

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10-28-2010  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

IN RE THE MARRIAGE OF: ) 1 CA-CV 10-0214 A  
)  
TRAVIS JUSTIN BUSH, ) DEPARTMENT C  
)  
Petitioner/Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellant Procedure)  
MIRANDA RAY BUSH, )  
)  
Respondent/Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-093567

The Honorable James P. Beene, Judge

**AFFIRMED IN PART AND REMANDED IN PART**

The Murray Law Offices PC Scottsdale  
By Stanley David Murray  
and

Ronee Korbin Steiner PC Scottsdale  
By Ronee Korbin Steiner  
Attorneys for Respondent/Appellant

William R. Wingard LLC Tempe  
By William R. Wingard  
Attorneys for Petitioner/Appellee

O R O Z C O, Judge

¶1 Miranda Bush (Mother) appeals the family court's order modifying child custody and awarding Travis Bush (Father) joint physical custody. Because the family court failed to make specific findings in accordance with Arizona Revised Statutes (A.R.S.) section 25-403.B. (Supp. 2009),<sup>1</sup> we affirm in part and vacate and remand in part for further proceedings consistent with this decision.

#### FACTS AND PROCEDURAL HISTORY

¶2 The parties were divorced on June 22, 2006. The decree made Mother and Father joint legal custodians of their child, named Mother as the primary residential parent and outlined a parenting time schedule.

¶3 On February 29, 2008, the family court adopted recommendations from a February 6, 2008 parenting conference report, and ordered Mother and Father to share physical custody equally. Mother appealed, challenging the trial court's failure to make the requisite findings in compliance with A.R.S. § 25-403. This court vacated the family court order because it was an improper modification to the established joint physical custody arrangement and remanded the matter to the family court. *Bush v. Bush*, 1 CA-CV 08-0146 A, 2008 WL 4763461, at \*3, ¶ 16 (Ariz. App. Oct. 28, 2008) (mem. decision).

---

<sup>1</sup> We cite to the current version because the 2009 amendments to this section are immaterial to the decisions in this case.

¶4 Father filed a petition to modify child custody on December 30, 2008 and on December 14, 2009, the family court issued an order that confirmed joint legal custody to the parties. It also ordered Mother and Father to share equally physical custody of their daughter. The order, however, failed to include the necessary findings mandated by A.R.S. § 25-403.B. The order also adjusted the child support obligations and held each party responsible for their respective attorney fees.

¶5 Mother filed a motion for a new trial and requested the court make the statutory findings. Father successfully opposed the motion. Mother filed a timely notice of appeal of the trial court's December 14, 2009 and January 29, 2010 orders. We have jurisdiction in accordance with Article 6, Section 9, of the Arizona Constitution, and A.R.S. sections 12-120.21. (2003), -2101.B., C., and F.1. (2003).

#### **DISCUSSION**

¶6 In child custody matters "there can be no question under all the authorities" that "the pole star by which [the court] is led to a decision" is the child's best interest. *Dickason v. Sturdavan*, 50 Ariz. 382, 386, 72 P.2d 584, 586-87 (1937). "In considering a motion for change of custody, the court must initially determine whether a change of circumstances has occurred since the last custody order." *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982). "Only after the

court finds a change has occurred does the court reach the question of whether a change in custody would be in the child's best interest." *Id.*

***Motion to Dismiss Petition to Modify Custody***

¶17 In her motion to dismiss Father's December 2008 petition, Mother argued that Father's "basis for modification is insufficient." However, "[t]he [family] court has broad discretion in determining changed circumstances." *Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994). "On review, the [family] court's decision will not be reversed absent a clear abuse of discretion, i.e., a clear absence of evidence to support its actions." *Pridgeon*, 134 Ariz. at 179, 655 P.2d at 3.

¶18 In his petition, Father alleged that "the child adjusted extremely well to the schedule where she shared time equally between the parents." This "allowed for more meaningful and frequent contact between the child and both parents and also allowed the child to bond significantly with both parents." Father also alleged that he "has the ability to properly care for the child and has the ability to do so for extended periods of time."

¶19 The family court agreed and found that Father's change in employment, which resulted in an increased income and flexible work schedule, was sufficient evidence of "a substantial and continuing change of circumstances warranting a modification of

Father's parenting time." Because the family court has broad discretion in this matter, we find there was a sufficient basis for the petition to modify custody.

***Specific Statutory Findings***

¶10 "When determining custody, initially or on request for modification, a trial court must comply with § 25-403(A)." *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 4, 38 P.3d 1189, 1191 (App. 2002) (enumerating A.R.S. § 25-403.A.'s factors). "In 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. (emphasis added).

¶11 In this case, the parties do not dispute that the order modifies child custody. Nor do they dispute that the family court failed to make the required findings pursuant to A.R.S. § 25-403; rather, the dispute concerns the proper remedy. Mother argues that the decision should be vacated and that we should dismiss Father's petition outright, or in the alternative, that we should grant a new trial. We decline to do either.

¶12 "We review the [family] court's decision regarding child custody for an abuse of discretion." *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003) (citing *Diezsi*, 201 Ariz. at 526, ¶ 3, 38 P.3d at 1191). "Failure to make the requisite findings pursuant to A.R.S. § 25-403 can

constitute an abuse of discretion requiring reversal and a remand." *Hart v. Hart*, 220 Ariz. 183, 186, ¶ 9, 204 P.3d 441, 444 (App. 2009). "The grant or denial of the motion for a new trial is within the sound discretion of the [family] court and we will not upset its ruling absent a clear showing of abuse of discretion." *Adroit Supply Co. v. Elec. Mut. Liability Ins. Co.*, 112 Ariz. 385, 389, 542 P.2d 810, 814 (1975).

¶13 Failure to make the required statutory findings calls for remand with instructions that the family court perform the analysis required by A.R.S. § 25-403. For example, in *Reid v. Reid*, after finding that "the court provided no explanation why this [child custody] arrangement was in the children's best interest," we chose to "vacate the family court's order and remand the matter for that court's reconsideration and for the court to make findings supporting its decision as required by A.R.S. § 25-403(B)." 222 Ariz. 204, 207-10, ¶¶ 13 and 20, 213 P.3d 353, 356-59 (App. 2009); accord *Downs v. Scheffler*, 206 Ariz. 496, 501, ¶ 19, 80 P.3d 775, 780 (App. 2003) (finding that none of the factors were addressed and choosing to "remand to allow the trial court to make the findings required under A.R.S. § 25-403(A) and (J)"); *Diezsi*, 201 Ariz. at 527, ¶ 11, 38 P.3d at 1192 (remanding with directions to make the required statutory findings after determining that the trial court did not consider any of the requisite factors).

¶14 Likewise, in *Hart v. Hart*, after finding that “[t]here was evidence regarding many of the foregoing factors,” we chose to “vacate the custody order and remand to allow the family court to make additional findings and conclusions in accordance with A.R.S. § 25-403.” 220 Ariz. at 186-87, ¶¶ 12 and 14, 204 P.3d at 444-45. We chose to “vacate the custody order, rather than simply remand for additional findings, because of the significant number of factors not addressed.” *Hart*, 220 Ariz. at 187, ¶ 14, 204 P.3d at 445. However, we declined to “suggest a particular outcome on remand” and chose not to “require additional evidentiary proceedings, unless the court determine[d] that they would be appropriate.” *Id.*; accord *Owen v. Blackhawk*, 206 Ariz. at 422, ¶ 12, 79 P.3d at 671 (“We reverse and remand to allow the trial court to state on the record its findings in compliance with A.R.S. § 25-403(J).”).

¶15 “Without further explanation from the [family] court regarding its consideration of the applicable factors, we cannot say that the [family] court did not focus too much attention on [one factor] to the exclusion of other relevant considerations.” *Reid*, 222 Ariz. at 207, ¶ 13, 213 P.3d at 356 (quoting *Owen*, 206 Ariz. at 421, ¶ 12, 79 P.3d at 670). As such, we find an abuse of discretion and without suggesting a particular outcome, remand with instructions that the family court articulate its findings pursuant to A.R.S. § 25-403.

### **Attorney Fees**

¶16 Mother also appeals from the denial of her request for attorney fees. We review the family court's decision "[w]hether to award attorneys' fees and the amount thereof" for an abuse of discretion. *Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997).

¶17 A.R.S. § 25-324 (Supp. 2009) directs the court, when considering the matter of attorney fees, to consider "the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." "[A]n applicant need not show both a financial disparity and an unreasonable opponent in order to qualify for consideration for an award." *Magee v. Magee*, 206 Ariz. 589, 591 n.1, ¶ 8, 81 P.3d 1048, 1050 n.1 (App. 2004).

¶18 With respect to financial resources, "[i]t is an abuse of discretion to deny attorneys' fees to the spouse who has substantially fewer resources, unless those resources are clearly ample to pay the fees." *Roden*, 190 Ariz. at 412, 949 P.2d at 72. However, inability to pay attorney fees is not a prerequisite; rather, "relative financial disparity between the parties is the benchmark for eligibility." *Magee*, 206 Ariz. at 593, ¶ 18, 81 P.3d at 1052. "If the trial court finds such a disparity, it is then authorized to undertake its discretionary function of determining whether an award is appropriate." *Id.*



¶19 Here, there is a clear earning disparity between the parties. The family court found that Mother's monthly income is \$1,600 and that Father's is \$4,501. Thus, Mother is eligible for an award of attorney fees. However, the fact that she is eligible does not make her entitled to attorney fees. When considering the matter of attorney fees, "the [family] judge can draw upon his knowledge of the case and upon his own experience." *Baum v. Baum*, 120 Ariz. 140, 146, 584 P.2d 604, 610 (App. 1978) (citing *Johnson v. Johnson*, 12 Ariz. App. 208, 469 P.2d 100 (1970)). A review of Mother's financial affidavit indicates that her expenses do not exceed her income; therefore, she is capable of paying her attorney fees.

¶20 With respect to the reasonableness of the parties' positions, we hold that it was not unreasonable for Father to pursue equal parenting time with his daughter. Given the family court's finding that Father's change in employment was a change in circumstances sufficient to reopen the matter of physical custody, *see supra* at ¶ 9, Father's desire to play a larger role in his daughter's life was reasonable. Thus, the family court's order denying Mother's fee request is affirmed. *See In re Marriage of Pownall*, 197 Ariz. 577, 584, ¶ 35, 5 P.3d 911, 918 (App. 2000).

***Attorney Fees on Appeal***

¶21 Finally, Mother requests attorney fees on appeal. Again, A.R.S. § 25-324 requires that we consider the financial resources of the parties and the reasonableness of the positions they have taken. As previously stated, a financial disparity and an unreasonable opponent are not both required to qualify. *Magee*, 206 Ariz. at 591 n.1, ¶ 8, 81 P.3d at 1050 n.1.

¶22 In this case, Father opposed Mother's motion for a new trial despite the absence of factual findings required by A.R.S. § 25-403. Father's response to Mother's motion argued that the family court "made the findings necessary to . . . justify its ruling that an equal time-sharing arrangement was in the best interests of the child." Had Father conceded in his response to Mother's motion for a new trial, as he does now, that the family court failed to make the requisite statutory findings, this appeal would not have been necessary. Because Father opposed mother's motion for a new trial despite the absence of factual findings as required by A.R.S. § 25-403, his position was unreasonable. Accordingly, we grant Mother's request for attorney fees on appeal.

**CONCLUSION**

¶23 Because the family court failed to comply with A.R.S. § 25-403, we vacate modification of the child custody order and remand with instructions to make factual findings in accordance

with the statute. We also award Mother her reasonable appellate attorney fees and costs, upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/S/

---

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

---

MAURICE PORTLEY, Presiding Judge

/S/

---

MARGARET H. DOWNIE, Judge