DIVISION ONE
FILED: 04/03/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	No. 1 CA-CV 11-0355
	)	
JUANITA BALLARD,	)	DEPARTMENT D
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
MICHAEL OVERTON,	)	
	)	
Respondent/Appellant.	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300DO200900854

The Honorable Joseph P. Goldstein, Judge *Pro Tempore*

VACATED AND REMANDED

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B R O W N, Judge

¶1 Michael Overton ("Father") appeals from the trial court's denial of his petition to relocate, asserting that the court failed to make specific findings required by Arizona

Revised Statutes ("A.R.S.") section 25-403 (Supp. 2011)[1] and existing case law. For the following reasons, we vacate the trial court's order and remand for further proceedings.

BACKGROUND

¶2 Father and Juanita Ballard ("Mother") married in 2002. Mother filed a petition for dissolution in November 2009, and Father did not appear. Following a default hearing, however, Father and Mother signed an agreement addressing custody, parenting time, and child support. The trial court subsequently entered a decree of dissolution in February 2010. The decree incorporated the agreement and awarded the parties joint legal and physical custody of the children, ages four and six. The agreement provided for equal parenting time, with each parent having the children for fourteen days of every twenty-eight day period. The decree stated that neither party could relocate with the children out of state without the written consent of the other party or a court-ordered parenting plan.

¶3 At the time of dissolution, Father and Mother both resided in Bagdad, Arizona. In July 2010, Father requested Mother's consent to his intent to relocate with the children to Winnemucca, Nevada for a new job scheduled to start in September 2010. Mother opposed the relocation, and in August 2010, Father

[1] Absent material revision, we cite the statute's current version.

filed a petition for relocation. In his petition, Father requested that if he moved to Nevada, the court "enter an Order for Physical Custody to Father and Long-distance Guideline Access to Mother." Father also asked the court to order the parties to participate in mediation to resolve the dispute.

¶4 While Father's petition for relocation was pending, Mother sought an injunction against harassment, and the court entered an order of protection against Father. Following the hearing requested by Father, the court dismissed the order of protection, but the parties stipulated to a "no contact" order.

¶5 On August 31, 2010, the court ordered the parties to attend mediation and that Father not relocate with the children. Father moved to Nevada without the children to commence his new employment.

¶6 The parties attended mediation in October 2010 and reached an agreement regarding parenting time, which the court entered as a permanent order. The mediated parenting plan affirmed joint legal custody and established a new parenting time schedule, but did not resolve which parent would have primary physical custody. Important to the principal issue on appeal, the plan states: "The parties are in disagreement on who the residential parent will be. This plan is a long

distance parenting plan[2] with Parent A being the residential (custodial) parent and Parent B being the non-residential (non-custodial) parent." The plan states further that "[t]he following items are referred to the Court for determination: Physical custody: custodial and non-custodial parent."

¶7 In February 2011, the court conducted a hearing on Father's petition. After considering testimony from Father, Mother, and several other witnesses, the court issued an order denying Father's petition and confirming the mediated parenting plan. The court found that (1) although Father's employment opportunity in Nevada was better than his career in Bagdad, his "relocation was not required;" (2) the children have extended family and community services available in both locations, and both households are suitable for the children; and (3) the children have lived in Bagdad all their lives. The court then concluded that Father had failed to meet the burden imposed by A.R.S. § 25-408(G) (Supp. 2011). Father timely appealed.

DISCUSSION

¶8 We review the trial court's decision for an abuse of discretion. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 19, 219 P.3d 258,

[2] Father testified at the relocation hearing that the parties chose Tonopah, Nevada as the exchange location because it is a populated meeting place near the midpoint of the parties' residences. He also testified that Tonopah is roughly 300 miles from Winnemucca.

262 (App. 2009). A court may allow a parent to relocate a child if the parent proves relocation is in the child's best interests. A.R.S. § 25-408(G). In making this determination, A.R.S. § 25-408(I) requires a trial court to consider all relevant factors, including those listed in A.R.S. § 25-403(A). While A.R.S. § 25-408 contains no requirement that the trial court make specific findings of fact in determining whether to permit relocation, A.R.S. § 25-403(B) provides that "[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." The "requirement that the family court make specific findings on the record about all relevant factors and the court's reasoning exists not only to aid an appellant and the reviewing court, but also for a more compelling reason-that of aiding all parties and the family court in determining the best interests of the child or children both currently and in the future." *Reid v. Reid*, 222 Ariz. 204, 209, ¶ 18, 213 P.3d 353, 358 (App. 2009).

¶9 The question we must resolve, then, is whether this case involves contested custody. Father asserts that "[i]t is an undisputable fact that with the Petition for Relocation must come a change in custody from joint legal and physical to joint legal with one parent being [the] residential parent." Mother counters that custody was not at issue "because the parties had

already agreed to a parenting plan contingent upon the court's decision regarding the relocation." We agree with Father.

¶10 First, the mediated parenting plan specifically noted that the parties had been unable to resolve the issue of which parent would have primary physical custody of the children. The parties expressly reserved "to the Court for determination" the issue of which parent would be the primary custodian.

¶11 Second, given the parties' prior joint custody arrangement, in which no primary custodial parent was designated, Father's request to move the children to Nevada naturally required a decision as to who the primary custodial parent would be. Winnemucca is located more than 700 miles from Badgad. While the original custody order provided for joint physical custody and equal parenting time, the mediated parenting plan provided for Parent A to have the children during the week, every other weekend, and half of the children's winter and summer breaks. Parent B was granted visitation every other weekend and portions of the school breaks.[3] If Father was permitted to relocate with the children, he would become Parent A, the custodial parent. If Father was not permitted to relocate the children, Mother would become Parent A. Although Father and Mother were in agreement as to parenting time, they

[3] The revised plan resulted in a change of parenting time from 50/50 to roughly 70/30.

contested which of them would be designated the custodial parent. We therefore conclude that custody was contested.

¶12 Our conclusion is consistent with this court's decision in *Owen v. Blackhawk*, 206 Ariz. 418, 79 P.3d 667 (App. 2003). In *Owen*, we held that the trial court was required to make specific findings on the record before determining whether to permit relocation if doing so would result in a change in physical custody. 206 Ariz. at 421, ¶ 11, 79 P.3d at 670. The mother sought to retain primary physical custody of the child upon her relocation to Wyoming. *Id.* at ¶ 9. The father opposed the child's relocation and requested a change of custody if the mother moved out of state. *Id.* We concluded that "[p]hysical custody was contested even though this case was brought under the relocation statute." *Id.*

¶13 Like the situation in *Owen*, the trial court here was considering a contested custody matter, because permitting Father to relocate with the children to Nevada necessarily involved the question of whether Father should be granted primary physical custody. 206 Ariz. at 421, ¶ 9, 79 P.3d at 670. While the court's order denying Father's petition included some general findings, the court did not make specific findings on many of the factors listed in A.R.S. §§ 25-408 or -403, either in its written order or on the record at the hearing on Father's petition. *See id*. at 421-22, ¶¶ 11-12, 79 P.3d at 670-

71 (explaining that trial court had made some findings under § 25-408 but none under § 25-403); *In re Marriage of Diezsi*, 201 Ariz. 524, 526, ¶ 5, 38 P.3d 1189, 1191 (App. 2002) (noting that trial court's order did not contain the findings required by § 25-403, nor did it reflect consideration of the factors listed therein). Accordingly, without commenting on the merits, we vacate the order denying Father's relocation petition and direct the court on remand to make findings on the record in compliance with A.R.S. § 25-403.[4]

¶14 Mother requests attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2011). Under this statute, we may award fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324(A). Mother does not include any discussion, however, about the financial resources of the parties. Nor does she include any assertion that Father has taken an unreasonable position on appeal. Thus, we deny Mother's request for fees.

[4] Father also asserts that the court erred in not considering evidence of pre-dissolution events in making its determination to deny his relocation petition. While we recognize it is the trial court's role to determine the credibility of witnesses, to the extent that those events may have bearing on the statutory factors, the court should consider them on remand.

CONCLUSION

¶15 For the foregoing reasons, we vacate the trial court's order denying Father's petition for relocation and remand for the trial court to make specific findings on the record as to all relevant factors that bear on the issue of whether Father's request for relocation (and primary physical custody) is in the best interests of the children.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge