IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

ANGELA M. HART, *Petitioner/Appellee*,

v.

SHAWN LEWIS HART, *Respondent/Appellant*.

No. 1 CA-CV 17-0502 FC
FILED 8-7-2018

Appeal from the Superior Court in Yuma County
No. S1400DO201400570
The Honorable Roger A. Nelson, Judge

AFFIRMED

COUNSEL

Torok Law Office, PLLC, Yuma
By Gregory T. Torok
Counsel for Petitioner/Appellee

Law Office of Phil Hineman, PC, Mesa
By Phillip D. Hineman, Jr.
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Jennifer M. Perkins joined.

S W A N N, Judge:

¶1 Shawn Lewis Hart ("Father") appeals the superior court's denial of his petition to modify parenting time. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Angela M. Hart ("Mother") were married in February 2002. The parties have one minor child, R.H., born September 2004. The parties commenced dissolution of marriage proceedings in California but never finalized the proceedings; however, in 2012, the California court issued a parenting time order. Thereafter, the parties moved to Arizona, where Mother filed a petition to modify the California order.[1] In November 2013, the superior court issued an order accepting jurisdiction over custody, parenting time, and legal decision-making issues, retained portions of the California order, and issued additional provisions pertaining to the parties' unsupervised parenting time in Arizona.

¶3 On May 1, 2014, Mother filed a petition for dissolution of marriage in Arizona as a separate case.[2] The petition also requested that the court affirm the legal decision-making and parenting time order issued in November 2013.

¶4 On July 10, 2014, Mother sought an order of protection against Father on behalf of R.H., and later filed a petition to modify legal decision-making and parenting time. In support of her request for an order of protection, Mother submitted an affidavit from her niece, L.B., whom Father and Mother had raised in their marital home from 2004 to 2010. In the affidavit, L.B. averred that she had resided with Mother and Father from ages 11 to 18; that when she was approximately 12-years-old, Father "grabbed [her] breasts," and one morning she woke up and saw Father

1 Yuma County Superior Court case number S1400DO201300833.

2 Yuma County Superior Court case number S1400DO201400570.

"lifting up [her] shirt"; and that, when she was "15 or 16 years old[,] . . . [she and Father] had sex steadily for a few months."

¶5 The court held a hearing on the request for an order of protection a day after entering a consent decree that dissolved the parties' marriage and affirmed the November legal decision-making and parenting time order. At the hearing, the court denied Mother's request for an order of protection but granted her oral motion for a temporary order—without notice—to require supervised visits, and her request to amend her petition to modify legal decision-making and parenting time that she had filed on July 10. The court also ordered Mother to file a formal pleading concerning the temporary order and ordered that "Father will have only supervised parenting time" with R.H.

¶6 Mother filed her amended petition to modify legal decision-making and parenting time, requesting that parenting time between Father and R.H. be "supervised only" under A.R.S. § 25-411(J). Father filed a response and the matter proceeded to an evidentiary hearing in February 2015. The court ordered that "Father is awarded supervised parenting time and . . . a third party as agreed by the parties shall be the supervisor of [Father's] parenting time."

¶7 In November 2016, Father filed a petition requesting that the court remove the supervision requirement. The petition included a psychosexual evaluation by Ashley B. Hart, a licensed psychologist. In his evaluation, Dr. Hart opined that Father's "psychosexual interests fall within normal limits. There was no indication of pedophilia or paraphiliac tendencies on this measure." Dr. Hart's evaluation further stated that "[t]here was no indication of major mental health disorder, psychoneurotic disorder, personality disorder, and there was no indication of substance use or abuse."

¶8 Before the hearing on Father's petition to remove the supervision requirement, Father requested findings of fact and conclusions of law under Ariz. R. Fam. Law P. 82 ("Rule 82"). At the hearing, Dr. Hart testified that he administered the Abel Assessment of Sexual Interest Visual Reaction Time, which is often requested by Pima County courts as a mode of evaluation. Dr. Hart further testified that according to the assessment, Father's "psychosexual interests were considered normal" and that Father demonstrated an interest in "adult females and adult males . . . [and] adolescent females above the age of 14, younger than the age of 18." Dr. Hart opined that Father "has the likelihood, just as anybody else, of committing a sexual offense." On cross-examination, Dr. Hart testified that

he had suggested to Father that he take a polygraph test as a part of the evaluation, but that Father had declined. Dr. Hart further testified that the polygraph test "could have" made a difference and that the examination would have "provided us more information."

¶9 The court denied Father's petition for modification of supervised parenting time. The court considered the evidence and testimony presented at the hearing, as well as the transcripts of previous hearings, and found that Father "[had] not provided compelling evidence that a modification of the current orders [was] appropriate." Specifically, the court determined that Father "did not do all that was asked of him by [Dr. Hart] during the evaluation process" including the polygraph test, which Dr. Hart testified was an important component of the psychosexual evaluation process. The court ultimately found that Father's "failure to comply with that request calls into question the results of the psychosexual exam." Father appeals.

DISCUSSION

¶10 On appeal, Father argues that the court erred by (1) failing to specifically enumerate its findings of fact and conclusions of law under A.R.S. § 25-403(B) and Rule 82; (2) applying the wrong burden of proof to his request to modify parenting time; and (3) improperly requiring that he undergo a polygraph examination. We address each of these arguments in turn.

I. THE COURT WAS NOT REQUIRED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER A.R.S. § 25-403(B), AND THE COURT MADE FINDINGS SUFFICIENT TO SATISFY FATHER'S RULE 82 REQUEST.

¶11 Father first challenges the court order denying modification of parenting time by arguing that the court "erred as a matter of law by failing to specifically enumerate its findings of fact and conclusions of law in violation of [A.R.S.] § 25-403." We review an order modifying parenting time for an abuse of discretion. *Baker v. Meyer*, 237 Ariz. 112, 116, ¶ 10 (App. 2015).

¶12 We disagree with Father that § 25-403(B) and its requirement for express written findings applies here. Section 25-403(B) applies in a "contested legal decision-making or parenting time case," but the process for *modifying* legal decision-making or parenting time is generally governed by § 25-411. *Murray v. Murray*, 239 Ariz. 174, 176, ¶¶ 6–7 (App. 2016). Section 25-411(J) provides that

> The court may modify an order granting or denying parenting time rights whenever modification would serve the best interest of the child, but the court shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger seriously the child's physical, mental, moral or emotional health.

¶13 Though § 25-411(J) requires the court to find certain facts in an order modifying parenting time, there is no requirement, as there is in § 25-403(B), that the findings be reduced to writing. *Hart v. Hart*, 220 Ariz. 183, 187, ¶¶ 16–17 (App. 2009). In *Hart*, we held that § 25-411 does not, by its terms, require the express findings that § 25-403 requires, and as in *Hart*, we decline here to "judicially impose a requirement the legislature has intentionally chosen not to require." 220 Ariz. at 187, ¶ 17.

¶14 Father next argues that the court erred by not complying with his Rule 82 request for findings of fact and conclusions of law. We disagree. Rule 82(A) provides that "[i]n all family law proceedings tried upon the facts, the court, if requested before trial, shall find the facts specially and state separately its conclusions of law thereon." Here, the court's order denying Father's petition sufficiently stated the factual bases for its conclusions. The court found that Father "ha[d] not provided" sufficient evidence to show that modification of the current order was appropriate. The court addressed the evidence presented by Father—such as the psychosexual evaluation and Father's refusal to adhere to his own expert's request that Father conduct a polygraph examination—and determined that such circumstances call "into question the results of the psychosexual exam." Based on these findings, we are able to evaluate the record and understand the reasons for the court's decision to deny Father's petition to modify parenting time.

II. THE COURT DID NOT APPLY AN INAPPROPRIATE BURDEN OF PROOF.

¶15 Father contends that the court abused its discretion by applying a "compelling evidence" burden of proof to his request to modify parenting time. When a party seeks to modify a parenting time order, the court must first determine whether there has been a "material change in circumstances affecting the welfare of the child." *Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 17 (App. 2015). The court does not evaluate the merits of a petition to modify unless this threshold showing is made. *See* A.R.S. § 25-411(J). The determination whether a change in circumstances exists is discretionary and is drawn from all evidence of record—it is not a function

of burdens of production and persuasion assigned to a single party. *See Brevick v. Brevick*, 129 Ariz. 51, 52 (App. 1981).

¶16 Here, Father sought to persuade the court that a change in circumstances existed, and for this proposition he relied on a psychosexual examination report. Yet his own expert testified that Father had not submitted to the polygraph portion of the examination, which "could have" made a difference in the examination's outcome. The court's statement that Father had not provided any "compelling evidence" showing that a modification of current orders was appropriate referred to its discretionary determination that no circumstance warranting modification existed. The court did not create a new burden of proof affecting the evaluation of the statutory factors governing legal decision-making and parenting time—its analysis never reached that stage because the evidence supporting changed circumstances was underwhelming.

¶17 We conclude the court reasonably determined that Father's failure to comply with all that was necessary for a reliable psychosexual evaluation placed the evaluation's results in doubt, and that Father did not demonstrate the necessary change in circumstances to warrant consideration of modification on the merits.

III. THE COURT DID NOT IMPOSE A REQUIREMENT UPON FATHER THAT HE COMPLETE A POLYGRAPH EXAMINATION.

¶18 Father contends that that the superior court abused its discretion by "unilaterally superimposing an improper requirement" that a polygraph examination "be included in the psychiatric expert's opinion." The argument mischaracterizes the issue. While it is true that polygraph evidence is not independently admissible, *Hyder v. Superior Court*, 127 Ariz. 36, 37 (1980), the court never suggested that it was. The court's comment that Father's failure to comply with the testing protocol, suggested by his own expert, affected its perception of the evidence was entirely appropriate. The court did not express an invitation, much less a requirement, that Father produce polygraph evidence. Instead it recognized that under Ariz. R. Evid. 703, experts may rely on otherwise inadmissible material in forming their opinions, and the quality of those opinions is a matter for evaluation by the finder of fact.

CONCLUSION

¶19 For the foregoing reasons, we affirm. In the exercise of our discretion, we deny Mother's request for attorney's fees on appeal.

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