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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/10/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EDWARD RENE SANCHEZ,) 1 CA-CV 11-0117A
)
Petitioner/Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
CHRISTA M. SEHESTED,)
) Not for Publication -
Respondent/Appellant.) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2004-090329

The Honorable John R. Zarzynski, Judge *Pro Tempore*
The Honorable Bruce Cohen, Judge

AFFIRMED

Edward R. Sanchez
Appellee, *In Propria Persona*

Chandler

The Murray Law Offices, P.C.
By: Stanley David Murray
Attorneys for Appellant

Scottsdale

T H O M P S O N, Judge

¶1 Christa M. Sehested (Mother) appeals the family court's order modifying legal and physical custody of the

parties' minor child and changing the parenting time order. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2004, Edward Rene Sanchez (Father) filed a complaint seeking to establish his paternity of the parties' minor daughter (J.), and asked the court to award him custody and grant Mother reasonable parenting time. The court ultimately entered a consent decree awarding Mother and Father joint legal and physical custody of J. and adopted their proposed parenting plan, which divided J.'s time equally between Mother and Father.

¶3 In September 2010, Father filed a petition to modify custody and parenting time, and requested the court award him sole custody of J. with reasonable visitation time for Mother. Father alleged Mother had failed to adhere to the parenting plan for the prior ten months and had not had any overnight visits with J. during that time Father also asked the court to enter a temporary custody modification pending its determination of his petition.

¶4 The court denied Father's request for emergency relief and set an evidentiary hearing. The court conducted the hearing on October 14, 2010, and heard testimony from Mother, Father, and Mother's parents. Thereafter, it granted Father sole legal custody of J. and ordered that Mother would have parenting time

three days per week, with no overnight parenting time. Mother timely appealed.

ISSUES

¶5 Mother argues the child custody order must be set aside because the family court made erroneous findings and failed to explain its reasons for modifying custody. She also maintains the record does not support the court's determination that it was in J.'s best interests to restrict Mother's parenting time.

DISCUSSION

A. Modification of Child Custody¹

¶6 Before the family court can change a previous custody order, it must determine that there has been a material change

¹ Mother preliminarily argues that the family court improperly modified the custody arrangement because custody was not at issue at the time of the evidentiary hearing. Mother argues that when the court denied Father's request for an emergency modification of custody and set the evidentiary hearing, it limited the hearing to modification of parenting time. The court's order, however, imposed no such limitation. At the hearing, the court alerted the parties that custody was at issue by stating, "The Court set this today, as you both know, for an Evidentiary Hearing on the issue of custody and parenting time" and told the parties before the hearing adjourned that its ruling would "deal[] with the issue of custody and parenting time." At no time did Mother object to the court's consideration of Father's petition for custody modification or request additional time to present evidence concerning that issue. Accordingly, we reject Mother's request that we vacate the order modifying custody for the reason that the court improperly considered custody. *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994).

in circumstances affecting the welfare of the child. *Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994). The court has broad discretion in making this determination, and we will not disturb its decision absent a clear abuse of discretion. *Id.*; *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1191 (App. 2002). "The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom." *Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (App. 1971). We will not substitute our opinion for that of the family court. *See id.* at 169, 481 P.2d at 539. Viewing the evidence in the light most favorable to sustaining the family court's findings, we determine whether the record reasonably supports the findings. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998).

¶7 When a parent petitions for modification of custody of a child, Arizona law mandates that the court "shall determine custody . . . in accordance with the best interests of the child." A.R.S. § 25-403(A) (2010).² In reaching this

² Those factors are: (1) each parent's wishes regarding custody; (2) the child's wishes regarding custody; (3) the interaction of the child with her parents, siblings, or any other person who may significantly affect her best interests; (4) the child's adjustment to home, school and community; (5) the mental and physical health of all individuals involved; (6) which parent is

determination, the court is required to "make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." A.R.S. § 25-403(B) (Supp. 2010). The family court's decision indicates it specifically and thoroughly considered the relevant statutory factors and placed its findings on the record. A.R.S. § 25-403(B); *Downs v. Scheffler*, 206 Ariz. 496, 500, ¶ 16, 80 P.3d 775, 779 (App. 2003). Nevertheless, Mother contends the court ignored or incorrectly interpreted evidence relating to six of these factors, namely, the wishes of the parents, the wishes of the child, the interaction of the child with the parents and siblings, the child's adjustment to home, school, and community, the mental and physical health of the parties, and which parent is more likely to allow frequent and meaningful contact with the other parent.³ We disagree.

more likely to allow the child frequent and meaningful continuing contact with the other parent; (7) which parent has provided primary care of the child; (8) the nature and extent of any coercion used by a parent in obtaining a custody agreement; (9) parental compliance with chapter 3 article 5 of Title 25 (requiring completion of a domestic relations educational program); (10) any conviction for false reporting of child abuse or neglect; and (11) whether there has been any domestic violence or child abuse. A.R.S. § 25-403(A).

³ Mother also complains the court did not make the findings required by A.R.S. § 25-403.01(B) (2007). That statute, however, only applies when the court orders joint custody over one parent's objection, not, as in this case, when the court awards sole custody. *Id.*

1. The Wishes of the Parents

¶8 The family court stated Father was seeking to eliminate joint legal custody and Mother wanted an essentially equal time-sharing arrangement. The court noted Father was concerned that Mother's frequent failure to exercise her parenting time had caused distress to J. and had adversely impacted Father's employment. Mother contends that finding is not supported by the record because Father testified he was concerned that Mother's health issues, not her failure to exercise parenting time, could cause J. distress. While Father did testify that he was concerned about the effect of Mother's anxiety on J., he also expressed concern over the instability created by Mother's failure to consistently follow the equal parenting time schedule and noted J.'s improvement over the past ten months when she had more limited parenting time with Mother. We deem it implicit in the court's statement that Father was concerned about Mother's frequent failures to exercise parenting time that the court understood it was Father's belief that it would be in J.'s best interests for him to have sole custody. The court adequately considered the evidence of the parties' wishes as to custody and its finding was supported by the evidence.

2. The Wishes of the Child

¶9 Mother argues the court erred in finding that neither party presented any testimony concerning J.'s wishes, citing her testimony and the testimony of J.'s maternal grandmother that J. wished to spend more time with Mother. Mother testified that, "in the beginning," J. would cry and ask when she would return to the old parenting time schedule, but offered no evidence regarding J.'s current view. J.'s maternal grandmother testified, rather broadly, that J. "wants to be with her mother." Because Mother did not offer any specific evidence of J.'s current wishes regarding custody, we find no abuse of discretion in the court's determination regarding this factor.

3. The Interaction of the Child with the Parents and Siblings

¶10 Mother next challenges the family court's finding that her anxiety problems have interfered with her ability to effectively parent J. At the hearing, Father described an incident in which Mother unnecessarily called for emergency services for J., causing an ambulance and a fire truck to be dispatched to Mother's home. Father testified that when he arrived J. was fine, but she was anxious that the ambulance meant she (J.) was going to die. Mother characterizes the incident as insignificant because J. suffered "no emotional

trauma requiring any medical treatment." Mother maintains her actions were justified by J.'s behavior, as she explained at trial that J. had been holding her throat, making choking noises, and stating she could not breathe. Mother also asserts that a doctor's visit described by Father at trial as unnecessary, was justified by the child's high fever and absence from school. Mother argues that the court's determination is not only erroneous, but an "unfair assessment" of Mother's vigilance concerning J.'s medical needs.

¶11 The family court was in the best position to weigh the evidence and draw reasonable inferences from it. When the evidence is conflicting, we defer to the trial court's determination of witness credibility and the weight to give the evidence. *Gutierrez*, 193 Ariz. at 347-48, ¶ 13, 972 P.2d at 680-81. The court appropriately considered the relevant evidence regarding J.'s relationship with her parents and we find no abuse of discretion.

4. The Child's Adjustment to Home, School, and Community

¶12 The family court noted that since November 2009, when the parenting time schedule changed, J. had thrived in Father's home, with her attendance at school stabilizing and her grades showing a marked improvement. Mother maintains this finding is erroneous and unsupported by the record because there is no

evidence that J. previously was tardy or absent from school. She also challenges the court's determination that the lack of overnight visits with Mother contributed to J.'s stability, claiming the record actually supports the opposite conclusion because Mother testified that J. now has a better school teacher.

¶13 Father testified that since the parenting time schedule changed, J. has performed "phenomenal" in school and attributed the change to the consistent schedule. He reported that she received straight As for the first time and had begun participating in sports, something she had not done in the past because of her shyness.

¶14 We defer to the family court's determination regarding this evidence and find no abuse of discretion in the court's finding concerning J.'s adjustment to home, school, and community.

5. The Mental and Physical Health of the Parties

¶15 In addressing this factor, the family court noted that Mother struggles with many health-related issues that primarily involve her emotional health. It cited Mother's testimony that if the court awarded her overnight parenting time she would ask J.'s maternal grandfather to live with her, "just in case," and explained that it understood Mother to mean that J.'s

grandfather would be present in case Mother was unable to appropriately care for J.

¶16 Mother complains the court failed to acknowledge that she unilaterally and voluntarily surrendered her overnight parenting time in order to address her medical issues and avoid exposing J. to them. She also points out that both she and her parents testified that she could now manage overnight visits on a phased-in schedule.

¶17 We find no abuse of discretion in the family court's determination.

6. Which Parent is More Likely to Allow Frequent and Meaningful Contact with the Other Parent

¶18 The court noted that for the preceding year, Mother had not taken advantage of all of her parenting time opportunities, even though Father had made J. available to Mother. It found Father would not interfere with Mother's contact with J., but that Mother might not promptly return J. to Father.

¶19 Father testified Mother had frequently failed to exercise her parenting time as a result of her health issues, or arranged her parenting time around accommodations for her health issues, such as the availability of a driver to pick up J. He also informed the court that Mother was often late to pick-up or return J.

¶20 This issue is uniquely one of credibility. The family court heard the parties' testimony and was in the best position to evaluate their demeanor and maturity. *Goats*, 14 Ariz. App. at 171, 481 P.2d at 541. We defer to the family court's determination and find no abuse of discretion.

¶21 The family court was in the best position to evaluate the statutory custody factors. It is apparent that the court weighed the factors in favor of Father, and its rationale for doing so is clear from the record. The court did not abuse its discretion by granting Father's petition to modify custody.⁴

B. Modification of Parenting Time

¶22 Finally, Mother argues the court erred in restricting her parenting time because it is not in J.'s best interests. The family court may modify a parenting time order whenever modification would serve the child's best interests. A.R.S. § 25-411(D) (Supp. 2010). The family court is not required to

⁴ We reject Mother's argument that we must vacate the custody modification because the court did not include explicit reasoning for why its award of sole custody to Father was in J.'s best interests. While the family court should have stated how its factual findings support the decision to modify custody, A.R.S. § 25-403(B), Mother did not advise the court that she believed its findings were inadequate, which would have allowed it to cure any omissions. See *Reid v. Reid*, 222 Ariz. 204, 209, ¶ 19, 213 P.3d 353, 358 (App. 2009) (discouraging the practice of waiting until appeal to raise objections that the family court's findings were inadequate). Moreover, in this case, the court's findings are sufficiently detailed to allow us to understand its logic and to meaningfully review whether the modification order was in J.'s best interests.

issue written findings when it modifies parenting time. A.R.S. § 25-408(A); *cf. Hart v. Hart*, 220 Ariz. 183, 187, ¶ 17, 204 P.3d 441, 445 (App. 2009) (interpreting A.R.S. § 25-411(D) and holding trial court was not required to make specific findings before ordering supervised parenting time).

¶23 Mother contends the court's allegedly erroneous findings concerning modification of custody also formed the basis for its order modifying parenting time and therefore urges us to vacate that order. She argues the court incorrectly interpreted the evidence and should have ruled that limited parenting time (1) was no longer necessary because Mother had resolved her health problems, and (2) would not be in J.'s best interests because Father could not spend adequate time with J. because of his work schedule and did not show adequate concern for J.'s health. As discussed, we defer to the family court's factual determinations because they are supported by reasonable evidence, *Gutierrez*, 193 Ariz. at 347-48, ¶ 13, 972 P.2d at 680-81, and the evidence supported the court's implicit determination that modification of parenting time would be in J.'s best interests.

CONCLUSION

¶24 For the foregoing reasons, we affirm. Mother requests an award of attorneys' fees and costs incurred on appeal pursuant to A.R.S. § 25-324 (Supp. 2010). Section 25-342(A)

grants the court discretion to award attorneys' fees and costs in a dissolution action based on the financial resources of the parties and the reasonableness of their positions. In the exercise of our discretion, we deny Mother's request.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

MAURICE PORTLEY, Judge

/s/

JOHN C. GEMMILL, Judge