IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

TARA BURKHALTER, *Petitioner/Appellant*,

v.

MICHAEL JANGULA, *Respondent/Appellee*.

No. 1 CA-CV 18-0139 FC
FILED 12-18-2018

Appeal from the Superior Court in Maricopa County
No. FC2017-094641
The Honorable Suzanne Scheiner Marwil, Judge

AFFIRMED

APPEARANCES

Tara Burkhalter, Phoenix
Petitioner/Appellant

Ellsworth Family Law, P.C., Mesa
By Steven M. Ellsworth, Spencer T. Schiefer
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Maria Elena Cruz delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Randall M. Howe joined.

C R U Z, Judge:

¶1 Appellant Tara Burkhalter ("Mother") challenges the family court's decree granting sole legal decision-making authority to Appellee Michael Jangula ("Father") for the parties' minor child, O.J. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Appellant Tara Burkhalter ("Mother") petitioned to establish legal decision-making, parenting time, and child support for the parties' minor child, O.J., in August 2017. Mother requested that she be named O.J.'s primary residential parent, that Father be allowed only supervised parenting time, and that Father pay child support. Father contended that he should be named O.J.'s primary residential parent and be given sole legal decision-making authority, alleging that Mother had "mental health issues that have not been addressed."

¶3 Following a trial, the family court entered a decree granting Father sole legal decision-making authority for O.J., granting both parties unsupervised parenting time, and ordering both parties to undergo random alcohol testing. The court also ordered Father to pay $378.56 in monthly child support and denied his attorneys' fees request.

¶4 Mother timely appealed the decree.[1] We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).

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[1] Mother attached several documents to her reply brief that she contends show the challenged findings were "based [on] lies and false accusations." Other than the child's birth certificate, however, it does not appear that any of the documents she attached were admitted into evidence at trial. Our review is limited to the evidence presented and admitted at trial. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 57, ¶ 16 n.1 (App. 2007) (citation omitted).

DISCUSSION

I. Waiver

¶5 Mother contends the court erred in granting Father sole legal decision-making authority for O.J. Mother contends some of the family court's findings "were hearsay and . . . not true" and that the court "took . . . lies into consideration" in making its decision. Father argues that Mother waived these contentions by failing to cite to any record evidence in her opening brief. *See* Ariz. R. Civ. App. P. ("ARCAP") 13(a)(7)(A) (opening brief must include "appropriate references to the portions of the record on which the appellant relies").

¶6 While Mother's opening brief cites no record evidence to support her contentions, we decline to apply waiver given our strong preference to resolve cases on the merits, particularly when a child's best interests are at issue. *See Adams v. Valley Nat. Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984) ("We recognize that courts prefer to decide each case upon its merits rather than to dismiss summarily on procedural grounds."); *cf. In re Marriage of Dieszi*, 201 Ariz. 524, 525, ¶ 2 (App. 2002) (declining to deem the failure to file an answering brief a confession of error where "a child's best interests are involved"). We thus consider Mother's specific contentions below.

II. Legal Decision-Making Authority

¶7 The family court must determine legal decision-making authority in accordance with the child's best interests. A.R.S. §§ 25-403(A), 25-403.01(A). In determining best interests, the court must consider the factors set forth in §§ 25-403(A) and 25-403.01(B). The court must make specific findings regarding all relevant factors and the reasons its decision is in the best interests of the child. *Hart v. Hart*, 220 Ariz. 183, 185-86, ¶ 9 (App. 2009).

¶8 The decree reflects the court's consideration of the relevant statutory factors. We therefore review its findings for an abuse of discretion. *Nold v. Nold*, 232 Ariz. 270, 273, ¶ 11 (App. 2013). We will find an abuse of discretion only if the record lacks any competent evidence to support the decision or if the court commits an error of law in reaching a discretionary conclusion. *Engstrom v. McCarthy*, 243 Ariz. 469, 471, ¶ 4 (App. 2018).

A. § 25-403.01(B)(3): The past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint legal decision-making

¶9 The court found Mother had "restricted Father from having parenting time since the parties separated" and that Mother had obtained an order of protection against Father. On appeal, Mother denies obtaining an order of protection against Father, but she admitted at trial that she had done so.

¶10 Mother also denies that she "is not capable of co-parenting." But Father and Mother's sister, Tanya Chavez, both testified regarding several incidents in which Mother demonstrated an unwillingness to co-parent. The family court had broad discretion to accept their testimony regarding those incidents. *See Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16 (App. 2009) ("Our duty on review does not include re-weighing conflicting evidence or redetermining the preponderance of the evidence.") (citing *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13 (1999)).

B. § 25-403.01(B)(4): Whether the joint legal decision-making arrangement is logistically possible

¶11 The court found that joint legal decision-making was not logistically possible, citing Father's testimony that (1) Mother had excluded him from certain decisions, (2) Mother had refused to exchange the child on past occasions, (3) Mother tried to alter O.J.'s birth certificate, (4) Mother called the police at the parties' exchanges of the child, and (5) Mother was unable to co-parent her other children with their father. There is record support for each of these findings.

¶12 Mother denies that she excluded Father from decision-making. Father testified, however, that she refused to let him take O.J. to the doctor and did not consult him before having O.J.'s ears pierced. Father also testified that Mother attempted to alter O.J.'s birth certificate. On appeal, Mother denies that she "altered any birth certificate" and contends she "always informed Father of doctor's appointments," but she does not point to evidence in the record to rebut Father's trial testimony.

¶13 Mother also contends Father called the police to child exchange locations and "refused to change locations." There is record evidence indicating, however, that it was Mother who called the police to pickup locations and refused to discuss changing the location of exchanges.

C. § 25-403(A)(5): The mental and physical health of all individuals involved

¶14 The family court found that Mother had certain "problematic personality traits." Mother contends that she did not lose custody of her other children because of her alleged drinking and that she never provided "false information regarding drinking." She also denies she threatened suicide. But Mother's sister and Father testified otherwise, and the court had discretion to accept their testimony. *Hurd*, 223 Ariz. at 52, ¶ 16. The court also cited in its findings a psychological evaluation of Mother that concluded "it would be difficult for [her] to co-parent," given certain elevated personality traits. The evaluator testified in support of this conclusion, which Mother does not address on appeal.

¶15 Mother also contends she "has not dr[u]nk in years" and that her sister "lied about knowing [her] drinking habits." Mother admitted at trial to drinking between 2011 and when she became pregnant with O.J. in 2016. Moreover, to the extent the court relied on her sister's testimony on this issue, it had broad discretion to determine witness credibility. *Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 18 (App. 2015) (citation omitted).

¶16 Mother also contends Father "continue[s] to smoke marijuana regularly." Father admitted to smoking marijuana in the past but denied doing so since O.J. was born. He also offered a recent drug test in which he tested negative for THC. Mother presented no competent evidence to rebut this testimony.

D. § 25-403(A)(6): Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent

¶17 The family court found that Mother had "proved resistant to Father exercising parenting time" by, among other things, not allowing Father to see O.J. for approximately thirty days after their relationship ended. The record supports these findings.

¶18 Mother responds that Father "never requested to see [O.J.]" and testified that she would "still send Father updates." The court clearly considered and in fact cited her testimony in making its findings on this factor. We defer to its weighing of the evidence. *Vincent*, 238 Ariz. at 155, ¶ 18.

E. § 25-403(A)(8): Whether there has been domestic violence or child abuse pursuant to § 25-403.03

¶19 Mother contends the court erred in finding she hit Father. **[OB, p. 2.]** The court only found that "Father says Mother hit him and they had heated arguments." The court also cited Mother's testimony that Father once "put his hands on her for taking [O.J.] for a walk" and verbally abused her during their relationship. Notably, the court did not say whether this factor favored either parent. We are unable to conclude the court erred in considering this factor.

III. Attorneys' Fees on Appeal

¶20 Father requests his attorneys' fees incurred on appeal pursuant to A.R.S. § 25-324(A), under which we must consider both parties' financial resources and the reasonableness of their positions throughout the proceedings. *Keefer v. Keefer*, 225 Ariz. 437, 441, ¶ 16 (App. 2010). Father does not challenge the family court's finding that he has "considerably more [financial] resources available" than Mother. He contends, however, that Mother's appeal is frivolous and caused him to incur unnecessary fees.

¶21 Having reviewed the record on appeal, we decline to award attorneys' fees. Father may recover his taxable costs incurred on appeal upon compliance with ARCAP 21.

CONCLUSION

¶22 The family court did not abuse its discretion in awarding Father sole legal decision-making authority for O.J. We therefore affirm.

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