

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/13/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 12-0133
)
HERIBERTO VARGAS, JR.,) DEPARTMENT A
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
AMANDA BROOKE SMITH,)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. FC2008-093852
FC2008-005678
(Consolidated)

The Honorable Benjamin R. Norris, Judge

ORDER VACATED; REMANDED

Allen & Foutz, P.L.L.C. Gilbert
By Shannon R. Allen
Brian A. Foutz
Attorneys for Petitioner/Appellant

Community Legal Services Mesa
By Sarah Youngblood
Attorneys for Respondent/Appellee

W I N T H R O P, Chief Judge

¶1 Heriberto Vargas, Jr. ("Father") appeals a family court order that he and Amanda Smith ("Mother") share joint

legal custody of the parties' minor child, with Mother to receive the majority of the parenting time. For the reasons that follow, we vacate the custody order and remand to allow the court to clarify its findings under Arizona Revised Statutes ("A.R.S.") section 25-403 (West 2012).¹

FACTUAL AND PROCEDURAL BACKGROUND

¶12 Since the birth of the child in 2008, Mother and Father have been involved in a series of custody disputes. Mother has a history of DUI convictions, including at least two involving "hit and run" incidents, and Father has a history of domestic violence.

¶13 The family court initially awarded the parties joint custody of the child, with Mother as the primary custodial parent. While on probation for a prior aggravated DUI, however, Mother was arrested in June 2009 and charged with four additional counts of aggravated DUI. Mother entered a plea agreement, pursuant to which she pled guilty to one count of aggravated DUI, and she was incarcerated for approximately five months beginning in November 2010. While Mother was incarcerated, the family court awarded Father temporary physical custody of the child. A few months after her release, in July 2011, Mother obtained an order of protection against Father,

¹ We cite the current version of the statutes unless changes material to our decision have occurred after the relevant date.

based on an alleged incident of domestic violence. The protection order, however, did not modify the prior custody order. Mother subsequently filed a petition to modify custody, parenting time, and child support, and she requested sole custody of the child.

¶4 On December 8, 2011, the family court held an evidentiary hearing and took the matter under advisement. In a signed minute entry filed December 21, 2011, the court ordered that the parties share joint legal custody of the child, but the court also reduced Father's parenting time and designated Mother as the primary residential custodian with final decision-making authority. Additionally, the court briefly noted in its order as follows: "In the end, given that Mother's last DUI was some two years ago, while Father's most recent domestic violence charges are still pending . . . the Court has decided to give[] Mother final decision-making authority and the majority of the parenting time, at least at this point in time."

¶5 Father filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).

ANALYSIS

¶6 Father contends the family court failed to make the factual findings required in a change of custody matter pursuant to A.R.S. § 25-403(B). In general, we review child custody orders for an abuse of discretion. *Andro v. Andro*, 97 Ariz.

302, 305, 400 P.2d 105, 107-08 (1965); *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). A court abuses its discretion if it commits a legal error while exercising its discretion. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). The overriding focus of any custody determination is the best interest of the child, and we afford the family court broad discretion in determining a child's best interest. *Borg v. Borg*, 3 Ariz. App. 274, 276, 413 P.2d 784, 786 (1966) (citing *Andro*, 97 Ariz. at 305, 400 P.2d at 107-08).

¶7 Subsection (A) of A.R.S. § 25-403 lists eleven factors a court shall consider in a child custody determination, "in accordance with the best interests of the child." The presence of domestic violence in a parenting relationship is one of those factors. See A.R.S. § 25-403(A)(11). When custody is contested, the family court is 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." A.R.S. § 25-403(B).

¶8 As previously interpreted by this court, § 25-403.03(D) provides a potential exception to this balancing of "best-interest" factors. *Hurd v. Hurd*, 223 Ariz. 48, 51, ¶ 13,

219 P.3d 258, 261 (App. 2009).² If the court finds an act of domestic violence between the parents, "there is a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child's best interests." A.R.S. § 25-403.03(D). If such a parent is seeking custody and fails to rebut the presumption, "the court *need not* consider all the other best-interest factors" listed in § 25-403(A). *Hurd*, 223 Ariz. at 51, ¶ 13, 219 P.3d at 261 (emphasis added).

¶19 Father contends the family court failed to substantively discuss the factors enumerated in § 25-403(A), made no findings as required by § 25-403(B), and arguably did not identify a specific act of domestic violence sufficient to trigger the rebuttable presumption under § 25-403.03(D).³ Mother

² It is unclear from the record whether A.R.S. § 25-403.03(A) might also apply here. Under that subsection, a finding of "*significant* domestic violence" precludes joint custody for the parent who committed the violence. A.R.S. § 25-403.03(A) (emphasis added). On remand, if the family court finds either that Father's alleged recent acts constitute significant domestic violence or he has a significant history of domestic violence, the court should restrict Father from having legal custody of the child. See *Hurd*, 223 Ariz. at 51, ¶ 12, 219 P.3d at 261.

³ Father also argues that the court "punished" him for asserting his Fifth Amendment rights during the evidentiary hearing because he chose not to answer questions related to the pending domestic violence charge. See U.S. Const. amend. V. But in child custody cases, courts are allowed to draw a negative inference from a Fifth Amendment invocation, *Montoya v. Superior Court*, 173 Ariz. 129, 131, 840 P.2d 305, 307 (App.

counters that the order is valid under the domestic violence exception, because the family court noted Father's prior domestic violence and pending charges in its order.

¶10 Even if the prior acts of domestic violence triggered the § 25-403.03(D) rebuttable presumption, however, the court's subsequent award of joint legal custody to Father constituted an implicit finding - that allowing Father's custody was *not* "contrary to the child's best interests" under § 25-403.03(D), which if true would rebut any initial § 25-403.03(D) presumption. The court was consequently required to address and weigh on the record the factors enumerated in § 25-403(A).

¶11 Because we cannot determine how the family court would weigh or balance the statutory factors, we must vacate the custody order. *See Reid v. Reid*, 222 Ariz. 204, 207, ¶ 13, 213 P.3d 353, 356 (App. 2009) (vacating the family court's custody order because this court could not "ascertain from the court's orders and ruling how the court weighed the statutory factors to arrive at its conclusion"). We remand for the family court to consider and document its findings, balance the factors, and enter a new custody order.⁴

1992), and there was additional evidence to support the court's findings of Father's domestic violence history.

⁴ As we have previously noted, "[w]e vacate the custody order, rather than simply remand for additional findings, because of the significant number of factors not addressed."

CONCLUSION

¶12 For the foregoing reasons, we vacate the family court's custody order and remand this matter for further consideration and findings pursuant to A.R.S. § 25-403(A) and (B).

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
JOHN C. GEMMILL, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge

Hart v. Hart, 220 Ariz. 183, 187, ¶ 14, 204 P.3d 441, 445 (App. 2009) (citation omitted). Further, although Father suggests we reverse the custody order, we have consistently held the family court is in the best position to evaluate the evidence. See *Andro*, 97 Ariz. at 305, 400 P.2d at 107-08; *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." (citation omitted)).