IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

SHANE D. SMITH, *Petitioner/Appellee*,

v.

KAITLYN SMITH, *Respondent/Appellant*.

No. 1 CA-CV 21-0317 FC
FILED 4-5-2022

Appeal from the Superior Court in Maricopa County
No. FC2020-094281
The Honorable Suzanne Scheiner Marwil, Judge

AFFIRMED

COUNSEL

The Hogle Firm, Mesa
By Nathan J. Hogle
Counsel for Appellant

Scoresby Family Law, Mesa
By J. Kyle Scoresby, Lyndsey Fibus
Counsel for Appellee

OPINION

Vice Chief Judge David B. Gass delivered the opinion of the court, in which Presiding Judge Paul J. McMurdie and Judge Angela K. Paton joined.

G A S S, Vice Chief Judge:

¶1 This case is about whether the superior court had sufficient evidence to order a reduction of a parent's parenting time and require such time to be supervised based on an endangerment finding. Because we conclude the superior court did not modify parenting time and relied on sufficient evidence, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Shortly after the parents married, they had a child and moved from Idaho to Arizona. The child, now two, has a genetic disorder requiring regular medical visits. The parents were married for just under one year before mother "unilaterally took the child to Idaho without notice to [f]ather." Mother now lives in Idaho, where her family resides. Father lives in Arizona.

¶3 Mother filed for divorce in Idaho, while father filed for divorce in Arizona. Idaho later deferred jurisdiction to Arizona under the Uniform Child Custody Jurisdiction and Enforcement Act. *See* A.R.S. § 25-1002(7) (defining home state for jurisdictional purposes).

¶4 After the superior court resolved the jurisdiction issue, it entered temporary orders. To begin, father had six weeks of make-up parenting time. The temporary orders then gave mother and father equal parenting time with two weeks on and two weeks off. Mother and father abided by the temporary orders.

¶5 As the trial approached, father was concerned mother's mental health would interfere with her parenting. Father asked the superior court to order mother to undergo a psychological evaluation. The superior court granted father's request and appointed Doctor Stacy LaMorgese to evaluate mother. The evaluation showed mother performed poorly in tests designed to test mother's intellectual capabilities. As part of the evaluation, LaMorgese diagnosed mother with several mental health disorders and expressed concerns about mother's ability to complete regular adult tasks

associated with child rearing, such as filing paperwork. LaMorgese also recommended therapy to help mother better parent the child.

¶6 At trial, father sought sole legal decision-making authority and to limit mother's parenting time to one weekend a month. Mother sought joint legal decision-making and equal parenting time. In its decree of dissolution, the superior court ordered joint legal decision-making but gave father final decision-making authority.

¶7 Based on mother's examination and diagnoses, the superior court found mother's mental health issues, taken together with the child's special needs, "would endanger the physical, emotional, or mental well-being of the child" if mother had unsupervised parenting time. The superior court then awarded mother one week of parenting time per month, but it ordered mother's parenting time to be supervised.

¶8 The superior court said it might consider lifting the restrictions if mother complied with LaMorgese's therapeutic recommendations and submitted paperwork showing she complied, could care for her own needs, and had reasonable expectations for how the child should behave. Mother timely appealed. This court has jurisdiction under article VI, section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21.A.1 and 12-2101.A.1.

ANALYSIS

¶9 This court reviews orders establishing or modifying parenting time for an abuse of discretion but reviews *de novo* questions of statutory interpretation. *Nold v. Nold*, 232 Ariz. 270, 273, ¶ 11 (App. 2013) (establishing orders reviewed for an abuse of discretion); *Gonzalez-Gunter v. Gunter*, 249 Ariz. 489, 491, ¶ 9 (App. 2020) (modifying orders reviewed for an abuse of discretion and statutory interpretation reviewed *de novo*). This court views the evidence in the light most favorable to upholding the superior court's orders and will affirm findings if reasonable evidence supports them. *Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 17 (App. 2015). Under the abuse of discretion standard, this court will reverse the superior court's finding when the record is "devoid of competent evidence to support the decision." *Little v. Little*, 193 Ariz. 519, 520, ¶ 5 (1999); *see also Bishop v. Law Enf't Merit Sys. Council*, 119 Ariz. 417, 421 (App. 1978) (this court will reverse the superior court's finding when "no evidence exists to support the decision").

I. The Superior Court Did Not Modify Mother's Parenting Time.

¶10 Mother argues the superior court erred under § 25-411.J when it entered a final order reducing her parenting time from the temporary orders.

¶11 The parenting-time-modification statute, however, applies only to final orders, such as dissolution decrees, not to temporary orders. *See* A.R.S. § 25-411.A ("A person shall not make a motion to modify a *legal decision-making or parenting time decree* earlier than one year after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe" the child is endangered. (emphasis added)), .J ("The court may modify an order granting or denying parenting time rights . . . 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."). Temporary orders are cut from an entirely different cloth than permanent orders, especially in the context of parenting time. *See Gutierrez v. Fox*, 242 Ariz. 259, 267–68, ¶¶ 27–34 (App. 2017) (unlike final orders, temporary orders setting parenting time do not require best-interests findings under § 25-403). Temporary orders do not "requir[e] detailed findings" because of their "transitory nature." *Id.* at 268, ¶ 34. Temporary orders also do "not prejudice the rights of the parties or of any child" in family law proceedings because they become ineffective and unenforceable after dismissal of an action and are displaced entirely following entry of a final decree. *Id.* (quoting A.R.S. § 25-315.F.1; citing Ariz. R. Fam. P. 47(M)). And § 25-411.J does not apply to § 25-403's best-interests findings or parenting-time orders.

¶12 Here, the superior court's first ruling subject to § 25-411 was the decree of dissolution. Accordingly, the temporary order mother references was not subject to § 25-411's modification requirements.

II. Arizona Law Does Not Have A Presumption For Equal Parenting Time.

¶13 Mother argues the superior court erred in awarding her only twenty-five percent of the parenting time because Arizona law has a presumption for equal parenting time.

¶14 This court has said, "equal or near-equal parenting time is presumed to be in a child's best interests." *See Woyton v. Ward*, 247 Ariz. 529, 531, ¶ 6 (App. 2019). But that statement was a short-hand explanation of a more comprehensive constitutional and statutory analysis.

¶15 Without a court order, every parent has the right to co-equal custody of their child. *Gutierrez*, 242 Ariz. at 269, ¶ 42 (citing *Maricopa Cnty. Juv. Action No. JD-4974*, 163 Ariz. 60, 62 (App. 1990)). By statute, Arizona's public policy is "absent evidence to the contrary, it is in the best interests of a child . . . [t]o have substantial, frequent, meaningful and continuing parenting time with both parents [and t]o have both parents participate in decision-making about the child." A.R.S. § 25-103.B. Though § 25-103.B expressly sets "the declared public policy" of Arizona, it does not create a presumption a parent must overcome.

¶16 Legal presumptions come in various forms and are generally tied to a burden of proof to establish the presumption, are identified as rebuttable or not, and determine what is needed to rebut the presumption. *See Seiler v. Whiting*, 52 Ariz. 542, 548–49 (1938) (discussing legal presumptions); Ariz. R. Evid. 301 (presumptions in civil cases generally); *Presumption*, Black's Law Dictionary (11th ed. 2019) ("A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption."). Further, the legislature could have created a legal presumption for equal parenting time if it intended to do so, but it did not. *See Parsons v. Ariz. Dep't of Health Servs.*, 242 Ariz. 320, 323, ¶ 11 (App. 2017) (This court first looks "to the statute's plain language as the best indicator of [legislative] intent[,]" and if the language is clear and unambiguous, this court "must give effect to that language without employing other rules of statutory construction."); *cf. Hart v. Hart*, 220 Ariz. 183, 187, ¶ 17 (App. 2009) (principles of statutory construction require this court to "not judicially impose a requirement the legislature has intentionally chosen not to require"). This point is particularly true when the legislature has established a presumption in other family-law matters. *See* A.R.S. §§ 25-403.03.D (establishing parenting-time presumption concerning domestic-violence cases); -403.04.A (similar for substance abuse); -814 (presumption of paternity); -408.H (presumption written agreements are in the child's best interests).

¶17 Notwithstanding the *Woyton* court's shorthand use of the term, this court did not establish a legal presumption for equal parenting time. In *Woyton* and other cases using the presumption language, the parents did not bear a specific burden of proof to overcome presumed equal parenting time. 247 Ariz. at 531, 533, ¶¶ 6, 12; *Gunter*, 249 Ariz. at 492–93, ¶¶ 11–19. Instead, this court recognized equal parenting time as a starting point for the superior court's best-interests analysis. *See Woyton*, 247 Ariz. at 531, ¶ 6 (acknowledging equal parenting time is not always possible after factoring in the parents' circumstances); *Barron v. Barron*, 246 Ariz. 580, 584, ¶ 10 (App. 2018) (maximizing parenting time is the "starting point"), *vacated*

in part on other grounds, 246 Ariz. 449, 452, ¶ 21 (2019). The evidence—not a presumption linked to a burden of proof—guides the court in deciding the appropriate parenting-time schedule. *See* A.R.S. § 25-103.B.1 ("It also is the declared public policy of this state and the general purpose of this title that *absent evidence to the contrary*, it is in a child's best interest . . . [t]o have substantial, frequent, meaningful and continuing parenting time with both parents." (emphasis added)). And from that starting point, the superior court may adjust a parent's parenting time after considering several variables, such as relocation, domestic violence, and the children's best interests. *See Woyton*, 247 Ariz. at 532, ¶¶ 9–10 (relocation); *DeLuna v. Petitto*, 247 Ariz. 420, 425, ¶ 18 (App. 2019) (domestic violence); *Nold*, 232 Ariz. at 273–74, ¶¶ 12–14 (children's best interests).

¶18 Mother also misplaces her reliance on § 25-403.02.B. That statute requires the superior court to "*maximize*" each parent's respective parenting time if doing so is "*consistent with the children's best interests* in section 25-403 and sections 25-403.03, 25-403.04 and 25-403.05." *See* A.R.S. § 25-403.02.B (emphases added) (cleaned up). The statute at issue here, § 25-403, does not reference any presumption, much less provide a presumption for equal parenting time. *See* A.R.S. § 25-403.B; *see also Parsons*, 242 Ariz. at 323, ¶ 11 (a statute's plain language guides its interpretation); *cf.* A.R.S. § 25-403.03.D (establishing a presumption if a parent has committed an act of domestic violence against the other parent). Instead, the superior court "has discretion to determine parenting time based on all the evidence before it" and should maximize parenting time only if it is in the child's best interests. *Gunter*, 249 Ariz. at 492, ¶¶ 11–12. And consistent with that point, § 25-103.B.1—Arizona's public policy statute—does not refer to equal parenting time, instead saying "it is in a child's best interest . . . [t]o have substantial, frequent, meaningful and continuing parenting time with both parents." Further, mother and father's long-distance parenting plan makes equal or near-equal parenting time especially unpractical. *See Gutierrez*, 242 Ariz. at 271, ¶ 47 (equal or near-equal parenting time is often impossible in long-distance parenting).

¶19 Because Arizona law does not have a presumption of equal parenting time, the superior court did not err.

III. Because The Superior Court Considered The Child's Best Interests, It Did Not Err By Not Explaining Why It Awarded Less Than Equal Parenting Time.

¶20 Mother argues the superior court erred in ordering less than equal parenting time because it did not explain why it made such an award, and it did not have sufficient evidence. To the contrary, the superior court explained its ruling in the decree and the evidence supported its decision to order less than equal parenting time.

¶21 The superior court made the required best-interests findings under §§ 25-403 and -403.01. *See Woyton*, 247 Ariz. at 533, ¶ 12. The superior court could have then used these findings to order less than equal parenting time. *See Gunter*, 249 Ariz. at 492, ¶¶ 11, 13 (the superior court has the "discretion to determine parenting time based on all the evidence before it"). Here, the superior court had ample evidence supporting an award of less than equal parenting time from its best-interests findings. First, the superior court determined the temporary parenting plan might endanger the child's safety because the child has a genetic disorder requiring regular medical check-ups and mother's mental health diagnoses could interfere with the child's needs. Second, the superior court determined mother's mental health diagnoses may also cause her to have unrealistic expectations for the child, contributing to issues such as mother inappropriately disciplining the child or not modeling appropriate behavior. Moreover, the superior court issued the temporary order—providing mother with equal parenting time—before her court-ordered mental-health evaluation. The superior court later relied on the new evidence of mother's mental-health diagnosis along with the child's special needs to support granting mother less than equal parenting time. The superior court also explained how its best-interests findings supported its overall decision. *See Nold*, 232 Ariz. at 273, ¶ 13 (ruling § 25-403.B requires the superior court to explain "the reasons why its decision is in the children's best interests").

¶22 And contrary to mother's argument, the superior court need not specifically spell out how its best-interests findings support an award of less than equal parenting time when it makes the required, applicable findings. *See* A.R.S. § 25-403.B; *cf. Hart v. Hart*, 220 Ariz. 183, 186–87, ¶ 13 (App. 2009) (reversing a parenting plan order when the superior court failed to make sufficient findings under the § 25-403 factors and "a weighing of the statutory factors . . . may have yielded a different outcome") (citing *Owen v. Blackhawk*, 206 Ariz. 418, 421–22, ¶¶ 11–12 (App. 2003)). Further, under the abuse of discretion standard, this court must uphold a superior court's order when sufficient evidence supports the underlying

findings. *O'Hair v. O'Hair*, 109 Ariz. 236, 240 (1973) ("the duty of a reviewing court begins and ends with the inquiry whether the [superior court] had before it evidence which might reasonably support its action viewed in the light most favorable to sustaining the findings").

¶23 Accordingly, the superior court did not err in awarding less than equal parenting time to mother.

IV. The Superior Court's Award Of Less Than Equal Parenting Time Need Not Be Supported By An Endangerment Finding.

¶24 Mother argues the superior court could not reduce her parenting time to less than equal absent a finding of endangerment under A.R.S. § 25-411. As discussed above, the superior court did not reduce mother's parenting time under § 25-411 because the reduction mother refers to is from a temporary order, not a final order. *See supra* ¶¶ 10–12. Instead, the superior court had "discretion to determine parenting time based on all the evidence before it." *Gunter*, 249 Ariz. at 492, ¶ 11. And because this was not a post-decree restriction, the superior court was not required to make specific findings on the record on the issue of endangerment. Here, the superior court made the required best-interests findings under §§ 25-403.A (legal decision-making and best interests of child) and -403.01 (sole and joint legal decision-making and parenting time) after the parents contested legal decision-making authority. *See Christopher K. v. Markaa S.*, 233 Ariz. 297, 301, ¶ 18 (App. 2013) (failure to make specific findings may constitute an abuse of discretion when custody is contested).

¶25 Mother further relies on § 25-411.J to contend the superior court needed to make certain findings—specifically mother would endanger substantially "the child's physical, mental, moral or emotional health"—before ordering the supervision of her parenting time. Father argues the superior court did not need to make an endangerment finding under the facts of this case. Because § 25-411.J does not apply here, we agree with father. Subsection J's endangerment-finding requirement applies only if the superior court modifies a permanent parenting-time schedule. *Gunter*, 249 Ariz. at 492, ¶ 13 (discussing when a "court may 'modify an order granting or denying parenting time rights'" under § 25-411.J). Here, the superior court did not order a modification of parenting time but instead established permanent parenting-time orders for the first time. *See supra* at ¶¶ 10–12. Though other statutes require certain findings for supervision, those statutes do not apply here. *See* A.R.S. §§ 25-403.03.F (domestic violence), -410.B (judicial supervision of parenting time by local social service agency).

¶26 In short, the superior court had broad authority to establish parenting-time orders under the facts here, especially when establishing a long-distance parenting plan. *See* A.R.S. § 25-403.02.B (the superior court adopts parenting plans "[c]onsistent with the child's best interests"); *Gutierrez*, 242 Ariz. at 271, ¶ 47. Accordingly, the superior court did not abuse its discretion when it required supervision of mother's parenting time and awarded mother approximately twenty-five percent of the parenting time.

ATTORNEY FEES

¶27 Father seeks attorney fees and costs under ARCAP 21 and A.R.S. § 25-324, arguing mother took "extremely unreasonable positions" on appeal and has maintained such positions throughout these proceedings. We conclude no party took unreasonable positions. We decline to award attorney fees after considering the relevant factors under § 25-324. As the successful party, we award father his costs on appeal upon compliance with ARCAP 21. *See* A.R.S. § 12-341.

CONCLUSION

¶28 We affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA