IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TAMERA LYNN VAN BERKEL, *Petitioner/Appellant*,

v.

PAUL WILLIAM VAN BERKEL, *Respondent/Appellee*.

No. 1 CA-CV 19-0829 FC
FILED 12-15-2020

Appeal from the Superior Court in Maricopa County
No. FC2007-006101
The Honorable Melissa Iyer Julian, Judge

AFFIRMED

COUNSEL

Law Offices of Kimberly A. Eckert, Tempe
By Kimberly A. Eckert
Counsel for Petitioner/Appellant

Paul William van Berkel, Gilbert
Respondent/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Cynthia J. Bailey joined.

C A T T A N I, Judge:

¶1 Tamera van Berkel ("Mother") appeals the superior court's order modifying her parenting time and child support obligation as to her minor son. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Paul van Berkel ("Father") were divorced in 2010 after a nine-year marriage. Mother and Father have two children: a son (J.V.) born in 2003, and a daughter (T.V.) born in 2005. After multiple post-dissolution proceedings, the superior court adopted a parenting plan in 2016 that gave each parent equal parenting time and joint legal decision-making authority over both children.

¶3 After the 2016 parenting plan went into effect, Mother's relationship with J.V. deteriorated. Both Mother and J.V. described arguments that escalated to physical violence, and Mother called the police on several occasions while J.V. was at her house, stating that she feared for her safety. Mother sent J.V. to Father's house after several arguments, and at one point asked Father to take over parenting J.V. full-time.

¶4 Mother and J.V. eventually resolved their disagreements, but in November 2018, they again argued, and Mother told J.V. to leave and live at Father's house. J.V. thereafter refused to see Mother, and although Mother tried to force J.V. to see her, he refused to do so.

¶5 In April 2019, Father petitioned to modify legal decision-making and parenting time, alleging that J.V.'s fractured relationship with Mother was harmful to J.V. Mother opposed modification and petitioned to enforce the existing parenting time order. The superior court selected a court-appointed advisor ("CAA") to conduct interviews and make recommendations to the court about the children's best interests, and the court subsequently held an evidentiary hearing on the modification request and the petition to enforce.

¶6 The CAA testified at the hearing that J.V. preferred to live with Father full-time and did not want to have a relationship with Mother. Mother testified that Father had poisoned her relationship with J.V., whereas Father asked the court to consider Mother's history of mental health issues and alcoholism.

¶7 The superior court modified parenting time as to J.V. based on the "increasingly toxic" relationship between Mother and J.V. Although recognizing the parents' high-conflict relationship, the court left joint legal decision-making in place. As to Mother's relationship with J.V., the court found that both Father and Mother had behaved poorly and had actively contributed to the deterioration of Mother's relationship with J.V. The court nonetheless found that designating Father as J.V.'s primary residential parent and temporarily eliminating Mother's parenting time with J.V. was in J.V.'s best interests. The court designed a relationship-rebuilding and reunification plan involving individual therapy for J.V., followed by reunification therapy between Mother and J.V., transitioning to once-weekly then increasing parenting time upon recommendation by J.V.'s individual therapist. Finally, the court adjusted child support in light of the changed parenting time order, requiring Mother to pay Father $808 per month.

¶8 Father timely appealed the superior court's ruling, and Mother filed a cross-appeal. This court later dismissed Father's appeal, leaving only Mother's challenge to the superior court's ruling.[1] We have jurisdiction under A.R.S. § 12-2101(A)(2).

DISCUSSION

¶9 Mother challenges the superior court's parenting time order and the court's child support order.

I. Parenting Time.

¶10 Mother does not contest the superior court's authority to modify parenting time in light of her changed relationship with J.V. *See*

[1] Additionally, Mother moved to strike Father's answering brief, asserting that it contained information that is not part of the record. We previously denied Mother's motion, but we will consider only those facts in the record before the superior court. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 500 (App. 1992); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990).

Christopher K. v. Markaa S., 233 Ariz. 297, 300, ¶ 15 (App. 2013). Rather, she argues that the court abused its discretion by eliminating her parenting time with J.V. and by failing to establish a sufficient reunification timeline. We review an order modifying parenting time for an abuse of discretion. *DeLuna v. Petitto*, 247 Ariz. 420, 423, ¶ 9 (App. 2019).

¶11 Arizona law favors "substantial, frequent, meaningful and continuing parenting time with both parents," A.R.S. § 25-103(B)(1), and generally presumes that "equal or near-equal parenting time is . . . in a child's best interests." *Woyton v. Ward*, 247 Ariz. 529, 531, ¶ 6 (App. 2019); *see also Baker v. Meyer*, 237 Ariz. 112, 114, ¶ 6 (App. 2015). Presumptions notwithstanding, the superior court must make a parenting time determination in accordance with the best interests of the child. A.R.S. § 25-403(A); *see also Andro v. Andro*, 97 Ariz. 302, 305 (1965). The court must consider all relevant factors weighing on the child's well-being, including the parents' relationship with the child, the child's wishes if the child is of a suitable age and maturity, and whether the parent will allow the child frequent, meaningful, and continuing contact with the other parent. A.R.S. § 25-403(A)(1), (4), (6). Accordingly, the superior court retains discretion to depart from near-equal parenting time if the circumstances presented show a different plan to be in the child's best interests. *Gonzalez-Gunter v. Gunter*, 249 Ariz. 489, 492, ¶ 11 (App. 2020). Recognizing that the superior court is in the best position to judge witness credibility and weigh conflicting facts, "[w]e will not reweigh the evidence or substitute our evaluation of the facts." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51–52, ¶ 11 (App. 2009).

¶12 Relying primarily on her own testimony, Mother argues that the evidence does not support the court's decision to temporarily eliminate her parenting time. But the court made comprehensive best-interests findings, and the record provides ample support for those findings, as well as for the court's ultimate parenting time plan. The record shows, and Mother does not dispute, that her relationship with J.V. deteriorated. *See* A.R.S. § 25-403(A)(1). J.V., then 16 years old, indicated that he did not want to have a relationship with Mother, *see* A.R.S. § 25-403(A)(4), and the CAA described the relationship between Mother and J.V. as fraught with a "great deal of resentment" and a "great deal of hurt." Although Mother disagrees with the superior court's assessment of who is to blame for the disruption in her relationship with J.V., the court's findings and its modified parenting time plan are supported by the record. *See Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16 (App. 2009); *see also McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6 (App. 2002).

¶13 Citing A.R.S. § 25-411(J), Mother contends that a simple best-interests finding was insufficient and that the superior court erred by

reducing her parenting time without finding that she would seriously endanger her child's health. Subsection 25-411(J) authorizes "modify[ing]" a parenting time order based on the child's best interests, but prohibits "restrict[ing] a parent's parenting time rights" absent a finding "that the parenting time would endanger seriously the child's physical, mental, moral or emotional health." But the "endanger seriously" finding is required only to "restrict" parenting time rights, which refers not to reducing parenting time, but rather to placing conditions on *how* a parent may exercise parenting time. *Gonzalez-Gunter*, 249 Ariz. at 492, ¶ 13 (citing *Hart v. Hart*, 220 Ariz. 183, 187–88, ¶¶ 16, 18 (App. 2009)). Here, the court's order reduced but did not "restrict" Mother's parenting time, so § 25-411(J) does not apply.

¶14 Finally, Mother contends that the superior court erred by failing to set specific deadlines to complete each step of the reunification process. The superior court has discretion to create a parenting plan in the child's best interests. *See* A.R.S. § 25-403.02(B); *Armer v. Armer*, 105 Ariz. 284, 289 (1970). Although Mother asserts that the lack of a more concrete reunification plan rewarded Father's bad behavior, the record supports the superior court's exercise of its discretion to formulate a parenting plan to meet J.V.'s needs while allowing for gradual reunification as Mother and J.V. rebuild their relationship.

¶15 The multi-step reunification plan provides for individual therapy for J.V. and reunification counseling under a specified timeline. The plan provides for weekly dinners with J.V. after as few as two counseling sessions, at the recommendation of the therapists. Mother's parenting time would then increase gradually until Mother and Father have equal parenting time or J.V. emancipates. Although Mother argues that the superior court should have imposed a fixed date by which equal parenting time would be reinstated, the court cannot dictate timelines for successful therapeutic intervention; instead, the child's best interests must drive the timeline. *See Jordan v. Rea*, 221 Ariz. 581, 589, ¶ 19 (App. 2009). Here, the court's multi-tiered reunification plan properly serves the ultimate goal of providing Mother with substantial, frequent, and meaningful parenting time consistent with J.V.'s best interests. Because the plan falls within the court's broad discretion, we affirm. *See Armer*, 105 Ariz. at 289.

II. Child Support.

¶16 Mother next argues that the superior court erred in calculating child support, first by miscalculating Father's income and

second by not crediting Mother with any parenting time despite the gradual reunification plan.

¶17 We review a superior court's child support calculation for an abuse of discretion, accepting the court's factual findings unless clearly erroneous. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5 (1999); *Engel v. Landman*, 221 Ariz. 504, 510, ¶ 21 (App. 2009). But we "draw our own legal conclusions from facts found or implied in the judgment." *McNutt*, 203 Ariz. at 30, ¶ 6 (citation omitted).

¶18 Mother argues that the court miscalculated Father's income because (1) the court failed to base its calculation of his income on gross receipts from his business and (2) the court should have imputed additional income to him because he is voluntarily underemployed.

¶19 Mother relies on $156,000 of gross receipts from Father's chiropractic business to suggest that the superior court erred by attributing Father an annual income of only $68,252. For child support purposes, gross income means "income from any source." A.R.S. § 25-320 app. ("Guidelines") § 5(A). The Guidelines calculate gross income from self-employment by subtracting the "ordinary and necessary expenses required to produce income" from gross receipts. Guidelines § 5(C). The court has discretion to determine which expenses qualify for these purposes. *Id.*

¶20 The superior court did not err in calculating Father's income. Recognizing that Father was the sole shareholder in his chiropractic business, the court arrived at the total of $68,252 by relying on the total amount of wages, income, losses, and dividends set forth in the business tax return. Although the parties offered divergent views on Father's income—Mother suggesting $85,000 and Father relying on the $48,000 reported on his personal tax return—the court's calculation properly focused on net earnings the business generated and distributed to Father as income. *See Strait v. Strait*, 223 Ariz. 500, 502, ¶ 8 (App. 2010); *cf. Milinovich v. Womack*, 236 Ariz. 612, 616, ¶ 15 (App. 2015).

¶21 Mother next argues that Father, who works 30 hours per week, is voluntarily underemployed and that the superior court thus should have imputed a higher income to him. The Guidelines allow but do not require the superior court to impute income up to full earning capacity if a parent is unemployed or underemployed voluntarily and unreasonably. *See* Guidelines § 5(E); *see also Little*, 193 Ariz. at 521, ¶ 6. In the context of self-employment in particular, the Guidelines are "not limited by any artificial construct of a forty-hour workweek," recognizing that "full-time"

work may reflect schedules both over and under 40 hours per week. *See McNutt*, 203 Ariz. at 32, ¶¶ 14–15. To determine whether imputation of additional income is appropriate, the court considers factors including the financial impact on the children, the reasonableness of the parent's decision to leave or reduce work, and whether the parent made the decision in good faith. *Little*, 193 Ariz. at 522–23, ¶¶ 12–14.

¶22 Here, the record supports the court's decision not to impute additional income to Father. Father did not terminate his employment. Instead, he is working a 30-hour-average workweek at a self-owned business. And Mother failed to present any evidence that Father's 30-hour-per-week pay has placed the children in financial peril or was otherwise unreasonable. *See McNutt*, 203 Ariz. at 33, ¶ 21. The superior court considered the evidence regarding the adequacy of Father's employment and income, and we do not reweigh the evidence on appeal. *See Clark v. Kreamer*, 243 Ariz. 272, 276, ¶ 14 (App. 2017).

¶23 Finally, Mother argues that the superior court failed to adjust her support obligation to credit her with any parenting time with J.V., which she asserts disincentivized Father from facilitating the reunification process. For a parent like Mother, who has multiple children subject to different parenting plans, but does not have more than half of the parenting time with any child, the court determines the appropriate parenting time cost adjustment by averaging the total number of parenting time days (the sum of the days with each child, divided by the number of children). Guidelines § 16. Here, the superior court properly calculated that average as 91 parenting days (182 days for T.V., 0 days for J.V.), yielding an adjustment percentage of 16.1%. *See* Guidelines § 11 Parenting Time Table A; Guidelines § 16.

¶24 Mother asserts that the superior court should have accounted for her anticipated phased-in parenting time, which would begin upon the reunification therapists' recommendation. But Mother will not qualify for a different adjustment percentage until she exceeds an additional 48 days of parenting time with J.V. *See* Guidelines § 11 Parenting Time Table A (0.161 adjustment percentage applicable to credit for 88 to 115 days); Guidelines § 16. Although the court's reunification plan contemplates dinner visits expanding into overnight visits and eventually to equal parenting time, Mother must exercise many more days of parenting time before the adjustment will affect her child support obligation. And the Guidelines allow for modification of a child support order upon a substantial and continuing change of circumstances like Mother's anticipated substantial increase in parenting time. *See* Guidelines § 24.

Accordingly, the superior court properly adjusted Mother's support obligation to reflect current (and potentially expanded) parenting time.

III. Attorney's Fees and Costs on Appeal.

¶25 Mother requests an award of attorney's fees incurred on appeal pursuant to A.R.S. § 25-324(A). After considering the parties' financial resources and the reasonableness of their positions, in the exercise of our discretion, we decline Mother's request.

CONCLUSION

¶26 Because reasonable evidence supports the superior court's determination of parenting time and child support, we affirm.

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