IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

ARTURO RAMOS, *Petitioner/Appellant*,

v.

ELIZABETH JUANITA HENDRICKS, *Respondent/Appellee*.

No. 1 CA-CV 21-0103 FC
FILED 11-16-2021

Appeal from the Superior Court in Yuma County
No. S1400DO201801655
The Honorable Mark W. Reeves, Judge

VACATED AND REMANED

COUNSEL

Mary Katherine Boyte PC, Yuma
By Mary K. Boyte Henderson
Counsel for Petitioner/Appellant

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By Vida Z. Florez-Warner
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Brian Y. Furuya delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Michael J. Brown joined.

F U R U Y A, Judge:

¶1 Arturo Ramos ("Father") appeals the superior court's order allowing Elizabeth Hendricks ("Mother") to relocate to South Carolina with their daughter and requiring Father to pay all travel expenses related to his exercise of parenting time. Father also appeals the court's failure to include a judgment for the attorneys' fees previously ordered as a sanction for Mother's discovery violation. For the following reasons, we vacate the court's orders and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Father are the unmarried parents of a now three-year-old child born in July 2018. At the time of trial, Mother's other children were ages nine, five, and seven months. After Father petitioned to establish legal decision-making authority and parenting time, the parties agreed to joint legal decision-making and nearly equal parenting time, which the court adopted in a final order in March 2019.

¶3 In January 2020, Mother sent notice to Father of her intent to relocate to South Carolina with the child. Mother's new husband ("Stepfather") is in the military and was reassigned from Yuma, Arizona, to South Carolina. Father petitioned to prevent the relocation. In September 2020, Mother sought temporary orders allowing her to join Stepfather in South Carolina immediately. However, after the November 5, 2020 hearing on temporary orders, Mother agreed to remain in Yuma until the final hearing, which was less than a month away.

¶4 After the final hearing, the superior court granted Mother's request to relocate to South Carolina. The long-distance parenting plan awarded Father regular telephone and video calls, plus in-person parenting time for approximately two and half months in the summer of 2021 as well as December 1, 2021 through January 30, 2022. The parenting plan further allocates Father two months in the summer of 2022 and January 3–29, 2023.

Father's parenting time reverts to the original schedule for the rest of 2023 and January 2024. The court ordered the parties to follow a more traditional long-distance parenting plan once the child starts school in 2024. The court ordered Father to pay all costs associated with travel. Because Father must pay all travel costs, the court reduced his child support obligation from $193 to $139 per month. Although the court previously granted Father's motion to compel discovery and awarded attorneys' fees as a sanction, a corresponding order was never entered stating the amount of the fee award. Father timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) and -2101(A)(2).

DISCUSSION

I. Relocation Order

¶5 "The court shall determine whether to allow the parent to relocate the child in accordance with the child's best interests." A.R.S. § 25-408(G). To determine the child's best interests, the court must consider the factors listed in A.R.S. § 25-403 and seven other factors set forth in § 25-408(I). Relevant to this case, these factors include among them the requirement for the court to consider "[t]he child's adjustment to home, school and community." A.R.S. § 25-403(A)(3). We review the court's relocation order for an abuse of discretion, viewing the evidence in a light most favorable to upholding the court's findings. *Murray v. Murray,* 239 Ariz. 174, 176, ¶ 5 (App. 2016); *Vincent v. Nelson,* 238 Ariz. 150, 155, ¶ 17 (App. 2015).

¶6 Father argues the court abused its discretion by failing to consider all statutory factors relevant in ordering relocation. The court found that the child's adjustment to home, school, and community was "not a factor" because of her young age. *See* A.R.S. § 25-403(A)(3). This is incorrect. The child's young age (two and a half at the time) does not mean that each of the three components listed in this factor do not apply. A young child may not yet be in school or involved in community activities, but in most cases, even a two-year-old child may show an adjustment or non-adjustment to one or both parents' homes. In fact, the parties testified to this. This subsection, unlike § 25-403(A)(4), does not state that courts should only consider this factor "[i]f the child is of suitable age and maturity." Thus, the court must consider § 25-403(A)(3) in all cases in which the parties present relevant evidence.

¶7 Here, both parties presented evidence about the child's home life and whether the child was adjusting or not adjusting to her current

living arrangements with each parent. Mother and Stepfather also addressed the proposed living arrangements in South Carolina. Further, Father testified that the child had participated in gymnastics, so she did have some limited community involvement. Mother specifically testified that the child was not adjusting to her home because she and her four children shared one bedroom at her parents' home, so a move to South Carolina would improve the child's home with Mother.

¶8 Generally, the court's relocation decision is entitled to great deference because it is the fact finder and determines the witnesses' credibility. *See Gutierrez v. Gutierrez,* 193 Ariz. 343, 346, ¶ 13 (App. 1998). But the court "abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles." *Hammett v. Hammett,* 247 Ariz. 556, 559, ¶ 13 (App. 2019). Failure to consider an applicable statutory factor constitutes an error of law. *Layne v. LaBianca,* 249 Ariz. 301, 302, ¶ 5 (App. 2020) (citing *Hurd v. Hurd*, 223 Ariz. 48, 54, ¶ 26, (App. 2009)).

¶9 The child's adjustment to home was relevant, and both parents presented evidence as to this as described above, *supra* ¶ 7. Based on the court's finding, without qualification, that § 25-403(A)(3) was not a factor because of the child's young age, we cannot presume that the court considered the child's adjustment to home and weighed that portion of this factor. Nor can we presume that the court considered the child's home life when it weighed § 25-403(A)(2) (requiring a court to consider a child's interaction and relationship with parents, siblings, or others). These are two separate considerations. Section 25-403(A)(2) encompasses the child's personal relationships, whereas § 25-403(A)(3) addresses how the child is acclimating to their home and living arrangements, school, and community activities. Although there may be some overlap when family members share a home, we presume the legislature would not include redundant or superfluous factors. *Villa De Jardines Ass'n v. Flagstar Bank, FSB,* 227 Ariz. 91, 95, ¶ 7 (App. 2011). The court must consider *all* applicable factors if the record contains relevant evidence. Thus, the court erred by not considering § 25-403(A)(3). *Layne,* 249 Ariz. at 302, ¶ 5; *Hurd,* 223 Ariz. at 54, ¶ 26.

¶10 Also informing our decision is the court's finding that there were reasons both for and against allowing relocation and many of the other factors did not favor one party in particular. For example, the court found that the child has a strong bond with both parents, *see* § 25-403(A)(1); the child has positive interactions with both parents, *see* § 25-403(A)(2); the child's wishes were not relevant, *see* § 25-403(A)(4); both parents would allow visits, § 25-403(A)(6); neither parent misled the court, *see* § 25-403(A)(7); domestic violence and child abuse were not present, *see* § 25-

403(A)(8); neither parent coerced the other, *see* § 25-403(A)(9); both parents complied with the education requirement, *see* § 25-403(A)(10); there was no false reporting of child abuse, *see* § 25-403(A)(11); neither parent acted in bad faith by seeking or opposing relocation, *see* § 25-408(I)(2); both parents would comply with court orders, *see* § 25-408(I)(4); and neither parent had improper motives for moving or opposing the move, *see* § 25-408(I)(7). Given this delicate balancing of factors, we cannot say the court's failure to consider the evidence relating to § 25-403(A)(3) did not affect the final relocation decision.

¶11 Father also asserts that several other findings are not supported by the evidence. We need not and do not address these findings because we vacate the relocation order and order the court to consider § 25-403(A)(3) and weigh it along with the other factors on remand. In so doing, we offer no opinion on the merits, recognizing that a reweighing of all statutory factors together may, or may not, yield a different outcome. *See Hart v. Hart*, 220 Ariz. 183, 186–87 ¶ 13 (App. 2009). Nor do we opine whether additional evidentiary proceedings are necessary and commend such a decision to the discretion of the court. *See id.* at 187, ¶ 14.

II. Travel Expenses

¶12 The relocation order requires Father to pay for all travel expenses, in addition to escorting the child for each visit. Father argues this was an abuse of discretion because he has limited financial resources and because Mother's conduct caused the long-distance travel. *See* A.R.S. § 25-320, app. § 18 ("[T]he court shall consider the means of the parents and may consider how their conduct (such as a change of residence) has affected the costs of parenting time [in allocating travel costs]."). Because the court must reconsider the relocation order, the allocation of travel expenses may also change. Therefore, we decline to address the allocation of travel expenses.

III. Sanctions for Granting Father's Motion to Compel

¶13 The court granted Father's motion to compel, finding Mother failed to comply with his discovery requests. Although the court ordered sanctions in an amount to be determined after Father submitted a fee application, fees were never awarded. Father argues this was an abuse of discretion. Contrary to Mother's assertion, Father did not waive this issue. He brought the issue to the court's attention and resubmitted the order granting sanctions and his fee application as trial exhibits.

¶14 The superior court has discretion to award attorneys' fees as a sanction when a motion to compel is granted. *See* Ariz. R. Fam. Law P.

65(a)(4)(A). The court did so here in the order granting the motion to compel. Yet the final order did not include a fee award. Because the court did not explain this inconsistency, we cannot determine whether it was an abuse of discretion or an oversight. Thus, on remand the court shall determine the appropriate sanction, if any, or state why sanctions are no longer warranted.

IV. Attorneys' Fees and Costs on Appeal

¶15 We deny Mother's request for attorneys' fees because Father's appeal was filed in good faith and grounded in fact and law. Upon compliance with ARCAP 21, Father is entitled to his costs as the successful party on appeal under A.R.S. § 12-342.

CONCLUSION

¶16 We vacate the relocation orders and remand for the superior court to reweigh the best interests and relocation factors, including § 25-403(A)(3), and to make specific findings on the record pursuant to § 25–403(B). On remand the court shall also reconsider the sanctions award.

AMY M. WOOD • Clerk of the Court
FILED: AA