DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF:	No. 1 CA-CV 09-0745
JESSICA KRISOLOGO,	DEPARTMENT C
Petitioner/Appellant,	**MEMORANDUM DECISION**
v.	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
GRANT MINER,	
Respondent/Appellee,	
and	
DIANA WILLIAMSON, Paternal Grandmother,	
Intervenor/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-053265

The Honorable Carey Snyder Hyatt, Judge

AFFIRMED IN PART AND REMANDED

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Attorneys for Appellee Father and Intervenor Appellee

O R O Z C O, Judge

¶1 Jessica Krisologo (Mother) appeals from the family court's order concerning child custody and parenting time. For the reasons that follow we affirm in part and remand for additional findings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Grant Miner (Father) are the parents of a minor child (Child) born in 2002. In January 2004, while the parties were living in Washington, Father was arrested and charged with committing domestic violence against Mother. Father completed a diversion program consisting of domestic violence counseling and his case was dismissed.

¶3 In June 2008, after the parties moved to Arizona, Father was again arrested for committing domestic violence against Mother. Father pled guilty, was placed on probation for two years and was ordered into domestic violence counseling.

¶4 In November 2008, Mother obtained an order of protection prohibiting Father from contacting her and Child. Mother also filed a petition to establish child custody and parenting time, requesting sole custody of Child and supervised parenting time for Father. Father answered and requested joint custody. The court subsequently modified the order of protection, allowing Father contact with Child and supervised visitation. In February 2009, after an evidentiary hearing on

Father's petition for temporary orders, the court awarded Mother and Father temporary joint legal custody. Pursuant to Mother's request, the court ordered the parties to participate in a domestic violence assessment by Carl W. Mangold, LCSW.

¶5 After trial, the court found that although Father previously committed domestic violence against Mother, the evidence did not support a finding of significant domestic violence for purposes of A.R.S. § 25-403.03.A. The court awarded the parties joint custody of Child and nearly equal parenting time. Mother filed a motion for new trial, or alternatively, to alter or amend the judgment which the court denied. This appeal followed.[1] We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B., F.1. (2003).

DISCUSSION

I. Standard of Review

¶6 We review the family court's custody determination for an abuse of discretion and in the light most favorable to upholding the family court's decision. *Hurd v. Hurd,* 223 Ariz.

[1] Although Mother's notice of appeal was premature, it was followed by a final appealable judgment. *See Barassi v. Matison,* 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). A premature notice of appeal takes effect when the court enters the final judgment. *Id.*; *Schwab v. Ames Constr.,* 207 Ariz. 56, 58, ¶ 9, 83 P.3d 56, 58 (App. 2004). Accordingly, this appeal became effective on January 12, 2010, the date the court entered the final judgment.

48, ___, ¶ 11, 219 P.3d 258, 261 (App. 2009); *Maher v. Maher,* 17 Ariz. App. 22, 22, 495 P.2d 147, 147 (App. 1972). The court's factual findings will be upheld if there is any reasonable evidence supporting them. *Moreno v. Jones,* 213 Ariz. 94, 98, ¶ 20, 139 P.2d 612, 616 (2006). We review the decision to deny a motion for new trial for an abuse of discretion. *Pullen v. Pullen*, 223 Ariz. 293, ___, ¶ 10, 222 P.3d 909, 912 (App. 2009).

II. Rule 82.A.

¶7 Mother argues the family court erred by failing to issue specific findings of fact and conclusions of law concerning A.R.S. § 25-403.03.A., D., E., and F. in violation of Arizona Rule of Family Law Procedure (Rule) 82.A.

¶8 Rule 82.A. requires a court to make specific findings of fact and conclusions of law if requested to do so prior to trial. When a timely request for findings of fact is made, the family court's factual findings must be sufficient to allow the appellate court to examine the basis for the family court's decision. *See Elliott v. Elliott*, 165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990) (addressing Arizona Rule of Civil Procedure 52(a), the predecessor of Rule 82.A., and noting "it must be clear how the court actually did arrive at its conclusions"); *see also Miller v. Bd. of Supervisors of Pinal County,* 175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993) ("The reviewing court needs a sufficient factual basis that explains *how* the trial court

actually arrived at its conclusion."). Accordingly, when Rule 82.A. is invoked, this court will not infer additional findings necessary to sustain the judgment. *Elliott,* 165 Ariz. at 135, 796 P.2d at 937.

¶9 Here, the family court set trial for June 15, 2009, and ordered any party requesting findings of fact and conclusions of law pursuant to Rule 82.A. to "submit proposed findings of fact and conclusions of law . . . no later than 30 days prior to trial." Mother subsequently requested specific findings of fact and conclusions of law, particularly concerning application of A.R.S. § 25-403.03.A., D., E., and F. On May 21, twenty-five days prior to trial, Mother filed a motion to continue trial and to allow additional time to submit proposed findings due to Father's failure to timely comply with her discovery requests. The court denied Mother's motion.

¶10 Nevertheless, before trial, Mother renewed her request for specific findings of fact and conclusions of law, and also requested permission to submit proposed findings of fact. The court denied Mother's request to submit proposed findings, but stated it would issue findings of fact and conclusions of law. Accordingly, the court was required to make specific findings of fact and conclusions of law pursuant to Rule 82.A. and we address the sufficiency of the court's findings pertaining to each statute Mother contests.

III. Domestic Violence

A. A.R.S. § 25-403.03.A.

¶11 Under A.R.S. § 25-403.03.A., the court may not award joint custody if it "makes a finding of the existence of significant domestic violence . . . or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence." A.R.S. § 25-403.03.A. (Supp. 2009).

¶12 Here, the court found in part:

> Moreover, Mr. Mangold interprets Mother's invalid and inaccurate test scores to mean that she is minimizing her victimization, which may be the case. However he goes on to state that her scores also seem to indicate that she has not accurately appraised or has exaggerated Father's abusive behavior.
>
> Based upon all of the credible evidence presented, the Court finds that Father has engaged in domestic violence against Mother and is in need of further treatment in this area. The evidence indicates that Father has previously successfully participated in treatment and can only be further helped in this area by continuing treatment. The evidence does not support a finding of the existence of significant domestic violence so as to preclude an award of Joint Legal Custody and/or significant parenting time between the child and Father.

Although the court did not reference A.R.S. § 25-403.03.A., by specifically finding no significant domestic violence precluding

an award of joint custody, it is clear the family court considered A.R.S. § 25-403.03.A.

¶13 There is substantial evidence that Father committed domestic violence against Mother in January 2004 and in June 2008. There is conflicting testimony about other instances of domestic violence throughout Mother and Father's relationship. Father consistently maintained that although there was domestic violence, it was not significant. The family court is in the best position to assess the credibility of witnesses and we give great deference to its determination. *Standage v. Standage,* 147 Ariz. 473, 479, 711 P.2d 612, 618 (App. 1985); *Gutierrez v. Gutierrez,* 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). Accordingly, the family court found Father more credible on this issue by specifically finding no significant domestic violence based on the credible evidence.

¶14 Mother also argues the family court erred in failing to address whether there was a significant history of domestic violence. Section 25-403.03.A. does not require the court to make a specific finding regarding the history of domestic violence. *See Elliott,* 165 Ariz. at 131 n.1, 796 P.2d at 933 n.1 (noting the child support and spousal maintenance statutes do not require specific findings on each factor, but instead only require the court to consider the factors). The statute precludes an award of joint custody if the court finds a

significant history of domestic violence. By awarding joint custody and not specifically finding a significant history of domestic violence, the court determined there was no significant history of domestic violence.

¶15 Although we do not downplay the existence of domestic violence, the court did not err by concluding that two instances of domestic violence four years apart did not constitute a significant history of domestic violence. *See Canty v. Canty,* 178 Ariz. 443, 445, 448, 874 P.2d 1000, 1002, 1005 (App. 1994) (allegations of domestic violence that occurred three years and two years prior to a custody hearing were a factor considered against the perpetrator, but did not "automatically tip the scales against the offending spouse"); *cf. Hurd,* 223 Ariz. at ___, ¶¶ 14-17, 219 P.3d at 261-62 (court found a history of domestic violence based on mother's testimony corroborated by the children, police reports, a letter from a social worker, and mother's report to health care professionals). Therefore, the family court's findings concerning A.R.S. § 25-403.03.A. are sufficient and supported by the record.

B. A.R.S. § 25-403.03.D., E.

¶16 If the court determines a parent seeking custody has committed an act of domestic violence against the other parent, A.R.S. § 25-403.03.D. creates "a rebuttable presumption that an award of custody to the parent who committed the act of domestic

violence is contrary to the child's best interests." The presumption "does not apply if both parents have committed an act of domestic violence." A.R.S. § 25-403.03.D.

¶17 Here, the family court specifically found Father committed domestic violence against Mother, but did not discuss the rebuttable presumption or mention A.R.S. § 25-403.03.D. Father contends the presumption did not apply because the court found both parties committed acts of domestic violence. The court found:

> Mother is also in need of Domestic Violence Victim counseling. Additionally, the evidence demonstrates that the child has been exposed to verbal violence between the parties. The parties, but most particularly Father and the minor child, would be significantly benefitted by some family counseling regarding the child's victimization from the previous domestic violence incidents between Father and Mother.

Further, addressing a separate statute concerning daughter's best interests, A.R.S. § 25-403.A.5. (Supp. 2010),[2] the court found in part:

> Domestic violence has been a problem in the relationship with Father as the principal. The child of these parties . . . [has] auditorily witnessed the verbal altercations between the parties involving both parties yelling at each other.

[2] We cite to the current version of applicable statutes where no material changes have since occurred.

The court's findings indicate only Father committed an act of domestic violence. Father's argument illustrates the lack of findings by the court regarding the rebuttable presumption. *See Miller,* 175 Ariz. at 299, 855 P.2d at 1360 (the factual findings must explain how the court arrived at its conclusion). Because the court did not address the rebuttable presumption, we are unable to determine whether the court appropriately applied the presumption.

¶18 Alternatively, Father argues that if the rebuttable presumption applied, he rebutted it. Section 25-403.03.E. lists several factors a court should consider in determining if a parent rebutted the presumption:[3]

> 1. Whether the parent has demonstrated that being awarded . . . joint . . . custody is in the child's best interests.
>
> 2. Whether the parent has successfully completed a batterer's prevention program.
>
> 3. Whether the parent has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate.
>
> 4. Whether the parent has successfully completed a parenting class, if the court determines that a parenting class is appropriate.
>
> 5. If the parent is on probation, parole or community supervision, whether the parent is

[3] The court is not required to make specific findings on each factor, but is only required to consider them. *Elliott,* 165 Ariz. at 131 n.1, 796 P.2d at 933 n.1.

> restrained by a protective order that was granted after a hearing.
>
> 6. Whether the parent has committed any further acts of domestic violence.

¶19 The court did not specifically reference A.R.S. § 25-403.03.E., but did issue findings regarding some of the factors. In particular, the court issued specific findings on the relevant A.R.S. § 25-403.A. factors[4] regarding Child's best interests, which are encompassed within A.R.S. § 25-403.03.E.1. Mother does not contest the sufficiency of those findings. The court also found Father "previously successfully participated in

[4] Those factors include: the wishes of the parents as to custody; the wishes of the children; the interaction and interrelationship of the children with the parents; the children's adjustment to home, school and community; the health of the parties involved; which parent is more likely to allow the child frequent and meaningful contact with the other; whether one parent has provided primary care of the child; and the extent of coercion or duress used by a parent in obtaining an agreement for custody. A.R.S. § 25-403.A.1.-8. This statute was amended in 2009, after the court issued its findings in this case, and now specifically requires the court to consider "[w]hether there has been domestic violence or child abuse." A.R.S. § 25-403.A.11.; 2009 Ariz. Sess. Laws, ch. 57, § 1 (1st Reg. Sess.).

treatment" for domestic violence, thus considering A.R.S. § 25-403.03.E.2.[5]

¶20 Nevertheless, the court also found Father was in need of a substance abuse assessment and treatment and a parenting skills class.[6] A.R.S. § 25-403.03.E.3., 4. Additionally, the court made some references to the order of protection. A.R.S. § 25-403.03.E.5. Finally, although the record shows there had been no further instances of domestic violence, the court did not address A.R.S. § 25-403.03.E.6.

¶21 Thus, some of the factors favor Father, perhaps indicating he rebutted the presumption; but some do not. From the findings, we are unable to determine how the court reached its conclusion. *See Miller,* 175 Ariz. at 300, 855 P.2d at 1361 (Rule 82.A. "findings must encompass all of the 'ultimate' facts" - those essential and determinative of how the court reached the conclusion (citations omitted)). Because it is not

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[5] Mother argues Father "learned nothing" from the domestic violence program in Washington because he subsequently committed domestic violence against Mother and because his basic outlook had not changed. Contrary to Mother's argument, Father testified the treatment "was a good treatment," he "learned a lot in that class," he was successful with the program, and he came away with a lot of information. Additionally, his treatment records indicate Father was an "active participant" and took "responsibility for his actions" and "made changes in his attitude and continues to work on issues such as boundaries." Thus, the court appropriately determined Father successfully completed a domestic violence program.

[6] Father's treatment records indicate he completed the parenting classes, but the court did not mention this.

clear from the court's findings whether it applied the rebuttable presumption, and if it did, how the court determined Father rebutted the presumption, we remand with instructions for the court to explain its application of A.R.S. § 25-403.03.D and E.

C. A.R.S. § 25-403.03.F.

¶22 Under A.R.S. § 25-403.03.F.:

> If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the child's emotional development. If the parent meets this burden to the court's satisfaction, the court shall place conditions on parenting time that best protect the child and other parent from further harm.[7]

Despite finding that Father committed domestic violence against Mother, the court did not reference A.R.S. § 25-403.03.F. or Father's burden under this statute. The court stated, "[t]he evidence does not support a finding of the existence of significant domestic violence so as to preclude an award of Joint Legal Custody and/or significant parenting time between

[7] Conditions a court may order include exchanging the child in a protective setting; supervised parenting time; counseling; abstinence from consuming controlled substances during parenting time; keeping the address of the other parent confidential; prohibiting overnight parenting time; requiring a parent to post a bond for the child's safe return; and any other necessary condition. A.R.S. § 25-403.03.F.1.-4., 6.-9.

the child and Father." Under A.R.S. § 25-403.03.F., the standard is not the existence of significant domestic violence; the statute requires only an "act" of domestic violence to trigger its application. Further, the court's only finding concerning daughter's emotional development indicated that there was insufficient evidence presented.[8] Thus, it is not clear whether the court placed any burden on Father.

¶23 Based on its findings, however, the court seemed to address A.R.S. § 25-403.03.F. by imposing some conditions on Father's parenting time. For instance, the court ordered Father to enroll in a domestic violence treatment program, a family counseling program with daughter,[9] and a substance abuse program. A.R.S. § 25-403.03.F.3., 9. Further, pursuant to the order of protection, Mother's address is protected. A.R.S. § 25-403.03.F.8. Finally, Child is to be exchanged by the parties or their representatives at her school or at a different public setting when school is not in session. A.R.S. § 25-403.03.F.1.

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[8] The court mentioned this finding in connection with Mother's relocation request under A.R.S. § 25-408.I.6. (Supp. 2010).

[9] Contrary to Mother's argument, the court did not order joint counseling between her and Father in violation of A.R.S. § 25-403.03.G. The court ordered Mother to participate in domestic violence victim counseling and "to make herself available to become involved in any treatment involving the child."

¶24 In light of these findings, the court was implicitly satisfied that parenting time with Father will not endanger Child or impair her emotional development.[10] Nevertheless, without expressly referencing Father's burden under A.R.S. § 25-403.03.F. and specifying what facts satisfied the burden, we cannot be sure the court appropriately applied the burden. *Elliott,* 165 Ariz. at 135, 796 P.2d at 937. Therefore, we remand with instructions for the family court to issue specific findings concerning A.R.S. § 25-403.03.F.

IV. Expert Analysis

¶25 Last, Mother argues there are several problems with the court's findings and conclusions concerning the domestic violence tests administered to the parties.

¶26 According to the results of the tests, Father scored in the "medium risk range" in the areas of control, violence, and stress coping – below the range indicative of a serious problem. Further, Mangold testified Father's scores indicate he was truthful in his responses. Conversely, Mother's scores indicate she was not being truthful, and thus her test results were invalid and inaccurate. However, based on the test

[10] Indeed, there is support in the record that parenting time will not be harmful to Child as evidenced by Mother letting Child visit with Father on a regular basis after the June 2008 domestic violence incident and prior to the order of protection issued in November 2008. Also, Child was doing well in school, and was well-adjusted to the parenting schedule and school.

results, Mangold concluded Father is abusive and domestic violence intervention groups have not altered his behavior.

¶27 Addressing Father's scores, the court found that although Father scored high in the areas concerning domestic violence his score was below the range indicative of a serious problem, which is supported by the test and Mangold's testimony. In fact, Mother's score in the violence category, although lower than Father's, was in the same "medium risk range." The court also noted that although Mother's invalid test results could indicate that she is minimizing her victimization, the results could also mean she "has not accurately appraised or has exaggerated Father's abusive behavior," which is also supported by the record.

¶28 Mother contends the tests only supplemented Mother's case, but did not substitute for the "irrefutable evidence presented through other witnesses and exhibits." No other witnesses testified at trial besides Mother, Father, and Mangold. According to the documentary evidence, a neighbor witnessed the June 2008 domestic violence incident. Father did not deny this incident. There was no other independent evidence of domestic violence, as the remaining evidence is based on Mother's accounts of the incidents. The court is not bound to accept testimony of an interested party. *Estate of Reinen v. N.*

Ariz. Orthopedics, Ltd., 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000).

¶29 Mother also argues the tests did not absolve the court of its responsibility to apply A.R.S. § 25-403.03.D., F. We agree, and as previously discussed, we are remanding these matters for additional findings. *See supra* ¶¶ 16-24.

¶30 Finally, Mother contends the reliability of Father's scores should be questioned in light of the difference in his scores on the same test eight months earlier. All of Father's scores with the exception of one in the "control" category, decreased in the later test, thus indicating less risk. The decrease in scores could indicate the success of the domestic violence counseling Father had nearly completed at the time of trial. Although Father's "control" score increased from low risk to medium risk, there is no evidence this category alone indicates Father's scores are unpredictable or make the court's findings and conclusions inappropriate. Accordingly, the court's findings concerning the domestic violence assessment tests are supported by the record.

V. Attorneys' Fees

¶31 Father requests attorneys' fees on appeal pursuant to A.R.S. § 25-324.A. (Supp. 2010), contending Mother's appeal was

not reasonable.[11] Mother requests attorneys' fees for the preparation of her reply brief pursuant to A.R.S. §§ 25-324.A. and 12-349.A. (2003). Both parties adopted reasonable positions on appeal. Further, Mother has not established Father 1) defended a claim without substantial justification, 2) defended a claim primarily for delay or harassment, 3) delayed the proceedings, or 4) engaged in abuse of discovery. A.R.S. § 12-349.A. Therefore, in our discretion, we decline to award fees to either party. However, as the successful party, Mother is entitled to her costs, upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶32 For the foregoing reasons, we affirm the court's findings concerning A.R.S. § 25-403.03.A. and the domestic violence assessment tests and remand for additional findings on A.R.S. § 25-403.03.D., E., and F.[12]

_____
PATRICIA A. OROZCO, Judge

CONCURRING:

_____ _____
MAURICE PORTLEY, Presiding Judge MARGARET H. DOWNIE, Judge

[11] The record indicates Father has a higher income and more financial resources than Mother.

[12] The current custody and parenting time order shall remain in effect pending resolution of this matter on remand.