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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



DIVISION ONE
FILED: 10/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

In re the Matter of:) 1 CA-CV 10-0670
)
CARRIE LORENE ENGLISH,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
WINSTON SHONDELL TERRY,) Civil Appellate Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. DR2000-014650

The Honorable Paul A. Katz, Judge (Retired)

REVERSED AND REMANDED

Community Legal Services
By Patricia A. Madsen
Attorneys for Petitioner/Appellant

Phoenix

Winston Shondell Terry
Appellee *In Propria Persona*

Queen Creek

O R O Z C O, Judge

¶1 Carrie Lorene English (Mother) appeals the order granting primary physical custody of the parties' minor child to Winston Shondell Terry (Father). For the reasons stated below,

we reverse the custody order and remand for proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 The parties, who were never married, have one child, who was born in September 1999. Paternity was established in December 2000, while Father was incarcerated. Father remained incarcerated for approximately the first seven years of the child's life. Mother cared for the child during that time. Once Father was released, he spent an unspecified amount of time with the child, while Mother continued to be the primary residential parent.

¶3 In November 2009, Father filed a petition requesting sole custody of the child. Conciliation services interviewed the parties and the child, but offered no custody recommendation. After an evidentiary hearing, the family court awarded the parties joint legal custody and found it was in the child's best interests for Father to have primary physical custody.

¶4 Mother filed a motion for new trial, which the family court denied without comment. Mother filed a timely notice of

appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B and F.1 (2003).¹

DISCUSSION

¶5 Mother argues that the family court abused its discretion when it: (1) failed to make specific findings of fact as required by A.R.S. § 25-403.B (Supp. 2010)²; (2) failed to consider and properly apply the domestic violence presumption in A.R.S. § 25-403.03 (Supp. 2010); (3) considered inappropriate factors in determining custody; and (4) failed to consider the status quo as it related to the child's best interests. "We review the trial court's decision regarding child custody for an abuse of discretion." *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003).

Findings of Fact Regarding Statutory Factors

¶6 Section 25-403.A lists several factors that the court must consider when determining custody in accordance with the child's best interests. The court is required to "make specific findings on the record about all relevant factors and the

¹ Father failed to file an answering brief. Although we *may* treat this failure as a confession of error, "[w]e decline to do so here because a child's best interests are involved." *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 2, 38 P.3d 1189, 1190 (App. 2002); see ARCAP 15(c).

² We cite to the current versions of the applicable statutes when no revisions material to this decision have since occurred.

reasons for which the decision is in the best interests of the child." A.R.S. § 25-403.B. "[A] custody decision without the specific findings required by § 25-403 is deficient and, as a matter of law, constitutes an abuse of the family court's discretion." *Downs v. Scheffler*, 206 Ariz. 496, 499, ¶ 9, 80 P.3d 775, 778 (App. 2003) (citing *Diezsi*, 201 Ariz. at 526, ¶ 5, 38 P.3d at 1191).

¶7 The family court made findings and explained the reasons for its decision to award primary physical custody to Father. The findings do not specifically list the § 25-403.A factors by number, but several of the findings correspond to the statutory factors. For example, the court found both parents were fit and proper parents; the child appeared to be well-adjusted to his school and environment; and Mother had been the child's primary caregiver since birth. These findings correspond to sections 25-403.A.5 ("The mental and physical health of all individuals involved."); 25-403.A.4 ("The child's adjustment to home, school and community."); and 25-403.A.7 ("Whether one parent, both parents or neither parent has provided primary care of the child.").

¶8 Other findings by the court relate to "[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." A.R.S. § 25-403.A.3. The court found that although Mother provided a loving environment where the child lived with five step-siblings, the child would have his own bedroom in Father's home and "would receive individualized assistance by his Father and step-mother with his school work." Additionally, the court found that Mother's husband is frequently out of town on business, and Mother "at times works long hours at the family apple orchard . . . often leaving [the child] to be supervised by his 16 year old step-brother."

¶9 Although these findings do not refer to the relevant statutory factors by number, they comply with the requirement for specific findings. However, as Mother argues, there was evidence relevant to other statutory factors which the family court failed to consider on the record.

¶10 It was undisputed that Mother consistently allowed Father frequent and meaningful contact with the child, even without court orders. She allowed paternal relatives to take the child to visit Father in prison. Also relevant is Father's refusal to return the child to Mother after his parenting time, as scheduled. Father claimed at trial that he did not return the child because he believed the child was not doing well in school under Mother's care. All of this evidence is relevant in

determining “[w]hich parent is more likely to allow the child frequent and meaningful continuing contact with the other parent.” A.R.S. § 25-403.A.6. The court failed to consider and weigh this factor in determining custody.

¶11 Additionally, the court did not consider evidence that Mother complied with A.R.S. § 25-351 (Supp. 2010) regarding parenting education, and Father apparently did not comply. See A.R.S. § 25-403.A.9 (“Whether a parent has complied with [A.R.S. § 25-351].”). The conciliation services report also suggested that Father could benefit by training in parenting skills because he had been in prison much of the child’s life. The court did not address Father’s failure to take the parenting class or the recommendation of parenting skills training for Father or indicate whether this weighed in its determination of custody. The court also failed to make a finding relating to the parties’ wishes as to custody. See A.R.S. § 25-403.A.1.

¶12 Because both parents sought primary custody, their wishes appears to be a neutral factor; however the court was required to weigh evidence on the other two factors in determining the child’s best interests. We cannot ascertain from the record before us if or how the court weighed these factors. Accordingly, we hold the family court abused its discretion in awarding custody to Father without considering

these additional relevant factors. See *Hart v. Hart*, 220 Ariz. 183, 186-87, ¶¶ 11-13, 204 P.3d 441, 444-45 (App. 2009) (holding family court abused its discretion by failing to make findings regarding relevant statutory factors on which evidence was presented).

Domestic Violence Statutory Factors

¶13 Mother also argues the court failed to properly apply the prohibition against awarding custody to a party with a significant history of domestic violence. See A.R.S. § 25-403.03.A. Father admitted to pushing Mother twice during their relationship. Mother testified that there was unspecified "rage and violence" during their relationship. The family court, however, expressly found that there was no significant history of domestic violence.

¶14 The family court is in the best position to weigh evidence, judge credibility, and observe the parties. See *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004) (citation omitted). Therefore, we will defer to the family court's determination that the evidence did not establish a "significant" history of domestic violence between these parties. Because there was not "significant" domestic violence, the statutory prohibition in § 25-403.03.A did not apply in this case.

¶15 Mother further argues the evidence established that Father committed "an act" of domestic violence under A.R.S. § 25-403.03.D.2 and/or -403.03.D.3. Mother alleged at the parenting conference that Father pushed and choked her on more than one occasion and held a gun to her head but she had not reported the incidents to police. Father admitted to pushing Mother. No specific evidence was offered at trial about these allegations. Although the family court found no "significant history" of domestic violence, these allegations, if accepted, would support a finding that Father committed "an act" of domestic violence, which would trigger the rebuttable presumption against awarding custody to Father. See A.R.S. § 25-403.03.D. By failing to consider § 25-403.03.D, the family court abused its discretion. On remand, the court shall determine whether Father committed an act of domestic violence pursuant to § 25-403.03.D and, if so, whether Father has rebutted the presumption against awarding custody to him.

Inappropriate Considerations

¶16 Mother also contends the family court improperly based its custody decision on the parents' gender, financial resources, and number of other children. Mother argues the following portion of the court's order indicates it considered these inappropriate factors:

While this has been a difficult decision for this Court to make in light of the fact that Mother has been [child's] primary caretaker since birth, this Court believes the child would benefit from spending more time with his Father as he approaches his teenage years. This Court also believes that while the child has a very loving environment in Mother's home, where he lives with his five step-siblings, he would have the opportunity to live in a 4 bedroom home with Father and Father's new wife, with a bedroom of his own and would receive individualized assistance by his Father and step-mother with his school work. While at Mother's home, the child has the benefit of enjoying five brothers and sisters, he is unable to get the individualized attention that at this time he appears to need.

¶17 Although the court did not directly state that the child should be placed with Father because both are male, the first sentence quoted above, as well as comments at the hearing that a boy that age may need "a little more time with his biological father and role model" and that "[w]hile step-father is probably an excellent role model, Father is going to have to play more and more of that role. . . ." and "it might be a good and healthy thing" for the child to spend a year or two with Father "when he's 13, 14 or 15" suggests the court was giving preference to Father because of his gender. The court gave no explanation for and cited no evidence to support these statements. Courts are specifically precluded from giving preference to a parent as custodian because of that parent's

gender. A.R.S. § 25-403.01.A (2007). Accordingly, the court abused its discretion by concluding that Father's gender was a factor favoring custody.

¶18 Additionally, the fact that the child will have his own bedroom at Father's house instead of sharing a room with one brother at Mother's house is irrelevant. There was no evidence suggesting that Mother's home was lacking in any aspect, much less any evidence that sharing a bedroom with a step-brother was in any way detrimental to the child.

¶19 Mother also challenges the court's conclusion that at her house the child was not getting the individualized attention he needed. Mother presented the child's report cards, which show he was, on average, a B student with satisfactory behavior reports. Father's wife testified that one teacher told her the child was a "great student, but he was falling behind." Father also testified that the child told him his sixteen-year-old step-brother looked after him when Mother worked until six or eight o'clock in the evening. However, Mother and her husband disputed that she worked in the evenings.³

³ Mother argues her Affidavit of Financial Information (AFI) provided support for her claim that she did not work long hours. She contends the court erred in rejecting her AFI, which she offered as a trial exhibit. We find no abuse of discretion. Mother told the court she had filed a copy of her AFI with the court. However, Mother did not actually file her AFI. It was Mother's obligation to see that relevant information was

¶120 We do not reweigh conflicting evidence. See *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). We cannot say the family court abused its discretion in determining the child needs greater individualized attention. However, there seems to be no disagreement that the child is well-adjusted and, overall, a decent student.

¶121 We conclude the family court abused its discretion by considering Father's gender and the fact that the child would have his own room at Father's house, but would share a room with his step-brother at Mother's house.

Status Quo

¶122 Mother argues that the family court failed to give adequate consideration to the present custody arrangement. The family court's findings indicate that it did consider that the child was well-adjusted to his current school and lived in a "loving" environment. Thus, we reject Mother's argument that the court did not consider the status quo.

¶123 Mother further argues that the proceeding before the family court was more analogous to a request to modify custody than a request to make an initial custody determination,

properly submitted to the court. We find no abuse of discretion by the family court in refusing Mother's AFI under these circumstances. See *State v. Jenson*, 153 Ariz. 171, 181, 735 P.2d 781, 791 (1987) (holding that appellate courts uphold a trial court's determination of relevancy and admissibility of evidence absent an abuse of discretion).

because the child had lived with Mother since his birth and for ten years before Father requested custody.

¶124 As previously stated, paternity was established in 2000, while Father was in prison. According to A.R.S. § 25-803.D (2007): "In any case in which paternity is established the parent with whom the child has resided for the greater part of the last six months shall have legal custody unless otherwise ordered by the court." Although not specifically stated in the paternity order, by operation of § 25-803.D, the 2000 paternity order implicitly awarded Mother legal custody of the child. Therefore, in ruling on Father's motion in 2009, the court was required to find a "change in circumstances materially affecting the welfare of the child" before custody could be modified. See *Hendricks v. Mortensen*, 153 Ariz. 241, 243, 735 P.2d 851, 853 (App. 1987). In this case, the court erred in not making such findings.

CONCLUSION

¶125 We hold that the family court abused its discretion by failing to consider some of the relevant statutory factors and by basing its decision on improper considerations. Furthermore, the court erred in not determining whether Father committed an act of domestic violence and, if so, whether he rebutted the presumption against awarding custody to him, and in not

determining whether there had been a substantial and continuing change in circumstances, materially affecting the welfare of the child. Accordingly, we reverse the custody order and remand for further proceedings consistent with this decision. On remand, the court shall also consider how the child is adjusting to the custody arrangement since the family court made its order in December 2010.⁴

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Presiding Judge

/S/

ANN A. SCOTT TIMMER, Judge

⁴ We offer no opinion on the outcome or whether the court should allow testimony or other additional evidence about any of these matters.