IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

CARY YOUNG,
Petitioner/Appellant,

v.

DARCY A. BENOIT,
Respondent/Appellee.

No. 1 CA-CV 21-0293 FC
FILED 5-31-2022

Appeal from the Superior Court in Maricopa County
No. FC2011-007603
FC2011-007604
The Honorable Bradley H. Astrowsky, Judge

VACATED AND REMANDED

APPEARANCES

Cary Young
Petitioner/Appellant

Scottsdale Family Law, PLLC, Scottsdale
By Aaron T. Blase
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Presiding Judge David D. Weinzweig delivered the decision of the Court, in which Judge Brian Y. Furuya and Judge Jennifer M. Perkins joined.

W E I N Z W E I G, Judge:

¶1 Cary Young ("Father") appeals the family court's modification order denying him parenting time and awarding Darcy Benoit ("Mother") sole legal decision-making authority. Because the court erred, we vacate and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Father dated for several months in 2010 and 2011. They had sex, often unprotected, and Mother got pregnant. Their relationship ended before the child, Jack, was born in October 2011.[1] Two months later, Father petitioned the family court to establish paternity, child custody, parenting time and child support.

Agreement and Original Order (2012)

¶3 Mother and Father resolved all issues under a "Joint Custody Agreement and Parenting Plan." Both parents were represented by counsel, and both signed the agreement. In relevant part, the agreement provided that "[t]he parties have taken into consideration the best interest of the minor child as required under A.R.S. § 25-403," "[n]either parent is influenced by duress or coercion in entering into this Agreement," "FATHER and MOTHER can sustain an ongoing commitment to the child," and "[t]here has been no significant domestic violence that would preclude joint legal custody in this matter."

¶4 The court entered a stipulated order ("2012 Decree"), awarding Mother final decision-making authority on important decisions and awarding Father parenting time every other weekend. The 2012 Decree confirmed: "Both parties testify that they understand this agreement and believe it is to be in the best interests of the minor children at this time, that

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[1] We use a pseudonym to protect the child's identity.

no one has threatened, promised or coerced them in any way to get them to reach the agreement; and the terms are fair and equitable."

¶5 The court found it was "in the best interests of the parties' minor child that the parties are awarded joint legal custody" under A.R.S. § 25-403. The court also found that Mother and Father had "mutually agreed to proceed by consent," that "no duress or coercion [was] involved in the negotiations," and that "each party underst[ood] that by virtue of this agreement, they are waiving their right to trial." Neither Father nor Mother appealed from the 2012 Decree.

First Modification (2016)

¶6 Almost two and a half years later, Mother petitioned to modify the 2012 Decree, requesting sole legal decision-making and that Father's parenting time be supervised. She alleged a substantial and continuing change of circumstances based on an order of protection she secured against Father—arising from harassment when Jack was exchanged—as well as evidence that Father cut Jack's hair without Mother's consent, that Father was a "religious fanatic" who imposed his beliefs on the child, and that Father disregarded medical advice by giving Benadryl and adult probiotics to Jack. Father denied the allegations and petitioned for joint legal decision-making, a modification in his favor.

¶7 The family court appointed an advisor and licensed psychologist ("first advisor") to investigate the claims. The first advisor met and interviewed both parents and issued a written report of his findings. He reported that both "parents agree that the past, present, and potential future relationship between both parents and the child is very good," but noted the "parents communicate poorly," and "[t]here is considerable upset between them." The report recounts that "Mother alleges a history of emotional and verbal abuse," mostly "mental," although he "cornered her and/or held her down on occasion." The report also mentions that Mother's counselor diagnosed her with PTSD based in part on Father's "emotional and physical and sexual abuse." Father denied all the allegations.

¶8 The court held an evidentiary hearing in February 2016, and heard testimony from both parents. It also admitted various exhibits, including the first advisor's report and several of Mother's exhibits. The court then denied Mother's petition to modify but granted Father's request for joint legal decision-making and equal parenting time ("2016 Decree"). The court described the first advisor's report as "thoughtful and thorough"

and accepted his "recommendations and analysis." The court also acknowledged that "Mother [had] presented much evidence," including police reports and medical records, "attempting to demonstrate Father's inability to properly parent and the contentiousness between the parties," but the court found this evidence was "dated" and "of little relevance to what is actually occurring now or even within the last eighteen months." As to the best-interest factors, the court found:

> *The past, present and potential future relationship between the parent and the child*. Both parents are well bonded to the Child. Both parents spoke positively about the other parent's interactions with the Child during the parenting conference.
>
> * * *
>
> *Whether there has been domestic violence or child abuse pursuant to A.R.S. § 25-403.03*. Mother alleged that there was previous domestic violence in the parties' relationship. Mother also obtained an order of protection against Father in 2014 which has since expired. Mother alleges that Father was verbally abusive and intimidating. Even taken as true, the Court does not find that any previous alleged domestic violence is relevant to the current situation between the parties. The parties have minimal contact with each other. The[y] conduct exchanges at a police station in order to further minimize any issues that might arise.

Second Modification (2019)

¶9 About three years later, in November 2019, Mother petitioned the family court to modify the 2016 Decree. This time, she requested an order granting her sole legal decision-making and suspending Father's parenting time.

¶10 Mother's petition focused on one month, November 2019, alleging an assortment of "substantial and continuing changes in circumstances," including that Father pressed on Jack's belly after an appendectomy, forced Jack to engage in physical activity and did not give him pain medication. According to the petition, Jack told Mother that Father hit and kicked him, called him names like "stupid face," did not feed him and made him sleep in the bathroom. Mother's petition did not allege any past or present sexual abuse. Mother secured a temporary order for sole legal decision-making, which required that Father's parenting time be supervised.

¶11 The family court appointed a second advisor and licensed social worker ("second advisor") to investigate the claims and report her findings. The second advisor reviewed many documents and interviewed both parents, eight-year-old Jack, his therapist and Mother's therapist. The second advisor later released a written report in January 2021, recommending that Mother's petition be denied. The second advisor concluded "there is insufficient information to find that Father has abused or neglected [Jack] or that restrictions should be placed on his parenting time."

¶12 When interviewed by the second advisor in 2020, Mother alleged she was sexually abused by Father in 2010, and Father responded to the allegation. According to second advisor's report:

> Mother alleged that Father sexually assaulted her, which resulted in the conception of the child. Father explained that he was taking diazepam for anxiety, and it impacted his sexual performance. When they were having sex, Mother complained that her back was hurting, but Father was close to orgasming and did not immediately stop. Mother pushed Father off of her. He noted that they had sex numerous times afterwards.

¶13 The second advisor added that Mother had reported Father to law enforcement for alleged sexual abuse of Jack in 2015, before she first moved to modify. After an investigation, however, the police department and the Department of Child Safety determined the accusations were unsubstantiated. Jack also accused Father of serious abuse and neglect in 2019, before Mother moved for the second modification. But again, the police and DCS investigated and determined the claims were unsubstantiated. Indeed, the DCS investigator said, "there was no evidence of abuse and neglect," and Jack's "disclosures did not seem credible."

¶14 During his interview, Jack told the second advisor he did not want to spend time with Father "because he is rude." Jack's therapist, however, told the advisor that Jack was "oppositional and manipulative" and "in a loyalty bind between his parents." The advisor also reported that Jack was admitted for inpatient psychiatric treatment in 2020 and the hospital "determined [he was] a danger to himself and others, and he reported visual and auditory hallucinations."

¶15 The court held an evidentiary hearing and heard testimony from Mother, maternal grandmother and the second advisor. Father

represented himself. When the second advisor took the stand, the court asked her a series of questions about "an issue that has been weighing on me since I reviewed your report," which led to the following exchange:

> Court: You would agree with me that it is accurate that before, even before Mother filed her current petition, there is an allegation that she made that the child in this case was conceived by way of sexual assault, correct?
>
> Witness: Correct.
>
> Court: Would you agree that in your interview with Father, Father—while not using those words, in essence, admitted to a sexual assault?
>
> Witness: Yes.

¶16 Father then tried to cross-examine the second advisor, but the court warned him about the "potential criminal ramifications" of his statements, which "may be used against [him] in court in a criminal prosecution." After this warning, Father stopped his questioning and sat down.

¶17 In March 2021, the court granted Mother's petition and more ("2021 Decree"). The court awarded Mother sole legal decision-making authority and terminated Father's parenting time. It found "a substantial and continuing change does exist because Father admitted to the [second advisor] that he committed a sexual assault against Mother, and the child is fearful to spend unsupervised time with Father."

¶18 On the best-interest factors, the court stressed that "Father sexually assaulted [Mother] during [their] relationship [in 2010]," which "Father admitted." The court described the incident as follows:

> Mother had told [Father] to stop and that she was in pain during what began as a consensual sexual encounter. Father further stated that he intentionally did not cease the activity despite Mother's withdrawal of her consent to same because he was close to having an orgasm. In fact, Mother credibly reported, it was this non-consensual sexual act that led to the conception of the child.

¶19 Based on that incident, the court found that Father should have no parenting time, stressing:

> No woman should be forced into or ordered to maintain a relationship with her sexual abuser. Furthermore, it is contrary to a child's best interests to have a relationship with his mother's sexual assailant. That, combined with Father's emotional and physical abuse of the child warrant a cessation of Father's parenting time with the child.

¶20 The court also accepted Jack's testimony that Father had tortured him and "he does not feel safe around Father." Based on this same evidence, the court also found that Father had "engaged in acts of domestic violence against Mother and the child," triggering a presumption that it was not in Jack's best interest for Father to have sole or joint decision-making authority and concluding that Father did not rebut the presumption. The court also increased Father's child support payments and found that he owed over $6,000 in past-due support.

¶21 Father moved for reconsideration to no avail and timely appealed. We have jurisdiction. *See* A.R.S. § 12-2101(A)(2).

DISCUSSION

¶22 Father challenges the family court's modification order terminating his parenting time and awarding Mother sole legal decision-making, which we review for an abuse of discretion. *See Engstrom v. McCarthy*, 243 Ariz. 469, 471, ¶ 4 (App. 2018). An abuse of discretion results when the record is "devoid of competent evidence to support the decision," or when the court commits an error of law in reaching a discretionary conclusion. *Id*. For conclusions of law and statutory interpretation, our review is de novo. *Id*.

I. Modification

¶23 Arizona courts apply a two-step inquiry to determine whether a custody decree should be modified. The court must first "ascertain whether there has been a change of circumstances materially affecting the welfare of the child." *See Backstrand v. Backstrand*, 250 Ariz. 339, 343, ¶ 14 (App. 2020) (quoting *Black v. Black*, 114 Ariz. 282, 283 (1977)). If the court finds a change of circumstances, it will then decide whether the proposed modification would be in the child's best interest. *Id*. Absent contrary evidence, we presume that "substantial, frequent, meaningful and

continuing parenting time with both parents" is in a child's best interest. *See* A.R.S. § 25–103(B).

A. Change in Circumstances

¶24 The family court first determines whether the record shows a substantial and continuing change in circumstances affecting the child's welfare. *See Backstrand*, 250 Ariz. at 343, ¶ 14. This prong is rooted in the principle of res judicata, and parents who seek modification must show "the change justifies departing from the principles of res judicata underlying the order currently in place." *See id*. at 344, ¶ 16 (citing *Ward v. Ward*, 88 Ariz. 130, 134-35 (1960)). A change is continuing if it alters the child's environment so that the original decree no longer responds to and fits the current circumstances. *See id*. at ¶ 17. "[T]he burden is on the moving party to satisfy the court that conditions and circumstances have so changed after the original decree as to justify the modification." *Burk v. Burk*, 68 Ariz. 305, 308 (1949).

¶25 Here the family court found a substantial and continuing change based on two points: (1) Father's admission to the second advisor that he sexually assaulted Mother in 2011, and (2) Jack's fear of unsupervised parenting time with Father. We examine each reason in turn.

i. Allegation of sexual assault

¶26 As its first "substantial and continuing change," the court found that "Father admitted to the [second advisor] that he committed a sexual assault against Mother." That was error for two reasons.

¶27 First, the alleged assault occurred in early 2011—almost two years before Mother agreed to joint custody as ordered by the 2012 Decree, five years before the 2016 Decree, and ten years before the 2021 Decree. Our supreme court has cautioned that the "power to modify [a custody] decree is to be exercised only when cogent reasons are shown," and those "reasons must constitute facts or conditions *unknown at the time of the original decree, or occurring subsequent to the decree*." *Davis v. Davis*, 78 Ariz. 174, 176 (1954) (emphasis added). The legislature likewise imposes a temporal requirement to modify an order of joint legal decision-making based on domestic violence, spousal abuse and child abuse, which must have occurred "*since* the entry of the joint legal decision-making order." A.R.S. § 25-411(A) (emphasis added).

¶28 Second, Mother thus waived her right to modify custody based on the earlier 2010 incident. *See Glidewell v. Glidewell*, 869 N.W.2d

796, 802 (2015) (parent waived and was estopped from seeking modification based on an incident of domestic violence that happened before the original decree). Mother had every chance to present evidence and argument of Father's alleged abuse in 2012, but she entered an agreement after Jack's birth to share joint legal custody with Father. The court then entered the 2012 Decree for joint legal custody, finding it was in Jack's best interest for the parents "to have joint legal custody." *See Olesen v. Daniel*, 251 Ariz. 25, 30, ¶ 20 (App. 2021) (movant "had a full and fair opportunity to litigate whether he committed the acts of domestic violence alleged"). The 2012 Decree also confirmed that Mother and Father "testif[ied] that they understand this agreement and believe it is to be in the best interests of the minor children at this time, that no one has threatened, promised or coerced them in any way to get them to reach the agreement, and the terms are fair and equitable." Neither Father nor Mother appealed from the 2012 Decree. The family court erroneously found a change in circumstances based on the decade-old sexual assault allegation.

ii. The child's wishes

¶29 The court's second reason for finding "a substantial and continuing change" was Jack's fear of "spend[ing] unsupervised time with Father." That was error, too.

¶30 A child must be of "suitable age and maturity" for the court to consider the child's "wishes [over] legal decision-making and parenting time." *See* A.R.S. § 25-403(A)(4). The court never addressed how or why it considered Jack's wishes on parenting time. And the record reflects:

- Jack's therapist described Jack as "oppositional and manipulative" and "in a loyalty bind between his parents."

- Jack often struggled to distinguish reality from fiction, "report[ing] visual and auditory hallucinations," and was deemed unbelievable by a DCS investigator who could see no reason to separate Jack from his Father.

- Jack accused Father of serious abuse and neglect in 2019, but police and DCS closed the investigation as unsubstantiated, finding that Father was "truthful when he denied abuse and neglect," and finding "no evidence of abuse or neglect."

- Jack was eight years old when he shared his wishes.

¶31 It was error for the family court to find that Jack's wishes qualified as a change in circumstances. As a result, we need not reach the best-interests prong for modification. *See Ward*, 88 Ariz. at 135.

CONCLUSION

¶32 For these reasons, we vacate the family court's modification order and remand for the court to hold an evidentiary hearing and determine whether Mother met her burden to modify the custody decree.

¶33 We deny Mother's request for attorney fees and costs under A.R.S. § 25-324(A) and ARCAP 25. We also deny Father's request for attorney fees because he represented himself on appeal. *See Munger Chadwick, P.L.C. v. Farwest Dev. & Const. of the Sw., LLC*, 235 Ariz. 125, 126, ¶ 5 (App. 2014). As the prevailing party, however, Father is entitled to costs upon compliance with ARCAP 21.

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