

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

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

DANA D'LEE HUMPHREYS BAUGHMAN, ) 1 CA-CV 10-0269  
)  
Petitioner/Appellant, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
CHARLES H. OLDHAM, ) (Not for Publication -  
) Rule 28, Arizona Rules of  
Respondent/Appellee. ) Civil Appellate Procedure)  
) **FILED 7/19/11**

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Appeal from the Superior Court in Maricopa County

Cause No. FC2004-008097

The Honorable Bruce R. Cohen, Judge

**AFFIRMED**

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Law Office of Joel L. Brand Phoenix  
By Joel L. Brand  
Attorneys for Petitioner/Appellant

Charles H. Oldham, Respondent/Appellant Mesa  
In Propria Persona

Defenders of Children Phoenix  
By David M. Lujan  
Attorneys for Amicus Curiae

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**P O R T L E Y**, Judge

¶1 Dana D'Lee Humphreys Baughman ("Mother") appeals from the denial of her request to modify child custody. For the following reasons, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

¶12 Pursuant to a 2004 consent decree of dissolution, Mother was awarded sole custody of the parties' two children. Charles Oldham ("Father") agreed to defer to Mother's decisions regarding parenting time, which was to be supervised initially. He subsequently requested a modification of the custody and parenting time arrangement because Mother had prevented him from having any parenting time with the children. The family court appointed Dr. Lavit as the custody evaluator.

¶13 Mother moved to Pennsylvania with the children. Father objected, and the family court held an evidentiary hearing. The court denied the request to relocate the children because Mother had failed to demonstrate that relocation would be in their best interests.

¶14 After a hearing on Father's custody modification petition, the court found that Mother was more stable in Pennsylvania and that the children were doing reasonably well in her care. The court allowed the children to remain with Mother in Pennsylvania, but established a parenting time schedule for Father. The court also told Mother that she needed to comply with the parenting time orders or the court would consider that she was acting contrary to the children's best interests.

¶15 Within three months of the March 2006 order, Father had filed three notices that Mother had failed to comply with the court order. Father then filed for custody modification. After an evidentiary hearing, the family court concluded that Mother failed to comply with the March 2006 custody order and that her actions were unreasonable. The court also found that the children, who were then visiting Father, were doing well in his care and that there was no evidence of abuse or neglect. The court also noted that it had previously considered the potential for domestic violence in reaching its March 2006 custody order. The court concluded "that even if there was domestic violence in the past between the parties, Father has now rebutted the presumption that he should not be awarded custody in the best interest of the children." As a result, the court found that Mother's mental health was now "impacting her ability to allow Father continuing and meaningful contact with the children." Thus, the court awarded Father primary physical custody of the children in Arizona in August 2006 and established a parenting time schedule for Mother.

¶16 Almost three years later, Mother filed a petition to modify the 2006 custody order. She argued that as a result of her improved mental health, she had successfully complied with the custody and parenting time orders for three years. Because

she had improved her life, mental health, and had remarried, she should be awarded physical custody of the children.

¶17 After an evidentiary hearing on Mother's petition, the family court denied her petition to modify custody. The court discussed the statutory factors in Arizona Revised Statutes ("A.R.S.") sections 25-403 and -408(I) (Supp. 2010), and found that Mother failed to establish that a change in custody would be in the children's best interests.

¶18 Mother filed a timely appeal, and we have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

#### **DISCUSSION**

¶19 Mother contends that the court abused its discretion when it denied her modification request in light of her improved mental health and the history of domestic violence. Specifically, she argues that the court abused its discretion by failing to adequately consider the extent of the history of domestic violence in this case. Additionally, she contends that A.R.S. § 25-403.03 (Supp. 2010) required the court to find that the history of domestic violence was contrary to the children's best interests. We review the child custody ruling for an abuse of discretion. *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1191 (App. 2002).

¶10 Although Mother argues that the court did not consider the history of domestic violence, she fails to recognize that the court fully considered that history in August 2006 when it found that Father had rebutted the statutory presumption against awarding him custody. Moreover, after recognizing the domestic violence history in its 2009 minute entry, the court also considered the fact that Father's parenting time prior to the August 2006 order had been monitored; that there was no evidence of domestic violence or abuse; that the children were doing well during their visits with him; and that Father had completed therapy.

¶11 Mother argues that the prior orders did not appropriately address the domestic violence. She, however, did not appeal those orders and cannot now challenge the 2006 findings.

¶12 Mother also argues that she was not given credit for her improved mental health, and following court orders, since 2006. She also had remarried, and the children enjoy spending time with her and their new family in Pennsylvania. Significantly, there was evidence that the children were doing very well under the custody orders, and the parties were exchanging the children as ordered.

¶13 "To change a previous custody order, the court must determine whether there has been a material change in circumstances affecting the welfare of the child[ren]." *Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994) (citing *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982)). "The trial court has broad discretion to determine whether a change of circumstances has occurred and on review the trial court's decision will not be reversed absent a clear abuse of discretion, in other words, a clear absence of evidence to support its actions." *Hendricks v. Mortensen*, 153 Ariz. 241, 243, 735 P.2d 851, 853 (App. 1987) (citing *Pridgeon*, 134 Ariz. 177, 655 P.2d 1); see *Canty*, 178 Ariz. at 448, 874 P.2d at 1005 (citing *In re Wise*, 14 Ariz. App. 125, 126, 481 P.2d 296, 297 (1971)). Based on the record, because there was evidence to support the family court's decision, we cannot say that the ruling was made without factual justification.

¶14 Mother and amicus curiae, Defenders of Children, contend that the family court committed legal error by failing to consider the evidence of past domestic violence as contrary to the children's best interests pursuant to A.R.S. § 25-403.03 as well as the reasons for Mother's noncompliance with court orders in 2006. Father's history of domestic violence, however, was not the reason the court awarded custody to Mother in 2006.

Instead, the court found that a change in custody at that time “would not be in the children’s best interest as it would uproot them from their primary caregiver with whom they are doing reasonably well.”

¶15 The court later found that Mother unreasonably failed to comply with the custody order and transferred custody to Father. Because the court made specific findings in the 2006 order, and Mother did not appeal the order, we cannot reconsider the court’s alleged failure to give appropriate weight to the domestic violence or reweigh Mother’s reasons for failing to comply with court orders. The current language in A.R.S. § 25-403(A)(6)<sup>1</sup> did not exist in 2006.

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<sup>1</sup> The following highlighted language was added to § 25-403(A)(6) in 2009:

The court shall determine custody, either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all relevant factors, including:

. . . .

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.**

2009 Ariz. Sess. Laws, ch. 57, § 1 (1st Reg. Sess.) (emphasis added).

¶16 The children have been in Father's custody since August 2006 without allegations or evidence of domestic violence. Mother has made remarkable strides in overcoming her post-traumatic stress, which the court recognized. Mother, however, had the burden to demonstrate that a substantial and continuing change of circumstances existed that affected the children's best interests. *Andro v. Andro*, 97 Ariz. 302, 306, 400 P.2d 105, 108 (1965). She did not meet the burden because she did not demonstrate a significant change in circumstances that would warrant uprooting the children from the successful custody arrangement in place.

**CONCLUSION**

¶17 We affirm the family court's custody order.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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LAWRENCE F. WINTHROP, Judge

/s/

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SHELDON H. WEISBERG, Judge\*

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\* Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Sheldon H. Weisberg, as appointed to serve as a judge pro tempore in the Arizona Court of Appeals, Division One, to sit in this matter.