IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

AMBERLYN D. MEJIA,
Appellee,

and

JOE L. FLORES JR.,
Appellant.

No. 2 CA-CV 2021-0106-FC
Filed April 13, 2022

Appeal from the Superior Court in Pima County
No. D20121609
The Honorable Wayne E. Yehling, Judge

AFFIRMED

COUNSEL

The Redmon Law Firm, Tucson
By Nathaniel Scott Redmon
Counsel for Appellee

Berkshire Law Office PLLC, Tempe
By Keith Berkshire and Alexandra Sandlin
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Espinosa concurred.

V Á S Q U E Z, Chief Judge:

¶1 Joe Flores appeals from the trial court's ruling denying his petition to modify legal decision-making and parenting time following the dissolution of his marriage to Amberlyn Mejia. He argues that the court erred by not considering the merits of his petition and by failing to make specific findings under A.R.S. §§ 25-403(A) and 25-403.04. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the decree. *In re Marriage of Foster*, 240 Ariz. 99, ¶ 2 (App. 2016). The parties were married in 2009 and have two children. In 2012, the trial court entered a default decree dissolving the parties' marriage. Under the decree, the parties shared legal decision-making and Amberlyn had primary physical custody, with "reasonable parenting time" awarded to Joe.

¶3 By way of background, the parties each sought to modify legal decision-making and parenting time several times since the trial court entered the decree. Relevant to this appeal, in May 2016, the court issued an order on the parties' post-decree petitions to modify parenting time, replacing "all previous orders on legal decision-making and parenting time." That order awarded the parties joint legal decision-making of the children, ordered Amberlyn as their primary residential parent, and awarded Joe four days of parenting time up to five times a year, in addition to setting a summer, vacation, and holiday parenting schedule. Then in July 2019, the court entered a stipulated order pursuant to Joe and Amberlyn's agreement that parenting time under the May 2016 order would be temporarily modified until June 2020. Under the stipulated order, the children would reside in California with Joe, and Amberlyn was granted parenting time one weekend a month.

¶4 In February 2020, Joe filed a petition to modify legal decision-making and parenting time and petitioned to permanently relocate the

children to his home in California. He argued that Amberlyn is a "serious alcoholic," and her actions have endangered the children's well-being. Joe also contemporaneously filed a petition for temporary orders alleging the same issues as his petition, which the court granted, suspending Amberlyn's parenting time. After a hearing, relating to Joe's request for temporary orders, the court ordered Amberlyn's parenting time to be supervised but otherwise affirmed all other provisions of the July 2019 order. In May 2020, Amberlyn filed a motion to modify the temporary orders to allow her unsupervised parenting time, stating that she is not an alcoholic. After a hearing, the court ordered that Amberlyn's remaining parenting time under the July 2019 order would be unsupervised unless she was driving with the children.

¶5 In July 2020, the trial court issued its under-advisement ruling denying Joe's underlying modification petition. The court made specific findings concerning all the relevant best-interests factors under A.R.S. § 25-403(A) and also found it was in the children's best interests to affirm the July 2019 order, with the exception that the May 2019 parenting plan would start again in August 2020.

¶6 In October 2020, Joe again sought to modify legal decision-making and parenting time and to relocate the children to California. In this petition, he raised many of the same arguments from the February 2020 petition and provided additional examples as to why he "***still*** believes [Amberlyn] is a serious alcoholic." He, again, filed a petition for temporary orders based on the same allegations as his petition. After a hearing, the trial court entered temporary orders granting Joe "exclusive parenting time" and the ability to relocate the children to California "on a temporary basis," primarily based on evidence that Amberlyn was cited for an extreme DUI during the pendency of the petition. It also granted Amberlyn supervised parenting time in California during which she was not to drive with the children present, based on the finding that "[u]nsupervised parenting time . . . with [Amberlyn] may lead to a significant risk of serious physical, emotional, or mental harm for the minor children."

¶7 At an evidentiary hearing in early 2021 on Joe's petition to modify, Joe primarily testified about his concerns over Amberlyn's alcohol use, including her two DUI cases that were pending at the time. Amberlyn testified about the role alcohol had played in her life and the steps she was taking to develop skills and "make better choices than drinking." In May 2021, the trial court entered an under-advisement ruling denying Joe's petition, finding he had not met the standards under A.R.S. § 25-411(A) that would justify a modification of legal decision-making or parenting time.

Joe then moved for reconsideration, to set aside the order, and for a new trial on the grounds that Amberlyn had since been convicted of the two DUIs. The motions were denied. Joe appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (2).

Discussion

¶8 Joe argues the trial court abused its discretion in denying his petition for modification because it improperly interpreted A.R.S. § 25-411(A) and failed to consider the relevant best-interests factors. We review the trial court's orders concerning legal decision-making and parenting time for an abuse of discretion, *Nold v. Nold*, 232 Ariz. 270, ¶ 11 (App. 2013), and defer to its findings of fact unless they are clearly erroneous, Ariz. R. Fam. Law P. 82(a)(5).

¶9 Section 25-411(A), A.R.S., governs the process for modifying legal decision-making or parenting time. It provides, in part, that a parent cannot file a petition to modify "a legal decision-making or parenting time decree earlier than one year after" an existing order setting same, unless the court permits the filing based on evidence that "there is reason to believe the [children's] present environment may seriously endanger the [children's] physical, mental, moral or emotional health." *Id.*

¶10 When considering a petition for modification, the trial court must first find whether the petition establishes "adequate cause" for the hearing. § 25-411(L); *see also* § 25-411(A) ("A motion or petition to modify an order shall meet the requirements of this section."). A change of circumstances materially affecting the welfare of the children constitutes adequate cause. *Vincent v. Nelson*, 238 Ariz. 150, ¶ 17 (App. 2015). If a material change in circumstances is established, the court must then determine whether modification would be in the children's best interests, considering "all factors that are relevant to the [children's] physical and emotional well-being." A.R.S. § 25-403(A); *see also Christopher K. v. Markaa S.*, 233 Ariz. 297, ¶ 15 (App. 2013). Additionally, if the court determines a parent has abused alcohol within twelve months before the filing of the petition for legal decision-making or parenting time, there is a rebuttable presumption that it is contrary to the children's best interests for the court to award sole or joint legal decision-making to that parent. A.R.S. § 25-403.04(A).

¶11 Joe contends the trial court summarily denied his petition to modify on a procedural basis when it found "the Petition failed to meet the one-year requirement of A.R.S. § 25-411(A) or show the Children were

endangered with Mother." This argument mischaracterizes the court's ruling. The court permitted Joe to file the petition, acknowledging that he had established a prima facie case justifying the temporary orders. The court noted, however, that it did not grant the temporary orders primarily on the allegations raised in Joe's petition but on Amberlyn's second DUI, recognizing that "[t]he incident was so fresh at the [temporary orders] hearing that [Joe] had not even had the opportunity to amend his Verified Petition to mention it in his allegations." The court did not reject Joe's petition summarily.

¶12 Joe nevertheless maintains that the trial court did not address the merits of his petition. But to the extent he presented evidence, the court expressly addressed it, finding that it was "unreliably second-hand or required the Court to draw inferences from scant evidence." Ultimately, it was on this basis that the court denied his petition, finding that he failed to prove during the evidentiary hearings that the allegations in his petition met § 25-411's standards for modification of legal decision-making and parenting time.

¶13 In a related argument, Joe contends that because the trial court found that he met § 25-411's standards after the temporary orders hearing, it erred when it subsequently found he did not meet the same standards after the evidentiary hearings. Joe testified that although Amberlyn is in treatment for her alcohol use, she has participated in treatment before and so he believes "nothing has been resolved." Joe also testified that he received information from the extended family of Amberlyn's child from a different relationship that she was driving while intoxicated by using her mother's vehicle without an interlock device.

¶14 The trial court addressed the evidence in its ruling. It outlined the concerns it initially had for the children's well-being if Amberlyn continued to have unsupervised parenting time in the time between her second DUI and the evidentiary hearings. It noted that the second DUI not only constituted a change in circumstances materially affecting the welfare of the children, but it also gave the court "reason to believe the [children's] present environment may seriously endanger [them]." *See* § 25-411(A), (L). However, the court went on to state that, based on the evidence at the evidentiary hearing, Amberlyn had alleviated its concerns for the children's well-being under her supervision. She acknowledged her problem with alcohol, was participating in counselling, and had voluntarily installed an ignition interlock device on her vehicle. In addition to the court finding Joe's testimony unreliable, it also noted that he was essentially attempting

to argue the same issues from his prior petition to modify, which was denied in the court's July 2020 under-advisement ruling.

¶15 On this record, Joe has not demonstrated that the trial court abused its discretion by finding his petition did not meet § 25-411's standards for modification. And to the extent he invites us to reweigh the evidence, we will not do so. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 16 (App. 2009) ("Our duty on review does not include re-weighing conflicting evidence . . . ."); *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4 (App. 2002) (trier of fact "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings"); *see also Burk v. Burk*, 68 Ariz. 305, 308 (1949) (holding that "[t]he trial judge is in the best position to determine what is best for the child").

¶16 Joe next argues that the trial court erred by failing to make best-interests findings under § 25-403(A). But this ignores that the court incorporated its earlier findings by reference based on its finding that Joe was repeating old arguments and facts. Here, because the court found no basis for modification under § 25-411(A), it was not required to reconsider the § 25-403(A) factors and make new findings. *See Backstrand v. Backstrand*, 250 Ariz. 339, ¶¶ 22, 25 (App. 2020) (best-interests analysis of two-step modification inquiry occurs after trial court first finds change of circumstances); *Pridgeon v. Superior Court*, 134 Ariz. 177, 179 (1982) ("Only after the court finds a change [of circumstances] has occurred does the court reach the question of whether a change in custody would be in the child's best interest.").

¶17 Joe last contends that the trial court erred by failing to consider and make substance-abuse findings under § 25-403.04(A). To satisfy § 25-403.04(A), the court must state its:

> 1. Findings of fact that support its determination that the parent abused drugs or alcohol or was convicted of the offense.
>
> 2. Findings that the legal decision-making or parenting time arrangement ordered by the court appropriately protects the child.

Although the court did not directly cite § 25-403.04, it found that "[t]he main uncontroverted evidence that [Amberlyn] dangerously abused alcohol since the last parenting time order was [her] arrest for driving under the influence for which a citation was filed," satisfying § 25-403.04(A)(1). The court also found that Amberlyn addressed its concerns,

as discussed above, and "would [not] seriously endanger [the children's] physical, mental, moral or emotional health," again, satisfying § 25-403.04(A)(2). And although § 25-403.04(B) lists factors the court must consider if present, it does not require the court to cite the statute for each finding that supports its determination, including that a parent has rebutted the presumption. Here, the record indicates that the court considered Amberlyn's pending DUI charges, all other relevant evidence it deemed admissible, and implicitly found she rebutted the presumption when it stated that she "effectively addressed the [court's] concerns." In sum, the court did not abuse its discretion by denying Joe's petition to modify.

Attorney Fees

¶18 Both parties have requested attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P. In our discretion, we decline to award either party attorney fees. But as the prevailing party, Amberlyn is entitled to her costs on appeal upon compliance with Rule 21.

Disposition

¶19 For the foregoing reasons, we affirm the trial court's denial of Joe's petition to modify legal decision-making and parenting time.