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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

DAYNA MARIE SCOTT, *Petitioner/Appellee*,

v.

TIM JAMES CUSICK, *Respondent/Appellant*.

No. 1 CA-CV 12-0829

FILED 12-17-2013

Appeal from the Superior Court in Maricopa County
No. FC2010-001544
The Honorable Christopher T. Whitten, Judge

AFFIRMED

COUNSEL

Dayna Marie Scott, Phoenix

Petitioner/Appellee In Propria Persona

McCulloch Law Office, Tempe
By Diana McCulloch

Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the court, in which Presiding Judge Maurice Portley and Judge John C. Gemmill joined.

C A T T A N I, Judge:

¶1 Tim Cusick appeals the denial of his petition to modify child custody and request for attorney's fees. For reasons that follow, we affirm.

PROCEDURAL AND FACTUAL HISTORY

¶2 Tim Cusick ("Father") and Dayna Scott ("Mother") are parents of a son born in 2004. As the result of a 2011 consent decree and stipulated parenting plan, Father and Mother have shared joint legal and physical custody of their son. In May 2012, Father filed an emergency petition seeking sole legal custody and an order that Mother have supervised parenting time as a result of her arrest for extreme DUI and other episodes of excessive drinking.

¶3 After a return hearing on the emergency petition, the family court declined to modify joint custody or parenting time. The court ordered, however, that Mother undergo random alcohol testing not less than twice a week. The court further directed that, if Mother were to test positive or miss an alcohol test, her parenting time would be suspended.

¶4 Prior to the scheduled evidentiary hearing on Father's petition, Mother asked the court to terminate the random alcohol testing requirement because she was planning to travel abroad and would have an ignition interlock device on her car when she was not traveling. Father objected, and the court denied Mother's request.

¶5 After Mother missed a scheduled alcohol test in June, Father filed an emergency request to suspend her parenting time. The court denied the request, but affirmed Mother's obligation to test regardless of her location. Father filed another notice when Mother missed another scheduled test. Mother admitted missing the two scheduled tests, and the court granted the parties' stipulated request for supervised parenting time until the scheduled evidentiary hearing.

¶6 On September 27, 2012, the court conducted an evidentiary hearing, at which both parties testified, as did Mother's doctor, who evaluated Mother for alcohol use and possible dependence. The doctor noted that Mother's DUI appeared to be an isolated incident of alcohol abuse, and he opined that Mother was not dependent on alcohol. He also offered his view that Mother exercised poor judgment by drinking while in Europe and while still subject to court-ordered random alcohol testing. The doctor recommended an additional six months of monitoring and random testing.

¶7 After considering the testimony presented, the court concluded that continuing joint legal custody was in the child's best interest. The court reaffirmed its prior orders regarding custody and parenting time, conditioned on Mother's complete abstinence from alcohol and compliance with a treatment program and random alcohol testing six times per month for at least six months. The court denied both parties' requests for attorney's fees.

¶8 Father filed a notice of appeal of the order denying his petition to modify and his request for attorney's fees. He also filed a motion for reconsideration that was subsequently denied. We have jurisdiction over Father's appeal of the order denying the petition to modify and the request for attorney's fees. *See* Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(2).[1]

DISCUSSION

I. Sufficiency of Findings.

¶9 We review a family court's decision regarding child custody issues under an abuse of discretion standard. *See In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1191 (App. 2002). Father argues that the court abused its discretion by failing to make findings required under A.R.S. §§ 25-403 (Supp. 2012), 25-403.01 (2007), and 25-403.04 (2007).[2] *See*

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[1] Absent material revisions after the relevant date, statutes cited refer to the current version unless otherwise indicated.

[2] Effective January 1, 2013, sections 25-403 and 25-403.04 were modified and section 25-403.01 was repealed. *See* 2012 Ariz. Sess. Laws Ch. 309 §§ 5, 6, 10. We apply the statutory language in effect at the time the trial court issued its order.

Owen v. Blackhawk, 206 Ariz. 418, 421-422, ¶ 12, 79 P.3d 667, 670-71 (App. 2003); *Diezsi*, 201 Ariz. at 526, ¶ 5, 38 P.3d at 1191. We conclude that the family court made the required findings under § 25-403 and § 25-403.04, and that findings under § 25-403.01(B) were not required under the circumstances presented here.

A. A.R.S. §§ 25-403(A) and 25-403.01 Findings.

¶10 Section 25-403(A) provides that "[t]he court shall determine custody, either originally or on petition for modification, in accordance with the best interests of the child." Relevant factors, which must be addressed in specific written findings where custody is contested, include the following:

> 1. The wishes of the child's parent or parents as to custody.
>
> 2. The wishes of the child as to the custodian.
>
> 3. 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.
>
> 4. The child's adjustment to home, school and community.
>
> 5. The mental and physical health of all individuals involved.
>
> 6. Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent. [ ] .
>
> 7. Whether one parent, both parents or neither parent has provided primary care of the child.
>
> 8. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.
>
> 9. Whether a parent has complied with [domestic education programs set forth in A.R.S. § 25-351 *et seq*.].
>
> 10. Whether either parent was convicted of an act of false reporting of child abuse or neglect [ ].

> 11. Whether there has been domestic violence or child abuse [ ].

A.R.S. § 25-403(A).

¶11 Section 25-403.01(B) provides that in awarding child custody, "[t]he court may issue an order for joint custody over the objection of one of the parents if the court makes specific written findings of why the order is in the child's best interests." The statute further provides that the best interests determination should be made after considering the factors set forth in § 25-403(A), as well as the following four factors:

> 1. The agreement or lack of an agreement by the parents regarding joint custody.
>
> 2. Whether a parent's lack of agreement is unreasonable or is influenced by an issue not related to the best interests of the child.
>
> 3. The past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint custody.
>
> 4. Whether joint custody is logistically possible.

A.R.S. § 25-403.01(B).

¶12 The family court here made express written findings regarding the § 25-403(A) factors, but did not specifically address the § 25-403.01(B) factors. Father challenges the "clarity" of the § 25-403(A) findings, arguing that the court was required to state how much weight it gave each factor and why joint custody was in the child's best interests. Father relies on *Reid v. Reid*, in which the family court considered evidence in addition to statutory factors, but did not state which evidence influenced its decision. 222 Ariz. 204, 207, ¶ 13, 213 P.3d 353, 356 (App. 2009). This court found an abuse of discretion because "the court's cursory findings did not indicate how it weighed [the custody evaluation] and other relevant evidence to reach [its] conclusion." *Id.*

¶13 Unlike in *Reid*, the family court's findings in this case are not cursory, nor do they refer to evidence in addition to the statutory factors, or reject a custody evaluator's recommendation without explanation. *See id.* The findings discuss each of the relevant factors and state which

factors are relevant and why. Where the evidence regarding a particular factor was disputed or not clearly neutral, the findings detail how the factor was considered. For example, in addressing § 25-403(A)(3), the family court noted that, as a result of Mother's conduct, her contact with the child had been limited; in discussing § 25-403(A)(5) the court noted Mother's alcohol abuse; and when discussing § 25-403(A)(6), the court noted Mother's disregard of certain court orders. The findings also expressly reference the parties' history of cooperative joint custody and the importance of having two participating and physically present parents where possible.

¶14 Father disputes the weight the court attributed to Mother's failure to follow court orders, her expert's testimony, the parties' ability to communicate, and the temporary modification of Mother's parenting time in August 2012. But we do not reweigh the evidence on appeal, and we defer to the family court's position as fact finder. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.,* 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004). The findings were sufficient for this court to ascertain the basis for the family court's order and thus satisfied the requirements of A.R.S. § 25-403.

¶15 The family court did not make specific written findings regarding the factors set forth in § 25-403.01. Father did not object, however, or otherwise request that the court make findings under this section. Accordingly, Father has waived this issue. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) (finding that, absent extraordinary circumstances, defects in a trial court's order must be challenged in that court or will be deemed waived on appeal); *Banales v. Smith*, 200 Ariz. 419, 420, ¶ 8, 26 P.3d 1190, 1191 (App. 2001) (holding that a failure to object to a lack of findings regarding one of the A.R.S. § 25-403(A) factors waives the issue on appeal); *cf., Nold v. Nold*, 232 Ariz. 270, 272, ¶ 9, 304 P.3d 1093, 1095 (App. 2013) (declining to apply doctrine of waiver when the family court made no findings regarding § 25-403 factors).

¶16 Furthermore, unlike § 25-403, which by its express terms applies not only to initial custody determinations, but also to petitions to *modify* custody orders, § 25-403.01 contains no such express provision. Absent a claim raised before the family court that one or more of the § 25-403.01(B) factors are relevant to a petition to modify a prior order, we conclude that the family court need not make written findings regarding those factors.

¶17 Moreover, even assuming written findings were required, any error in not making such findings was harmless. The first two § 25-403.01(B) factors relate to whether the parties have agreed or disagreed regarding custody, and whether a parent's failure to agree was unreasonable. Here, the family court was obviously aware that there was no agreement regarding joint custody because it was addressing a *contested* petition to modify a prior custody order. And, the reasonableness of the parents' positions was necessarily considered in determining whether to modify the prior order.

¶18 The final two § 25-403.01(B) factors relate to the parents' ability to cooperate in decision making and whether joint custody is logistically possible. In seeking to modify the prior joint custody arrangement, Father did not raise these issues or otherwise suggest logistical problems or a problem with cooperative decision making; instead, the basis for the petition to modify was Mother's alcohol abuse. Thus, the final two § 25-403.01(B) factors were not relevant to the custody modification decision.

¶19 Finally, although the family court did not specifically discuss the § 25-403.01(B) factors, the court noted that it had considered the case history – which included the fact that the parties shared joint custody for over a year prior to this proceeding. The case history suggested that the parties were able to make decisions jointly and that joint custody was logistically possible. Accordingly, the court was aware of and considered the parents' ability to cooperate and the logistics of joint custody before deciding to continue the joint custody arrangement.

B. A.R.S. § 25-403.04 Findings.

¶20 A.R.S. § 25-403.04(A) creates a rebuttable presumption that it is contrary to a child's best interests to award sole or joint custody to a parent who has been convicted of specific drug and alcohol offenses, including an extreme DUI offense, within twelve months before the petition or request for custody is filed. Although Mother's extreme DUI conviction occurred just days after Father's petition was filed, the presumption is nevertheless applicable. *See Diezsi*, 201 Ariz. at 526-27, ¶¶ 8-9, 38 P.3d at 1191-92.

¶21 In determining whether the presumption has been rebutted, under § 25-403.04(A), the court must consider whether "the custody or parenting time arrangement ordered by the court appropriately protects the child." The court should also consider the absence of a conviction for

any other "drug offense" in the past five years and the "[r]esults of random drug testing for a six month period that indicate that the person is not using [illegal] drugs." *See* A.R.S. § 25-403.04(B).

¶22 Father contends that the court failed to make the required finding that court-ordered custody or parenting time "appropriately protects the child." *See* A.R.S. § 25-403.04(A)(2). Although the family court did not expressly cite § 25-403.04, the court acknowledged Mother's conviction for extreme DUI, and its concern that Mother's alcohol abuse "might negatively impact her ability to safely parent [the child]." The court conditioned all of Mother's parenting time on her continued complete abstinence from alcohol and her complete compliance with all rules of a six-month treatment program, including random alcohol testing. Additionally, the court ruled that Mother's parenting time would be automatically suspended if she consumed alcohol or failed to comply with the treatment requirements.

¶23 The family court has discretion to determine the degree of protection warranted in a particular case, and, absent an abuse of that discretion, we will not substitute our judgment on appeal. We conclude that the conditions imposed on Mother satisfied the statutory requirement that the court state how its custody or parenting time orders appropriately protect the child.

¶24 Father further contends the family court lacked sufficient information about the treatment program it ordered, pointing to several alleged deficiencies with the program and to concerns regarding Mother's post-hearing conduct. But Father did not raise these deficiencies below, and we will therefore not consider them on appeal. *See Dillig v. Fisher,* 142 Ariz. 47, 51, 688 P.2d 693, 697 (App. 1984) (an argument not raised in the trial court cannot be raised for the first time on appeal).

¶25 Finally, Father contends that there is no evidence supporting a finding that Mother rebutted the presumption against joint custody. Father argues in particular that the factor set forth in § 25-403.04(B), six months of negative drug testing, could not have been met because Mother admitted drinking during the four months between the date Father filed his petition and the hearing.

¶26 Assuming, without deciding, that § 25-403.04(B) applies not only to drug testing, but also to alcohol testing, the statute requires only that the court "consider" evidence of the test results; it does not require the court to find that the test results mandate a particular custody

determination. Here, Mother testified that she drank only when on vacation in Europe when the child was not present, and her failures to test occurred while she was on vacation. Mother's expert, who testified regarding her ability to parent and regarding alcohol dependence, opined that Mother was not a danger to her child. The expert also opined that Mother's recent alcohol use was an isolated incident and that she was not alcohol dependent. In light of this evidence, we conclude that the family court did not abuse its discretion by concluding that Mother rebutted the presumption against awarding her joint custody.

II. Equal Parenting Time Order.

¶27 Father argues that, because the court should not have awarded Mother joint custody, it follows that the award of equal parenting time was also an abuse of discretion. Because we have concluded that the trial court did not abuse its discretion in awarding joint custody, this argument is moot.

III. Denial of Attorney's Fees.

¶28 The family court denied Father's request for attorney's fees after finding that neither party acted more unreasonably than the other. We review the family court's decision to deny Father's request for attorney's fees under an abuse of discretion standard. *Mangan v. Mangan,* 227 Ariz. 346, 352, ¶ 26, 258 P.3d 164, 170 (App. 2011). Father claims he is entitled to an award of fees pursuant to A.R.S. § 25-324(A), which states that the court may award fees after considering the parties' financial resources and the reasonableness of each party's positions. Father argues that Mother's extreme DUI conviction, as well as her objections to and failure to comply with the temporary testing orders, constituted unreasonable conduct. Father also seeks fees pursuant to A.R.S. § 25-324(B), which mandates an award of fees if the opposing party's petition was not filed in good faith, not grounded in law or fact, or filed for an improper purpose.

¶29 Although we do not condone the conduct that precipitated these proceedings, Mother's pleadings did not appear to have been without a basis in fact or to have been filed to harass Father, delay the proceedings or increase the cost of litigation. Accordingly, we conclude

that the trial court did not abuse its discretion by denying Father's request for fees.[3]

ATTORNEY'S FEES AND COSTS ON APPEAL

¶30 Both parties request an award of attorney's fees and costs on appeal pursuant to A.R.S. § 25-324. Father also cites A.R.S. § 12-349 in support of his request. Neither party took unreasonable positions on appeal, and in our discretion, we deny both parties' requests for fees. As the successful party on appeal, Mother is entitled to an award of costs under A.R.S. § 12-342.

CONCLUSION

¶31 We affirm the family court's orders. Mother is entitled to her costs on appeal upon compliance with ARCAP 21, but each party shall bear their own attorney's fees on appeal.

[3] Father also raises the denial of his motion for reconsideration as an issue on appeal. But the family court's denial of that motion is not properly before us. The court did not consider the motion for reconsideration until after Father filed his notice of appeal; thus the notice of appeal does not encompass the order denying the motion for reconsideration. Furthermore, the denial of a motion for reconsideration is not an appealable order unless it meets certain requirements not met here. *See Arvizu v. Fernandez,* 183 Ariz. 224, 226-27, 902 P.2d 830, 832-33 (App. 1995) (holding that, to be appealable, a post-judgment order must address issues different from those in the underlying judgment and must affect the judgment by enforcing it or staying its execution).