IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

DAVID C., *Petitioner/Appellant*,

v.

LORI C., *Respondent/Appellee*.[1]

No. 1 CA-CV 18-0673 FC
FILED 9-26-2019

Appeal from the Superior Court in Maricopa County
No. FC2010-070032
The Honorable Lisa Ann VandenBerg, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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Lori Cooper, Surprise
Respondent/Appellee

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[1] To safeguard the identity of the child, we amend the caption of this appeal as shown above. We order that the above caption shall be used on all future documents filed in this matter.

MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Michael J. Brown and Judge Kent E. Cattani joined.

S W A N N, Chief Judge:

¶1 David C. ("Father") appeals the superior court's order granting Lori C. ("Mother") sole legal decision-making, designating her the primary residential parent of their minor child, and awarding her attorney's fees. We detect no abuse of discretion with respect to the court's rulings on legal decision-making and parenting time, and we therefore affirm them. We vacate the attorney's fee award as unsupported by the evidence.

FACTS AND PROCEDURAL HISTORY

¶2 In 2010, Father and Mother divorced by consent decree, agreeing to joint legal custody of their child and weekly parenting time for Father from Thursday evening through either Saturday morning or Sunday evening depending on the week. Six years later, the parties filed cross-petitions to modify legal decision-making and parenting time. After a hearing, the superior court entered an order affirming joint legal decision-making and increasing Father's summer parenting time (the "April 2017 Order").

¶3 The following year, the child's sixth-grade teacher sent a letter to both parents expressing concern about the child's poor school performance and overall well-being. That same month, the child expressed suicidal thoughts to Father.

¶4 Father thereafter petitioned the superior court for sole legal decision-making. When Mother failed to appear at the temporary orders hearing, the court granted Father's request pending further court order. With three weeks remaining in the school year, Father removed the child from his school near Mother's home, which he had attended since kindergarten, and enrolled him in a school near Father's home. Father also initiated safe-harbor counseling for the child, without Mother's consent. In response, Mother filed multiple pleadings, including a cross-petition to modify legal decision-making, parenting time, and child support. Like Father, she sought sole legal decision-making.

¶5 After an evidentiary hearing, the superior court granted Mother sole legal decision-making authority, designated her the primary residential parent, and awarded her $5,965 in attorney's fees. The court granted Father parenting time every other weekend from Friday evening until Monday morning, with the parenting schedule set forth in the April 2017 Order to be reinstated upon Father's participation in a counseling assessment and all recommended treatment. The court denied Father's motion for new trial. Father appeals.

DISCUSSION

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY AWARDING MOTHER SOLE LEGAL DECISION-MAKING AND MAKING HER THE PRIMARY RESIDENTIAL PARENT.

¶6 The superior court must determine legal decision-making and parenting time in accordance with the best interests of the child. A.R.S. §§ 25-403(A), -403.01(B), -403.02(B). We review the court's rulings for abuse of discretion. *See In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 3 (App. 2002).

A. The Superior Court Did Not Abuse Its Discretion by Implicitly Finding Changed Circumstances.

¶7 When considering a petition to change legal decision-making or parenting time, the court must determine whether there has been a change in circumstances materially affecting the child's welfare. *See Christopher K. v. Markaa S.*, 233 Ariz. 297, 300, ¶ 15 (App. 2013). Father contends that the superior court erred by failing to make written findings of changed circumstances.

¶8 Because changed circumstances is a threshold requirement for modifying legal decision-making or parenting time, we encourage trial judges to make written findings regarding changed circumstances. But no statute or case requires written findings, and here, neither party requested findings under ARFLP 82(a). We therefore infer that the superior court implicitly found changed circumstances and, on this record, we conclude that reasonable evidence easily supported the implicit finding. Father himself raised the child's mental state as a significant issue that could in itself support such a finding. *See Silva v. De Mund*, 81 Ariz. 47, 50 (1956) (holding that when express findings not required, appellate court "must assume the trial court found every controverted issue of fact necessary to sustain the judgment and, if there is reasonable evidence to support such findings, hold that it did so correctly").

B. The Superior Court Made the Statutorily Required Findings Regarding Mother's Opioid Use.

¶9 Father next contends that the superior court erred by failing to explain how its legal decision-making and parenting time rulings adequately protect the child from Mother's use of prescription opioids.

¶10 Section 25-403.04 creates a rebuttable presumption that a court should not award sole or joint legal decision-making authority to a parent who has abused drugs or alcohol within the past twelve months. If the court finds that such substance abuse has occurred, it must consider, "at a minimum," the following evidence to determine if the substance-abusing parent has rebutted the presumption:

> 1. The absence of any conviction of any other drug offense during the previous five years.
>
> 2. Results of random drug testing for a six month period that indicate that the person is not using drugs as proscribed by title 13, chapter 34.
>
> 3. Results of alcohol or drug screening provided by a facility approved by the department of health services.

A.R.S. § 25-403.04(B). The court also must explain how its order "appropriately protects the child." A.R.S. § 25-403.04(A)(2).

¶11 Here, evidence offered at trial suggested that Mother is opioid-dependent. Based on that evidence, the superior court determined that § 25-403.04 applied and the presumption arose. The court then considered the statutory factors but found that no evidence relating to them existed. Consistent with the statute, the court also considered *additional* factors before concluding that Mother had rebutted the presumption. The court found:

> [T]he evidence does not demonstrate that Mother's prescription drug use has posed a danger to the Child or rendered Mother incapable of making good legal decisions for her Child. Instead, Mother testified to a recent promotion at her job and the Child reported to CAA [the Court-Appointed Advisor] that Mother is attentive to his needs including education and that he had begun to improve his grades when Father withdrew him from [the school near Mother's home].

The foregoing satisfied § 25-403.04.

C. Sufficient Evidence Supports the Superior Court's Rulings.

¶12 Father finally contends that the superior court's legal decision-making and parenting-time rulings are not supported by competent evidence.

¶13 Father contends that the court erroneously interpreted and relied upon the April 2017 Order. Father is correct that Mother's medical records were not available to the court in April 2017. Accordingly, it would have been improper for the court to rely *solely* upon the April 2017 findings for its 2018 rulings. But the 2018 order reflects that the court considered new evidence, including Mother's medical records, the CAA's report, and the trial testimony.

¶14 Overall, the evidence presented at trial regarding both Mother and Father was conflicting. Though medical records suggest that Mother is opioid-dependent, she denied addiction, and other evidence suggested that her prescription-drug use did not render her unable to appropriately parent. As to Father, the CAA expressed concern about Father's anger, excessive drinking, and how those factors affect his relationship with the child, but Father denied a drinking problem and testified that he and the child have a good relationship.

¶15 Our role on appeal is not to re-weigh conflicting evidence. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16 (App. 2009). Rather, "[w]e must give due regard to the [superior] court's opportunity to judge the credibility of the witnesses," and we must affirm the court's ruling "if substantial evidence supports it." *Id.* Here, sufficient evidence supports the superior court's decision to award Mother sole legal decision-making authority and make her the primary residential parent.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BY AWARDING ATTORNEY'S FEES TO MOTHER.

¶16 The superior court may award attorney's fees and costs in a domestic-relations matter after considering the financial resources of the parties and the reasonableness of their positions. A.R.S. § 25-324(A). We will not disturb such an award absent an abuse of discretion. *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 36 (App. 2011). The court abuses its discretion when the record is devoid of competent evidence to support the decision. *Engstrom v. McCarthy*, 243 Ariz. 469, 471, ¶ 4 (App. 2018).

¶17 The superior court awarded fees to Mother based on findings that Father had acted unreasonably by (1) transferring the child to a new school, (2) retaining a safe-harbor counselor for the child without Mother's permission, (3) refusing to transport the child to school on Monday mornings, and (4) requesting Mother's medical records. The record is devoid of competent evidence to support those findings. First, when Mother failed to appear at the temporary orders hearing, Father obtained sole legal decision-making authority. In view of the child's acute emotional distress, Father's exercise of his authority to transfer the child to a new school and retain a counselor was reasonable. In addition, Father's efforts to obtain Mother's medical records were reasonable. The records he obtained reflect evidence of prescription-drug addiction—entirely appropriate evidence for Father to bring to the superior court's attention. Finally, it was not Father's responsibility to drive the child to school on Monday mornings. The court had earlier clarified that the parent "commencing their parenting time"—which was Mother on Monday mornings—was responsible for transporting the child to school.

¶18 We therefore conclude that the superior court abused its discretion by awarding attorney's fees to Mother, and we vacate that award.

CONCLUSION

¶19 For the foregoing reasons, we affirm the superior court's rulings on legal decision-making and parenting time, but we vacate the attorney's fee award. In exercise of our discretion, we deny Father's request for fees on appeal under § 25-324.

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