IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 8/6/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

DANIEL R. BARKLEY, Petitioner, v. THE HONORABLE JAMES T. BLOMO, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, AMY E. REYNOLDS and KAREN J. CARTER, Real Parties in Interest.	)	1 CA-SA 13-0167 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Petition for Special Action
From the Superior Court in Maricopa County

Cause No. FC2012-000478

The Honorable James T. Blomo, Commissioner

Jurisdiction Accepted; Relief Granted

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G O U L D, Judge

¶1 Daniel R. Barkley ("Father") seeks special action relief from the trial court's order granting temporary custody to Amy E. Reynolds and Karen J. Carter ("Petitioners"). For the following reasons, we accept jurisdiction and grant relief on the grounds the trial court abused its discretion in failing to make required factual findings under Arizona Revised Statutes ("A.R.S.") section 25-403 (2013).

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The child was born in February 2011. Father's wife passed away soon after the child's birth. Petitioners are the child's maternal aunt, Amy E. Reynolds, and his maternal grandmother, Karen J. Carter. On November 9, 2012, Petitioners filed a petition to establish custody of the child pursuant to A.R.S. § 25-415 (2012), asserting that they stood *in loco parentis* to the child.[1] Their petition asserted the child lived continuously in Petitioners' care since he was two months old and resided with Petitioners in the grandmother's home.

¶3 On November 15 the trial court held a return hearing, at which time the court heard testimony from the child's aunt and

[1] A.R.S. § 25-415 was repealed in 2013, and re-codified as A.R.S. § 25-409. A.R.S. § 25-409 is nearly identical to former A.R.S. § 25-415. Thus, we refer to the current version of the *in loco parentis* statute, A.R.S. § 25-409, in this decision.

Father.[2] The testimony of Father and the aunt was directly contradictory on the issue of who had been caring for the child prior to the hearing. Father, who appeared pro per, testified that the child had always lived with him, but that he allowed the child to stay with Petitioners on weekends. In contrast, the aunt testified that the child had not spent an overnight with Father since the summer of 2011. The aunt further testified she had provided financial support for the child and taken care of the child's medical needs without any assistance from Father. The aunt also testified that Father had never been able to maintain a consistent visitation schedule with the child.

¶4 During the hearing, the aunt testified that the day prior to the return hearing Father picked up the child under the false pretense of taking the child to a photo session. However, once Father obtained custody of the child, he refused to return him to the Petitioners. Father admitted this was true, stating, "I did what I had to do to get my son back in my -- in my control."

[2] Father argues that the order to appear at the return hearing stated no evidence would be presented at the hearing, and he was therefore denied due process when the court, without prior notice, took testimony from him and the child's aunt. However, the court provided Father with notice and an opportunity to present evidence at both the December 14, 2012 hearing and the January 15, 2013 hearing. We therefore conclude there was no due process violation.

¶5 At the conclusion of the hearing, the trial court determined that Father was not a credible witness, and that the child lived primarily in the care and custody of the Petitioners. The trial court further found the child's aunt stood *in loco parentis* to the child since June 2011, and on this basis granted temporary custody to the aunt.[3] The court then continued the return hearing to December to review the status of the case.

¶6 At the December return hearing the court revisited its temporary custody order. Father was represented by counsel at this hearing. Once again, Father testified that the child had lived with him in the six months prior to the filing of the petition, while aunt testified child had lived with her during this time. At the end of the hearing, the trial court left the temporary custody order in place, and set an evidentiary hearing for January 15, 2013, to hear further evidence on the matter.

¶7 During the January hearing, the trial court heard additional testimony from the parties, as well as testimony from

[3] The trial court stated that these orders were entered to maintain the status quo until a bonding assessment could be performed. On February 5, 2013, a bonding assessment report was filed by psychologist Dr. Glenn Moe. In the report, Dr. Moe opined that the child was primarily attached with the Petitioners, and that they shared a strong bond with the child. Dr. Moe further opined that the child had a secondary attachment to Father, thereby indicating that the child had lived primarily with the Petitioners and not Father. Based on his assessment, Dr. Moe recommended that the child be placed with the Petitioners. However, based on our review of the record, it appears that neither of the parties nor the trial court has taken any action pursuant to this report.

several witnesses called by the parties. Several witnesses called by the aunt testified that the child lived almost exclusively with the aunt. In contrast, Father's witnesses testified that the child spent the majority of his time with Father.

¶8 At the conclusion of the January hearing, the court found the testimony of the witnesses contradictory, but was unable to determine which party was presenting truthful, reliable testimony. Thus, the court simply ordered the temporary custody order to remain in effect "until further order of [the] Court." The record before this court reflects the fact that no further custody hearings have been set by the trial court in this case.

JURISDICTION AND STANDARD OF REVIEW

¶9 Special action relief is available when there is no "equally plain, speedy, and adequate remedy by appeal." Arizona Rules of Procedure for Special Actions 1(a). Here, the temporary custody order is not appealable, Father has no "equally plain, speedy, and adequate remedy by appeal," and we therefore accept jurisdiction. *Villares v. Pineda*, 217 Ariz. 623, 625, ¶ 11, 177 P.3d 1195, 1197 (App. 2008).

¶10 We will not disturb a trial court's temporary custody determination absent an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). Moreover, we defer to the trial court's determination of witness

credibility and the weight given to conflicting evidence. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002).

DISCUSSION

¶11 Father contends the trial court abused its discretion by failing to make factual findings regarding the best interests of the child as required under A.R.S. §§ 25-403 and 25-409.[4] For the reasons discussed below, we agree.

¶12 When custody is contested, A.R.S. § 25-403(B) states that the trial court "shall make specific findings on the record about all relevant factors" set forth in A.R.S. § 25-403(A),[5] as well as "the reasons for which the decision is in the best

[4] Father also contends that Petitioners failed to show, by clear and convincing evidence, that awarding custody of the child to the aunt pursuant to A.R.S. § 25-409 was in the child's best interests. Because we remand this case to the trial court to make express findings regarding its custody order, we do not reach this issue.

[5] These factors are: 1) the wishes of the parent as to custody; 2) the wishes of the child; 3) the interaction and interrelationship of the child with the parent, the child's siblings, and any other person who may affect the child's best interests; 4) the child's adjustment to home, school, and community; 5) the health of the parties involved; 6) which parent is more likely to allow the child frequent and meaningful contact with the other; 7) whether one parent has provided primary care of the child; 8) the extent of coercion or duress used by a parent in obtaining a custody agreement; 9) whether the parents have complied with the education program requirements; 10) whether either parent was convicted of false reporting of child abuse or neglect; and 11) whether there has been domestic violence or child abuse. A.R.S. § 25-403(A)(1)-(11) (2012).

interests of the child." A.R.S. § 25-403(B) (2012). *In re Marriage of Diezsi*, 201 Ariz. 524, 525-26, ¶ 4, 38 P.3d 1189, 1191 (App. 2002). A custody order that does not contain the express findings "required by § 25-403 is deficient and, as a matter of law, constitutes an abuse of the family court's discretion." *Downs v. Scheffler*, 206 Ariz. 496, 499, ¶ 9, 80 P.3d 775, 778 (App. 2003). Moreover, we have previously held that the requirement to make express findings under A.R.S. § 25-403(A) is not limited to custody determinations between a child's natural parents, but also includes *in loco parentis* custody determinations made pursuant to A.R.S. § 25-409. *Id.*, 206 Ariz. at 500, ¶¶ 11-16, 80 P.3d at 779.

¶13 Here, the best interest findings required by A.R.S. § 25-403(B) do not appear in the record. None of the requisite best interest findings are contained in the minute entry orders or transcripts for the November, December, and January hearings. Accordingly, the trial court's order is deficient as a matter of law, and the trial court committed reversible error in granting Petitioners' motion for temporary custody by failing to make the requisite findings. *See Diezsi*, 201 Ariz. at 526, ¶ 5, 38 P.3d at 1191 (finding court abused its discretion in denying a father's request to change custody without making requisite findings); *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).

¶14 Petitioners argue that the express findings requirement contained in A.R.S. § 25-403(B) only applies to final custody orders, and that temporary custody orders entered pursuant to A.R.S. § 25-404 are not subject to this requirement. We disagree. The plain language of A.R.S. §§ 25-403(A) and (B) is not limited to final custody orders, but applies to any contested custody determination by the court. Moreover, A.R.S. § 25-404 clearly states that when either party objects to a proposed custody order, "[t]he court may award temporary legal decision-making and parenting time *under the standards of section 25-403* after a hearing...." A.R.S. § 25-404(A) (2012) (emphasis added). *See DePasquale v. Superior Court*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995) (holding that a trial court could not award temporary custody without independently determining the child's best interests).

CONCLUSION

¶15 For the foregoing reasons, we grant the petition and remand this case to the trial court to enter findings, on the current record or as supplemented at the discretion of the court, pursuant to A.R.S. § 25-403. Further, we deny Petitioners' request for attorneys' fees.

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
KENT E. CATTANI, Judge

/S/
PATRICIA K. NORRIS, Judge