FILED BY CLERK
MAR 22 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEBBORRAH E. JONES, Petitioner/Appellant, v. MARK E. LUCE, Respondent/Appellee.	2 CA-CV 2009-0064 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. SP-8562

Honorable John F. Kelly, Judge
Honorable Kenneth Lee, Judge

AFFIRMED

DeConcini McDonald Yetwin & Lacy, P.C.
By Wayne E. Yehling
Tucson
Attorneys for Petitioner/Appellant

Lawrence E. Condit
Tucson
Attorney for Respondent/Appellee

V Á S Q U E Z, Judge.

¶1 Debborrah Jones appeals[1] from the trial court's order granting sole legal and primary physical custody of the parties' minor child to the child's father, Mark Luce. She contends the court failed to "properly analyze[] the factors of A.R.S. § 25-403" and erred in denying her request for attorney fees and granting Mark's fee request. For the reasons set forth below, we affirm.

Facts and Procedural Background

¶2 Debborrah and Mark are the natural parents of R., born out of wedlock on May 13, 1996. Pursuant to a paternity action filed shortly after R.'s birth, Mark was ordered to pay $862 per month for child support. In June 2007, Debborrah filed a petition to modify the child support order. Mark filed a response and counter-petition to modify child support and parenting time. In November, Mark asked the court to order a custody and parenting-time evaluation. On January 18, 2008, he filed a motion to modify legal and physical custody. At a hearing on January 23, the parties agreed to a custody evaluation, and the court set a temporary parenting schedule, which accommodated the parents' work schedules through June 15, 2008. It also ordered Mark to continue paying $1,800 per month in child support, an amount he apparently had agreed to pay after the original child support order, without waiving his right of reimbursement for overpayment pending the court's ultimate determination.

¶3 In March 2008, Debborrah obtained an order of protection prohibiting Mark from having contact with her and R. After a hearing, the trial court found

[1]Debborrah filed a premature notice of appeal before the trial court had entered final judgment on the issue of attorney fees. However, she filed a second notice of appeal after the court entered the final order. We thus consider her appeal.

Debborrah had "sustained her burden of proof with respect to the order of protection that covers herself and her home." However, it "modif[ied] the order of protection to remove R[.] from [it]" and ordered future parenting exchanges to be made through the Judicial Supervision Program (JSP). In June, that program notified the court that Debborrah had rejected Mark's proposal for parenting time with R. after June 15, the last date specifically covered by the court's January order. On July 21, the court ordered the resumption of parenting time in accordance with the original schedule. However, it reserved ruling on Mark's motion for fees relating to that issue until final judgment.

¶4 A five-day trial was held in November and December 2008. In the ruling that followed, the trial court noted "the parties [we]re not able to communicate effectively to make joint decisions regarding R." "[G]iven the history and relationship of the parties," it concluded, "joint legal custody [wa]s not in R[.]'s best interest and [wa]s simply not workable." The court stated it agreed with Dr. Balch, the psychologist who had conducted the custody evaluation, "that it [wa]s in the child's best interest that the primary residence of the child be modified to [Mark]." The court awarded Mark sole legal and primary physical custody of R. with reasonable parenting time to Debborrah. It generally denied both parties' requests for attorney fees. However, finding "unjustified" Debborrah's "insistence that [Mark]'s parenting time with R[.] cease until a Court order was issued relating to parenting time beyond June 15, 2008," it awarded Mark's fees "in connection with reestablishing parenting time in June and July, 2008." This appeal followed.

Discussion

I. Change in Custody

¶5 Debborrah first contends the trial court abused its discretion in granting Mark's motion for change of custody. "'To change a previous custody order, the court must determine whether there has been a material change in circumstances affecting the welfare of the child.'" *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 16, 79 P.3d 667, 671 (App. 2003), *quoting Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994). We review the trial court's "decision regarding child custody for an abuse of discretion," *id.* ¶ 7, viewing the evidence and all reasonable inferences derived therefrom "in the light most favorable to sustaining [its] findings." *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d 676, 679 (App. 1998). The court's "finding[s] will be upheld if there is any reasonable evidence to support [them]." *Mitchell v. Mitchell*, 152 Ariz. 317, 323, 732 P.2d 208, 214 (1987).

¶6 The trial court's order included a thorough review of the evidence and a detailed discussion of the factors it found relevant to its custody determination. *See* A.R.S. § 25-403(A), (B) ("In a contested custody case, the court shall 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."). Debborrah challenges the court's analysis and conclusions with respect to factors (A)(2), the wishes of the child; (A)(3), the relationship between the child and his or her parents, siblings, and others who "may significantly affect the child's best interest"; (A)(5), the involved individuals' physical and mental

health; and (A)(7), "whether one parent, both parents or neither parent has provided primary care of the child." *Id.* We address each of these factors in turn.

Wishes of the child

¶7 Debborrah argues that, although "the trial court acknowledge[d] that R[.] would prefer to live with Debborrah, it minimize[d] this concern by further finding that R[.]'s interests ha[d] been 'enmeshed' with Debborrah's" and failed "to indicate how this alleged enmeshment . . . would be addressed or improved by changing custody." "The wishes of the child of a sufficient age to form an intelligent custody preference are persuasive, although not controlling." *J.A.R. v. Superior Court*, 179 Ariz. 267, 274, 877 P.2d 1323, 1330 (App. 1994). In other words, although a court must consider the child's wishes, it is not bound by them. The primary consideration in determining child custody must be the best interests of the child. *Evans v. Evans*, 116 Ariz. 302, 306, 569 P.2d 244, 248 (App. 1977).

¶8 The trial court noted R. "ha[d] expressed his desire to be physically located with [Debborrah]." However, it found that "[R.]'s desires ha[d] become enmeshed with [Debborrah]'s interest" and that "Dr. Balch indicate[d] that [R.] may feel the need to distance himself from [Mark] in order to stay aligned with [Debborrah]." The court further stated that, while in Debborrah's care, R.

> ha[d] come to learn and become directly involved in many of the legal disputes regarding the modification of custody . . . . R[.] was able to read at least the findings and recommendations of [the custody evaluator] while at [Debborrah]'s home. He ha[d] become involved as a witness to or overheard several allegations made to various authorities . . . that [Mark] has violated the Order of Protection, a Court

> Order, or endangered the child such that Child Protective Services was called to investigate. Many of these allegations turn[ed] out to be unfounded or exaggerated. Yet, the constant underlying message to R[.] from [Debborrah] . . . is that [Mark] is a danger to [her] and a danger to R[.] The continued exposure of R[.] to the substance and allegation[s] in the ongoing legal dispute on custody is not in the child's best interest. Even the current therapist . . . expressed some doubt as to whether [Debborrah] would refrain from continuing to expose R[.] to the details of the legal disputes, despite [the therapist]'s oral recommendation that R[.] be shielded from this information.

¶9 The record demonstrates that, although the trial court considered R.'s wishes, it specifically found that R.'s "continued exposure . . . to the substance and allegation[s] in the ongoing legal dispute," which contributed to the enmeshment, was not in his best interests. Based on that finding, which Debborrah does not directly challenge, the court concluded R.'s expressed wishes had been affected by Debborrah's "constant underlying message to [him] . . . that [Mark] [wa]s a danger" to them both; accordingly, it assigned them less weight. The court's findings are supported by the record. Thus, we cannot say it abused its discretion in ruling contrary to R.'s wishes.

Adjustment to home, school, and community[2]

¶10 Debborrah next contends "[t]he trial court's finding that Mark would provide R[.] a more stable living environment is highly problematic." She maintains this finding is not supported by the record and asserts the court's statement that R.'s

[2]Although Debborrah has discussed home stability and education as part of her discussion of R.'s relationships with others, many of these considerations relate to R.'s adjustment to Mark's and Debborrah's respective home environments and his school. *See* § 25-403(A)(4).

academics have suffered from that environment contradicts its additional finding that R.'s school performance was satisfactory.

¶11 The trial court found Debborrah's home environment "unstable" because she did not have a consistent caregiver for R. during the early mornings and evenings when she was at work, and it found R.'s "academics [had] suffer[ed] from the instability." In contrast, the court found that, although Mark had, "at times, high and unrealistic expectations for R[.]," R. desired a relationship with him and, by living with Mark, R. would have increased support and assistance with his schoolwork and would learn how to compromise and accommodate others. It therefore concluded that, "if R[.] were to live primarily with [Mark], a more beneficial environment would be provided."

¶12 There was evidence to support the trial court's conclusion. According to Debborrah's statements during the custody evaluation, when she worked 6:00 a.m. to 2:00 p.m. shifts, she would take R. to a friend's house or Mark's house at about 5:30 a.m. R. would then sleep until it was time to get up for school. After school, he would return to a friend's or his father's house until Debborrah was able to pick him up. Sometimes R. stayed overnight at Mark's. Debborrah did not have a set schedule or arrangement for R.'s caretaking. And, when her shifts changed to 8:00 a.m. to 6:00 p.m., Debborrah indicated she was able to take R. to school in the mornings, but in the afternoons R. stayed either with a friend or home alone until Debborrah returned. Considering these facts, Dr. Balch concluded in his written evaluation report:

> It does seem to be the case that [Debborrah's] work responsibilities and her utilizing various others over time to help . . . take care of R[.] ha[ve] limited her ability to be a

> consistent educational overseer for R[.] There is a concern that R[.] has been shuffled from place to place over the years and until quite recently it appears that there was not a consistent ability for R[.] to even sleep in his own bed until school started, or to be able to return to a consistent home setting once school was finished.

¶13 Based on the interviews and information Balch collected for the custody evaluation, he testified at trial that Mark's

> family . . . is quite educationally attentive, if not rigorous, and I think it would be to R[.]'s advantage to have that kind of consistency and that kind of . . . educational stimulation, if not . . . expectations, as opposed to what has been the case historically . . . where he's dropped off early in the morning somewhere, and then brought to school, and then goes to somebody else's house in the afternoon who are charged with overseeing his homework, or is left at . . . his mother's home with mother not arriving until much later in the evening. . . . R[. has] had somewhat of a spotty educational situation. So I think it's clearly to his advantage to be in the best possible educational environment.

¶14 As Debborrah points out, the trial court found R.'s current educational achievement "satisfactory." But, contrary to her assertion, this does not inherently contradict the court's conclusion that R.'s academic achievement had been limited by the lack of consistency in his school-week schedule. While living with Debborrah, R. was able to maintain a "satisfactory" level of academic achievement, despite the instability in his daily routine. However, as Dr. Balch made clear, the stability and emphasis on academics at Mark's home would give R. the opportunity to achieve a greater level of academic success. The court therefore did not abuse its discretion in concluding that R.'s best interests with respect to home environment and education favored Mark. *See Anderson v. Anderson*, 121 Ariz. 405, 407, 590 P.2d 944, 946 (App. 1979) ("The fact that

[a parent is] found fit d[oes] not relieve the trial judge of the burden of determining which parent c[an] best meet the present needs of the child[].").

R.'s relationships with others

¶15 Debborrah acknowledges a trial court may consider a child's relationship with individuals who are not his parents pursuant to § 25-403(A)(3). However, she contends the statute "does not provide a trial court with discretion to emphasize this factor so heavily that the minor child's relationship with others, in this case R[.]'s relationship with Mark's wife and her children, overshadows an honest discussion of the important relationship, that is between Mark and R[.]" She additionally argues the court's ruling was error because "it is very difficult to escape the conclusion that but for the existence of Mark's new wife, the ruling would [not] have been the same."

¶16 The court addressed Mark's relationship with R., finding Mark "has, at times, high and unrealistic expectations for R[.] There are communication deficiencies. However, R[.] still desires a relationship with [Mark]." It also noted there had been "no significant difficulties" while R. lived with Mark in early 2007. The court further concluded that R. had established good relationships with Mark's wife and her two children living in the home and that it would benefit R. to live with Mark's family.

¶17 Debborrah has cited no authority to support her argument that the trial court erred in giving significant weight to R.'s relationship with Mark's wife. Indeed, § 25-403 required the court to consider this relationship, and courts generally must evaluate "[t]he total evidentiary picture" in making custody determinations. *Anderson*, 121 Ariz. at 407, 590 P.2d at 946. The record supports the court's conclusion that Mark's wife provides R.

additional stability. Mark works away from the home approximately fourteen days per month, usually for four days at a time. When he is not available to R., Mark's wife is consistently in the home to support and assist R. In contrast, when Debborrah is not available to R. because of work, there is no consistent caregiver and sometimes R. is on his own until she returns.

¶18 In considering R.'s relationship with Debborrah, the trial court found he was close to her and "over-identifies with her interests." It also noted Balch's finding that Debborrah "has less control over R[.] and he is able to manipulate and control her to avoid being held responsible and accountable for his conduct and to avoid doing his school work." Thus, the court did not abuse its discretion in considering the additional stability provided by R.'s relationship with Mark's wife in determining R.'s best interests.

Mental and physical health

¶19 Debborrah next contends the trial court abused its discretion in concluding that factor (A)(5), the physical and mental health of all individuals involved, "was a 'non-issue' because all involved in this case are in good physical and mental shape." She contends "the trial court failed to give [her] the credit due" with respect to this factor and claims it actually favors her because, "although [the court found that] R[.] ha[d] lived in an environment the trial court consider[ed] 'unstable,' that R[.] is 'enmeshed' with [her], and that R[.]'s academics have suffered on [her] watch, R[.] has no notable physical, mental or emotional problems."

¶20 However, whether Debborrah has minimally parented R. so that he has not suffered physically or mentally is not the issue. Debborrah's fitness as a parent is uncontested, as is Mark's. Thus, the only issue is R.'s best interests. *See Anderson*, 121 Ariz. at 407, 590 P.2d at 946. Neither party presented any evidence that R., Debborrah, Mark, or any of the other individuals involved have any physical or mental conditions that would affect the trial court's custody decision. It therefore did not abuse its discretion in not considering this factor further.

Primary custodian

¶21 Finally, Debborrah argues, "[a]nother example of the trial court's failure to give [her] credit where credit is due is with respect to its analysis of . . . § 25-403(A)(7), in which it acknowledges that Debborrah has been R[.]'s primary custodian for the majority of his life, but says nothing more about it." In particular, she contrasts Balch's evaluation, which she contends "spends some time analyzing this factor" with the court's summary discussion in the minute entry. However, as the trier of fact, the trial court was tasked with weighing the evidence, and this court will not re-weigh it on appeal. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). The court considered this factor but apparently, under the circumstances, did not find it particularly persuasive. We cannot say this constituted an abuse of the court's discretion.

Conclusion

¶22 The trial court appropriately analyzed each of the factors Debborrah raises, and substantial evidence in the record supports its factual findings and ultimate conclusion that changing sole legal and primary physical custody of R. to Mark was in

R.'s best interests. The court therefore did not abuse its discretion. *See Mitchell*, 152 Ariz. at 323, 732 P.2d at 214.

II. Attorney Fees

¶23 Debborrah argues the "trial court erred in awarding Mark attorney[] fees and not granting [her] attorney[] fees." The court largely denied the parties' requests for fees, finding "both parties have adequate resources to pay their own attorney[] fees." However, it found Debborrah had "cause[d] at least one unnecessary hearing with no good basis to support her position . . . relative to [her] insistence that [Mark]'s parenting time with [R.] cease until a Court order was issued relating to parenting time beyond June 15, 2008." It therefore ordered her to pay the attorney fees Mark had incurred to reestablish his parenting time. We review a court's award or denial of attorney fees for an abuse of discretion. *Breitbart-Napp v. Napp*, 216 Ariz. 74, ¶ 35, 163 P.3d 1024, 1033 (App. 2007).

¶24 Debborrah maintains "[i]t is . . . an abuse of discretion to deny attorney[] fees . . . to a party who has substantially fewer resources unless those resources are **clearly** ample to pay fees." She also argues the award of partial fees to Mark was an abuse of discretion because the court did not consider whether she was able to pay them.

¶25 Section 25-324, A.R.S., provides that "[t]he court . . . , after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending" a child custody proceeding. Debborrah cites *Burnette v. Bender*, 184 Ariz. 301, 908 P.2d 1086 (App.

1995), to support her contention that, where there is a great disparity in the income of the parties, it is an abuse of discretion for the trial court not to award fees to the party with the lesser income. In *Burnette*, the trial court had denied fees to the mother. 184 Ariz. at 306, 908 P.2d at 1091. On review, this court reversed and remanded the denial of fees because "the only reason given for denying that relief," the father's allegation she had unnecessarily prolonged litigation, was not supported by the record. *Id.* The father "had about three times the income of Mother and far more financial resources; Mother had relatively low income [of $1,587 per month], modest financial resources, and a high school student at home." *Id*. Similarly, in *Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997), we reversed a denial of attorney fees where the father had separate property worth $2,000,000 and an annual salary of $90,000 to $150,000 while the mother made $5.50 per hour.

¶26 However, this court has also held that, despite a disparity in the parties' financial resources, it is not an abuse of discretion to deny the party with fewer resources an award of fees where that party has sufficient assets to pay his or her own fees. *In re Marriage of Robinson*, 201 Ariz. 328, ¶¶ 21-22, 35 P.3d 89, 96 (App. 2001). Here, other than arguing that the disparity in income supports an award of her attorney fees, Debborrah has not directed us to any evidence that she is unable to pay her attorney fees with her monthly income of $5,319 and any other financial resources she may have. *See In re Marriage of Williams*, 219 Ariz. 546, ¶ 15, 200 P.3d 1043, 1047 (App. 2008) (in considering financial resources, court looks to relative disparity, ability of parties to pay fees, ratio of fees owed to assets owned, and similar matters; no factor "alone is

dispositive"). We therefore cannot say the court abused its discretion in denying Debborrah's request for fees. *See Marriage of Robinson*, 201 Ariz. 328, ¶¶ 21-22, 35 P.3d at 96.

¶27 Moreover, we disagree with Debborrah's contention that "it was an abuse of discretion for the trial court to overlook the vast financial disparity between the parties in awarding Mark any attorney[] fees." At a preliminary hearing, the court and the parties agreed to a parenting-time schedule through June 15, 2008. The schedule was, "in part, set to accommodate [Debborrah']s shifts in her work schedule [that change] every two months." When the schedule expired, Debborrah refused to allow Mark additional parenting time, requiring him to file a motion with the court and attend a hearing in order to re-establish visitation. The court ordered the prior parenting-time schedule to continue in effect until trial and reserved its ruling on Mark's request for fees until the entry of a final judgment. Ultimately the court concluded Debborrah's "position was unjustified and was another example of [her] continuing efforts to interfere with [Mark]'s parenting time." It thus awarded Mark "reasonable attorney[] fees in connection with re-establishing parenting time."

¶28 Although the trial court was required to consider the financial resources of the parties in awarding fees under § 25-324, they are not the sole consideration. *Marriage of Williams*, 219 Ariz. 546, ¶ 9, 200 P.3d at 1045. Here, the court had before it relevant information about the parties' financial resources. But how it chose to weigh that information is a matter left to the court's discretion. *Id.* ¶ 15. Additionally, the court found Debborrah had unnecessarily caused Mark to incur excess attorney fees in an

attempt to "interfere with [his] parenting time." And, contrary to her argument, the fact that her behavior was not in direct "violation of any court orders" does not mean the court abused its discretion in concluding her position was "unjustified." Her refusal to cooperate with Mark and respond to his attempts to create an interim parenting plan supports the court's determination. Therefore, having considered both the parties' resources and the reasonableness of Debborrah's position on the temporary parenting schedule, we cannot say the court erred in awarding Mark the attorney fees he incurred as a result of Debborrah's unreasonable position on this issue.

Disposition

¶29 We affirm the trial court's order granting sole legal and primary physical custody of R. to Mark and awarding him partial attorney fees. In our discretion, we deny both parties' requests for attorney fees on appeal.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge