DIVISION ONE
FILED: 11/20/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 11-0673
	)	
JULIE ERIN OLSON,	)	DEPARTMENT A
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	
	)	Not for Publication –
DARIN D. HIGGINSON,	)	(Rule 28, Arizona Rules
	)	of Civil Appellate Procedure)
Respondent/Appellee.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2007-070988

The Honorable Michael W. Kemp, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Platt & Westby, P.C. Phoenix
By Randi S. Sirlin
Attorney for Petitioner/Appellant

Darin D. Higginson El Mirage
In *Propria Persona* Respondent/Appellee

G E M M I L L, JUDGE

¶1 Petitioner/Appellant Julie Olson ("Mother") appeals the superior court's order modifying her parenting time, granting Respondent/Appellee Darin Higginson ("Father")

authority to transfer the children to a new school and granting him child support. For the following reasons, we vacate the family court's child support and parenting time orders and remand for further proceedings consistent with this decision. We affirm the court's order granting Father the authority to transfer the children to a new school.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Mother and Father were divorced on August 21, 2008. The court awarded them joint custody of their two minor children, with Father to have parenting time on alternating weekends and one night each week.

¶3 On May 27, 2010, Father petitioned to modify custody. The parties agreed their older child, T., was in crisis, but disagreed regarding what course of action would best serve her interests. Father asserted T. had experienced significant disruption in her relationship with Mother and needed a therapeutic interventionist to help rebuild that relationship. He asked the court to award him sole custody and set Mother's parenting time according to the recommendation of the therapeutic interventionist. The family court denied Father's request for a temporary modification without notice, but set an evidentiary hearing to address custody, parenting time, and

child support.[1] The court also appointed a parenting coordinator and ordered psychological evaluations of Mother, Father, and T.

¶4 Immediately prior to the scheduled hearing, Mother retained new counsel and requested a continuance. On January 7, 2011, the court continued the hearing to March 11, 2011, but ordered Father would have temporary physical custody of T. until further order. It also directed Mother and T. to participate in therapeutic intervention.

¶5 On March 11, 2011, the court conducted an evidentiary hearing on Father's petition to modify custody, parenting time, and child support. It granted sole legal custody of both children to Father and ruled Mother would have parenting time with T. as agreed between them or at the direction of the therapeutic interventionist. The court determined Mother had taken an unreasonable position in the proceedings and awarded Father $18,000 in attorneys' fees. It set another evidentiary hearing for May 27, 2011 to address parenting time and child support.

¶6 After the May 27, 2011 evidentiary hearing, the court

[1] Although the court's minute entry stated it was denying Father's petition to modify custody, it had conducted a hearing only on Father's request for temporary orders and later held an evidentiary hearing on Father's petition to modify custody. We therefore regard its June 11, 2010 ruling as a denial only of Father's request for a temporary modification without notice.

ordered the parties would have equal parenting time on a week-on, week-off basis and entered a child support order directing Mother to pay Father $208.58 per month. It further ordered the children would "remain in their current schools for the school year 2011-2012." The court set another evidentiary hearing for August 17, 2011 to address "the remaining issues related to" Father's petition, "specifically, parenting time and child support."

¶7 Father wrote in his pretrial statement that the court had not established a permanent parenting time order and that was the main issue the court should address at the August hearing. He stated the children should live primarily with him and have parenting time with Mother every other weekend and one night during the week. He asserted he wanted the children to enroll in a school near his home and maintained that because the court had awarded him sole legal custody, he should be able to decide where the children attended school. Finally, he asked the court to award him child support of $741 per month in accordance with the Arizona Child Support Guidelines, Arizona Revised Statutes ("A.R.S.") section 25-320 app. (Supp. 2012) ("Guidelines").[2]

[2] Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

¶8 After conducting the evidentiary hearing on August 17, 2011, the court affirmed its order granting Father sole legal custody and stated he would be the primary residential parent, with Mother to exercise parenting time every other weekend and one night each week. It granted Father authority to transfer the children to a school near his residence and set Mother's child support obligation at $735 per month.

¶9 Mother timely appealed the family court's signed ruling. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2) (2012).

ISSUES

¶10 Mother argues the family court erred by: (1) failing to make written findings regarding the children's best interests pursuant to A.R.S. § 25-403 (Supp. 2012)[3] before it altered Mother's parenting time; (2) reversing its earlier order and granting Father authority to change the children's school for school year 2011-2012, in the absence of proper notice to Mother; and (3) incorrectly calculating child support.[4]

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[3] We cite the version of the statute effective September 30, 2009 to December 31, 2012.

[4] Mother also challenges the family court's orders regarding attorneys' fees. First, the family court awarded $18,000 in attorney fees to Father on April 26, 2011. Mother's appeal on September 16, 2011, however, was an untimely challenge to that award of fees. Second, subsequent to the final judgment upon which this appeal is based, the family court denied Mother's

DISCUSSION

A. Modification of Parenting Time

¶11 Mother contends the family court erred by changing her parenting time without making the required statutory findings. We review the family 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).

¶12 When determining custody, the family court must consider all factors relevant to the children's best interests, including those factors set forth in A.R.S. § 25-403(A). "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." A.R.S. § 25-403(B). These specific findings are required even when the court changes only physical, and not legal, custody. *Owen*, 206 Ariz. at 421, ¶ 11, 79 P.3d at 670.[5] The family

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request for an award of fees incurred to obtain a signed release from Father for the therapeutic interventionist's records. Mother did not file an amended notice of appeal regarding that order. Accordingly, we do not consider those issues.

[5] "An order designating one parent as primary residential parent constitutes an order regarding physical custody as opposed to an order regarding parenting time. Physical custody involves the child's residential placement, whereas parenting time is what is traditionally thought of as 'visitation.'" *Owen*, 206 Ariz. at 421, ¶ 11, 79 P.3d at 670.

court's order granting Father primary residential custody did not contain the findings required by A.R.S. § 25-403(B), nor does it reflect that the court considered the factors set forth in A.R.S. § 25-403(A).

¶13 Father contends that because Mother did not provide a transcript of the trial court proceedings, we must assume the court made all necessary findings and the evidence supported those findings. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (stating that when the appellant fails to include all transcripts or other documents necessary for appellate court to consider the issues raised on appeal, court will assume the evidence supports the trial court's discretionary ruling). We acknowledge A.R.S. § 25-403(B) only requires the court to make findings "on the record," and if the family court had made oral findings at the conclusion of the August 17, 2011 evidentiary hearing and Mother failed to include that transcript in the record on appeal, we might assume those findings were sufficient to support the court's ruling. *See* Ariz. R. Fam. Law P. 82(A) (oral findings of fact are sufficient when recorded in open court following the close of evidence); *see also In re Marriage of Diezsi*, 201 Ariz. 524, 526, ¶ 5, 38 P.3d 1189, 1191 (App. 2002) (the court abused its discretion by failing to make A.R.S. § 25-403 findings when those findings did not appear in the order *or* in the transcript of the

proceedings); *Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶14 There is no indication in this case, however, that the court made any findings on the record at the time of the hearing. The court's minute entry ruling indicates it took the matter under advisement immediately after the parties' closing arguments and later issued a written ruling. On this record, it would be improper to assume the family court made the requisite A.R.S. § 25-403 findings on the record in open court.

¶15 We are unable to determine that the family court considered the children's best interests and the factors listed in A.R.S. § 25-403(A). We therefore conclude the court erred in designating Father the primary residential parent without making the requisite findings. *Owen*, 206 Ariz. at 421-22, ¶¶ 11-12, 79 P.3d at 670-71; *Diezsi*, 201 Ariz. at 525-26, ¶¶ 4-5, 38 P.3d at 1190-91. We vacate the order and remand with directions that the court make the findings required by A.R.S. § 25-403(A).

B. Authority to Change the Children's School

¶16 Mother next argues the court improperly ruled after the August 17, 2011 hearing that Father would be allowed to change the children's school. She contends the court previously resolved that issue and she had no notice the court would revisit the issue at the August hearing.

¶17 In March 2011, the court granted Father sole legal custody of the children. Mother contends, however, the court

limited Father's legal custody at the May 27, 2011 hearing when it ruled the children would attend the same school for school year 2011-2012. She maintains it was improper for the court to later change that ruling and allow Father to move the children to another school. The court's order that the children remain in their current schools for school year 2011-2012, although signed, did not resolve all pending issues arising out of Father's petition to modify custody and was therefore subject to revision and not final. *See* Ariz. R. Fam. Law P. 78(B) (stating an order that does not resolve all issues between all parties "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."). Accordingly, we reject Mother's argument that the family court erred by reversing its earlier ruling and allowing Father, as the parent with sole legal custody, to determine where the children would attend school.

¶18 Mother also argues the family court denied her right to due process because she did not have proper notice it would address the issue of the children's school at the August 17 hearing. Father specifically requested in his pre-trial position statement that the court allow him to change the children's school. He filed this statement on August 12, 2011, five days prior to the August 17, 2011 hearing and the mailing certificate indicates he mailed it to Mother's counsel on that

date. Mother objects that her counsel did not actually receive a copy of Father's pretrial position statement until one day prior to the evidentiary hearing. Although more substantial notice is preferable, on this record we conclude that Mother had adequate notice Father intended to ask the court to revise its earlier ruling regarding the children's school. Moreover, because Mother did not include a transcript of the August 17, 2011 hearing in the record on appeal, we are unable to determine whether she objected to Father's evidence or argument regarding the school issue at the hearing on the grounds that it had not been properly raised and therefore assume the family court properly considered that issue. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767; *see also Belliard v. Becker*, 216 Ariz. 356, 358, ¶ 13, 166 P.3d 911, 913 (App. 2007) (stating appellate court reviews trial court's decision admitting evidence for a clear abuse of discretion or legal error and resulting prejudice); *Health For Life Brands, Inc. v. Powley*, 203 Ariz. 536, 538, ¶ 11, 57 P.3d 726, 728 (App. 2002) (stating procedural defects are usually waived if not raised and preserved in the trial court); *Hanrahan v. Sims*, 20 Ariz. App. 313, 316, 512 P.2d 617, 620 (1973) (holding failure to raise res judicata argument in trial court constituted a waiver thereof), *abrogated on other grounds by Valento v. Valento*, 225 Ariz. 477, 481, ¶ 13, 240 P.3d 1239, 1243 (App. 2010).

¶19 We find no error in the court's decision to allow Father to change the children's school. We note that Mother's appeal does not challenge the court's legal custody determination, and Father's sole legal custody, absent a court order to the contrary, further support's Father's authorization to determine the children's school placement. *Compare* A.R.S. § 25-402(5) (2007) ("'Sole custody' means the condition under which one person has legal custody'"), *with* A.R.S. § 25-402(2) ("'Joint legal custody' means the condition under which both parents share legal custody and neither parent's rights are superior . . . ."); *see also Hindsley v. Hindsley*, 145 Ariz. 428, 430, 701 P.2d 1236, 1238 (App. 1985) (citation omitted) (recognizing the essence of custody includes the "right to make decisions regarding [a child's] care and control, education, health, and religion").

¶20 For these reasons, we affirm the court's ruling to allow Father to change the children's school.

C. Child Support Calculation

¶21 Finally, Mother contends the family court erred in calculating child support because it failed to consider the actual parenting time she exercised during spring and summer 2011 and improperly included day care costs for Father. In light of our decision to vacate the family court's order granting Father primary residential custody and remand for

further findings on that issue, we need not address this argument at this time. On remand, once the court determines primary physical custody of the children in conjunction with making the findings required by A.R.S. § 25-403(A), it shall reconsider child support and, if necessary, recalculate child support in accordance with the Guidelines.

CONCLUSION

¶22 To summarize, we affirm that portion of the family court's August 19, 2011 order granting Father authority to transfer the children to a new school. We vacate that portion of the order regarding parenting time and remand for further proceedings consistent with this decision. On remand, the court shall also, if appropriate, recalculate child support in accordance with its parenting time order, pursuant to the Guidelines.

¶23 Both parties request an award of costs and attorneys' fees incurred in this appeal. We decline Mother's request for attorneys' fees because she does not cite any underlying legal authority. ARCAP 21(c)(1) ("All claims for attorneys' fees must specifically state the statute, rule, decisional law, contract, or other provision authorizing an award of attorneys' fees."); *see Country Mut. Ins. Co. v. Fonk,* 198 Ariz. 167, 172, ¶ 25, 7 P.3d 973, 978 (App. 2000) (request for fees on appeal will be denied where party fails to state any substantive basis for the

request). Even if Mother had cited A.R.S. § 25-324 in support of her request for fees, we would in our discretion decline to award fees in this case. We also decline to award attorneys' fees to Father because he is self-represented. *Cf. Lisa v. Strom,* 183 Ariz. 415, 419–20, 904 P.2d 1239, 1243–44 (App. 1995) (refusing to award attorneys' fees to self-represented attorney-litigants who spent no money and incurred no debt for legal representation). We deny both parties' requests for an award of costs on appeal, concluding neither party should be considered the prevailing party on appeal.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
ANN A. SCOTT TIMMER, Presiding Judge

_____/s/_____
MARGARET H. DOWNIE, Judge