DIVISION ONE
FILED: 01/12/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 09-0149
	)	1 CA-CV 09-0391
PAIGE GAMBLE-TIKKA,	)	(Consolidated)
	)	
Petitioner/Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
HOWARD TIKKA, JR.,	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
Respondent/Appellant.	)	Civil Appellate Procedure)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-051111

The Honorable John Christian Rea, Judge

VACATED AND REMANDED

Mariscal, Weeks, McIntyre & Friedlander, P.A. Phoenix
By Marlene A. Pontrelli
Attorneys for Petitioner/Appellee

Nirenstein Garnice Soderquist, P.L.C. Scottsdale
By Jeffrey A. Leyton
Brian D. Carroll
Attorneys for Respondent/Appellant

T I M M E R, Chief Judge

¶1 In these consolidated appeals, Howard Tikka, Jr. ("Father"), challenges the family court's order permitting his

ex-wife, Paige Gamble-Tikka ("Mother"), to relocate their two minor children to California, and further challenges the court's parenting plan. Because the court's findings are insufficient to establish why relocation is in the children's best interest, we vacate the relocation order and remand for additional findings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Father and Mother married in August 1997 and divorced in April 2006. Their twin daughters were born in December 2000. Father and Mother agreed to share joint legal custody of their children and to equal parenting time. The parties received alternate weeks with the children under the parenting plan adopted by the court.

¶3 In June 2008, Mother notified Father of her intent to relocate the children to California. Father petitioned the court to prevent relocation. After an evidentiary hearing, the court issued findings of fact and concluded relocation was in the children's best interest. Father timely appealed this decision.[1] The court subsequently entered a parenting plan proposed by Mother from which Father filed a second appeal.

[1] After Father filed his notice of appeal, he filed a motion for reconsideration. The family court correctly declined to rule on the motion because the notice of appeal divested the court of jurisdiction. *See City of Phoenix v. Leroy's Liquors, Inc.,* 177 Ariz. 375, 381, 868 P.2d 958, 964 (App. 1993).

DISCUSSION

I. Relocation

¶4 In his first appeal, Father challenges the adequacy of the court's findings, the sufficiency of the evidence, and the court's interpretation of Arizona Revised Statutes ("A.R.S.") section 25-408 (2007), in granting Mother's request to relocate the children to California.[2]

¶5 We review the decision concerning the relocation of a child for an abuse of discretion. *Hurd v. Hurd,* 223 Ariz. 48, ___, ¶ 19, 219 P.3d 258, 262 (App. 2009); *Owen v. Blackhawk,* 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). A court abuses its discretion when it misapplies the law or otherwise exercises its discretion on untenable grounds. *Fuentes v. Fuentes,* 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004); *Woodworth v. Woodworth,* 202 Ariz. 179, 183, ¶ 23, 42 P.3d 610, 614 (App. 2002). We accept the family court's factual findings unless clearly erroneous or unsupported by any credible evidence. *Hrudka v. Hrudka,* 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995) (citations omitted). Statutory interpretation is a question of law that we review de novo. *Palmer v. Palmer,* 217 Ariz. 67, 69, ¶ 7, 170 P.3d 676, 678 (App. 2007).

---

[2] Mother argues Father's failure to provide a transcript mandates dismissal of this appeal. This issue is moot because we subsequently granted Father's request to belatedly file a transcript.

¶6 When parents cannot agree on the relocation of a child, A.R.S. § 25-408(G) mandates that "[t]he court shall determine whether to allow the parent to relocate the child in accordance with the child's best interest[]." In determining a child's best interest, A.R.S. § 25-403(A) (2007) lists specific factors a court must consider.[3] The parent seeking to relocate bears the burden of proving what is in the child's best interest. A.R.S. § 25-408(G). Additionally, the court must consider the eight factors listed in A.R.S § 25-408(I) pertaining to relocation, which incorporates by reference the A.R.S. § 25-403(A) best-interest factors.[4] *Hurd,* 223 Ariz. at ¶ 20, 219 P.3d at 262.

---

[3] Those factors include: (1) each parent's wishes regarding custody, (2) the child's wishes regarding custody, (3) the interaction of the child with his parents, siblings and any other person who may significantly affect his best interests, (4) the child's adjustment to home, school, and community, (5) the mental and physical health of all the individuals involved, (6) which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent, and (7) which parent has provided primary care of the child. A.R.S. § 25-403(A)(1)-(7).

[4] The eight factors are:

> 1. The factors under § 25-403.
> 2. Whether the relocation is being made or opposed in good faith and not to interfere with or to frustrate the relationship between the child and the other parent or the other parent's right of access to the child.
> 3. The prospective advantage of the move for improving the general quality of life for the custodial parent or for the child.

¶7 Regarding the A.R.S. § 25-408(I) factors, the court found in relevant part:

> 2. Mother intends to move to California to marry her fiancé and also for employment related reasons. . . . Mother's desire to relocate to California is reasonable and not based on any intent to interfere with Father's relationship with the children. Father's opposition to relocation is based on his desire to maintain the existing level of contact with the children.
>
> 3. Moving to California has the prospect of improving Mother's quality of life significantly. There is nothing in the schools or community that would improve the children's quality of life. This factor is neutral as to the children.
>
> 4. Mother presented as being very flexible and cooperative in arranging and facilitating parenting time for Father if the children live in California. Father is also likely to comply with parenting time orders.

> 4. The likelihood that the parent with whom the child will reside after the relocation will comply with parenting time orders.
>
> 5. Whether the relocation will allow a realistic opportunity for parenting time with each parent.
>
> 6. The extent to which moving or not moving will affect the emotional, physical or developmental needs of the child.
>
> 7. The motives of the parents and the validity of the reasons given for moving or opposing the move including the extent to which either parent may intend to gain a financial advantage regarding continuing child support obligations.
>
> 8. The potential effect of relocation on the child's stability.

A.R.S. § 25-408(I)(1)-(8).

> 5. There are approximately twenty flights a day from the airport nearest Mother's neighborhood in California to Phoenix. . . . Mother proposed that Father have one weekend a month, the majority of the summer, and other times. . . . [r]elocation would allow a realistic opportunity for significant parenting time.
>
> 6. Mother stressed the need for the girls to have a female role model. Both parents have different and unique qualities that are beneficial to the children. Mother is ambitious in her career, hard working, highly organized, and devoted to the children. Father is nurturing, artistic, and devoted to the children. Given Mother's testimony that she intends to move regardless of whether relocation is granted, the Court finds that the emotional, developmental, and physical needs of the children are slightly better served by moving to California.
>
> 7. Neither parent's position is based on a motivation to achieve a financial advantage.
>
> 8. The children are likely to be stable in either Arizona or California.
>
> . . .
>
> The Court finds, under all the circumstances, that it is in the best interest of the minor children to grant Mother's request to relocate.

¶8 Additionally, regarding the A.R.S. § 25-403(A) factors, the court determined the children have healthy relationships with both parents; are well adjusted in home, school, and community; both parents are fit and proper parents; both parents are exemplary in promoting the other parent's

relationship with the children; and both have care-giving experience. A.R.S. § 25-403(A)(3)-(7). The court also found the children have a healthy relationship with Mother's fiancé and his daughter and "Mother appears to be slightly more active in scheduling health care visits but . . . Father is clearly active, involved, and concerned in all the children's activities." A.R.S. § 25-403(A)(3), (7).

¶9 Father argues the court abused its discretion in granting the relocation petition because the court did not explain the reasons for its decision or how it determined relocating was in the children's best interest. We agree.

¶10 "In deciding a relocation request, the family court must make specific findings on the record as to all relevant factors *and the reasons its decision is in the children's best interest[]*." *Hurd,* 223 Ariz. at ___, ¶ 20, 219 P.3d at 262 (citation omitted) (emphasis added). Mother argues the relocation order should be affirmed because the court made precise findings on each § 25-408(I) factor. But while the court addressed each factor, it failed to explain why relocation was in the children's best interest. Instead, the court stated that "under all the circumstances . . . it is in the best interest of the minor children to grant Mother's request to relocate."

¶11 We are unable to determine how the court reached its conclusion merely from reviewing the court's findings on each factor. With the exception of the factor listed in A.R.S. § 25-408(I)(6), no findings favor one parent over the other. Additionally, the court noted that the children's quality of life would not necessarily improve by relocating to California and the children would likely be stable in either state.[5] Similarly, the court's findings on the § 25-403(A) factors do not favor either parent. In sum, a sufficient explanation of why relocation is in the children's best interest is particularly warranted when the reason is not readily gleaned from the court's findings.

¶12 Regarding A.R.S. § 25-408(I)(6), the court found that although "[b]oth parents have different and unique qualities that are beneficial to the children. . . . Given Mother's

[5] To the extent Father argues the court abused its discretion by failing to consider the prospective advantage of the move for improving the general quality of his life under A.R.S. § 25-408(I)(3), we disagree. As the non-moving parent, Father's quality of life is not affected, other than by the potential reduction in his parenting time. The advantages of moving are relevant only to the extent they benefit the children's life or outweigh the detriments of relocating the children. *See Pollock v. Pollock,* 181 Ariz. 275, 278, 889 P.2d 633, 636 (App. 1995) (noting "the more advantages that will ensue from a move, the heavier the weight in favor thereof"). Here, the court found the move would benefit Mother's quality of life, did not mention Father, and concluded this factor was neutral as to the children. There was also no evidence presented regarding the prospective advantage of the move for improving Father's quality of life.

testimony that she intends to move regardless of whether relocation is granted . . . the emotional, developmental, and physical needs of the children are slightly better served by moving to California." Even assuming this slight improvement of the children's needs satisfied Mother's burden of proving that relocation is in their best interest, we cannot uphold the court's ruling on this basis without further explanation. As Father contends, the court provided no explanation for its conclusion other than to say that "Mother stressed the need for the girls to have a female role model" and she intends to move to California regardless of the court's ruling on relocation. It is not clear, however, what weight, if any, the court gave to the children's purported need for a female role model, which arguably may not support a relocation decision. *See* A.R.S. § 25-403.01(A) (2007) ("The court in determining custody shall not prefer a parent as custodian because of that parent's sex."). It is similarly unclear whether and how the court concluded that Mother being "ambitious, hard working, highly organized and devoted to the children" better serves the children's needs than Father's nurturing and artistic qualities and his devotion to the children. Indeed, at the conclusion of the hearing, the court, addressing A.R.S. § 25-408(I)(6), stated:

> Mother testified that the children need her as mother. Father testified that the children need him as father. Both parents

> are probably correct. It is entirely uncertain whether the children would suffer more from losing their father or from losing their mother.

Without sufficient explanation, we cannot effectively assess whether the court abused its discretion in deciding that relocation is in the children's best interest.

¶13 As the parent seeking relocation, Mother had the burden of proving what is in the children's best interest. A.R.S. § 25-408(G). Here, the court made no findings why relocation was in the children's best interest. Thus, we cannot conclude that Mother met her burden of proof. Because the court did not explain its reasoning for granting the relocation, and the findings do not collectively favor either parent, the court erred. Therefore, we vacate the relocation order and remand with instructions for the court to explain the reasons why its decision is in the children's best interest. *See Hurd,* 223 Ariz. at ___, ¶ 20, 219 P.3d at 262.

¶14 Father also argues the court erred by entering a relocation order without a parenting plan in place pursuant to A.R.S. § 25-408(G). Although this issue is moot in light of our decision to vacate the relocation order, to the extent this issue may arise on remand, we address it. *Dawson v. Withycombe,* 216 Ariz. 84, 113, ¶ 98, 163 P.3d 1034, 1063 (App. 2007).

¶15 Section 25-408(G) provides "[t]o the extent practicable the court shall also make appropriate arrangements to ensure the continuation of a meaningful relationship between the child and both parents." If the statutory language is clear and unambiguous, we give effect to the language and do not look to other rules of construction. *Sheehan v. Flower*, 217 Ariz. 39, 40-41, ¶ 10, 170 P.3d 288, 289-90 (App. 2007). Section 25-408(G) does not specifically require a parenting plan to be implemented prior to granting relocation. A court is only required to consider whether the relocation will permit both parents to have an opportunity for parenting time. *See* A.R.S. § 25-408(I)(5).

¶16 Here, Mother submitted a proposed parenting plan at the hearing and the court heard testimony on her plan. Mother proposed for Father to have parenting time one weekend per month, the majority of the summer, and other designated times. The court considered this evidence when issuing its decision and found there was a realistic opportunity to allow for parenting time. The court stated Mother was allowed to relocate thirty days after its January 20, 2009 ruling and ordered the parties to submit a parenting plan by February 1. The parties prolonged implementing the parenting plan, however. *See infra* ¶¶ 19-20.

¶17 The statutory language is clear and unambiguous and does not require a parenting plan to be in place prior to

relocation. Further, the court found that the relocation would permit the parties each to have an opportunity for parenting time. The court attempted to make arrangements for parenting time prior to the relocation, thus complying with the purpose of the statute. Therefore, we discern no error.

II. Parenting plan

¶18 In his second appeal, Father argues the family court erred by adopting Mother's proposed parenting plan. Although we are vacating the relocation order and therefore vacating and mooting the parenting plan issued therein, we will address the second appeal in case the issue arises on remand. *Dawson,* 216 Ariz. at 113, ¶ 98, 163 P.3d at 1063.

¶19 Mother lodged a proposed parenting plan on February 2; Father lodged a proposed parenting plan on February 3. Each objected to the other's proposed plan. Mother objected to Father's proposed plan on grounds concerning parenting time. After hearing oral argument, the court adopted Father's proposed parenting plan, but ordered Father to file a revised plan with certain modifications.

¶20 Thereafter, Father lodged a proposed plan with the court's changes. Mother then objected to the provisions in Father's proposed plan concerning travel, medical insurance, and the children's living expenses, although these same provisions were in Father's original proposed parenting plan submitted on

February 3. Mother lodged a proposed plan incorporating the relevant provisions from the original 2006 parenting plan and consent decree concerning these issues. Father objected to Mother's proposed parenting plan. The court signed Mother's proposed plan, and Father timely appealed.

¶21 Father argues the court erred by allowing Mother's "multiple and continuous applications" of Arizona Rule of Family Law Procedure ("Rule") 81(C). Rule 81(C) provides that if an opposing party objects to the form of judgment submitted within five days, the party submitting the judgment has five days to respond, and the matter is then presented to the court for determination. Ariz. R. Fam. L.P. 81(C)(2).

¶22 Father's argument is based on *Rexing v. Rexing,* 11 Ariz. App. 285, 464 P.2d 356 (1970). In *Rexing,* the husband lodged a proposed dissolution decree with the court, and the wife objected pursuant to Arizona Rule of Civil Procedure 58(d).[6] *Id.* at 287, 464 P.2d at 358. We find *Rexing* distinguishable. *Rexing* specifically held that the wife "was afforded the complete benefit of Rule 58(d)." *Id*. In the present case, Mother was afforded the benefit of Rule 81(C). That is not the

[6] Because Rule 81 is based on Arizona Rule of Civil Procedure 58, it is appropriate for us to consider case law concerning that rule. *See* Ariz. R. Fam. L.P. 81 cmt. (stating Rule 81 is based on Arizona Rule of Civil Procedure 58); and Ariz. R. Fam. L.P. 1. cmt. (noting case law interpreting a rule of civil procedure applies to the relevant rule of family law procedure when the language in the two rules is substantially the same).

issue before us, however. Here, the issue is whether the court abused its discretion by signing the parenting plan Mother submitted despite previously ruling in an unsigned minute entry that Father's proposed parenting plan had been adopted. *See Reid v. Reid*, 20 Ariz. App. 220, 221, 511 P.2d 664, 665 (1973) (holding a trial court may enter final judgment different from a minute entry because it "has discretion to change its mind in order to render a correct decision").

¶23 We find *Reid* more applicable to the facts of the present case. In *Reid,* the issue presented was whether the family court had discretion to change a minute entry order for judgment when signing the final judgment. *Reid,* 20 Ariz. App. at 220, 511 P.2d at 664. The wife argued the court erred in changing the "substance" of the dissolution decree after hearing argument on the "form" of the decree. *Id.* The *Reid* court explained that the family court had discretion to change its decision prior to entry of judgment. *Id.* at 221, 511 P.2d at 665. Additionally, the court stated a "trial judge needs ample opportunity to . . . reconsider, if necessary, the evidence in order to apportion responsibilities . . . fairly." *Id.* Addressing *Rexing*, the *Reid* court stated the important consideration is that parties have an opportunity to be heard under 58(d), and in *Reid,* the wife was given two opportunities to be heard. *Id.* at 222, 511 P.2d at 666.

¶24 In the present case, the court stated in an unsigned minute entry that it adopted Father's parenting plan as a court order with certain changes. Although Father's initial proposed plan contained the same provisions that Mother subsequently objected to, the court had discretionary authority to consider Mother's second set of objections. When Father raised the issue concerning Mother's initial failure to object to those provisions, the court explained it found "Mother's objections well taken" and therefore signed her parenting plan. A proposed parenting plan is not binding upon the court as the court has discretion to determine any disputed element in the plan. *See* A.R.S. § 25-403.02 (2007) (addressing parenting plans and stating the court determines elements the parties are unable to agree on and the court may determine any other factors necessary to promote and protect a child's emotional and physical health); *see also Porter v. Porter,* 21 Ariz. App. 300, 302, 518 P.2d 1017, 1019 (1974), *superseded by statute on other grounds,* A.R.S. § 25-332, *as stated in Anderson v. Anderson,* 121 Ariz. 405, 406-07, 590 P.2d 944, 945-46 (App. 1979) (stating the court has broad discretion in determining what is most beneficial for the children).

¶25 To the extent issues concerning this parenting plan might arise on remand, we find no error in the plan itself.

III. Attorneys' fees on appeal

¶26 Both parties request an award of attorneys' fees for the two appeals pursuant to A.R.S. § 25-324 (Supp. 2008). Because the record reveals no financial disparity and the parties adopted reasonable positions in these appeals, we decline to award attorneys' fees or costs to either party.

CONCLUSION

¶27 For the foregoing reasons, we vacate the relocation order and remand for additional findings consistent with this decision.[7]

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Peter B. Swann, Presiding Judge

/s/
Michael J. Brown, Judge

[7] The current parenting plan shall remain in effect pending resolution of the relocation on remand.