

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. PATRICIA A. GREEN

CASE NO. D20141442

COURT REPORTER:

DATE: December 14, 2020

Courtroom - 774

JENNIFER
Petitioner

VS.

Mr. DW
Respondent

Jacob M Amaru, Esq. counsel for
Respondent

RULING

IN CHAMBERS UNDER ADVISEMENT RULING (MODIFICATION OF LEGAL DECISION-MAKING, PARENTING TIME AND CHILD SUPPORT)

This matter came before the Court for trial on October 15, 2020. During the trial, the Court heard from the parties, each party's significant other, and the parties' 27-year old son, as the only witnesses. The Court has since considered the evidence, including the demeanor of the witnesses, reviewed the exhibits as well as the case history, and considered the parties' arguments.

After significant deliberation, the Court makes the following findings and enters the following orders:

LEGAL DECISION-MAKING AND PARENTING TIME

Jurisdictional Findings

THE COURT FINDS that Jennifer (Petitioner/Mother) and Mr. DW (Respondent/Father) have one minor child in common: **Paisley** (DOB: __/__/2005).¹ At least one parent and the minor child have resided in Arizona continuously for at least six months preceding the Father's filing of the Petition for Modification of Legal Decision-Making and Parenting Time in November 2019. This Court, therefore, has jurisdiction as Arizona is the "home state" of the minor child. *See* A.R.S. § 25-1031. Further, this Court has jurisdiction pursuant to A.R.S. § 25-402.

THE COURT FURTHER FINDS that the federal Parental Kidnapping Prevention Act does not apply and that no international law concerning the wrongful abduction or removal of children applies.

¹The parties are also the parents to two older children, Daniel and Eric, both of whom are over the age of 18 and fully emancipated

Statement of Facts/Procedural History

The parties were divorced by Consent Decree of Dissolution of Marriage filed September 28, 2015. The Decree provided for joint legal decision-making and a relatively equal parenting time schedule (5-2-2-5) for their one remaining minor child.

Father filed a request for mediation in September 2019, Mother filed an objection to the request in October 2019. The Court ordered the parties to participate in mediation. Order, filed 11/06/2019. Before mediation was scheduled, Father filed the Petition that is the subject of this action.

At a hearing on December 24, 2019, the Court affirmed the parenting time schedule, and ordered the parties to mediation, among other orders. ME, filed 12/24/2019.

The parties failed to reach any agreements during mediation. Status Memo, filed 01/27/2020.

At a Review Hearing on March 10, 2020, the Court entered additional orders pursuant to the parties' agreement, including an order for interview of the minor child and requiring the parties to obtain therapeutic counseling services for the child. The Court also ordered Mother to participate in therapeutic counseling services; the child's counselor and Mother's counselor would determine whether joint family counseling would be appropriate. ME, filed 03/11/2020.

With the intervening changes resulting from the beginning of the COVID-19 pandemic, the interview of the child did not occur until June 26, 2020. Scheduling Notice, filed 06/05/2020; Memo noting completion, filed 07/15/2020.

At the time of the settlement conference scheduled for June 5, 2020, counsel "agreed not to proceed."² Settlement Conference Order, filed 06/08/2020. The Court scheduled another settlement conference for October 5, 2020. The parties remained unable to reach any agreements. ME, filed 10/05/2020; Settlement Conference Order, filed 10/14/2020.

Trial occurred on October 15, 2020; at which time the Court took the matter under advisement. ME, filed 10/20/2020.

Additional facts will be provided as necessary to the discussion.

Best Interest Findings: A.R.S. § 25-403

Section 25-403(A) enumerates specific factors for the Court to consider, among all factors that are relevant to the *child's* physical and emotional well-being. The best interest of a child is the primary consideration in awarding legal decision-making authority and parenting time. *Hays v. Gama*, 205 Ariz. 99, 102, ¶ 18, 67 P.3d 695, 698, ¶ 18 (2003).

In making the legal decision-making and parenting time determination, the Court is mindful that as a matter of public policy, absent evidence to the contrary, "it is in a child's best interest: (1) To have substantial,

² Counsel may have made this determination because the results of the child interview were not yet available.

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frequent, meaningful and continuing parenting time with both parents[; and] (2) To have both parents participate in decision-making about the child.” See A.R.S. § 25-103(B).

As precursor to the analysis of the child’s best interest and because of the parents’ inability to reach an agreement, the Court considers the following issues regarding the parents. See A.R.S. § 25-403.01.

1. Whether a parent's lack of an agreement is unreasonable or is influenced by an issue not related to the child's best interests.

The Court finds that each parent believes they are acting in the best interest of their child. Mother, however, fails to recognize how her negative interaction with Father and those in Father’s household, along with Mother’s negative characterizations of those individuals when speaking to the child, impacts her decision-making and her interaction with her daughter.

2. The past, present and future abilities of the parents to cooperate in decision-making about the children to the extent required by the order of joint legal decision-making.

The parents have had joint legal decision-making authority and a relatively equal parenting time schedule pursuant to the original court orders from 2015. The parties have demonstrated difficulty communicating throughout these proceedings. Mother and Father both testified that they do not get along. In March 2020, the parties agreed to individual therapeutic counseling services for the minor child and Mother, and to family counseling services if needed. ME, filed 03/11/2020. Neither party introduced any evidence during trial regarding the status of those services. It is difficult to predict whether the parents will be able to cooperate in the future.

3. Whether the joint legal decision-making arrangement is logistically possible.

The Court finds that a joint legal decision-making arrangement is logistically possible. The parents may communicate in writing, and each presently resides within Pima County.

THE COURT FURTHER FINDS as follows regarding the child’s best interests pursuant to A.R.S. § 25-403(A).

1. *The past, present and potential future relationship between the parent and the child.*

Both parents have been regularly involved in the child’s life, with each having relatively equal parenting time to date. Father desires to modify parenting time such that the child resides primarily with him. Mother disagrees and desires to maintain the current schedule. There is no reason the child’s relationship with both parents should not be maintained in the future; however, the future relationship between Mother and the child may depend on their ability to resolve differences that have been identified during these proceedings. As stated above, although the parties agreed to therapeutic counseling to address these concerns, there is no evidence that either party fully acted on those agreements. Mother testified that she had some virtual individual counseling sessions.

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2. *The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.*

Mother, the minor child, and Mother's significant other, Javier reside in Mother's home. Javier's 10-year old son is also present during his parenting time. Javier stated he and Mother have been dating approximately six years. Javier provided limited testimony because of time restraints; he described his relationship with the child as reinforcing Mother's instructions. The child reported having an "OK" relationship with Javier, and not having any relationship with his 10-year old son.

Father resides with his wife, Michelle. He stated they have been married approximately 2-1/2 years. There are no other children in the home. Michelle self-reported a good relationship with the child; the child stated her relationship with Michelle is "OK, we get along pretty well."

Additional information is provided in section 1 immediately above.

3. *The child's adjustment to home, school and community.*

The child appears well-adjusted to her home with Father; the child describes conflict in the home with Mother. Respondent's Exhibit G (Child Interview, dated 06/26/2020). The child contracted with her parents regarding school attendance, and she reports being well-adjusted to her school and community. Exhibit I and Exhibit G.

4. *If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.*

The child is of suitable age and maturity, and she participated in an interview with the Family Center of the Conciliation Court on June 26, 2020. The child expressed a desire to spend more time with Father, and to decrease the stress when going between the parents' residences. The child summarized her position during the interview. Trial Exhibit G, p.3.

5. *The mental and physical health of all individuals involved.*

There is no evidence of any diagnosed mental or physical health issue for either parent. Neither party provided any medical records or other evidence from which the Court can ascertain that the child has any significant mental or physical health issues.

6. *Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent.* [This paragraph does not apply if the Court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being the victim of domestic violence or child abuse.]

The Court finds that the parents are equally likely or unlikely to allow the child frequent, meaningful and continuing contact with the other.

7. *Whether one parent intentionally misled the Court to cause an unnecessary delay, to increase the cost of litigation or to persuade the Court to give legal decision-making or parenting time preference to that parent.*

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Not applicable.

8. *Whether there has been domestic violence or child abuse pursuant to A.R.S. § 25-403.03*

There is no evidence from which the Court can make a finding of domestic violence or child abuse. Father provided evidence of an incident between Father and Mother that occurred in December 2013, prior to entry of the Decree of Dissolution in September 2015. Exhibit P. There is no evidence of any post-Decree events, and Mother testified that she completed 26 counseling sessions in connection with the incident.

9. *The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.*

Not applicable.

10. *Whether a parent has complied with chapter 3, article 5 of title 25, Arizona Revised Statutes.*

The domestic relations education provisions of A.R.S. § 25-352 have been satisfied.

11. *Whether either parent was convicted of an act of false reporting of child abuse or neglect under A.R.S. § 13-2907.02.*

Not applicable.

In addition to the foregoing, the Court must also consider any history of domestic violence or child abuse (A.R.S. § 25-403.03), any substance abuse issues (A.R.S. § 25-403.04) and any sexual offender issues (A.R.S. § 25-403.05).

(a). *Domestic Violence or Child Abuse*

There are no substantiated allegations of domestic violence or child abuse, except as identified in paragraph 8 above.

(b). *Substance Abuse*

There are no allegations of substance abuse.

(c). *Sex Offender*

Neither party has any criminal charges or convictions for any sex offense.

Legal Decision-Making Authority

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Legal decision-making authority, as defined by A.R.S. § 25-401(3), means the legal right and responsibility to make all non-emergency legal decisions for a child including those regarding education, health care, religious training and personal care decisions. For the purpose of interpreting or applying any international treaty, federal law, a uniform code or the statutes of other jurisdictions of the United States, legal decision-making means legal custody.

THE COURT FINDS that, based on the above, it is in child’s best interest that Mother and Father continue to exercise joint legal decision-making authority. However, in the event the parties are unable to reach an agreement, Father will have the right to make the final decision. Absent an emergency or need to take the child to urgent care, Father will be responsible for scheduling all medical, dental and counseling appointments for the minor child, and Father will notify Mother of all scheduled appointments within 24 hours of making the appointment or such shorter time period as may be necessary if the appointment is set for a period where Father himself has less than 24 hours’ notice. All such notices will be sent by both text message and e-mail.

IT IS THEREFORE ORDERED modifying and awarding Mother and Father joint legal decision-making authority, with Father having final decision-making authority in the event of a disagreement. For the purpose of this order,

“Joint legal decision-making” means both parents share decision-making and neither parent’s rights nor responsibilities are superior except with respect to specified decisions set forth herein. Shared or joint legal decision-making authority does not necessarily mean equal parenting time (A.R.S. § 25-403.02(E)). Final decision-making authority allows Father to make the final decision in the event of a disagreement, but only after a good faith effort to consult with and obtain an agreement from Mother.

Specific Terms

Decision Making Authority regarding education- The Court is authorized to resolve the parental conflict regarding education, without the need to change the joint legal decision-making authority of both parents. *Paul E. v. Courtney F.*, 246 Ariz. 388 ¶27, 439 P.3d 1169 (Ariz. 2019) (specifically disapproving the contrary view in *Nicaise v. Sundaram (Nicaise I)*, 244 Ariz. 272, 280-81 ¶¶27-30, 418 P.3d 1045, 1053-54 (App. 2018)).

IT IS ORDERED that the child will continue to be enrolled in and attend her current school (Tucson High Magnet School). *See also* Trial Exhibit I. Each parent is responsible to transport the child to and from school during his or her parenting time. Father’s residence will be considered the child’s primary residence for purposes of school enrollment.

Parenting Time

Mother and Father share joint legal decision making. “Shared legal decision-making does not necessarily mean equal parenting time.” A.R.S. § 25-403.02(E). The following parenting plan is practical and maximizes each parent’s parenting time to the extent it is in the children's best interests. *See* A.R.S. § 25-403.02(B) and (E).

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THE COURT FINDS that Father has met the burden to establish a change of circumstances warranting a modification of parenting time.

IT IS THEREFORE ORDERED modifying parenting time as follows:

Mother will have parenting time every other weekend on an alternating schedule from Saturday at 9:00 a.m. to Sunday at 6:00 p.m. in week one (effective December 19, 2020 to December 20, 2020), and from after school on Friday or Friday at 6:00 p.m. (if school is not physically in session) until Sunday at 6:00 p.m. in week two (effective January 1, 2021 to January 3, 2021). The parties will repeat this schedule thereafter. The receiving parent will be responsible for picking up the child from school or the home of the other parent at the start of his/her parenting time. Exchanges at the parties' homes will be conducted curbside with neither parent exiting his/her vehicle.

IT IS FURTHER ORDERED affirming the holiday schedule as ordered on September 28, 2015. (For convenience, a copy of the current schedule is appended as Attachment A and incorporated by this reference.) Holidays will have priority over regularly scheduled parenting time and vacation parenting time.

The following provisions replace and supersede any prior orders that conflict with this Ruling:

1. **Summer/Vacation** – Summer break will abide the regular parenting time schedule, except that each party may have a maximum of two uninterrupted weeks of parenting time, with requests for the two (2) weeks to be made at least thirty (30) days in advance. In the event of a conflict, Mother's requests shall be controlling in even-numbered years, and Father's requests in odd-numbered years. A parent must not schedule vacation time such that the other parent will not see the child for a period in excess of fourteen (14) consecutive days. A parent must not schedule vacation time to interfere with the other parent's holiday parenting time. Unused vacation time does not roll over to the next year.
2. **School and Social Functions.** Each parent will assure that the other is identified on the child's school records, and that each parent is listed as an emergency contact. Both parents may attend school and other social functions in which the child participates (for example, sporting events, etc.). Both parents will keep one another current and informed about important medical issues and education events, as well as contact information for the child's healthcare providers and schools. However, each parent is individually responsible for contacting schools and medical providers to obtain this information directly from them. Neither parent will rely exclusively on the other parent to provide this information. Any appointments or conferences regarding the well-being of the child in any of these areas may be attended by either or both parents at their discretion. All communication between the parents must be respectful and polite. Neither parent will use the child as a messenger for information. The parents may communicate with one another via text message or e-mail during reasonable hours and with reasonable frequency.
3. **Extra-Curricular Activities.** Either parent may enroll the child in any extra-curricular activity during that parent's parenting time. Absent agreement, the activity cannot unreasonably interfere with the other parent's parenting time, the parent not consenting to the activity has no financial obligation for the

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activity, and the parent not consenting to the activity has no obligation to transport the child to or from the activity.

4. **Long-Distance/International Travel** -- Neither parent is authorized to travel outside of the continental United States with the child without express written consent of the other parent, which consent will not be unreasonably withheld, or Court Order. Neither parent will schedule vacation or other travel time with the child that requires the child to miss school without written consent of the other parent, or Court order. A parent traveling with the child outside of the State of Arizona will provide to the non-traveling parent an itinerary including, but not limited to, the dates, times, methods, and destinations of travel, and any and all contact information where the traveling parent and child may be reached. Written notice of intent to travel outside of Arizona must be provided to the non-traveling parent at least seven (7) calendar days in advance. When traveling without the child, the traveling parent will provide the non-traveling parent with the name and telephone number of a third person who will know how to reach the traveling parent in the event of an emergency.
5. Neither parent will relocate the minor child from Tucson, Arizona, absent written agreement signed by both parents and submitted to the Court for entry of an Order, or Court Order after a hearing. A parent desiring to relocate with the minor child must follow the provisions of A.R.S. §25-408.
6. Neither parent will use physical discipline on the child, and the parents will not allow any other person to physically discipline the child. Both parents will refrain from name-calling or using derogatory or profane language when talking to or describing the child, and each parent will assure that no one else does so, whether it is a sibling or other family member.
7. Neither parent will make negative comments about the other parent, a parent's partner, or family to the child or within the child's hearing, nor will either parent allow any third party to do so. Each parent will endeavor to instill in the minor child an attitude of respect and affection for the other parent. Each parent will avoid all confrontations, fights, and arguments with the other parent in the child's presence or hearing. Should it be determined that either parent speaks negatively of the other to the child, this will be seen as not in the best interest of the child, and the Court may consider holding a hearing to address such conduct.
8. **Temporary Modifications:** Mother and Father may temporarily modify any part of the above schedule (residential, vacation and holiday, vacation/travel, and exchange location) upon *mutual written agreement* of both parties, which may include text and/or e-mail. No long-term, or permanent, modification will be effective unless submitted to the Court as a written agreement, signed by both parties, and entered as a Court Order.
9. The provisions of A.R.S. §25-403.06 apply, and both parents are entitled to have equal access to prescription medication, documents and other information concerning the child's education and physical, mental, moral and emotional health including medical, school, police, court and other records directly from the custodian of the records or from the other parent, subject to any future Court Order to the contrary. School records (including, but not limited to, report cards/progress reports), legal records, and any medical records that are provided to a parent shall be promptly

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photocopied after receipt and supplied to the other parent when received (such information may also be transmitted electronically).

10. **Procedure for Changes, Disputes and Alleged Breaches.** In the event of any major changes in the life of either party or the children, which changes render the provisions of this Parenting Plan no longer feasible, or in the event the parties have a dispute or an alleged breach of the plan, the parties will attempt to settle their differences and/or renegotiate the terms hereof with the assistance of the Conciliation Court prior to commencement of any court action.
11. **Procedure for Periodic Review.** The parents will review this Plan annually or at the request of either parent (A.R.S. §25-403.02(C)(6)), to ensure that the child's best interests are being met.
12. **CONTACT INFORMATION.** The parents will keep each other advised of his/her current contact information at all times during the child's minority, to include a residence and mailing address(es), telephone number, and e-mail address(es). In the event of a change of address, telephone number or email address, such information must be provided to the other parent within 24 hours of such change.
13. **COMPLIANCE WITH A.R.S. §25-403.05(B).** Each party is required to read and abide by the notification requirements of §25-403.05(B), which states as follows: "A child's parent or custodian must immediately notify the other parent or custodian if the parent or custodian knows that a convicted or registered sex offender or a person who has been convicted of a dangerous crime against children as defined in §13-705 may have access to the child. The parent or custodian must provide notice by first class mail, return receipt requested, by electronic means to an electronic mail address that the recipient provided to the parent or custodian for notification purposes or by other communication accepted by the court."

CHILD SUPPORT MODIFICATION

The current child support order was entered in 2015. There has been a change in each party's financial circumstances since 2015. In addition, the Court has modified parenting time.

THE COURT FINDS that the relevant financial factors and the discretionary allowances and adjustments which the Court will allow for a current calculation of child support pursuant to the Arizona Child Support Guidelines are set forth in the Child Support Worksheet, filed this date, which the Court hereby affirms and incorporates and adopts as its findings with respect to child support.

IT IS THEREFORE ORDERED modifying child support effective January 1, 2021, pursuant to the Child Support Order, Worksheet and Income Withholding Order filed this date.

Insurance and Unreimbursed Medical Expenses

IT IS FURTHER ORDERED affirming that all medical, dental and orthodontia expenses incurred for the health and protection of the child not covered by insurance will be paid 60% by Father and 40% by Mother.

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IT IS ORDERED that unless good cause is shown, any request for payment or reimbursement of uninsured medical, dental, and/or vision costs must be provided to the other parent within 180 days after the date the services occur. The parent responsible for payment or reimbursement must pay his or her share, as ordered by the Court, or make acceptable payment arrangements with the provider or person entitled to reimbursement within 45 days after receipt of the request.

Both parents must use their best efforts to obtain services that are covered by the insurance. A parent who is entitled to receive reimbursement from the other parent for medical costs not covered by insurance will, upon request of the other parent, provide receipts or other evidence of payments actually made.

Exchange of Income Information

IT IS FURTHER ORDERED that the parties will exchange income information every 24 months. Said financial information will include, but not be limited to: personal tax returns with all schedules, affidavits of financial information, earning statements and other such documentation necessary to establish or prove the income of either party. In addition, at the time of the exchange of financial information, the parties will also exchange residential addresses and the names and addresses of their respective employers, unless such party's information is subject to a protective order issued by this Court.

ATTORNEY'S FEES AND COSTS

An award of attorney fees and costs is governed by A.R.S. § 25-324. Section 25-324 provides, in relevant part, as follows:

A. The court from time to time, 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 any proceedings under this chapter or chapter 4, article 1 of this title. On request of a party or another court of competent jurisdiction, the court shall make specific findings concerning the portions of any award of fees and expenses that are based on consideration of financial resources and that are based on consideration of reasonableness of positions. The court may make these findings before, during or after the issuance of a fee award.

B. If the court determines that a party filed a petition under one of the following circumstances, the court shall award reasonable costs and attorney fees to the other party:

1. The petition was not filed in good faith.
2. The petition was not grounded in fact or based on law.
3. The petition was filed for an improper purpose, such as to harass the other party, to cause an unnecessary delay or to increase the cost of litigation to the other party.

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C. For the purpose of this section, costs and expenses may include attorney fees, deposition costs and other reasonableness expenses as the court finds necessary to the full and proper presentation of the action, including any appeal.

D. The court may order all amounts paid directly to the attorney, who may enforce the order in the attorney's name with the same force and effect, and in the same manner, as if the order had been made on behalf of any party to the action.

THE COURT FURTHER FINDS that neither party acted unreasonably during these proceedings sufficient to warrant an award based on the unreasonableness of his or her position.

THE COURT FURTHER FINDS that the provisions of A.R.S. § 25-324(B) do not apply.

THE COURT FINDS that Father has greater financial resources than Mother, based primarily on the difference in their monthly income. The Court is unable to find, however, that Father's resources are such that he should be required to contribute to Mother's attorney's fees and costs.

IT IS THEREFORE ORDERED denying each party's request for attorney fees and costs.

IT IS ORDERED each party will be responsible for his or her own attorneys' fees and costs.

IT IS FURTHER ORDERED denying any affirmative relief sought before the date of this Ruling that is not expressly granted above.

IT IS FURTHER ORDERED signing this minute entry as a final order of this Court pursuant to Rule 78, *Arizona Rules of Family Law Procedure*.


HON. PATRICIA A. GREEN
(ID: bf146b70-d135-4766-a69a-bf44a74aeb58)

cc: Jacob M Amaru, Esq.
Lawrence Y. Gee, Esq.
Clerk of Court - Child Support Unit
Clerk of Court - Under Advisement Clerk

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