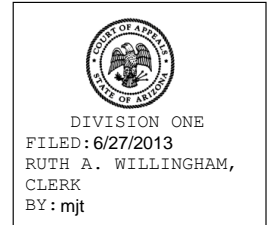


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 12-0327
)
BOBBIE LINN ANDERSON,) DEPARTMENT E
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) (Rule 28, Arizona Rules of
STEVEN GENE ANDERSON,) Civil Appellate Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Apache County

Cause No. S0100D02008139

The Honorable Kay H. Wilkins

AFFIRMED IN PART; REMANDED WITH INSTRUCTIONS

Bobbi Linn Anderson Mesa
In Propria Persona

Riggs Ellsworth & Porter PLC Show Low
By Michael R. Ellsworth
Attorneys for Respondent/Appellant

G E M M I L L, Judge

¶1 Steven Gene Anderson ("Father") appeals from the trial court's order modifying custody of the parties' three minor

children and changing the parenting time order after Father was held in contempt for violating previous orders issued by the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 In October 2008, Bobbi Linn Anderson ("Mother") filed a petition for dissolution of the parties' marriage. The trial court originally awarded the parties joint custody of the children, with Mother designated as the primary residential parent and parenting time for Father. After the older child acted out several times, she was removed from Mother's home by the Juvenile Court and placed with Father. Thereafter, both Mother and Father petitioned the court for sole custody of the children.

¶13 In July 2009, after conducting a hearing and interviewing the children, the trial court noted, with respect to Father:

Father involves the children in adult matters and loudly proclaims to anyone who will listen that Mother is immoral, is a liar and is not a fit parent. Father conveys this information to the children to the extent that they (and particularly the eldest child) are alienated from Mother. It is likely that Father's attitude is largely responsible for the alienation from Mother. Father's attitude is largely responsible for the eldest child's rebellion when placed in the custody of Mother.

The court awarded Father custody of all three children with parenting time for Mother, and further ordered that: "Neither parent shall denigrate the other parent in the hearing of the children . . . Neither party shall discuss adult issues with the children, particularly issues regarding their divorce . . ."

¶4 In 2010, Mother filed several petitions for modification of custody and contempt alleging that Father interfered with her parenting time and her relationship with the children. The court never ruled on the petition for contempt. It also declined her first petition for custody modification because it was filed less than one year from the original custody order. The court declined her second petition for custody modification because it did not set forth adequate grounds to require a hearing.

¶5 In August of 2011, in connection with the trial court's grant of Father's petition to increase Mother's child support obligation and Mother's request for modification of custody, the court found:

The sum of all this testimony is the same as the court observed at the previous hearings. Father is angry at Mother [for reasons the court noted in its ruling] and has involved the children in discussion of this issue to the detriment of the children with the intention of alienating the children from their mother.

The court did not modify custody at that time because of the eldest child's struggling relationship with Mother and because it did not want to split up the siblings.

¶6 In October of 2011, Mother filed a petition to hold Father in contempt for failure to obey the court's previous orders regarding her parenting time and award primary physical custody of at least the two younger children to Mother. Father responded to the petition and also filed a petition to modify parenting time and child support paid by Mother. The trial court held a hearing on both petitions and found Father in contempt for not allowing Mother the parenting time ordered by the court. It also found that Father's "contempt is willful; that it's been a pattern from day one, that Mr. Anderson has desired to alienate the children from their Mother, which is not in their best interest. Father puts his own desires to gain some sort of revenge against Mother [first]."

¶7 The court awarded custody of all three children to Mother, with the two younger children to reside primarily with Mother and the eldest to reside primarily with Father. Father filed a motion for new trial, a motion for reconsideration of the ruling, and a motion to alter or amend judgment. The trial court signed an order denying each of Father's motions and

affirming the finding of contempt and the custody modification as in the best interests of the children.

¶8 Father appealed.¹ We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2) (Supp. 2012).

DISCUSSION

¶9 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). Father argues that the trial court abused its discretion because it did not make findings of fact on the record as required by A.R.S. § 25-403(B) (Supp. 2012) and that it changed custody only to punish Father for his contempt.

¶10 When faced with a custody determination, the trial court must consider the factors set forth in A.R.S. § 25-403(A) regarding the children's best interests. When custody is contested, the trial court must make specific findings on the record regarding "all relevant factors and the reasons for which the decision is in the best interests of the child." A.R.S. § 25-403(B) (emphasis added). It is well established that it is

¹ Father filed several premature notices of appeal. Ultimately, after we issued an *Eaton Fruit* order, the trial court signed a final order resolving all issues, including the attorneys' fees issues, and Father filed an amended notice of appeal.

an abuse of discretion for the family court to fail to make requisite findings pursuant to A.R.S. § 25-403. See *Owen*, 206 Ariz. at 421-22, ¶ 12, 79 P.3d at 670-71 (holding court abused its discretion by modifying custody without making findings on the record); *Downs v. Scheffler*, 206 Ariz. 496, 501, ¶ 19, 80 P.3d 775, 780 (App. 2003) (same); *Hurd v. Hurd*, 223 Ariz. 48, 51, ¶ 11, 219 P.3d 258, 261 (App. 2009) (same).

¶11 Father concedes that under *Stapley v. Stapley*, 15 Ariz.App. 64, 485 P.2d 1181 (1971), the trial court may consider his contemptuous behavior as a factor in determining whether modification of custody is in the best interests of the children. However, he argues that a court may not change custody solely as punishment for contempt. We agree. *Stapley* cautioned that “punishment of a parent for contempt is not to be visited on the children and custody is not to be used as a reward or punishment of parental conduct.” *Id.* at 70, 485 P.2d at 1187.

¶12 Here, the trial court’s findings on the record do not satisfy the requirements of A.R.S. § 25-403(B). Although the trial court concluded that a change in custody was in the best interests of the children, it did not make findings specifically referencing the factors set forth in A.R.S. § 25-403(A).

¶13 Examination of the transcript from the hearing on Mother's contempt petition reveals that the trial court focused almost exclusively on Father's contempt in making its ruling. At the hearing, the court ordered that "as a punishment for the contempt and based upon the best interests of the children . . . Mother shall have custody of all three children." The court provided the following explanation for its decision:

I don't know how I can get through to you, sir. But I have tried everything over and over and over to emphasize to you that the children's relationship with their mother is important. And my orders are not suggestions, they are orders. You can go to jail for disobeying my orders. And I'm really close to that kind of sanction. Right now, I'm not going to do it. What you do, whether you recognize it or not, deeply damages the children, and that is the reason for my making this order. You are clearly in contempt. No doubt in my mind that you are in contempt of the Court's order.

If you care anything about [the eldest child], you will change your attitude and will work towards having [her] establish a relationship with her mother.

On the face of the record, it therefore appears that the primary reason for the order modifying custody may have been to punish Father for his contempt.

¶14 Father's contemptuous conduct does relate to several of the factors set forth in A.R.S. § 25-403, including the relationship between the parent and the children and the

likelihood that Father will allow the children frequent, meaningful, and continuing contact with Mother. A.R.S. § 25-403(A)(3) and (6). On this record, however, we cannot determine whether or how the court weighed the statutory factors to arrive at its conclusion that granting custody to Mother was in the children's best interests. See *Reid v. Reid*, 222 Ariz. 204, 207, ¶ 13, 213 P.3d 353, 356 (App. 2009) (holding findings inadequate where court did not indicate how it weighed the evidence and reached its conclusion). For that reason, we remand to allow the trial court to make the findings required by A.R.S. § 25-403 and to specify the weight it gave to Father's contemptuous conduct in deciding it was in the best interests of the children to modify custody.

¶15 Father also argues on appeal that he was denied his due process rights under the Fourteenth Amendment to the United States Constitution because he did not have notice that he might lose custody of his children in connection with Mother's petition for contempt. Mother's prayer for relief expressly requests modification of custody to purge the contempt:

3. That Petitioner be ordered to appear and show cause . . . why the Court should not offer as a purge that primary physical custody of at least the younger two minor children be awarded to Petitioner pursuant to A.R.S. § 25-414(A)(7).

4. That, after Respondent is given an opportunity to be heard, primary physical custody of at least the younger to minor children be awarded to Petitioner with Respondent to receive reasonable parenting time.

Given the foregoing, we find that Mother's petition provided the requisite notice to Father.

CONCLUSION

¶16 We conclude that Father had sufficient notice that modification of custody was at issue at his contempt hearing, such that there was no violation of his due process rights. And, for the reasons set forth above, we remand to the trial court to make specific findings based on the existing record in compliance with A.R.S. § 25-403(B) and explain the weight it is giving to Father's contemptuous conduct. The court, in its discretion, may supplement with additional findings.

/s/

JOHN C. GEMMILL, Judge

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

MICHAEL J. BROWN, Judge