DIVISION ONE
FILED: 11/30/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 10-0171
	)	
MARY BETH HOLSCHER,	)	DEPARTMENT D
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
v.	)	Rule 28, Arizona Rules
	)	of Civil Appellate
GRADY L. HILLIS,	)	Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Navajo County

Cause No. DO2007-0196

The Honorable Robert Van Wyck, Judge Pro Tem

REMANDED

Riggs, Ellsworth & Porter, P.L.C. Show Low
by Michael R. Ellsworth
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By Douglas C. Gardner
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I R V I N E, Judge

¶1 Mary Beth Holscher ("Mother") appeals from a decree of dissolution in which the family court awarded Mother and Grady

Hillis ("Father") joint legal and physical custody of their minor son, S., and set forth specific orders for shared parenting time.[1] Mother contends the court erred by failing to make the findings required by Arizona Revised Statutes ("A.R.S.") section 25-403 (Supp. 2010).[2] We agree and therefore remand.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Father married on August 23, 2002, and S. was born February 25, 2003. Mother filed a petition for dissolution on April 20, 2007 and sought sole custody of S. In his response to the petition, Father asserted "it is in the child's best interest, that the Court, after consideration of the relevant factors in A.R.S. § 25-403, award Respondent/Father sole custody of [S.] . . . ." Mother filed an emergency petition for temporary custody and visitation orders. After conducting a hearing on the petition, the court issued written temporary orders on January 3, 2008 pursuant to which S. was to reside primarily with Mother subject to visitation with Father every Tuesday from 10:00 a.m. to 6:00 p.m. and every Saturday and

[1] On the court's own motion, it is hereby ordered amending the caption for this appeal as reflected in this decision. The above referenced caption shall be used on all documents filed in this appeal.

[2] Unless otherwise specified, we cite to the current versions of the applicable statutes when no revisions material to this decision have since occurred.

alternating Sundays from 9:00 a.m. to 6:00 p.m. At some point thereafter, Mother allowed S. to stay overnight with Father on Saturdays and Sundays. Mother subsequently prohibited the overnight visits.

¶3 Father moved to modify the temporary orders. On April 9, 2009, the court held a hearing on Father's motion and modified the temporary orders to allow Father to have S. every Tuesday from 3:00 p.m. to 6:00 p.m. and every weekend from Friday at 5:00 p.m. until Sunday at 2:00 p.m. The court also set a final hearing for July 23, 2009.

¶4 On July 10, 2009, Father moved to continue the final hearing because he was involved in an accident in which he sustained multiple serious physical injuries. On July 30, 2009, Mother filed a motion for temporary order without notice. She requested Father's overnight parenting time be indefinitely suspended until after Father participated in counseling with S. and the therapist could recommend the frequency and duration of Father's overnight visits. As a basis for her motion, Mother alleged:

> On or about May 22, 2009, during [Father's] parenting time, while walking along a busy interstate, at night, upon information and belief, after [Father's] vehicle ran out of gas, both [Father] and [S.] were struck by a vehicle resulting in injuries to both [Father] and to [S.]. [Father] failed to exercise normal and reasonable parenting

> skills to provide for the safety and protection of [S.].

Father did not appear at the hearing held the next day, and the court granted Mother's motion.

¶5 A one-day trial on Mother's petition for dissolution was eventually held on August 28, 2009. The court heard testimony from Father, Mother and witnesses on behalf of both parties.[3] In its ruling from the bench, the court ordered joint custody, noting sole custody would give one parent too much control and that S. needs both parents involved in his upbringing.[4] On September 29, 2009, the court issued a written ruling that apportioned equal parenting time between Mother and Father. On October 16, 2009, the court held a telephonic status conference "to determine the remaining issues[,]" but the record does not reflect the court made any specific findings or rulings at the hearing.[5]

¶6 Father prepared a decree of dissolution incorporating the court's ruling regarding parenting time, and Mother objected

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[3] Although the court addressed issues pertaining to the division of property and child support, the predominant issues were custody and parenting time, with Mother seeking sole custody and Father seeking joint custody.

[4] S. has been diagnosed with autism, and as recognized by the parties and the court, therefore requires stability and consistency in his environment.

[5] The record on appeal does not contain the transcripts from the October 16 hearing.

to various provisions. The court held a hearing on November 20, 2009 at which the parties stipulated to revisions to the draft decree.[6] Father apparently incorporated those changes and lodged a revised decree. Mother did not object to the revised decree. The court entered the decree of dissolution on December 18, 2009, and Mother timely appealed.

DISCUSSION

¶7 Mother argues the family court failed to make the findings required by A.R.S. § 25-403 in support of its custody order.[7] Father contends Mother has waived the issue by not objecting to the final decree. Father also argues that we should affirm because Mother has not provided the transcripts from the November 20, 2009 hearing.

¶8 We review a trial court's custody determination for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). When determining custody "either originally or on petition for modification," a trial court, "in accordance with the best interests of the child," must consider "all relevant factors, including:"

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[6] The record on appeal does not contain the transcripts from the November 20 hearing.

[7] Mother also claims the court ignored evidence of domestic violence allegedly committed by Father. Based on our disposition of this case, we do not address this issue.

> 1. The wishes of the child's parent or parents as to custody.
>
> 2. The wishes of the child as to the custodian.
>
> 3. The 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.
>
> 4. The child's adjustment to home, school and community.
>
> 5. The mental and physical health of all individuals involved.
>
> 6. Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.
>
> 7. Whether one parent, both parents or neither parent has provided primary care of the child.
>
> 8. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.
>
> 9. Whether a parent has complied with chapter 3, article 5 of this title.
>
> 10. Whether either parent was convicted of an act of false reporting of child abuse or neglect under § 13-2907.02.
>
> 11. Whether there has been domestic violence or child abuse as defined in § 25-403.03.

A.R.S. § 25-403(A) (footnote omitted).

¶9 In a contested custody case, a family court is required to "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). Further, a court may only order "joint custody over the objection of one of the parents if the court [also] makes specific written findings of why the order is in the child's best interests." A.R.S. § 25-403.01(B) (2007). To determine best interests, the court considers four factors in addition to those enumerated in § 25-403(A): "[t]he agreement or lack of an agreement by the parents regarding joint custody," "[w]hether a parent's lack of agreement is unreasonable or is influenced by an issue not related to the best interests of the child," "[t]he past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint custody," and "[w]hether the joint custody arrangement is logistically possible." *Id.*

¶10 A family court is "statutorily required to document" its weighing of these factors. *Hart v. Hart*, 220 Ariz. 183, 186-87, ¶ 13, 204 P.3d 441, 444-45 (App. 2009). A failure to do so "can constitute an abuse of discretion requiring reversal and a remand." *Id.* at ¶ 9; *see Hurd v. Hurd*, 223 Ariz. 48, 51, ¶ 11, 219 P.3d 258, 261 (App. 2009) ("It is an abuse of discretion for the family court to fail to make requisite findings pursuant to

§ 25-403."); *Owen*, 206 Ariz. at 421-22, ¶ 12, 79 P.3d at 670-71 (holding court abused discretion by changing custody arrangements without making findings on record).

¶11 A family court's compliance with this statutory requirement facilitates appellate review because we can then determine which factors the court relied on, and we can ensure the court did not give inappropriate weight to a single factor "to the exclusion of other relevant considerations." *Owen*, 206 Ariz. at 421, ¶ 12, 79 P.3d at 670. Perhaps more importantly here, because a trial court has continuing jurisdiction to amend or modify custody determinations, "[t]he rationale for this requirement is not simply to aid appellate review[,] . . . but also to provide the family court with a necessary 'baseline' against which to measure any future petitions by either party based on 'changed circumstances.'" *Reid v. Reid*, 222 Ariz. 204, 209, ¶ 18, 213 P.3d 353, 358 (App. 2009).

¶12 Here, although the family court clearly found joint custody to be in S.'s best interests, nothing in the transcripts provided, the court's written ruling dated September 29, 2009, or the final decree of dissolution indicates any findings made pursuant to §§ 25-403 or -403.01.[8] Indeed, the record contains no

[8] The decree of dissolution does set forth findings pursuant to A.R.S. § 25-403.02 (Supp. 2010) that relate to the parenting plan.

express indication that the court even considered the statutory factors. We note that the parties requested during their closing arguments at trial that the court do so, and they specifically mentioned subsections 6 and 8.[9] Based on the record before us, we cannot ascertain which, if any, factors influenced the court's decision or how the court weighed the factors to conclude that joint custody is in S.'s best interest. The court's failure to make the requisite findings constituted an abuse of discretion. *See In re Marriage of Diezsi*, 201 Ariz. 524, 526, ¶ 5, 38 P.3d 1189, 1191 (App. 2002) (holding the court abused its discretion in denying a request to modify a custody arrangement because it failed to make A.R.S. § 25-403 findings); *see also Reid*, 222 Ariz. at 207, 209-10, ¶¶ 13, 20, 213 P.3d at 356, 358-59 (finding the family court erred when it failed to make the required A.R.S. § 25-403 findings although it asserted the custody arrangement was in the children's best interests).

¶13 We agree that Mother should have raised this issue with the family court, either by objecting to the decree lodged by Father that did not contain an analysis of the § 25-403 factors or by some other means. "[D]oing so would have provided

[9] Mother requested sole custody based in part on allegations of domestic violence committed by Father. We note subsection 11 of § 25-403 was not in effect at the time the court issued its written custody ruling. Subsection 11 was added to § 25-403(A) effective September 30, 2009. 2009 Ariz. Sess. Laws, ch. 57, § 1 (1st Reg. Sess.).

that court with a simpler, more expedient opportunity to remedy its lack of findings . . . ." *Reid*, 222 Ariz. at 209, ¶ 19, 213 P.3d at 358. Because the best interest of S. is the overriding focus in this case, and the family court specifically noted its concern that future changes in its custody order may be necessary,[10] it is important that the family court establish "baseline information" to assist the court in further proceedings. *See id.* Such information is especially important in this matter because future proceedings seem inevitable based on what appears to be an ongoing contentious dispute between the parties. Consequently, we decline Father's invitation to affirm on the basis that Mother has waived her argument on appeal or that she failed to provide us a complete record.

¶14 We therefore find an abuse of discretion, and without suggesting a particular outcome, we remand with instructions that the family court articulate its findings pursuant to A.R.S. §§ 25-403 and -403.01. We leave it to the court's discretion as to whether further proceedings are necessary or if findings can be made based on the record. If in the course of its analysis the court determines joint custody and equal parenting time is not appropriate, the court shall vacate the December 18, 2009 custody order and conduct whatever proceedings it deems

[10] The court specifically stated that if either party uses joint custody "as a hammer . . . I'll revisit it."

necessary. Because we are remanding for reconsideration and to allow the court to make appropriate findings, we do not address whether the evidence at trial supported the family court's orders.

CONCLUSION

¶15 This matter is remanded to the family court with instructions as set forth above. We decline to award either party their attorneys' fees on appeal. Mother is entitled to her costs incurred on appeal contingent on her compliance with ARCAP 21.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge