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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

In re the Matter of:) 1 CA-CV 11-0486
)
LUIS FERNANDO VARGAS,) DEPARTMENT C
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
MARIA DELA LUZ MOSQUEDA,) Civil Appellate Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Navajo County

Cause No. S0900D0201000588

The Honorable Ralph E. Hatch

AFFIRMED IN PART; REMANDED FOR RECONSIDERATION IN PART

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By Eduardo H. Coronado
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Show Low

Maria DeLa Luz Mosqueda
Respondent/Appellee *In Propria Persona*

Pinetop

H O W E, Judge

¶1 Luis Fernando Vargas ("Father") appeals the parenting time and custody orders in a decree of dissolution. He also appeals the award of specific property to Maria DeLa Luz Mosqueda ("Mother") as her separate property. For the reasons

below, we affirm the parenting time and property orders, but remand for reconsideration of the order granting Mother sole legal custody.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The parties were married in 2004 and separated for approximately four years before Father filed a petition for dissolution in November 2010. Both parents sought sole legal custody of the parties' two minor children. The parties agreed that until final orders were issued, Father would have parenting time with the children each Monday from 8:00 a.m. until 6:00 p.m.

¶3 Father admitted he had been arrested for domestic violence against Mother in 2007, but claimed the violence was mutual. Father completed the required domestic violence classes, as well as voluntarily taking additional anger management classes. Mother obtained a protection order against Father in 2010. The details regarding the 2010 protection order were not introduced at trial.

¶4 At trial, Father sought joint legal custody and parenting time from Sunday morning through Tuesday morning every week. Mother argued that she should have sole legal custody and Father should not have overnight parenting time because seeing Father living with his male partner was not good for the

children, and she was concerned about Father's home environment. On the second day of trial, Mother informed the trial court that the injunction against harassment against Father's partner that she had recently obtained included the children. Mother disclosed no details about this injunction. Father's partner did not testify.

¶5 The trial court awarded sole legal custody to Mother but awarded Father ten hours of parenting time each Monday and four additional hours each week plus additional time during holidays, but no overnight visits. The court awarded each party the personal property currently in his or her possession. Father filed a timely notice of appeal.¹ We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (West 2012).²

DISCUSSION

I. Overnight Parenting Time

¶6 Father argues the denial of his request for overnight parenting time was an abuse of discretion. "We review the trial

¹ Mother failed to file an answering brief. Although we may treat her failure as a confession of error, see Rule 15(c), Arizona Rules of Civil Appellate Procedure, in our discretion we address the merits because the best interests of children are involved, see *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 2, 38 P.3d 1189, 1190 (App. 2002).

² We cite to the current version of applicable statutes when no revisions material to this decision have occurred.

court's decision regarding child custody for an abuse of discretion." *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). Father contends that the court failed to consider: Mother's history of denying Father parenting time; Mother's admission that Father was fit to spend time with the children during the daytime; and his successful parenting in the past.

¶7 The court found that both parties were likely to allow frequent and meaningful contact with the other parent. See A.R.S. § 25-403(A)(6). Although the court did not elaborate on the reasons for so finding, we do not reweigh conflicting evidence and "give due regard to the trial court's opportunity to judge the credibility of the witnesses." *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009). Father testified to only two instances when Mother failed to allow the children to visit Father during his parenting time. Father admitted he has seen the children once a week since the parties separated in 2007. This evidence supports the court's finding that both parties were likely to allow frequent and meaningful contact.

¶8 Father also argues the parenting time order was an abuse of discretion because the evidence established that he had successfully exercised his weekly parenting time in the past and

should now be entitled to overnight parenting time. The trial court explained that it did not order overnight parenting because Father has not had any in over three years *and* because Mother obtained an injunction against harassment prohibiting contact between Father's live-in partner and the children. The details of that injunction are not in the record, but Father did not deny its terms or otherwise dispute it. Father did not address the injunction in his opening brief. The fact that Father lives with someone who legally may not have contact with his children supports the trial court's decision to deny Father overnight parenting time as long as the injunction is in place. As the trial court noted, once the injunction issue is resolved, Father may petition to modify the parenting time order. Based on the terms of the injunction, we affirm the parenting time orders.

II. Sole Legal Custody Order

¶9 The trial court found that awarding Mother sole legal custody was in the children's best interests. We review custody decisions for an abuse of discretion. See *Owen*, 206 Ariz. at 420, ¶ 7, 79 P.3d at 669. Father argues that the court abused its discretion because beyond the cursory findings on nine of the eleven statutory best interests factors, the trial court did not explain the basis for its findings. See A.R.S. § 25-403(A).

The parties spent significant trial time discussing a 2007 domestic violence incident for which Father was charged, pled guilty, and completed his sentence. However, the trial court stated only that "[F]ather has been convicted of a domestic violence offence [sic] against [Mother] and is currently in counseling. He desires to address that issue so it will not impede him from having custody and/or parenting time with his children." The court did not find "significant domestic violence" or a "significant history of domestic violence" pursuant to A.R.S. § 25-403.03(A). Therefore, the court was not precluded from awarding joint legal custody under § 25-403.03(A). *Hurd*, 223 Ariz. at 51, ¶ 12, 219 P.3d at 261 (holding that § 25-403.03(A) precludes an award of joint custody if the court finds significant domestic violence or a history of significant domestic violence).

¶10 Having found that Father committed "an act" of domestic violence, however, the court was required to consider and apply § 25-403.03(D), which establishes a rebuttable presumption against awarding custody to the offending parent unless both parents committed domestic violence. The court's findings do not mention this presumption. Father also contends that the court did not make the required findings regarding his

claim that the domestic violence was mutual, which would negate the rebuttable presumption in § 25-403.03(D).

¶11 We cannot discern whether the family court relied on the rebuttable presumption in A.R.S. § 25-403.03(D) in awarding sole custody to Mother. The findings of fact are inadequate to allow this court to review the basis for the court's decision that awarding sole custody to Mother was in the children's best interests. Courts are required to "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[ren]." A.R.S. § 25-403(B); *Hurd*, 223 Ariz. at 51, ¶ 12, 219 P.3d at 261. Section 25-403(A)(11) required the court to consider the domestic violence provisions in § 25-403.03. Therefore, when the court finds the existence of domestic violence that may give rise to the statutory presumptions and burdens detailed in § 25-403.03(D), (E), and (F), the court must make specific findings on the record regarding these considerations.

¶12 In this case, the court did not discuss whether Father rebutted the presumption against awarding custody to him. Father presented evidence that awarding him joint legal custody was in the children's best interests, that he successfully completed a domestic violence program and other relevant counseling and parenting classes. See A.R.S. § 25-403.03(D),

(E). This evidence was relevant to several considerations in § 25-403.03. Failure to make the required findings of fact is an abuse of discretion. See *Downs v. Scheffler*, 206 Ariz. 496, 499, ¶ 9, 80 P.3d 775, 778 (App. 2003); *Diezsi*, 201 Ariz. at 526, ¶ 5, 38 P.3d at 1191. The requirement that the court make specific findings on the record why its decision is in the children's best interests "exists not only to aid an appellant and the reviewing court, but also for a more compelling reason—that of aiding all parties and the family court in determining the best interests of the child or children both currently and in the future." *Reid v. Reid*, 222 Ariz. 204, 209, ¶ 18, 213 P.3d 353, 358 (App. 2009). For this reason, Father's failure to raise the lack of findings regarding the domestic violence presumption does not constitute waiver on appeal. *Id.* at 209-10, ¶ 20, 213 P.3d at 358-59. We remand for reconsideration because the court's findings and its discussion of the remaining § 25-403(A) factors did not establish why awarding Mother sole legal custody was in the children's best interests.³

III. Personal Property

¶13 Father argues that the trial court erred in denying his request for a stereo that he claimed was his separate property. We review the trial court's division of property

³ Father did not challenge the designation of Mother as primary custodial parent. Accordingly we do not address that finding.

under an abuse of discretion standard, but the characterization of property is a conclusion of law this court reviews de novo. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000).

¶14 Property a spouse owns before marriage is that spouse's separate property. A.R.S. § 25-213(A). The testimony regarding the stereo was unclear. Father testified that he purchased it before the marriage. Mother testified first that the stereo belonged to her, but later said she had *Father's* stereo. In light of the unclear and conflicting testimony, we defer to the fact finder. *Hurd*, 223 Ariz. at 52, ¶ 16, 219 P.3d at 262. Accordingly, we affirm the court's conclusion that the stereo in Mother's possession was her separate property.

CONCLUSION

¶15 We affirm the parenting time and property orders. We remand the custody order for reconsideration consistent with this decision.

/s/

RANDALL M. HOWE, JUDGE

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

PATRICIA A. OROZCO, Judge