DIVISION ONE
FILED: 10/10/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 12-0448
	)	
SHANNON MURAI LEE,	)	DEPARTMENT D
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
IAN MICHAEL FRAISER-SHAPIRO,	)	
	)	
Respondent/Appellee.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2011-092910

The Honorable Benjamin R. Norris, Judge

AFFIRMED

Katz & Bloom — Phoenix
By Jay R. Bloom
Attorneys for Petitioner/Appellant

Viles Law Offices, LLC — Phoenix
By James E. Viles
Attorneys for Respondent/Appellee

K E S S L E R, Judge

¶1 Shannon Murai Lee ("Mother") appeals from the family court's Decree awarding joint legal custody and designating Ian Michael Frasier-Shapiro ("Father") as the primary residential

parent for their three children. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Father and Mother met in California in 2002 and married in 2004. They have three children: C., K., and R. (collectively the "Children"). The family moved from California to Edmonton, Canada, in July 2007 so that Father could pursue a doctorate at the University of Alberta.

¶3 The parties separated in December 2010. Mother relocated to Arizona and moved in with her boyfriend (now her fiancé). The Children have resided primarily with Mother since March 2011.

¶4 Mother served Father with a petition for dissolution while he was in California. During the ensuing dissolution proceeding, each party accused the other of withholding the Children over the other party's objection. For example, Mother accused Father of parental kidnapping and obtained a court order compelling Father to return the Children to her in January 2012. Father asserted that Mother had breached an agreement to return the Children to him in Canada during 2011.

¶5 Denise Glassmoyer ("Glassmoyer"), a psychologist, conducted a parenting conference with the parties in March 2012. According to Glassmoyer's report, Father was nearing completion of his doctoral program in Canada and was looking for

employment. Father indicated that relocation was likely but he did not know whether he would return to Canada or remain in the United States.

¶6 One week before trial, Mother filed an unsuccessful motion to preclude Father's request to relocate the Children based upon Father's failure to disclose his intended residence. Meanwhile, Father filed a separate pre-trial statement affirming that he would reside in California if the family court designated him as the primary residential parent.

¶7 Father, then residing in Davis, California, stated for the first time at trial that he would accept one of two job offers from San Diego County employers. Father anticipated that his base salary would be about $60,000. He had identified a day care establishment and was considering an elementary school in the Claremont neighborhood.

¶8 In opposing relocation, Mother testified and provided evidence of the Children's adjustment to their Arizona home and their progress at a charter school, which she had chosen without consulting Father. Mother acknowledged that her only tie to Arizona is her fiancé, and her father and grandparents live in Southern California. Father testified that the Children sometimes called him by the fiancé's name, and opined that he was becoming estranged from them. Indeed, Father claims that he can barely get the Children to speak with him on the phone.

¶9 After a three-hour trial, the family court issued a twenty-one-page Decree awarding the parties joint legal custody, designating Father as the primary residential parent, and permitting Father to relocate the Children to California. The family court reasoned that this arrangement would create better relationships between the Children and both parents in the long run. Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).[1]

DISCUSSION

I. The family court did not abuse its discretion in awarding joint legal custody and designating Father as the primary residential parent.

¶10 We review the family court's custody determination for an abuse of discretion. *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1191 (App. 2002). Arizona statutes constrain the court's exercise of that discretion. *See Downs v. Scheffler*, 206 Ariz. 496, 502, ¶ 27, 80 P.3d 775, 781 (App. 2003). An abuse of discretion may occur if the family court fails to make a required finding in a contested custody case. *Owen v. Blackhawk*, 206 Ariz. 418, 421-22, ¶ 12, 79 P.3d 667, 670-71 (App. 2003).

[1] We cite the current version of the statute unless it has been materially amended since the proceedings below.

¶11 To determine child custody, the family court must consider and make specific findings concerning the relevant factors listed in A.R.S. § 25-403(A) (2007).[2] A.R.S. § 25-403(B). Mother contends that the family court failed to consider or give appropriate weight to the factors in subsections (2), (3), (6), and (8) of the statute. This Court does not reweigh the evidence, and considers only whether substantial evidence supports the family court's custody determination. *Rowe v. Rowe*, 154 Ariz. 616, 620, 744 P.2d 717, 721 (App. 1987), *superseded on other grounds by statute*, 1987 Ariz. Sess. Laws, ch. 195, § 1, *as recognized in Boyle v. Boyle*, 231 Ariz. 63, 66, ¶ 12, 290 P.3d 456, 459 (App. 2012). Such evidence exists here.

A. A.R.S. § 25-403(A)(2)

¶12 Section 25-403(A)(2) requires the family court to consider "[t]he wishes of the child as to the custodian." According to Mother, the family court erroneously failed to consider any child's wish in view of their ages, which ranged from two to seven, at trial. She contends that a seven-year-old like C. is able to express a preference as to his custodian, and the family court had school records enabling it to assess both C.'s and K.'s discretion.

[2] Effective January 1, 2013, the Arizona Legislature changed the term "custody" in A.R.S. § 25-403 to "legal decision-making or parenting time." *See* 2012 Ariz. Sess. Laws, ch. 309, § 5.

¶13 In *J.A.R. v. Superior Court*, this Court held that in reviewing custody determinations the wishes of a child of sufficient age and maturity are persuasive, but not controlling. 179 Ariz. 267, 274, 877 P.2d 1323, 1330 (App. 1994). Here, the family court had discretion under *J.A.R.* and Arizona Rule of Family Law Procedure 12 to pursue the issue with an in-chambers interview, but opted not to do so. *See id.* Glassmoyer likewise did not conduct a separate interview to ascertain the Children's wishes. In any event, each parent reported that the Children did not wish to reside with the other parent. We find no abuse of discretion in the family court's decision not to weigh this factor in favor of either parent.

B. A.R.S. § 25-403(A)(3)

¶14 Under A.R.S. § 25-403(A)(3), the family court must consider "[t]he 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." The family court found that the Children "do well" with each parent, but that parental conflict is their main source of stress. Mother complains, however, about the absence of express findings as to the Children's relationship with Mother's fiancé or their stepbrother, born to Mother and her fiancé in Arizona.

¶15 Here, the family court has adequately set forth findings according to the statute. Its findings incorporate an evaluation of the Children's parental relationships, which is further covered by other findings under A.R.S. § 25-403(A)(6). Further, we cannot assume that the family court would have found that Mother did "well" with the Children if the other members of her household were having a significant negative impact. In any event, the family court clearly considered the impact of the fiancé and stepbrother, because it noted Mother's testimony that the Children have a close relationship with other people in her household and Father's complaint that the Children sometimes called him by the fiancé's name.

C. A.R.S. § 25-403(A)(6)

¶16 Another factor, A.R.S. § 25-403(A)(6), requires the family court to consider "[w]hich parent is more likely to allow the child frequent and meaningful continuing contact with the other parent." The family court found that "whether intentionally or not, Mother has not been able to foster a healthy relationship between the [C]hildren and Father while the [C]hildren have been in her care." Mother characterized this finding as "not responsive."

¶17 The family court based this analysis on testimony that Mother distracted the Children when they were using Skype with their Father. In addition, the record indicates that Mother

frequently had excuses as to why the Children could not communicate with Father at designated times. In contrast, the record reflects that Father left his computer on during the Children's visits with him so that they would have easy access to Mother.

¶18 Mother's actions were relevant to the family court's evaluation of the likelihood that she would adequately foster contact with Father in the future. This evidence, along with Glassmoyer's report, indicated that Mother had not made such an effort. The family court's finding accordingly has adequate factual support, and is relevant to both the A.R.S. § 25-403(A)(3) and (6) factors. We find no abuse of discretion.

¶19 Mother points out that she had to contact a parental kidnapping hotline and obtain a court order to secure the return of her children from Father in California during January 2012. But Father had also contended that Mother breached an agreement to return the children to him in Canada in 2011. The family court acknowledged these assertions, but for purposes of A.R.S. § 25-403(A)(6) focused its analysis on whether the parties had recently fostered the relationship with the other parent while the Children were in his or her care.

¶20 On review, this Court does not reweigh evidence presented to the family court. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009). Even when conflicting

evidence exists, we will affirm the family court's decision when supported by substantial evidence. *Id.* Here, the evidence supports the A.R.S. § 25-403(A)(6) finding.

D. A.R.S. § 25-403(A)(8)

¶21 Finally, A.R.S. § 25-403(A)(8) requires the family court to consider "[t]he nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody." The family court found "that at different times, both parent[s] have taken actions that have undermined the [C]hildren's relationship with the other parent, but that Mother's actions have been the more significant, including but not limited to her failure to foster a healthy relationship between the [C]hildren and Father, whether intentional or not."[3] Mother contends that this finding does not address the A.R.S. § 25-403(A)(8) factor.

¶22 The family court recognized that both parents believe the other has been "withholding" the Children at different times, which would create duress in resolving parenting issues. But neither party was able to present the family court with a signed agreement regarding custody, and Mother insisted that no such agreement existed. If no agreement exists, the A.R.S. § 25-403(A)(8) factor does not apply. Nevertheless, as Mother concedes, the finding the family court made concerning the

[3] The family court found that the Children are "being alienated from Father" while in Mother's care. The family court did not specify the source of alienation.

parties' actions is still relevant to the A.R.S. § 25-403(A)(3) factor. This record accordingly supplies no basis for reversal.

¶23 In reviewing the overall adequacy of these findings, we have considered other cases in which Arizona courts have deemed findings insufficient. In *Downs*, for example, the family court had made no specific findings about the relevant custody factors. *See Downs*, 206 Ariz. at 501, ¶ 19, 80 P.3d at 780. Likewise, in *Owen*, the family court listed some A.R.S. § 25-403 factors by number and made detailed findings only as to one of those factors. *See Owen*, 206 Ariz. at 421-22, ¶ 12, 79 P.3d at 670-71. In *Diezsi* and *Nold v. Nold*, moreover, there was no indication that either family court had independently considered each relevant factor, let alone made the required findings. *See Diezsi*, 201 Ariz. at 526, ¶ 5, 38 P.3d at 1191; *Nold v. Nold*, 232 Ariz. 270, 273-74, ¶¶ 11-15, 304 P.3d 1093, 1096-97 (App. 2013).

¶24 The key consideration in all these cases is the reviewing court's inability to "ascertain from the court's orders and ruling how the court weighed the statutory factors to arrive at its conclusion." *Reid v. Reid*, 222 Ariz. 204, 207, ¶ 13, 213 P.3d 353, 356 (App. 2009). In contrast to those cases, the family court adequately addressed each of the findings at issue. On this record, we cannot say that the family court paid too much attention to the Children's estrangement from Father

"to the exclusion of other relevant considerations." *Owen*, 206 Ariz. at 421, ¶ 12, 79 P.3d at 670. The family court also adequately explained and supported its ultimate custody decision, and we find no basis for reversal.

II. The family court was not required to consider or apply the A.R.S. § 25-408 factors.

¶25 Mother also challenges the family court's application of the relocation statute factors in A.R.S. § 25-408 (2007). The statute provides in relevant part:

> If by written agreement or court order both parents are entitled to custody or parenting time and both parents reside in the state, at least sixty days' advance written notice shall be provided to the other parent before a parent may do either of the following:
>
> 1. Relocate the child outside the state.
>
> 2. Relocate the child more than one hundred miles within the state.

A.R.S. § 25-408(B).

¶26 This Court has held that the statute does not apply unless (1) a written agreement or court order provides for custody or parenting time by both parents, and (2) both parents reside in Arizona. *See Buencamino v. Noftsinger*, 223 Ariz. 162, 163, ¶¶ 8-10, 221 P.3d 41, 43 (App. 2009). It is undisputed that Father did not reside in Arizona. Accordingly, the family court was not required to consider the factors in A.R.S. § 25-408(I), although it had the discretion to do so. *See*

Buencamino, 223 Ariz. at 163 n.3, ¶ 10, 221 P.3d at 43 n.3. We, however, discern no prejudice from its analysis.

III. The family court did not misapply the disclosure rule.

¶27 Finally, Mother objects to the family court's acceptance of Father's belated disclosure and testimony about his new employment, residence, and plans for the Children. The family court has "broad discretion in ruling on discovery and disclosure matters, and we will not disturb its ruling absent an abuse of discretion." *Link v. Pima County*, 193 Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App. 1998) (citation and internal quotation marks omitted) (applying the civil disclosure rules).

¶28 According to Mother, the family court allowed Father to violate Arizona Rule of Family Law Procedure 65(C) by

accepting his evidence within three days of trial and at trial.[4] Mother's argument has merit. Nevertheless, in child custody matters, the court has a duty "to hear all competent evidence which may be offered." *Hays v. Gama*, 205 Ariz. 99, 103, ¶ 21, 67 P.3d 695, 699 (2003) (quotation omitted). Father's evidence

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[4] The rule provides in relevant part:

> C. Failure to Disclose; False or Misleading Disclosure; Untimely Disclosure. . . .
>
> 2. A party seeking to use information that that party first disclosed later than thirty (30) days before trial must obtain leave of court by motion, supported by affidavit, to extend the time for disclosure. Such information shall not be used unless the motion establishes and the court finds:
>
> a. that the information would be allowed under the standards of subdivision C(1), notwithstanding the short time remaining before trial; and
>
> b. that the information was disclosed as soon as practicable after its discovery.
>
> 3. A party seeking to use information that that party first disclosed during trial must obtain leave of court by motion, supported by affidavit, to extend the time for disclosure. Such information shall not be used unless the motion establishes and the court finds:
>
> a. that the information could not have been discovered and disclosed earlier even with due diligence; and
>
> b. that the information was disclosed immediately upon its discovery.

Ariz. R. Fam. L.P. 65(C).

enabled the family court to evaluate the parties' abilities to provide for the Children and ascertain their best interests under A.R.S. § 25-403(A). We cannot say that the family court abused its discretion by considering it.

¶29 Alternatively, Mother argues that the evidence provided did not establish a prima facie basis for determining joint custody and designating Father as the primary residential parent. As she points out, Father was unable to identify exactly which school the older Children would attend.

¶30 The record reflects that questions surrounding the California residence and school stemmed from Father's own uncertainty as to his prospects. The family court did know that Father would remain in the San Diego area. Father identified the neighborhood where he intended to reside and indicated that he would choose the local public school. Importantly, the family court also had evidence concerning Father's relationship with the Children and his ability to parent and foster relationships between the Children and Mother.

¶31 In sum, we cannot say that the evidence provided no adequate basis for a child custody determination. Moreover, the family court found that Father had "legitimate reasons" for his position and had no "bad-faith reason" for moving to California. On this record, we affirm the family court's custody determination.

CONCLUSION

¶32 We affirm the family court's rulings in all respects. Both parties have requested attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2012). Considering the relative financial resources of Mother and Father, we deny Father's request and award Mother her reasonable attorneys' fees and taxable costs on appeal subject to timely compliance with ARCAP 21.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
ANDREW W. GOULD, Presiding Judge

/s/
MICHAEL J. BROWN, Judge