IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

ALEX JEFFREY FRIEDMAN, *Petitioner/Appellee*,

v.

CORINNE DALIAH FRIEDMAN, *Respondent/Appellant*.

No. 1 CA-CV 17-0703 FC
FILED 9-11-2018

Appeal from the Superior Court in Maricopa County
No. FC2011-000108
The Honorable Pamela Hearn Svoboda, Judge

AFFIRMED

COUNSEL

Dickinson Wright PLLC, Phoenix
By Marlene A. Pontrelli, Michael R. Scheurich
Counsel for Petitioner/Appellee

Wilkins Law Firm PLLC, Phoenix
By Amy M. Wilkins
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

M c M U R D I E, Judge:

¶1 Corrine Dalia Friedman ("Mother") appeals from the denial of her petition to modify spousal maintenance. Mother argues the superior court abused its discretion by denying her petition to modify because there was an unanticipated, substantial, and continuing change in circumstances since the original support order. For the following reasons, we conclude the change in circumstances was not unanticipated and, therefore, does not constitute a substantial and continuing change in circumstances warranting a modification.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Alex Jeffrey Friedman ("Father") are Canadian citizens who were living in Arizona in 2011, when Father filed a petition for legal separation. The parties have one minor child, now age 15. Father has an E2 visa, which allows him to work in the United States on the condition that he invest $100,000 in a United States business and hire an American employee. Mother had an E2 dependent visa, which allowed her to work in the United States without restriction as long as she remained married to Father. Both visas must be renewed every two years and were due to expire on July 11, 2012, when the legal-separation petition was filed. In 2012 and 2014, Father renewed both parties' visas.

¶3 After a contested hearing, the separation decree awarded Mother spousal maintenance of $2800 a month for six years to "allow Mother the time she needs to secure additional employment and arrange for any training she needs to secure appropriate employment." The superior court also found that "Mother's immigration situation has affected her ability to gain employment."

¶4 In 2015, Father petitioned for dissolution and refused to renew Mother's dependent visa, which was due to expire in 2016. After her visa expired in July 2016, Mother had to return to Canada. The parties disputed whether the child should remain in Arizona with Father or live

with Mother in Canada. Mother also petitioned to modify her spousal maintenance due to the parties' divorce and her relocation to Canada. The superior court entered a dissolution decree allowing the child to return to Canada with Mother. The parties agreed to bifurcate the spousal maintenance issue which was addressed at a separate hearing.

¶5 The superior court subsequently denied the petition to modify spousal maintenance, finding that although Mother's return to Canada was a change in circumstances since the separation decree, it was a change Mother should have anticipated when the court initially awarded fixed-term spousal maintenance. Mother filed a timely notice of appeal from this order. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2).

DISCUSSION

¶6 The superior court can modify a spousal maintenance order upon a showing of a substantial and continuing change in circumstances since the decree was entered. *See* A.R.S. § 25-327(A); *MacMillan v. Schwartz,* 226 Ariz. 584, 588, ¶ 12 (App. 2011). "The burden of proving changed circumstances is on the party seeking modification." *McClendon v. McClendon*, 243 Ariz. 399, 401, ¶ 9 (App. 2017) (citing *Scott v. Scott,* 121 Ariz. 492, 494 (1979)). The superior court has discretion in determining whether there is a change of circumstances justifying a modification, and its decision will be upheld absent an abuse of that discretion. *MacMillan,* 226 Ariz. at 588, ¶ 12. We defer to the superior court's factual findings unless they are clearly erroneous but review questions of law *de novo*. *McClendon,* 121 Ariz. at 401, ¶ 8.

¶7 In 2011, when the original support order was issued, the superior court found Mother was employable, but she had trouble finding work in the United States due to her "immigration situation." The fixed-term award constituted a prediction that Mother should become self-sufficient within six years. *See Schroeder v. Schroeder,* 161 Ariz. 316, 322 (1989) (the duration of rehabilitative support awards represents the court's prediction of when independence will occur). "Should events subsequent to the decree occur—unanticipated at the time of the decree—that alter the time when self-sufficiency can be achieved, the trial court properly may decide that a substantial and continuing change in circumstances has occurred." *Id.* However, "[t]he future realization of conditions which could be reasonably anticipated by the parties at the time" of the original support order does not constitute changed circumstances warranting a

modification. *Alford v. Alford,* 18 Ariz. App. 1, 2 (1972), *overruled on other grounds in In re Marriage of Rowe,* 117 Ariz. 474, 476 (1978).

¶8 The divorce, Mother's return to Canada, and her need to obtain a Canadian real estate license, may be a change in circumstances since the 2011 decree, but these changes were not sudden or unanticipated as Mother claims. Mother contends that, at the time of the 2011 separation decree, the parties did not anticipate that Father would file for divorce and refuse to renew Mother's dependent visa. Mother alleged that the parties separated instead of divorced so she could remain in the United States, and they could co-parent their child. Mother claims the parties did not expect that she would return to Canada before their child turned eighteen in 2021. Father disputed this. According to Father, they had discussed divorce, and Mother knew he intended to file for divorce at some point and she would have to get her own visa if she wanted to remain in the United States. The superior court found Father's testimony more credible. We defer to this finding, *see Van Dyke v. Steinle,* 183 Ariz. 268, 273 (App. 1995), and conclude that Father filing for divorce was not an unforeseen change that would justify a modification, *see Alford,* 18 Ariz. App. at 2.

¶9 Additionally, Mother knew in 2011 that her immigration status made it difficult to find a job in the United States and that she may have to return to Canada if her visa was not renewed or she was not otherwise able to find work in the United States. Mother was also aware that E2 visas were not automatically renewed but had to be reviewed by the State Department every two years. Mother attempted to but was unable to obtain her own work visa, so she began training in 2013 to become a realtor, as a dependent on Father's E2 visa. However, Mother was aware her dependent visa was subject to renewal and required her to remain married to Father.

¶10 As of August 2016, Mother had a lead on a realtor position in Canada; but, according to Mother, this position would require a Canadian real estate license, which would take another two years to obtain. Yet, Mother never began that process and did not return to Canada until June 2017. At that time, the realtor position failed to materialize, and Mother did not apply for other jobs in Canada until July 2017.

¶11 Mother contends this case is like *Chaney v. Chaney,* 145 Ariz. 23 (App. 1985), which held that changed circumstances existed when the payor spouse retired three years after entry of a decree awarding the payee spouse lifetime maintenance. *Chaney* held that although the parties realized the payor spouse would probably retire three to four years after the decree,

the fact of the payor's retirement and the impact on his income would have been too speculative to reduce the *initial* award of lifetime maintenance based on the future retirement. *Id.* at 26–27. The appropriate time to consider the decreased income was after the change had occurred. *Id.*

¶12 Mother also cites *Hornbaker v. Hornbaker,* 25 Ariz. App. 577, 578 (1976), which held that changed circumstances existed when the payee spouse became employed after the decree awarded her lifetime maintenance. In *Hornbaker,* the superior court found no changed circumstances because the parties knew, at the time of the decree, that the payee spouse would enter the work force upon completing her degree. *Id.* This court reversed, holding that the specific facts of the payee spouse's employment were not known at the time of the initial award and, thus, her subsequent employment constituted a substantial change in circumstances. *Id.*

¶13 These cases are distinguishable because they involve lifetime maintenance. Where the award is for a fixed duration, there is a prediction regarding the receiving spouse's ability to become self-sufficient. *See Schroeder,* 161 Ariz. at 322. When unanticipated circumstances defeat that prediction, as in *Schroeder,* a modification is warranted. *Id.* at 323 (circumstances warranted modification of fixed-term award because payee spouse was unable to achieve financial independence within the anticipated time-frame due to unexpected serious illness and additional expenditures). That is not the case here.

¶14 Mother's uncertain immigration status was known at the time of the original maintenance order, and, based on that known fact, the superior court anticipated she could become self-sufficient in six-years. The realization of Mother's possible return to Canada within that six-year period was not speculative. The failure to achieve financial independence was a result of Mother's failure to adequately prepare for this eventuality. The change in Mother's circumstances was reasonably anticipated, and her failure to find employment was not sudden and unexpected but was the result of Mother's conduct that does not warrant modification.

¶15 Both parties request an award of attorney's fees and costs on appeal pursuant to A.R.S. § 25-324. In the exercise of our discretion, we award Mother a reasonable amount of attorney's fees upon compliance with Arizona Rule of Civil Appellate Procedure ("ARCAP") 21. Although unsuccessful, Mother did not take an unreasonable position on appeal, and Father has far greater financial resources. However, as the successful party

on appeal, Father is entitled to an award of costs on appeal upon compliance with ARCAP 21. *See* A.R.S. § 12-342.

CONCLUSION

¶16 We affirm the order denying Mother's petition to modify spousal maintenance. Mother is awarded her reasonable attorney's fees due to the financial disparity. Father is entitled to recover his costs.

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