IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

SCOTT ANDREW GILBERT, JR., *Petitioner/Appellant*,

v.

SAMANTHA FLORENCE BEACH, *Respondent/Appellee*.

No. 1 CA-CV 21-0686 FC
FILED 9-8-2022

Appeal from the Superior Court in Maricopa County
No. FC2018-070105
The Honorable Susanna C. Pineda, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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By Kiilu Davis, Sally M. Colton
Counsel for Petitioner/Appellant

Katz & Bloom, Phoenix
By Norman M. Katz
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Cynthia J. Bailey delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Vice Chief Judge David B. Gass joined.

B A I L E Y, Judge:

¶1 Scott Andrew Gilbert Jr. ("Father") appeals from post-decree orders for legal decision-making authority, child support, and attorneys' fees. For the reasons stated below, we affirm the legal decision-making order, but vacate and remand for reconsideration of the child support and attorneys' fees orders.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Samantha Florence Beach ("Mother") have one child. The 2019 consent decree provided for equal parenting time and joint legal decision-making authority with Mother having the final say on education and medical decisions. Because they had approximately the same income, no child support was ordered.

¶3 In December 2020, Father petitioned to modify the legal decision-making and parenting time orders in the decree based, in part, on Mother's alleged drug abuse. He obtained an emergency temporary order suspending Mother's parenting time based on his allegation that Mother had threatened physical harm to the child. But at the end of an evidentiary hearing, the court vacated that temporary order, finding no evidence to support Father's allegations. Mother was awarded make-up parenting time.

¶4 The day after the evidentiary hearing, Father tried to prevent Mother's parents from picking up the child after school for the make-up parenting time. Police became involved and allowed the grandparents to take the child to Mother.

¶5 Mother opposed Father's petition and cross-petitioned to modify the decree to give her sole legal decision-making authority, reduce Father's parenting time to every other weekend, and modify child support accordingly. Following another evidentiary hearing, the superior court found no evidence supporting Father's allegations of drug or child abuse. The court granted Mother's cross-petition in part, awarding her sole legal

decision-making authority, but did not modify the equal parenting time or child support orders.

¶6 The superior court found Father took unreasonable positions and awarded Mother her attorneys' fees in an amount to be determined. Before Father filed his timely response to Mother's fee application, the court entered an order awarding Mother fees. Father timely appealed and we have jurisdiction under A.R.S. § 12-2101(A)(2).

DISCUSSION

I. Legal Decision-Making Authority

¶7 Father raises several arguments challenging the decision to award Mother sole legal decision-making authority. We review legal decision-making orders for an abuse of discretion and accept the court's findings of fact absent clear error. *Engstrom v. McCarthy*, 243 Ariz. 469, 471, ¶ 4 (App. 2018).

A. Change of Circumstances

¶8 When presented with a petition to modify legal decision-making and parenting time, the superior court must first determine whether a change of circumstances has occurred since the last order. *Backstrand v. Backstrand*, 250 Ariz. 339, 343, ¶ 14 (App. 2020) (citing *Black v. Black*, 114 Ariz. 282, 283 (1977)). "Only if it finds such a change in circumstances may it 'then proceed to determine whether a change in custody will be in the best interests of the child.'" *Id.* The court has broad discretion to determine whether a change of circumstances has occurred. *Id.*

¶9 Father contends the superior court abused its discretion because it did not make specific findings stating changed circumstances. Section 25-411(J), however, does not require the court to make specific or even express, written findings about changed circumstances.

¶10 In granting Mother's petition, the court impliedly found a change in circumstances. *See Gen. Elec. Cap. Corp. v. Osterkamp*, 172 Ariz. 191, 193 (App. 1992) ("Implied in every judgment, in addition to the express findings made by the court, are any additional findings necessary to sustain the judgment, if reasonably supported by the evidence and not in conflict with the express findings."). The court found that, after the consent decree, Father had engaged in a pattern of harassment against Mother, making joint legal decision-making unworkable. The record supports this finding and

the resulting inference that this changed circumstance warranted a renewed analysis about what legal decision-making orders were in the child's best interests. *See Canty v. Canty*, 178 Ariz. 443, 448-49 (App. 1994) (finding a change of circumstances when the joint custody arrangement was no longer logistically possible).

B. Best Interests Analysis

¶11 Father argues that the superior court abused its discretion because its best interests findings do not track the language of A.R.S. § 25-403(A). He also argues that the evidence does not support the court's findings.

¶12 When deciding whether a modification of legal decision-making authority or parenting time is in the child's best interests, courts must consider the factors listed in A.R.S. § 25-403(A). *See Hart v. Hart*, 220 Ariz. 183, 185, ¶ 9 (App. 2009). If the matter is contested, as it is here, the court must make "specific findings on the record about all relevant factors and the reasons [why] the decision is in the best interests of the child." A.R.S. § 25-403(B); *see also Hart*, 220 Ariz. at 185-86, ¶ 9. Failure to make the necessary findings may constitute an abuse of discretion. *Hart*, 220 Ariz. at 186, ¶ 9.

¶13 Compliance with this statutory mandate facilitates meaningful appellate review, *see Owen v. Blackhawk*, 206 Ariz. 418, 421-22, ¶ 12 (App. 2009), and "provide[s] the family court with a necessary 'baseline' against which to measure any future petitions by either party based on 'changed circumstances.'" *Reid v. Reid*, 222 Ariz. 204, 209, ¶ 18 (App. 2009). "This statutory requirement cannot be satisfied by inference . . . or waived by a party." *Olesen v. Daniel*, 251 Ariz. 25, 29, ¶ 17 (App. 2021).

¶14 Father contends the superior court included factors other than those listed in § 25-403. Section 25-403(A), however, instructs the court to consider *all* factors that are relevant to the child's best interests, including the statutory factors listed in § 25-403. Thus, the statutory factors are not exclusive. *See* A.R.S. § 1-215(14) ("'Includes' or 'including' means not limited to and is not a term of exclusion.").

¶15 Father argues the superior court erred by considering the parents' wishes because this factor was removed as a statutory best interests factor in 2009. *See* 2012 Ariz. Sess. Laws, ch. 309, § 5 (2d Reg. Sess.). The removal of this factor does not indicate it is not relevant. Rather, it suggests the legislature considered this factor superfluous because the court necessarily considers the parties' positions when making its decision. Nor

did the legislature prohibit the court from considering the parents' wishes in assessing best interests. Moreover, the court here simply stated the parties' competing positions on legal decision-making authority and parenting time and that the factor did not weigh in favor of or against either party.

¶16 Father also contends the findings listed the child's wishes twice. *See* A.R.S. § 25-403(A)(4). In one paragraph, the court stated the evidence showed the child was happy in Mother's care and "somewhat stressed" before Father's parenting time. In another paragraph, the court found no evidence as to the child's wishes. In both instances, the court found the child was very young and "not mature enough to have a valid say." The record supports the court's finding that there was no evidence as to the child's wishes. The statement about the child's demeanor relates to the child's adjustment to home, not his wishes, *see* A.R.S. § 25-403(A)(3), and does not constitute an inconsistent or improper finding of fact.

¶17 Father next argues the superior court overlooked whether either parent intentionally misled the court. *See* A.R.S. § 25-403(A)(7). Father, however, cited no evidence relating to this factor. Given this lack of evidence, we cannot say the court abused its discretion in determining that certain factors were "not applicable." The court is required to discuss only those factors it finds relevant under the facts of the case. *See* § 25-403(B); *Hart*, 220 Ariz. at 186, ¶ 9. Here, the court made specific findings about the factors it deemed relevant and specified how it weighed those factors. It is not the province of this court to reweigh the evidence. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16 (App. 2009).

¶18 Father also asserts the superior court erred in considering whether one, both, or neither parent has provided primary care to the child. As Father correctly observes, this is no longer a required statutory factor. *See* 2012 Ariz. Sess. Laws ch. 309, § 5 (2d Reg. Sess.). Although the court cited the former statutory language, the findings that the parents have shared equal parenting time, that Mother makes the child's medical appointments at her convenience, and that Father attends those appointments and school meetings are relevant to other statutory factors. *See* A.R.S. § 25-403(A)(1) (court shall consider "[t]he past, present and potential future relationship between the parent and the child."); -403(A)(2) (court shall consider "[t]he interaction and interrelationship of the child with the child's parent or parents[.]"). The erroneous reference to a former statutory factor does not warrant reversal here because the substantive evidence cited by the court is relevant to other current factors. *But cf. Barron v. Barron*, 246 Ariz. 580, 586, ¶ 15 (App. 2018) (holding the court erred by

considering the primary caregiver factor when awarding more parenting time to one party), *overruled on other grounds,* 246 Ariz. 449 (2019). The court did not commit reversible error by considering this relevant evidence.

C. Sufficiency of the Evidence

¶19 Father contends the evidence does not support the finding that Mother did not abuse her prescription medications. The undisputed evidence showed Mother took one of her prescription medications by crushing the pill and ingesting it nasally through a straw. Mother admitted she took a migraine medication called sumatriptan this way to expedite pain relief. There was no evidence as to how often or if she did so after September 2020, which is the date of the evidence on which Father relies. Mother claimed she no longer takes her medication this way.

¶20 According to Mother, one of her health care providers told her nasal ingestion of this medication was acceptable, but she did not recall which provider. Father argues that his medical expert testified that the Federal Drug Administration has not approved nasal ingestion of the several drugs he was asked about. But his expert did not testify specifically as to sumatriptan, the migraine medicine Mother admitted ingesting nasally. Father also contends the court should discount Mother's testimony because she failed to show which health care provider said she could take her medication this way. This court does not weigh conflicting evidence or determine witness credibility. *Hurd*, 223 Ariz. at 52, ¶ 16. Viewed in the light most favorable to upholding the superior court's ruling, *Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 17 (App. 2015), the evidence supports the finding that Mother did not abuse her prescription medication.

¶21 We affirm the order awarding Mother sole legal decision-making authority.

II. Child Support

¶22 Neither party paid child support under the original decree because they had approximately the same income and shared equal parenting time. In her counter-petition, Mother asked the court to modify the child support order in connection with her request to decrease Father's parenting time. The court did not modify Father's parenting time and declined to modify child support because there was no change in parenting time or a substantial change in income. We review the superior court's ruling on a petition to modify child support under an abuse of discretion standard, but we review de novo the court's interpretation of the child

support statutes and guidelines. *Milinovich v. Womack*, 236 Ariz. 612, 615, ¶ 7 (App. 2015).

¶23 According to the child support worksheet Mother provided with the consent decree, her income was $2,683.33 a month, and Father's was $3,000. Now Mother earns about $7,000 a month.[1] Father's income, by contrast, rose slightly to $3,250 a month. Thus, contrary to the court's finding, there was a significant change in Mother's income.

¶24 Yet Mother contends the superior court was not required to modify child support because it did not also modify parenting time. Mother suggests that the court could only modify child support if it accepted her request to modify parenting time regardless of any change in the parties' income. That argument is contrary to the law. Under A.R.S. § 25-403.09(A), the court must address child support whenever it enters a parenting time order. Although the court did not *modify* the existing parenting time orders, it considered the cross-petitions to modify parenting time which, by virtue of § 25-403.09(A), put child support at issue. *See Heidbreder v. Heidbreder*, 230 Ariz. 377, 380, ¶ 9 (App. 2012). Because both parties sought to modify the parenting time orders, they were on notice or should have been on notice that child support was also at issue under § 25-403.09(A). Thus, there was not a due process issue with the court addressing child support at the hearing. In fact, the parties introduced evidence relevant to the child support determination.

¶25 Because the superior court is statutorily obligated to consider whether a child support modification is warranted even when the parties do not specifically request it, *id.* at ¶¶ 9-10, it follows that the court must also address child support when a party seeks a modification and the evidence shows a significant change in the parties' income, as here. The record does not support the finding that there was no substantial change in income. Thus, the court erred by not addressing child support. We vacate the order that neither party pay child support and remand for reconsideration.[2]

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[1] Mother's financial affidavit was not offered into evidence.

[2] Because the 2022 Guidelines apply to all orders entered after January 1, 2022, the court shall apply those Guidelines on remand unless the parties agree or the court determines there is good cause to use the 2018 Guidelines. *See* Guidelines § XVII(A) (2022).

III. Attorneys' Fees

¶26 Father's response to Mother's fee application was due November 29, 2021. However, several hours before Father responded on November 29, the court issued its order awarding Mother more than $11,000 in attorneys' fees.

¶27 Failing to afford a party opposing attorneys' fees the opportunity to address the reasonableness and appropriateness of the claimed fees and expenses as provided in applicable rules violates procedural due process. *Sycamore Hills Estates Homeowners Ass'n, Inc. v. Zablotny*, 250 Ariz. 479, 485, ¶ 24 (App. 2021). Father's response challenged several specific entries in the fee application, which the superior court failed to consider. Therefore, the court erred by awarding fees to Mother without considering Father's response. We vacate the fee award and remand for reconsideration.

ATTORNEYS' FEES AND COSTS ON APPEAL

¶28 Both parties request attorneys' fees and costs on appeal under A.R.S. § 25-324. After considering the reasonableness of the parties' positions throughout the litigation and their financial resources, we deny the fee shifting requests, leaving each party to bear their own attorneys' fees on appeal. Because both parties prevailed in part, neither is entitled to an award of costs under A.R.S. § 12-342.

CONCLUSION

¶29 The order granting sole legal decision making-authority to Mother is affirmed. We vacate the child support and attorneys' fees rulings and remand for reconsideration consistent with this decision.

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