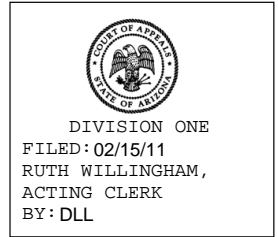


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



In re the Matter of:) No. 1 CA-CV 10-0524 A
)
EDUARDO BALBOA,) DEPARTMENT C
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
KIMBERLY GREENWAY,) Procedure)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-009255

The Honorable Pamela S. Gates, Judge

AFFIRMED

The Murray Law Offices, P.C.
By Stanley David Murray
Attorneys for Petitioner/Appellant

Phoenix

Kimberly Greenway
Respondent/Appellee In *Propria Persona*

McLeansville, NC

D O W N I E, Judge

¶1 Edwardo Balboa ("Father") appeals from the family court's order modifying primary residential parent status. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶12 Father and Kimberly Greenway ("Mother") were never married, but they have a daughter in common ("Child"), who was born in 2005. In December 2007, Mother moved with Child to North Carolina without notifying Father. Father filed a petition to establish paternity, custody, and parenting time. Pursuant to Father's request for temporary orders, the court ordered Mother to return Child to Arizona and granted Father temporary sole legal custody.² After a trial on Father's petition, the court entered a June 2008 order, awarding joint legal custody and designating Father as the primary residential parent.

¶13 In October 2009, Mother filed a petition to modify custody. She alleged that Child's home environment was unsafe and that Father had refused to provide her with information about who was caring for Child. After a trial in December 2009, the family court modified physical custody, designating Mother as the primary residential parent. Father timely appealed.³ We

¹ We disregard Mother's statement of facts because she fails to cite to the record as required. See ARCAP 13(a)(4); and *State Farm Mut. Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 257 n.1, 963 P.2d 334, 336 n.1 (App. 1998).

² Mother was given ten days of parenting time every month in North Carolina.

³ Contrary to Mother's claim, Father's notice of appeal was timely. The custody modification and parenting plan orders were not appealable because they were not signed and did not resolve all pending issues. The court subsequently issued a formal

have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C).

DISCUSSION⁴

¶4 We review a decision modifying custody for an abuse of discretion. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982); *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). A court abuses its discretion when it misapplies the law or when there is no competent evidence supporting the decision. *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963); *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). We accept the family court's factual findings unless they are clearly erroneous or unsupported by any credible evidence. *Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995).

¶5 According to Father, Mother failed to establish a material change in circumstances warranting modification. Before a court can modify a custody order, there must be a

signed child support order pursuant to Arizona Rule of Family Law Procedure 81, resolving the final issue. Father filed his notice of appeal within thirty days after entry of that order. See ARCAP 9(a).

⁴ Father asks us to strike Mother's brief in its entirety because she presents information not in the record, fails to cite authority in support of her arguments, and does not address the issues raised in the opening brief. See ARCAP 11(a)(1), 13(a)(6) & (b). We decline to strike Mother's brief, but we disregard those portions that reference information not in the record or that are unrelated to the issues identified in the opening brief.

substantial and continuing change in circumstances materially affecting the welfare of the child. *Hendricks v. Mortensen*, 153 Ariz. 241, 243, 735 P.2d 851, 853 (App. 1987). As the party seeking modification, Mother had the burden of establishing a change in circumstances. *Pridgeon*, 134 Ariz. at 181, 655 P.2d at 5.

¶16 The family court found that there had been material changes in circumstances warranting modification of primary residential parent status. The court was not required to make specific findings regarding changed circumstances because neither party requested findings of fact or conclusions of law pursuant to Arizona Rule of Family Law Procedure 82(A). See *Stevenson v. Stevenson*, 132 Ariz. 44, 46, 643 P.2d 1014, 1016 (1982). We assume that the court "found every fact necessary to support its judgment and must affirm if any reasonable construction of the evidence justifies the decision." *Id.*; see also *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998) ("[W]e may infer additional findings of fact and conclusions of law sufficient to sustain the trial court's order as long as those findings are reasonably supported by the evidence, and not in conflict with any express findings.").

¶17 The record reflects sufficient changed circumstances. Mother presented evidence that Father is reluctant to provide information about Child, that Father's mother speaks negatively

about Mother to Child, and that the environment in Arizona is generally hostile toward Mother. Additionally, because Father's mother will not initiate telephone calls to Mother, Mother's conversations with Child occur through a three-way process, enabling Father to monitor those calls. Since the prior custody order, Mother has graduated from school, obtained a full-time job, and moved. Mother's work schedule is flexible and will allow her to work while Child is attending school, maximizing their time together. Mother has enrolled Child in dance and gymnastics, but could not enroll her in preschool because she was not in North Carolina long enough. Mother also presented evidence of Father driving with Child while drinking, sending Child outside while sick with wet hair and no socks, and failing to promptly bring Child to the doctor.⁵ Considered together, there were sufficient changed circumstances affecting Child's welfare to warrant modification proceedings.⁶

¶18 Father next argues that the court erred by failing to state why custody modification was in Child's best interests.

⁵ Although Father disputed these allegations, Mother's testimony was corroborated by other witnesses. Even if these incidents "were isolated and non-recurring," as Father argues, the record demonstrates other changed circumstances.

⁶ Father argues the trial evidence showed the petition allegations were unfounded. Regardless of whether Mother proved the specific allegations of her petition, the record is replete with evidence of changed circumstances. The petition's allegations were merely a procedural condition for a modification hearing, not a condition for modifying custody. A.R.S. § 25-411(F) (Supp. 2010).

In determining whether modification is appropriate, a court must consider the statutory factors enumerated in A.R.S. § 25-403(A). In a contested custody case, the court must make specific findings on the record about the relevant factors and state why its decision is in the child's best interests. A.R.S. § 25-403(B); *Hurd v. Hurd*, 223 Ariz. 48, 51, ¶ 11, 219 P.3d 258, 261 (App. 2009).

¶19 Here, the family court made specific, detailed findings regarding all of the § 25-403(A) factors. Those findings are supported by the record. Additionally, even though it was not required to do so, the court made specific findings regarding the factors listed in § 25-408(I) pertaining to relocation. See *Buencamino v. Noftsinger*, 223 Ariz. 162, 164 n.3, ¶ 10, 221 P.3d 41, 43 n.3 (App. 2009) (relocation factors are inapplicable if both parents do not reside in Arizona; however, the family court has discretion to consider such factors if appropriate).

¶10 The family court should have stated how its factual findings support the decision to modify physical custody.⁷ We will not hesitate to remand for additional findings when we

⁷ Father failed to advise the family court that he believed its findings were inadequate, which would have allowed it to readily cure any omissions. We discourage the practice of waiting until appeal to raise such objections. See, e.g., *Reid v. Reid*, 224 Ariz. 204, 210-12, ¶¶ 27-31, 213 P.3d 353, 359-61 (App. 2009) (Hall, J., dissenting).

cannot readily ascertain the court's rationale in this regard. In the case at bar, though, the family court's findings are exceptionally detailed. They allow us to understand the court's logic and to meaningfully review whether the modification order was in Child's best interest.

¶11 The family court identified the long-distance parenting plan, which required extensive travel between Arizona and North Carolina, as a "central area of concern." It noted that Child was approaching school age and stated:

The parties need to be diligent in taking into consideration the child's ongoing relationship between Mother and Father and how this long distance parenting arrangement will provide for her emotional, physical, and psychological development and well-being. The Court finds that Father and [Child's] paternal grandmother are less sensitive to [Child's] emotional and psychological development as a result to [sic] the separation between Father and Mother.

The court also discussed Father's reluctance to provide information about Child and Father's mother's hostility toward Mother. Obviously, a home environment that is hostile toward one parent is not in a child's best interest. On the other hand, the court praised the maternal grandmother's nurturance of Child's relationship with Father, stating:

[Child's] maternal grandmother testified that she loves Father and is focused on ensuring that [Child] has a positive relationship with both parents. [Child's]

maternal grandmother presented compelling testimony regarding her commitment to ensuring a positive relationship between [Child], Mother, and Father.

As we discussed *supra* in connection with the changes in circumstances, the family court cited other factors that it believed weighed against Father, including the pornographic photos he sent to Mother, and Mother's work schedule, which allowed her to work when Child is in school. It is apparent that the family court weighed the statutory factors more heavily in favor of Mother, and its rationale for doing so is clear from the record.

¶12 Father requests attorneys' fees on appeal pursuant to A.R.S. § 25-324. After considering the financial resources of the parties and Father's positions on appeal, we deny his request.

CONCLUSION

¶13 We affirm the judgment of the family court.

/s/

MARGARET H. DOWNIE, Judge

CONCURRING:

/s/

DANIEL A. BARKER, Presiding Judge

/s/

MICHAEL J. BROWN, Judge