IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DENNIS ELDER, *Petitioner/Appellee*,

v.

TIFFANY KUSMIT, *Respondent/Appellant*.

No. 1 CA-CV 20-0034 FC

FILED 11-17-2020

Appeal from the Superior Court in Maricopa County
No. FC2015-009002
The Honorable Kevin B. Wein, Judge

AFFIRMED

COUNSEL

Bonnie Yarbrough PLC, Mesa
By Bonnie Yarbrough
Counsel for Petitioner/Appellee

Adam C. Rieth PLLC, Mesa
By Adam C. Rieth
Counsel for Respondent/Appellant

MEMORANDUM DECISION

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

B A I L E Y, Judge:

¶1 Tiffany Kusmit ("Mother") challenges the trial court's ruling denying her petition to modify legal decision-making, parenting time, and child support. Because Mother has shown no error, we affirm the order.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Mother and Dennis Elder ("Father") have one minor child, K.E., born in November 2008. In 2016, the trial court approved an agreement granting the parties joint legal decision-making and equal parenting time. In 2018, after Mother petitioned the court to modify its order, the court awarded Father sole legal decision-making as to education and medical care and designated Father as K.E.'s primary residential parent, awarding Mother parenting time on alternating weekends and every Wednesday.

¶3 In July 2019, Mother petitioned to modify the 2018 order. Mother alleged Father had failed to advise her of K.E.'s medical appointments, was not meeting K.E.'s medical needs, prematurely terminated K.E.'s counseling, and that K.E.'s behavioral issues had worsened at home and at school.

¶4 At a hearing on the petition in November 2019, Mother testified that after the 2018 order, K.E. had become increasingly disrespectful both at her home and at school. Mother also testified K.E. had begun "getting lower grades than is typical for her," and had multiple school detentions. As of the date of the hearing, K.E. had five B's and three A's, but according to Mother, "[K.E.]'s capable of getting all A's in her classes." Mother further asserted that Father failed to consistently initial K.E.'s homework sheets and that during Father's parenting time K.E. had been tardy several times and had multiple dress-code violations. As to

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[1] "We view the evidence in the light most favorable to sustaining the family court's findings . . . ." *Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 17 (App. 2015).

K.E.'s medical needs, Mother testified Father consistently failed to take K.E. to annual exams and regular dental check-ups.

¶5 Father disputed Mother's allegations. For example, although he acknowledged that he did not take K.E. to the dentist for over a year after she began to show signs of cavities in 2018, he clarified that the dentist had recommended dealing with the cavities "when it becomes a problem." Father also testified, and school records confirmed, that K.E. had only four tardies during the entire school year. Father further offered that he signed K.E.'s homework sheets only when K.E. requested it, explaining that he and K.E.'s teacher had agreed that K.E. should be responsible for getting Father's signature on her homework.

¶6 After considering the evidence, the court found "there has been no material change in circumstances" since the 2018 order. The court determined it was unclear whether K.E.'s performance at school had declined, as there was "little testimony" showing any difference in her performance over the last two school years. The court also concluded that Father had addressed K.E.'s medical needs in a reasonably timely fashion, noting that none of K.E.'s medical professionals shared Mother's concerns. As to Mother's allegation that Father prematurely ended K.E.'s counseling, the court found that Father credibly testified otherwise. Because the court found no material change in circumstances, it did not consider whether a change in custody would be in K.E.'s best interest.

¶7 We have jurisdiction over Mother's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶8 In considering a change in legal decision-making, the trial court must determine whether there has been a change in circumstances materially affecting the welfare of the child, and if so, whether a change in legal decision-making is in the child's best interest. *Black v. Black*, 114 Ariz. 282, 283 (1977); *see also Pridgeon v. Superior Court (La Marca)*, 134 Ariz. 177, 180 (1982) ("Only after the court finds a change has occurred does the court reach the question of whether a change in custody would be in the child's best interest.").

¶9 Mother asserts that the trial court erred by rejecting her argument that three changed circumstances warranted a modification of legal decision-making and parenting time: (1) Father's termination of K.E.'s

counseling; (2) K.E.'s issues at school; and (3) Father's failure to meet K.E.'s medical needs.

¶10 We review the trial court's ruling on a motion for change in legal decision-making for abuse of discretion. *Pridgeon*, 134 Ariz. at 179. We will not reverse the trial court's decision unless there is "a clear absence of evidence to support its actions." *Id.* We defer to the court's findings of fact unless they are clearly erroneous. *Engstrom v. McCarthy*, 243 Ariz. 469, 471, ¶ 4 (App. 2018).

¶11 Mother argues that in addressing the counseling issue, the court abused its discretion by relying on testimony from Father that the court had previously excluded. But this argument misconstrues the record. The court did not preclude Father's testimony that K.E. did not need counseling. Instead, the court excluded Father's opinion that counseling might be necessary to address Mother and K.E.'s relationship. The court properly considered Father's opinion that K.E. no longer needed counseling. And although the 2018 order stated that the "[f]ailure to pursue regular counseling for the Child may be considered in the context of any future motions to modify this order," the court was not required to find Father's termination of K.E.'s counseling to be a material change in circumstances that warranted modification. Moreover, Mother testified that K.E. actually stopped counseling in December 2017—five months before the 2018 order granting Father sole medical decision-making. Thus, Mother did not establish a change from the date of the 2018 order.

¶12 Mother also argues the court only considered the broad categories of education and medical decision-making, but did not examine the specific facts alleged in each category. Not so. As the court's order reflects, it did consider specific allegations, including K.E.'s school tardies, behavioral concerns, grades, and the totality of K.E.'s medical needs. Mother asks this court to reweigh the evidence, something we will not do on appeal. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 12 (App. 2002). The trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of the witnesses, and make appropriate findings." *Id.* at 280, ¶ 4. The court has broad discretion in deciding whether a material change in circumstances has occurred. *Pridgeon*, 134 Ariz. at 179. Mother does not show the court abused its discretion by concluding that no material change in circumstances existed. *See id.*

¶13 Finally, Mother claims the court's failure to make any best-interest findings pursuant to A.R.S. § 25-403 was an abuse of discretion.

However, the court was not required to make any best-interest findings because it concluded there had been no material change in circumstances. *See Black*, 114 Ariz. at 283.

¶14 Both Mother and Father request their attorneys' fees and costs incurred on appeal. In an exercise of discretion, we decline to award either party their attorneys' fees and costs incurred on appeal.

CONCLUSION

¶15 Because Mother has shown no error, we affirm the court's order denying her petition to modify.

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