DIVISION ONE
FILED: 09/30/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| IN THE MATTER OF: | ) | 1 CA-CV 09-0570 |
| | ) | |
| DAMON J. EGGERT, | ) | DEPARTMENT C/T |
| | ) | |
| Petitioner/Appellant, | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| v. | ) | Rule 28, Arizona Rules of |
| | ) | Civil Appellant Procedure) |
| VERONICA A. DICKENS, | ) | |
| | ) | |
| Respondent/Appellee. | ) | |

Appeal from the Superior Court in Navajo County

Cause No. S-0900-DO-0020000588

The Honorable Ralph E. Hatch, Judge Pro Tempore

**AFFIRMED**

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David J. Martin Attorney at Law, PLLC — Lakeside
By David Joseph Martin
Attorneys for Appellant

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**O R O Z C O**, Judge

**¶1** Damon Eggert (Father) appeals the family court's order awarding the parties joint legal custody of the two minor children, P.E. and B.E., and primary physical custody of the

children to Veronica Dickens (Mother).[1] For the reasons that follow, we affirm the family court's ruling.

**FACTS AND PROCEDURAL HISTORY**

**¶2** In December 2000, a decree of dissolution was entered which awarded joint legal and physical custody of the minor children to Mother and Father. The parties entered into a stipulation in January 2004 that awarded joint legal custody of the children to both parents and primary physical custody to Mother with visitation to Father.

**¶3** Father filed a petition to modify custody without notice in December 2008, alleging the health, safety and welfare of the children was in serious and immediate jeopardy because Mother had removed the children from their home and school and the jurisdiction of the court. Based on Father's Petition, the family court entered temporary orders awarding Father sole custody of the minor children with restricted and supervised visitation by Mother. The family court entered another temporary order in January 2009 that awarded joint legal custody to both parents and primary physical custody to Father.

[1] Mother did not file an answering brief in response to this appeal, which we may regard as a confession of error. We decline to do so, on this record. *See Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982) ("Although we may regard [the] failure to respond as a confession of reversible error, we are not required to do so.").

**¶4** The matter was set for trial in June 2009 at which time the family court heard testimony from Father, Mother and both minor children. Mother testified as to what the children had told her regarding their time with Father and where the children told Mother they would like to live. Father objected to Mother's hearsay testimony and the trial court overruled the objection citing the Arizona Rules of Family Law Procedure[2] (ARFLP), which allow for leniency regarding the admissibility of evidence by a court, as opposed to the Arizona Rules of Evidence.

**¶5** Mother's attorney argued her testimony should be admitted because the Arizona Rules of Evidence had not been imposed, as required by ARFLP Rule 2. When asked by the court to respond to Mother's arguments, Father's attorney stated, "I believe that's correct." However, in March 2007, Father's attorney had filed a notice with the court to invoke the Arizona Rules of Evidence pursuant to Arizona Rules of Family Law Procedure 2.B.1. and requested that the Rules of Evidence govern any subsequent hearings.

**¶6** Mother requested the family court interview the children, pursuant to Rule 12 of the Arizona Rules of Family Law Procedure. After both parties presented their evidence, the family court privately interviewed the children over Father's

[2] ARFLP Rule 2.B.2 admits all relevant evidence and Rule 2.B.1 states with notice to the court "any party may require strict compliance with the *Arizona Rules of Evidence*."

objection. During these interviews, the children were questioned regarding their individual likes and dislike about living with each parent. The interviews were supportive of Mother and her testimony and conflicted with Father's testimony. The family court did not allow Father the opportunity to testify or present additional evidence after the children's interviews.

**¶7** The family court awarded Mother primary physical custody of the children and issued the following order:

> Pursuant to [A.R.S. § 25-403], the Court finds that it is in the best interest of both minor children, [B.E. & P.E], that the Parties be granted joint legal custody, with the [Mother] being awarded primary physical custody of both children. In reaching its decision the Court has considered the evidence and the wishes of the children. The Court finds that although both Parties are loving parents, the Mother has been the primary care giver, and has a special interpersonal relationship with both [children], and that to continue that relationship is in the children's best interest. Additionally, this order will allow both children to continue to be near their [older] brother, [C.E.] who is currently residing with the Mother.
>
> Furthermore, the children have developed many friends over the summer in Bullhead City. The Court finds that although the Mother took the children to Bullhead City without the Father's knowledge, she did so as she had just separated from her current husband . . . and needed a place to stay. They have since reconciled and he plans to join them in Bullhead City. However, prior to moving there she did allow frequent and meaningful visitation. The Court believes that she will again allow such visitation.
>
> Finally, the court heard significant evidence that the Father often drinks alcohol to excess, and that this excessive consumption is troubling to the

children. For the reasons cited above the Mother is awarded primary physical custody.

**¶8** Father did not file a motion to reconsider or request the family court to make the specific necessary findings pursuant to Arizona Revised Statutes (A.R.S.) sections 25-403.A and -408.I (2006).[3] Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21.A.1 and -2101.B (2003).

**DISCUSSION**

**¶9** Father raises three issues on appeal. He argues that the family court: (1) denied him due process of law because his children were interviewed privately by the family court and he did not have an opportunity to rebut their testimony; (2) abused its discretion by soliciting and admitting inadmissible hearsay; and (3) abused its discretion by failing to make specific findings on the record about all relevant factors pursuant to A.R.S. §§ 25-403.A and -408.I.

**Interviews of Children**

**¶10** Father argues the family court violated his due process rights by interviewing the children privately, and not affording him the opportunity to rebut their statements. A family court is given discretion to conduct an interview with minor children regarding custody at any stage of the proceeding, but the

[3] Unless otherwise specified, we cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

interview must be recorded by a court reporter or any electronic medium. ARFLP 12. Furthermore, A.R.S. § 25-405.A (2006) states, "The court may interview the child in chambers to ascertain the child's wishes as to the child's custodian and parenting time." In this case, the family court interviewed the children and asked questions which elicited each child's likes and dislikes about living with each parent. Therefore, the family court did not exceed its authority based on A.R.S. § 25-405.A and Rule 12 of the Arizona Rules of Family Law Procedure when conducting its interview with each child.

**¶11** Father contends that he was prejudiced because he did not have an opportunity to be aware of the statements made by the children and rebut them prior to his closing argument. The statements which concerned Father included: (1) the children's desire to live with Mother; (2) the children's statements that Father gets drunk on a regular basis; and (3) B.E.'s statements that Father threw a stuffed animal at her, hitting her in the head because her room was not clean enough. However, Father previously testified regarding these issues and has not indicated what new or additional evidence he would have presented if he were given the opportunity to rebut the children's testimony.

**¶12** During the interviews, the family court asked general questions and allowed the children to lead into more specific topics. For example, when asked where P.E. would like to live,

he responded that he would "like to stay with [his] mom." When Father testified he stated P.E. had expressed a desire to live with him. During Father's testimony he also indicated B.E. said, "I like living with you. I want to be with you, Dad." Father also testified that he could not remember a time when P.E. expressed a desire to live with him that was not prompted by B.E.

**¶13** During the family court's interview, P.E. brought up Father's drinking by recounting an incident when Father was cooking dinner and started yelling at him while "drunk." In response to a question asking how often Father gets drunk, P.E. replied "every other day." During Father's testimony, he denied being "intoxicated four to five times per week." When asked if he drank to the point of slurring his words, Father responded, "No." Father also denied drinking to the point where he would stagger.

**¶14** B.E. told the family court that while cleaning her room at Father's home, he came into her room, messed things up making her start over, and then threw a stuffed animal at her. Father testified he told B.E. she needed to pick up her room, she complied with his request, and he did not throw a stuffed animal or toy at B.E.

**¶15** To allow Father to merely repeat his denial of the allegations by the children would have been cumulative. Furthermore, Father has not identified what, if any, new evidence

he would have presented had he been given the opportunity to rebut the children's interview. We therefore find no error in the family court denying Father's request to rebut the children's interview.

**Hearsay Evidence**

**¶16** Father contends the family court abused its discretion by admitting inadmissible hearsay, which unduly prejudiced him. "The only objection which may be raised on appeal . . . is that made at trial." *Romero v. Sw. Ambulance*, 211 Ariz. 200, 203-04, ¶ 6, 119 P.3d 467, 470-71 (App. 2005) (quoting *Selby v. Savard*, 134 Ariz. 222, 228, 655 P.2d 342, 348 (1982)). An objection at trial on one ground does not preserve an objection on another ground on appeal. *See id.* "[W]hen a party fails to raise an issue before the trial court, the issue is waived on appeal . . . ." *Reid v. Reid*, 222 Ariz. 204, 208, ¶ 16, 213 P.3d 353, 357 (App. 2009); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994).

**¶17** The Arizona Rules of Family Law Procedure "govern the procedure . . . in all family law cases." ARFLP 1. Rule 2.B.1 states:

> Upon notice to the court filed by any party at least forty-five (45) days prior to hearing or trial, or such other date as may be established by the court, any party may require strict compliance with the *Arizona Rules of Evidence* . . . the notice provided for in this paragraph will be deemed timely if filed

> within a reasonable time after the party receives notice of the hearing or trial date.

Father filed a notice invoking the Arizona Rules of Evidence in March 2007 for a hearing in April 2007. The current appeal stems from a trial held in June 2009. Father claims his March 2007 notice invoking strict compliance with the Arizona Rules of Evidence applied to the June 2009 trial because he requested the notice to be invoked for any subsequent hearings.[4]

**¶18** During trial, Father failed to tell the court he had previously invoked the Arizona Rules of Evidence. In fact, Father denied that a notice had been filed, as indicated in the following exchange that occurred during Mother's testimony:

> Mother's Counsel: Your kids told you where they would like to live; with their father or with you?
>
> Father's Counsel: Objection; hearsay.
>
> Mother's Counsel: Your Honor, no one's imposed the Rules of Evidence in this matter; strict confines with the Rules of Evidence, as required pursuant to Rule 2 of the Arizona Rules of Family Law Procedure.
>
> Family Court: What's your response to that [Father's Counsel]?
>
> Father's Counsel: I believe that's correct. It still has to be reliable.

[4] Father impliedly argues that a single notice pursuant to Arizona Rules of Family Law Procedure 2.B.1 is sufficient to invoke the Arizona Rules of Evidence in all subsequent proceedings. Assuming without deciding a single notice would suffice, we suggest the better practice is to submit a notice prior to every hearing or trial in which a party wishes to invoke the Rules of Evidence.

> Family Court: Well, objection's overruled, and I'll give it the weight I believe it deserves.

**¶19** Father's failure to remind the court of his notice, invoking strict compliance with the Rules of Evidence, which was given two years earlier, for another hearing, waived his hearsay objection. *See Woodworth v. Woodworth*, 202 Ariz. 179, 184, ¶ 29, 42 P.3d 610, 615 (App. 2002). Accordingly, we find no error in the family court's decision to admit Mother's hearsay testimony.

**Specific Findings**

**¶20** Father argues the family court abused its discretion by awarding primary custody of the minor children to Mother without making specific findings on the record according to A.R.S. §§ 25-403.B and -408.I.

**¶21** "In making a custody determination, the court must consider the factors enumerated in A.R.S. § 25-403(A) regarding the children's best interests." *Reid*, 222 Ariz. at 207, ¶ 11, 213 P.3d at 356. The statute states, "[i]n a contested custody case, the court shall 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. When a court fails to make the requisite findings pursuant to A.R.S. § 25-403.B, we have held the trial court abused its discretion. *Reid*, 222 Ariz. at 210, ¶ 26, 213 P.3d at 359; *In re Marriage of Diezsi*, 201 Ariz. 524, 526, ¶ 5, 38 P.3d 1189, 1191 (App. 2002).

**¶22** Under A.R.S. § 25-403.B the term "specific findings on the record" requires a detailed finding of fact, more than a mere explanation or summary of the evidence presented and how it is in the best interest of the child. *See Owen v. Blackhawk*, 206 Ariz. 418, 421, ¶ 9, 79 P.3d 667, 670 (App. 2003). In *Owen*, this Court reversed and remanded to allow the trial court to state its findings because the trial court had listed some statutory factors, but had not detailed the factors to favor either parent. *Id*. at 421-22, ¶ 12. *Owen* also held detailed findings of fact are required under A.R.S. § 25-408.I when determining whether to allow the relocation of children in a custody dispute. *Id*. at 421, ¶ 9. Therefore, the specific findings of fact are required for both A.R.S. §§ 25-403 and -408, when the issue concerns relocation of children in a custody dispute.

**¶23** In *Reid*, the trial court failed to produce any explanation as to why the custody arrangement would be in the best interest of the children. 222 Ariz. at 207, ¶ 13, 213 P.3d at 356. The trial court did not state which factors had influenced its decision, and this Court was unable to determine how the trial court weighed the statutory factors. *Id.* This Court stated:

> [h]ad the court substantially complied with A.R.S. § 25-403(A) by considering and making findings on all but one of the requisite factors . . . we would be in a much better position to determine whether the court

> properly weighed and considered the necessary factors in determining the best interests of the children.

*Id*. at 208, ¶ 16.

**¶24** The family court should consider the following factors in determining the best interests of the children:

> 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.

A.R.S. § 25-403.A.1-7. While the family court findings are not as complete as we would prefer, the findings are sufficiently outlined and we are able to adequately review its findings pursuant to A.R.S. § 25-403. Furthermore, we note that Father could have requested more specific findings of fact in a motion to reconsider, but failed to do so.

**¶25** The first factor, determining the custody wishes of the parents, Mother and Father both wanted primary physical custody of the children. The family court considered the second factor, who the children wished to live with, when it stated the children

were troubled by the Father's alcohol use and preferred to live with Mother.

**¶26** In determining the interaction of those who may affect the children's best interest, the family court found the children would benefit from being near their older brother and continuing their "special interpersonal relationship" with Mother. The fourth factor, the children's community adjustment, was addressed by the statement that the children had made "many friends" while living in Bullhead City during the summer.

**¶27** The family court made findings regarding the health and wellness of all individuals involved by stating the benefits the children would experience by living with Mother, her special relationship with the children, and Father's propensity to drink alcohol in excess and its impact on the children. The sixth factor, addressing which parent would allow the other parent to have meaningful contact with the children, was decided when the family court stated that Mother had a history of allowing the children to have frequent and meaningful contact with Father. Lastly, the family court determined the seventh factor, which parent has provided primary care of the children, by stating "the Mother has been the primary care giver," since 2004.

**¶28** The family court made sufficiently specific findings of fact pursuant to A.R.S. § 25-403.B and elaborated why these facts

lead to its determination that custody of the children with Mother was in the children's best interest.

**¶29** The family court should consider the following factors in determining the effects of relocation on the children:

> 1. The factors prescribed under A.R.S. § 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.
> 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.[5] The second factor seeks to determine if the moving parent's relocation is motivated by preventing the other parent from having access to their children. Here, the family court found Mother moved to Bullhead City because she did not have a place to live after separating from her current husband,

[5] A.R.S. § 25-408.I.1 requires the court to analyze the relevant factors in § 25-403.A, which we addressed in the preceding section.

thus her move was not motivated to prevent Father from having access to the children. In fact, the family court found Mother was more likely to allow meaningful contact between the children and Father. In factor three, the court is to assess the impact relocation will have on the children or parent's quality of life. The family court determined the children's best interests would be served by living with Mother in Bullhead City.

**¶30** The family court's reasoning on the likelihood of Mother complying with parenting time orders was based on her history of allowing frequent and meaningful visitation between Father and the children. The family court next, provided an opportunity for each parent to have substantial parenting time through its joint custody arrangement. The arrangement allows for Mother to have the children during the school year (early August through the middle of May) and Father to have the children for the summer months. The family court also allowed Father monthly visitations and ordered visitation during holidays, birthdays, and other yearly celebrations.

**¶31** The family court addressed the sixth factor, focused on the effect the move will have on the children's development, by commenting on its concern with Father's alleged drinking habits. The family court also commented on the children's experience being in Bullhead City near their friends, brother, and Mother.

**¶32** The final relevant factor requires the court to determine the impact relocation would have on the children's well being and stability. Here, the family court stated the children would be more stable in Bullhead City because of the friendships and family relationships there.

**¶33** The family court substantially complied with A.R.S. §§ 25-403 and -408.I and this Court is able to identify which factors it cited in its ruling. Therefore, we find the family court did not abuse its discretion and made findings consistent with the statutory requirements.

**CONCLUSION**

**¶34** For the above mentioned reasons, we conclude there was no denial of due process or abuse of discretion by the family court. Accordingly, we affirm.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge