not receiving as much parenting time as the plan contemplated because Mother had moved to California, the plan clearly stated that Mother was allowed to move to California with the child, and Father had agreed to this term. Thus, the family court did not abuse its discretion by concluding that these allegations did not rise to the level of showing a change in circumstances affecting the welfare of the child. Accordingly, the record supports the court's dismissal of the petition for lack of adequate cause.

¶15 Father asserts that violations of a parenting plan constitute a basis for modification per se because they are listed under the same category as domestic violence and child abuse under A.R.S. § 25–411(A). As such, he contends that his allegations were sufficient to avoid dismissal. But alleged violations of a parenting plan are not in the same category as allegations of domestic violence or child abuse. Under A.R.S. § 25–411(A), a parent may petition for modification based on spousal or child abuse at "any time" after entry of the joint legal decision-making order. In contrast, a parent may petition for modification based on parenting plan violations only if "six months" have passed since the joint legal decision-making order was entered. *Id.* Furthermore, no allegation under § 25–411(A) constitutes a per se basis for modification because any allegation, even one of spousal or child abuse, must meet § 25–411(L)'s standard of "adequate cause." *See* A.R.S. § 25–411(A) ("A motion or petition to modify an order shall meet the requirements of this section."). Thus, Father's argument fails.

2. Attorneys' Fees

¶16 Father asserts that the family court erred in two respects by awarding Mother her attorneys' fees. First, he claims that Mother's failure to comply with ARFLP 49(D) prohibited an award of fees. Second, he claims that the family court erred by awarding fees not related to Mother's motion to dismiss. We review an award of attorneys' fees for an abuse of discretion. *Magee v. Magee*, 206 Ariz. 589, 590 ¶ 6 (App. 2004).

¶17 A family court may award attorneys' fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25–324(A). While the primary purpose of the statute is to "provide a remedy for the party least able to pay," *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 524 ¶ 13 (App. 2007), the court can award fees based on either factor, *Magee*, 206 Ariz. at 591 n.1 ¶ 8. In exercising its discretion to award attorneys' fees based on either factor, the court must consider both

reasonableness and financial disparity. *Myrick v. Maloney*, 235 Ariz. 491, 494 ¶ 9 (App. 2014).

¶18 Here, Mother requested attorneys' fees in her motion to dismiss. Mother and Father did not submit any financial information following the request. The family court first considered the financial disparity between the parties. The family court noted that it found "no evidence concerning substantial disparity of financial resources between the parties." In considering reasonableness of the parties, however, the family court found that Father acted unreasonably in the litigation because Father filed a petition that "did not state sufficient facts to support the relief requested, and was based on the administrative portions of the Court's previous order, rather than the substantive provisions of the previous order." Thus, the court did not abuse its discretion.

¶19 Relying on ARFLP 49(D), Father asserts that a party requesting attorneys' fees must submit an affidavit of financial information at the time of filing the resolution statement. But Father failed to raise the issue of Mother's non-compliance with ARFLP 49(D) in his response to Mother's fee application. This Court generally will not consider arguments that were not presented to the family court and are raised for the first time on appeal. *Hannosh v. Segal*, 235 Ariz. 108, 115 ¶ 25 (App. 2014). Thus, Father's argument based on Mother's failure to follow family law procedure is waived.

¶20 Father asserts next that the family court erred by awarding Mother significant attorneys' fees not related to her motion to dismiss. He claims that the first 37 time entries in Mother's fee affidavit all predated Father's petition. He also claims that the fee application contained several fees for unrelated matters as well as unknown matters due to redactions. Whether attorneys' fees should be awarded under A.R.S. § 25–324 is within the family court's sound discretion. *Schmidt v. Schmidt*, 158 Ariz. 496, 500 (App. 1988). A party requesting attorneys' fees must submit a fee application in sufficient detail to enable the court to assess the reasonableness of the time incurred. *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188 (App. 1983). The family court does not abuse its discretion unless no evidence supports the court's conclusion, or the reasons the court provides are "clearly untenable, legally incorrect, or amount to a denial of justice." *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350 ¶ 17 (App. 2006). When no request for findings is made and the family court does not make specific findings of fact, we must assume that the family court found every fact necessary to support its ruling and "must affirm if

any reasonable construction of the evidence justifies the decision." *Horton v. Mitchell*, 200 Ariz. 523, 526 ¶ 13 (App. 2001).

¶21 Here, Mother requested an award of $12,739 in attorneys' fees for legal work performed from January 4, 2016, through October 19, 2016, and she submitted an affidavit detailing the fees. Father filed his second petition to modify on March 18, 2016, and he objected to all fees incurred before this date. Furthermore, Father objected to some fees after this date because they were either unreasonable for the time expended, pertained to unrelated matters, or were unknown due to redaction. Because Mother's award was reduced to $8,500, the family court apparently agreed with some of Father's objections. Furthermore, Father did not request findings under A.R.S. § 25–324(A) regarding the fee award. Therefore, we must assume that the family court found every fact necessary to support its ruling, and it did not abuse its discretion by determining the amount of Mother's attorneys' fees.

CONCLUSION

¶22 For the foregoing reasons, we affirm. Mother has requested an award of attorneys' fees incurred on appeal pursuant to A.R.S. § 25–324. In an exercise of discretion, we award Mother reasonable attorneys' fees on appeal upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.

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