IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

VERONICA CERVANTES,
Petitioner/Appellant/Cross-Appellee,

v.

LARISSA GOLDMAN,
Respondent/Appellee/Cross-Appellant.

No. 2 CA-CV 2016-0190-FC
Filed November 21, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. DC20150029
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

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By Kelly J. Flood and Nathan Andrews
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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 Larissa Goldman appeals from a number of orders related to the trial court's modification of a negotiated visitation agreement with her former domestic partner. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's rulings. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1 (App. 2007). Goldman was in a long-term, committed relationship[1] with Veronica Cervantes beginning in at least 1998, and the two presented themselves as the parents of a minor child born to Goldman in December 2007. The relationship, however, deteriorated, and in August 2014, the parties separated. Although Cervantes moved out of the home she shared with Goldman and the child, she continued to have contact with them until June 2015, when Goldman told members of Cervantes's family that they and Cervantes "would never see [the child] again."

¶3 Upon learning that Goldman was severing contact with the child she had helped raise, Cervantes filed a request in Pima County Superior Court for third-party visitation rights pursuant to A.R.S. § 25-409(C)(2). Goldman's response to the visitation request conceded that Cervantes stood "*in loco parentis* to the minor child," and acknowledged she was "entitled to some visitation." Before any hearings on Cervantes's petition, the parties agreed on, and submitted to the trial court, a school-year visitation schedule that was "adopted [by the court] as an order." The court vacated the trial that had been set on the matter, and set a review hearing in April 2016 to resolve the unsettled summer visitation schedule.

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[1]In 2005 or 2006, Goldman and Cervantes engaged in a "commitment ceremony" in Nevada, and later registered with the City of Tucson as a civil union.

¶4 Before the review hearing, Goldman requested an "emergency order enforcing the parties' third-party visitation agreement." Goldman sought enforcement of a provision that required her and Cervantes to "follow the advice and recommendation of the [child's] therapist" as to Cervantes's visitation, who had recommended that Cervantes's visitation be reduced. Cervantes countered that the provision contained a typographical error and that the parties had agreed only to allow the therapist to decide summer visitation.

¶5 In ruling on the motion to enforce, the trial court observed that the parties' agreement "listed with specificity the regular visitation schedule" and contained a provision that the parties agreed to comply with the therapist's recommendations for "Vacation and Summer 2016" visitation. The court also noted, however, that a different section of the agreement indicated that the parties agreed to be bound by the therapist's recommendations for all visitation, not just the summer break and any vacations. In light of the conflicting provisions, and following an evidentiary hearing at which testimony and documentary evidence was received, the court concluded the provision indicating the therapist could modify the regular visitation schedule was ambiguous, and in a February 2016 ruling severed it from the agreement.

¶6 Goldman's request for an emergency order was accompanied by a petition for "termination of [the] third-party visitation order," in which she alleged Cervantes had "repudiated the agreement's requirement to follow the [child's] therapist's recommendations" regarding visitation, and argued that her decision to terminate visitation was entitled to deference. The trial court heard evidence on Goldman's petition in April and May of 2016, and in June issued an under-advisement ruling denying the petition but reducing visitation to one weekend a month. Cervantes timely appealed, but abandoned her appeal by not filing an opening brief, and this court dismissed the appeal. Goldman cross-appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Ambiguous Provision

¶7 Goldman first contends the trial court erred by finding the provision she sought to enforce ambiguous. The struck term reads: "The parties will follow the advice and recommendations of the therapist as to [Cervantes's] visitation schedule, vacations and the Summer Break schedule." Although that language appears clear on its face, Cervantes argued below that it contained a typographical error, and should have

reflected the parties' agreement to follow the therapist's recommendations as to her "visitation schedule *for* vacations and the Summer Break schedule." Cervantes maintained the parties had not intended for the therapist to override the previously negotiated regular visitation schedule, relying on the "Visitation Schedule" section of the agreement, which set out the visitation schedule in extensive detail as well as the parties' agreement to "comply with recommendations and advice of the minor child's therapist as to vacations and Summer vacation." She also points out that that section reflects the parties' agreement to confer in April 2016 "to address the issue of Summer visitation and vacations." Cervantes asserted that the "regular visitation schedule and holidays are what the parties spent most of the hours negotiating," and the "therapist was [included as] an after[-]thought when the parties could not agree to a summer and vacation schedule."

¶8 After considering all the agreement's provisions, the trial court determined that the provision concerning the recommendations of the therapist being dispositive over all visitation—the provision Goldman sought to enforce—was at odds with the specific provision addressing the same subject in the "Visitation Schedule" section of the agreement, and concluded there was a "mutual mistake as to the terms." Accordingly, the court determined that although that provision "standing alone, is not ambiguous," "in the context of the entire agreement" it was unclear, and thus "w[ould] not be enforced."

¶9 The interpretation of a settlement agreement is a question of law subject to our de novo review. *Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, ¶ 6 (App. 2003). As the trial court correctly noted, "A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions." *Hamberlin v. Townsend*, 76 Ariz. 191, 196 (1953). "Individual clauses in an agreement and particular words must be considered in connection with the rest of the agreement." *Id.* And domestic relations agreements, like other contracts, are given a reasonable construction to accomplish the intention of the parties. *See Harris v. Harris*, 195 Ariz. 559, ¶ 15 (App. 1999) (separation agreement "read in light of the parties' intentions as reflected by their language and in view of all circumstances").

¶10 Goldman argues that the provision she sought to enforce was not ambiguous "even in context," and contends it should not have been severed from the agreement. Although, as the trial court noted, that term might not, on its face, be ambiguous, clearly it cannot be squared with the provision in the "Visitation Schedule" section that subjects only summer

visitation to the therapist's recommendations. Addressing this discrepancy, Goldman contends the provision in the "Healthcare" section should override the detailed visitation provisions because "it was the therapy which was the overriding concern."

¶11 We find Goldman's argument unconvincing. Had the parties intended that the therapist override the detailed visitation agreement beyond only summer vacations, either that provision would have been included in the section setting forth the visitation schedule, or it would have been explicit that the therapist's recommendations would control notwithstanding the detailed, negotiated visitation schedule. As the trial court observed, the agreement contains "inconsistent, if not incompatible" provisions regarding the deference afforded the therapist's recommendations on the regular visitation schedule. Because we construe any ambiguity in the agreement against the drafter, here Goldman, *see United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 260 (App. 1983), and because the agreement expressly provides that severance of an invalid provision is the preferred course of action, we cannot say the trial court erred.

Provision's Materiality

¶12 Goldman next argues that even if the provision she seeks to enforce was ambiguous, "it was such a material provision that excising it from the entire agreement should have rendered the agreement void." In her motion to reconsider, Goldman asserted she would not have entered the agreement "absent the provision that the parties would abide by the therapist's recommendations" as to visitation. She correctly points out that an agreement should be set aside if there is a mutual mistake as to a basic assumption on which the parties made the contract. *See Emmons v. Superior Court*, 192 Ariz. 509, ¶ 14 (App. 1998); *see also* Restatement (Second) of Contracts § 152 cmt. b (1981) ("A mistake of both parties does not make the contract voidable unless it is one as to a basic assumption on which both parties made the contract.").

¶13 The trial court, however, concluded Goldman "ha[d] not shown by clear and convincing evidence that the visitation agreement should be set aside *in toto*," and determined that severance, a remedy expressly allowed by the agreement, was an "adequate" cure. Such a conclusion necessarily suggests the court had doubts about the credibility of Goldman's contention that she would not have entered into the agreement absent the provision allowing the therapist to override the

visitation schedule. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa Cty.*, 208 Ariz. 532, ¶ 23 (App. 2004) (noting additional findings necessary to sustain the judgment implied so long as reasonably supported by evidence and not in conflict with express findings); *see also Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13 (App. 1998) (trial court is arbiter of witness credibility and we do not second guess its assessment of conflicting testimony). The location of the provision in the "Healthcare," not the "Visitation Schedule" section, and the absence of language indicating intent to override the detailed schedule therein, supports the court's determination that Goldman had not met her burden of showing the agreement should be set aside. Because we do not engage in the reweighing of evidence or override the court's credibility determinations, *Gutierrez*, 193 Ariz. 343, ¶ 13, we reject Goldman's assertion that the court erred by not finding the agreement void.

Constitutional and Statutory Claim

¶14 Goldman lastly raises a constitutional and statutory claim, arguing the trial court erred by analyzing the visitation agreement as "a mere issue of contract," and thus violated her "fundamental" right to "determine the upbringing of her child." In support, she relies on three cases: *Troxel v. Granville*, 530 U.S. 57, 70 (2000), in which the United States Supreme Court held that a fit parent's visitation decision is entitled to "at least some special weight"; *Egan v. Fridlund–Horne*, 221 Ariz. 229, ¶31 (App. 2009), which recognized that an individual not a "parent" under the domestic relations statutes does not enjoy the same legal rights as a parent; and *Goodman v. Forsen*, 239 Ariz. 110, ¶ 13 (App. 2016), which held that the "special weight" afforded a fit parent's visitation decision means "the parents' [visitation] determination is controlling unless a parental decision clearly and substantially impairs a child's best interests." Each of those cases, however, addressed initial visitation determinations, not modification or attempted rescission of an existing agreement as in this case. We have found nothing in any of those decisions that would necessitate their application in the current context, nor has Goldman provided any authority for doing so. Indeed, our research indicates that the weight of authority is to the contrary. *See Hunter v. Haunert*, 270 S.W.3d 339, 345 (Ark. Ct. App. 2007) (noting standard for modification of visitation "more rigid" than initial determination in order to promote stability and continuity for children); *Rennels v. Rennels*, 257 P.3d 396, 401 (Nev. 2011) (refusing to extend presumption that fit parents act in best interest of children to modification of judicially approved nonparent visitation arrangements); *Kulbacki v. Michael*, 899 N.W.2d 643, ¶ 7 (N.D. 2017) (applying standard for modifying parenting time to modification of third-

party visitation); *Lovlace v. Copley*, 418 S.W.3d 1, 27-31 (Tenn. 2013) ("presumption of superior parental rights does not apply in proceedings to modify or terminate grandparent visitation"); *Rhodes v. Lang*, 791 S.E.2d 744, 748 (Va. Ct. App. 2016) (applying different standards to initial visitation determinations and subsequent modifications thereof); *see also Schaffer v. Schaffer*, 884 N.E.2d 423, 427-28 (Ind. Ct. App. 2008) (where issue is modification of third-party stepparent visitation, "the only relevant inquiry is the best interests of the child").

¶15 As the United States Supreme Court has recently observed in a similar context, "permanency and stability [are] important to children's best interests." *Obergefell v. Hodges*, ___ U.S. ___, ___, 135 S. Ct. 2584, 2600 (2015); *see also Hudson v. Jones*, 138 P.3d 429, 432 (Nev. 2006) (noting law's desire to meet children's need for stability); *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000) (finding "stability for the child and the need to prevent constant litigation" valid policy concerns). Arizona courts have similarly recognized a child's interest in stability in other areas, *see, e.g., Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 34 (2005) (noting judges must protect a child's interest in stability and security in parental severance matters), and other courts have expressly recognized the stability afforded by final visitation orders, *see Lovlace*, 418 S.W.3d at 31 (declining to apply presumption of superior parental right in a modification proceeding promotes important policy goal of stability for the child); *Rennels*, 257 P.3d at 401 (same). To allow a parent to readily rescind a visitation agreement negotiated by the parties and approved by the court, rather than requiring the party to meet the requirements for modification, would undermine the stability important to children's best interests.

¶16 Moreover, permitting a negotiated, agreed upon, and court-adopted visitation agreement to be set aside as a result of a new or changed parental preference could have a chilling effect on settlement negotiations. As Cervantes points out, it would contravene the policy interest of favoring settlement to permit revocation of such an agreement "at the whim of the party." *See Yollin v. City of Glendale*, 219 Ariz. 24, ¶ 15 (App. 2008) ("The public policy of this state favors private negotiated settlement of disputes.").

¶17 Finally, because the trial court in this case presumed Goldman's request to terminate third-party visitation was in the best interests of the child, yet found that presumption rebutted, we need not resolve the question of what level of deference, if any, a fit parent is afforded in a visitation modification proceeding. Even were we to apply

the standards governing an initial third-party visitation determination to the modification in this case, we would find no abuse of discretion by the trial court. *See McGovern v. McGovern*, 201 Ariz. 172, ¶ 6 (App. 2001) (appellate court reviews visitation determinations for abuse of discretion).

¶18 The record reflects the trial court weighed Goldman's petition to terminate visitation against her very recent decision to allow substantial and continuing visitation, and the impact on the child of excluding Cervantes from the child's life. *Cf. Egan*, 221 Ariz. 229, ¶ 23 (parent's voluntary agreement to permit some visitation would be entitled to "significant weight"). Faced with Goldman's contradictory positions, and after hearing two days of testimony and evidence, the court took into account Goldman's apparent wishes based on both her earlier and her subsequent decisions. Specifically, the court entered orders limiting regular visitation with Cervantes to the amount of time suggested by the child's therapist. The court also expressly determined visitation should be continued in order to prevent "substantial emotional harm" to the child. And, significantly, it accommodated Goldman's desires with respect to certain parenting behaviors during Cervantes's visitation, demonstrating the court did, in fact, accord special weight and deference to Goldman's wishes.

Attorney Fees

¶19 Goldman lastly argues the trial court "did not use the proper standard" when it awarded Cervantes $300 in attorney fees after Goldman requested expedited hearings to alter the visitation agreement so the child could accompany her on certain occasions. Specifically, she claims the court erred by not stating "its legal basis for the award of attorney's fees." Cervantes counters that "the legal authority for an award of attorneys' fees is found within A.R.S. § 25-324," and the "court's application of this legal authority is supported by the minute entry stating that [Goldman]'s requests were unfounded, manipulative, and prejudicial." We review an award of attorney fees for an abuse of discretion. *Murray v. Murray*, 239 Ariz. 174, ¶ 20 (App. 2016).

¶20 Under § 25-324(A), a trial court may award fees "after considering the financial resources of both parties and the reasonableness of the positions each party had taken throughout the proceedings." In its in-chambers ruling on Goldman's motion to reconsider the attorney fee award, the court stated that Goldman "shall pay counsel for [Cervantes] $300 in attorney's fees and, pursuant to ARS §25 – 324 (D), the payments

shall be made directly to counsel." Although the court omitted a citation to § 25-324 in its original order granting fees, it is clearly inferable that statute was the basis for the award. Accordingly, we see no error.

Disposition

¶21 Because the trial court applied well-established principles to the agreement at issue in this case and, in any event, accorded due deference to Goldman's position, we affirm the court's rulings, as well as its award of attorney fees in favor of Cervantes. Both Goldman and Cervantes have requested an award of fees on appeal pursuant to A.R.S. § 25-324(A) and Rule 21(a), Ariz. R. Civ. App. P. Because we lack any substantive evidence of the relative financial resources of the parties, we deny those requests.