IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

MAMAK CHAREPOO, *Petitioner/Appellee*,

v.

SHIDAN DAHNAD, *Respondent/Appellant*.

No. 1 CA-CV 13-0356
FILED 5-6-2014

Appeal from the Superior Court in Maricopa County
No. FC2008-003017
The Honorable Sam J. Myers, Judge

AFFIRMED

COUNSEL

Wylde Summers PLLC, Gilbert
By Jennifer Summers
Counsel for Petitioner/Appellee

Shidan Dahnad, Florence
Respondent/Appellant In Propria Persona

MEMORANDUM DECISION

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Margaret H. Downie joined.

B R O W N, Judge:

¶1 Shidan Dahnad ("Father") appeals the trial court's order granting Mamak Charepoo's ("Mother") motion for relocation and petition for modification of parenting time. Because we find no abuse of discretion, we affirm.

BACKGROUND

¶2 The parties' divorce became final in March 2009. Mother and Father's two sons and daughter were ages thirteen, three, and ten, respectively, at that time. In the decree of dissolution, the trial court granted sole legal decision-making (formerly "custody") to Mother because Father is a registered sex offender and is serving a 17-year prison sentence based on convictions for two counts of child molestation.[1] In doing so, the court declined to engage in an analysis of the statutory factors normally applicable in a contested legal decision-making proceeding, finding instead that the "determination is controlled" by Arizona Revised Statutes ("A.R.S.") section 25-403.05, which creates a legal presumption against granting legal decision-making or unsupervised parenting time to a parent who is a registered sex offender.

¶3 Noting that parenting time was the "most significant issue raised at trial," the court found it was in the best interests of the children that Father would have ongoing parenting time, to occur twice a month.[2]

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[1] Father's convictions and sentences for molesting two of his neighbors' children were affirmed by this court in 2009. *See State v. Dahnad*, 1 CA-CR 06-1024, 2009 WL 325445 (Ariz. Ct. App. Feb. 10, 2009) (mem. decision).

[2] In May 2009, the court found that two visits per month were too disruptive to the children's school schedules; therefore, the visits were reduced to one per month during the school year, unless the visitation

The court's order also provided for weekly telephone contact between Father and two of the children and stated that he could write letters to them. The court noted that Mother acknowledged she had supported Father during his criminal trial and appeal, but she could no longer do so because she was fearful that Father was "capable of molesting children within his family." The court explained, however, that Mother had not produced corroborating evidence from any psychologist, and that doing so would have been "very helpful" in determining what parenting time would be in the children's best interests. The court also stated it had received no evidence of any ongoing counseling of the children.

¶4 Mother petitioned for modification of parenting time in November 2010, alleging that Father had not received any counseling for his crimes and that the children had been negatively impacted by the prison visits. Specifically, Mother asserted that Father continually pressured the children to share their feelings with him, made them feel responsible for his incarceration, and pressured them to hug him when they left the visits. Father acknowledged he had not had any counseling while incarcerated, but denied Mother's allegations regarding his actions toward the children during their visits. Father also requested an "order [to modify] his parenting time to a minimum of two-and-a-half (2 ½) hours per visit."

¶5 After an evidentiary hearing, the court granted Mother's petition, finding that Mother had "demonstrated a significant and continuing change of circumstances based upon the increased age of the children since the entry of the parenting time orders." The court determined that the twice-monthly scheduled visits to Father were not in the best interests of the children, given that the two oldest children were old enough to decide when and how often they would like to see Father. As to the youngest child, the court ordered Mother to take him to visit Father quarterly and to continue to arrange for telephone contact once per month.

¶6 Father appealed, and a different panel of this court vacated the trial court's order because it failed to consider "whether continuing parenting time with Father as previously ordered would endanger seriously the [children's] physical, mental, moral or emotional health as required by § 25-411(J)." *Charepoo v. Dahnad*, 1 CA-CV 11-0643 A, 2012 WL

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occurred during summer break or on weekends, in which case there would still be two per month.

2929410 (Ariz. Ct. App. July 19, 2012) (mem. decision). The matter was remanded for reconsideration of Mother's petition "based on the existing record or, at the court's discretion, as supplemented by the parties."

¶7 In August 2012, Mother filed a petition to relocate the children to Boston, Massachusetts. Mother explained that her new husband was offered a position in Boston with a thirty-percent higher salary. Father countered that it would not be in the best interests of the children to be relocated, but if the court approved the request, Mother should pay the transportation costs associated with parenting time. In his pretrial statement, Father conceded to sharing transportation costs, but requested parenting time to occur three times per year to coincide with the children's school vacations, and should consist of four visits to the prison in two consecutive weekends, with each visit lasting a minimum of five hours.

¶8 In April 2013, the court held a consolidated hearing on Mother's remanded petition for modification of parenting time and her petition for relocation. In a nine-page ruling, the court found that Mother had met her burden of showing that relocation was in the children's best interests. The court also placed additional limitations on Father's parenting time, concluding that in-person visits would be limited to one visit per year, and only if requested by the children and approved by a parenting coordinator or therapeutic interventionist. Father timely appealed.

DISCUSSION

¶9 Before addressing the issues Father has raised on appeal, we note that because it is undisputed that Father is a registered sex offender, he cannot be granted sole or joint legal decision-making nor can he be awarded unsupervised parenting time without an express finding, in writing, that "there is no significant risk to the child[ren]." *See* A.R.S. § 25-403.05. With this understanding, we turn to Father's arguments.

I. Motion to Compel Children's Therapy Records

¶10 Father asserts the trial court abused its discretion by denying a motion to compel disclosure of the children's therapy documents. We disagree.

¶11 Anticipating a hearing on the pending petitions for relocation and modification of parenting time, in November 2012 Father's attorney requested the children's treatment records from Julie Skakoon,

the children's court-appointed therapist.[3] Skakoon requested the court's direction on the matter, commenting that she did not believe it was in the children's best interests to have their records released. In response, Mother argued that releasing the children's records would be against their privacy interests and that she could not afford to pay for the therapist to testify at the upcoming hearing. Father countered that he requested the records so he could ascertain whether Mother's request to relocate was made in good faith.

¶12 Father then served a subpoena on Skakoon for the treatment records. Skakoon again requested the court's guidance on whether she should turn over the records to Father, reiterating her concern about the the potential impact on the children. Seven days before the evidentiary hearing, Father filed a motion to compel disclosure of the records. After hearing argument from counsel just prior to the evidentiary hearing, the court denied Father's motion, finding it was untimely.

¶13 Even assuming the court erred in finding the motion untimely, the record supports the trial court's decision not to compel the therapist to disclose the children's treatment records to Father. Although A.R.S. § 25-408(J) creates a presumption of parent entitlement to children's records, a court may preclude disclosure if it finds that such disclosure would "endanger seriously the child's or a parent's physical, mental, moral or emotional health," which may be implied from the record. Here, a reasonable reading of the record supports the court's decision based on the concerns expressed by Skakoon and Mother. Therefore, the court did not abuse its discretion in denying Father's motion.

II. **Motion to Relocate**

¶14 We review a court's decision to grant a motion to relocate for an abuse of discretion, considering the evidence in the light most favorable to upholding the decision. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 19, 219 P.3d 258, 262 (App. 2009). An abuse of discretion exists when the

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[3] The court originally appointed Diana Vigil to perform the duties of a "therapeutic interventionist" for twelve months after the parties divorced. Vigil was to recommend to the court an appropriate parenting plan, but this record does not reflect that any such recommendation was made. The court subsequently appointed Skakoon to replace Vigil, but clarified that Skakoon had been appointed to serve as the therapist for two of the children.

record "is devoid of competent evidence to support the decision." *Id*. An abuse of discretion also occurs "[w]here there has been an error of law committed in the process of reaching [a] discretionary conclusion." *Id.* (internal quotations omitted). When reviewing the record for an abuse of discretion we will not substitute our discretion for that of the trial court unless the court's findings are clearly erroneous. *Hrudka v. Hrudka,* 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995); *In re Marriage of Berger*, 140 Ariz. 156, 162, 680 P.2d 1217, 1223 (App. 1983) ("If there is any credible evidence to support the trial court's findings, we must accept those findings.").

A. Adequacy of Findings

¶15 When a motion to relocate has been properly filed, the court "shall determine whether to allow the parent to relocate the child in accordance with the child's best interests." A.R.S. § 25-408(F). In determining the child's best interests, "the court shall *consider* all relevant factors" including the eight factors contained in A.R.S. § 25-408(H). (Emphasis added). The first factor under section 25-408(H) is an analysis under A.R.S. § 25-403. Section 25-403(A) sets forth eleven best interests factors, which under § 25-403(B) must be made on the record if parenting time is contested. Father argues the trial court abused its discretion because it failed to make an explicit determination that relocation was in the best interests of the children under § 25-403(B).

¶16 Assuming, without deciding, that § 25-403(B) applies to Mother's request to relocate in light of Father's incarceration and status as a registered sex offender, we disagree that the court abused its discretion in permitting Mother to relocate. The trial court made extensive findings as to each of the eleven factors provided under A.R.S. § 25-403(A), as well as the seven additional factors of § 25-408(H). After making each of these determinations, the trial court found that "Mother had met her burden of showing that moving . . . is in the children's best interests."

¶17 With regard to § 25-403(B), the trial court stated at the outset that Mother bore the burden of establishing relocation was in the children's best interests. The court then referenced §§ 25-408 and 25-403, noting that it was required to make specific findings on the relevant factors, including best interests. Even though the court did not specifically state that it was making a best interests finding pursuant to § 25-403(B), the court's order as a whole reflects that the court complied with the statutory requirement. *See Munari v. Hotham,* 217 Ariz. 599, 603, ¶ 16, 177 P.3d 860, 864 (App. 2008) ("Implicit in the court's reasoning that

deprivation of the . . . visitation time is 'extremely detrimental' to the child . . . is the finding that relocation without some form of visitation . . . would adversely affect the child's stability or his emotional, physical, or developmental needs.").

B. Sufficiency of Evidence

¶18 Father challenges the trial court's findings as "contrary to the record and to evidence presented at [trial]." In essence, Father requests that we reweigh the evidence on appeal, which we will not do. *See Hurd*, 223 Ariz. at 52, ¶ 16, 219 P.3d at 262 ("Our duty on review does not include re-weighing conflicting evidence or redetermining the preponderance of the evidence."). The record shows that the purpose of Mother's relocation request was to allow her new husband to accept a higher-paying job and that the relocation would likely (1) result in Mother having access to greater income; (2) improve the general quality of life for Mother and the children; and (3) have a positive effect on the emotional, physical, and developmental needs of the children. These factors support the court's decision to approve Mother's request to relocate, and we therefore find no abuse of discretion.

III. Petition for Modification of Parenting Time

¶19 We review a trial court's parenting time decisions for an abuse of discretion. *Amer v. Amer,* 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). "The question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason." *Cook v. Losnegard*, 228 Ariz. 202, 205, ¶ 11, 265 P.3d 384, 387 (App. 2011) (internal quotation omitted). The trial court is in the best position to determine the children's best interests, *Earley v. Earley*, 10 Ariz.App. 308, 309, 458 P.2d 512, 513 (1969), and to evaluate the sufficiency of the evidence. *See Berger*, 140 Ariz. at 162, 680 P.2d at 1223 ("If there is any credible evidence to support the trial court's findings, we must accept those findings."). We will therefore not set aside the trial court's findings unless they are clearly erroneous. *Hrudka*, 186 Ariz. at 92, 919 P.2d at 187.

A. Compliance with A.R.S. § 25-411(J)

¶20 Father argues the trial court did not properly comply with A.R.S. § 25-411(J) in determining whether to modify the original parenting time order. Specifically, Father contends the court erred in finding that

parenting time with him would endanger the minor children. We disagree.

¶21 Arizona Revised Statutes section 25-411(J) provides that a court "may modify an order granting or denying parenting time rights whenever modification would serve the best interest of the child, but the court shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger seriously the child's physical, mental, moral or emotional health." Although the trial court referenced § 25-408(A),[4] the court did address the threshold issue contemplated by § 25-411(J), which is whether granting Father parenting time would "endanger seriously the child's physical, mental, moral or emotional health."

¶22 Unlike the circumstances when the original parenting time order was entered, when the trial court considered Mother's requests to relocate and modify parenting time, the children had received a number of counseling sessions. In her updates to the court, the children's therapist explained that when visiting Father twice a month, the children were exhibiting aggressive behavior toward authority figures, suffering anxiety, and having trouble sleeping. Additionally, Father failed to comply with the recommendations established by the therapist. For example, one of the children reported that Father would "pressure them" when either of them requested to leave the visit early. Based on those circumstances, the court did not abuse its discretion.

B. Modification of Parenting Time

¶23 Father also argues the trial court abused its discretion when it modified Father's parenting time. After the court determined modification was appropriate, it ordered the following changes:

> 1. In-person Visitation
> Father shall have in-person visitation only if requested by the children and recommended by a Parenting Coordinator or Therapeutic Interventionist, but not to exceed one visit with the youngest child per year. Visits with the two older

[4] On remand we directed the court to consider Mother's petition under the standard set forth in § 25-411(J). *See supra* ¶ 7. Additionally, we note that § 25-408(A) has been deleted by the legislature, effective Jan. 1, 2013. *See* 2012 Ariz. Sess. Laws, ch. 309, § 18.

children should be at their discretion, if such visitation is recommended by a Parenting Coordinator, and again, not to exceed one visit per year.

2. Visitation Costs
Father should be responsible for all the visitation costs for Mother and the children, including airfare and car rental expenses, as Father's incarceration would require the children to travel to Arizona for visitation and Father should [bear those costs] as Father has not contributed to the children's therapy costs, nor pays child support[.]

3. Telephone Contact
Father may call the children once per month at an agreed upon time that is convenient for both Father's and the children's schedules. . . . [the children] may request additional telephone contact with Father as often as they wish. Because the Court has ordered that any communication between Father and the children must be professionally monitored, Mother will continue to monitor these telephone calls to save Father the added expense and delay of making arrangements with a parenting coordinator or therapist.

4. Letters
Father may continue to write letters to the children only if he sends them to a therapist, so the children have an opportunity to process the letters with someone other than Mother. . . . Father has demonstrated that he does not follow the rules in his letters and birthday cards by initiating and encouraging contact with his extended family without the permission of Mother.

¶24 Father asserts that limiting his parenting time to only once per year at the request of his children violates A.R.S. §§ 25-403.02(E) and 25-408(F). Given that Father does not have shared legal decision-making authority, § 25-403.02(E) does not apply here. *See* A.R.S. § 25-403.02(E) (stating that "[s]hared legal decision-making does not necessarily mean equal parenting time"). Furthermore, § 25-403.02(B) explicitly requires the court, under § 25-403.05, to consider whether a parent is a convicted sex offender when adopting a parenting plan. Similarly, § 25-408(F) requires a trial court to make appropriate arrangements to ensure the continuation of

a meaningful relationship between the child and both parents "to the extent [it is] practicable." Given Father's incarceration for sexual misconduct and the court's findings that visitation with Father has had a negative impact on his children, the court did not abuse its discretion in limiting in-person visitation with Father.

¶25 Father argues next that the trial court abused its discretion in making him solely responsible for in-person visitation costs. When allocating parenting time expenses, "the court shall consider the means of the parents and may consider how their conduct [] has affected the costs of parenting time." A.R.S. § 25-320, app. § 18. Despite the fact that Mother's relocation will create additional travel expenses, the court was obligated to consider "how [the] conduct [of a parent] has affected the costs of parenting time." It was therefore reasonable to weigh Father's incarceration (resulting from his conduct) against Mother's decision to relocate when allocating traveling costs. Thus, we cannot say that the court abused its discretion by making Father responsible for traveling costs.[5]

¶26 Father also takes issue with the trial court's modification of his telephone contact, asserting the court failed to indicate the reason for the modification and questioning whether there was an order that Father's phone calls with his children should be monitored in the first place. The court, however, was not required to state its reasoning for this finding. *See Hart v. Hart,* 220 Ariz. 183, 187, ¶ 17, 204 P.3d 441, 445 (App. 2009) ("As shown by [A.R.S. §§ 25-403(B), 25-411(D)], the legislature chose to make 'specific findings on the record' a requirement in some circumstances but not in others. The legislature knows how to make written findings a requirement and did not do so here."). Additionally, even if the court had not previously ordered monitoring of Father's telephone calls, the court's failure to do so is harmless. The relevant issue is whether the court's decision, directing that phone calls be monitored going forward, constitutes an abuse of discretion. We conclude the court acted within its discretion based on the concerns raised by the children through Skakoon and Mother. Moreover, the legislature has demonstrated its intent to

[5] Father primarily relies on *Hurd,* 223 Ariz. at 53, ¶ 24, 219 P.3d at 263, for the proposition that courts have routinely split travel costs 50-50 between parents when one parent moves out of state. But *Hurd* did not involve the situation where one parent is a registered sex offender and cannot travel due to incarceration.

require supervision for contact between a registered sex offender and his or her children. *See* A.R.S. § 25-403.05.

¶27 Finally, Father argues that because the trial court ordered that he could "continue to write letters to the children only if he sends them to a therapist" the court has created a "Catch-22" situation so long as Mother places the children with a therapist. However, nothing in the court's order prevents Father from requesting appointment of a new therapist or parenting coordinator.

¶28 In light of the trial court's finding that visitation with Father has had a negative impact on the children's physical, mental, moral, or emotional heath, and given the practical considerations flowing from Mother's relocation, we conclude the court did not abuse its discretion in modifying Father's parenting time.

CONCLUSION

¶29 We affirm the trial court's order granting Mother's petition to relocate and petition to modify parenting time. Both parties have requested attorneys' fees on appeal pursuant to A.R.S. § 25-324. Father is not entitled to a fee award because he is representing himself on appeal and he has not prevailed on any of the issues raised. In our discretion, we deny Mother's request for fees but recognize her entitlement to costs incurred on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

Ruth A. Willingham · Clerk of the Court
FILED: MJT