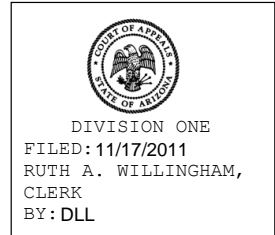


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF:) 1 CA-CV 10-0381
)
BRANDON NICHOLSON,) DEPARTMENT D
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
JOCELYN BUSH,) Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court of Maricopa County

Cause No. FC2008-050640

The Honorable Michael D. Gordon, Judge

AFFIRMED

Oldham Kramer Akron, Ohio
By Barbara A. Knapic
And Caryn L. Peterson
Attorneys for Respondent/Appellant, Pro Hac Vice

Cooper & Rueter, LLP Casa Grande
By Kent P. Volkmer
Attorneys for Respondent/Appellant

Brandon Nicholson, *In propria persona* Peoria

T H O M P S O N, Judge

¶1 Jocelyn Bush (mother) appeals from the trial court's order awarding the parties joint legal custody of their four-year old child (child), with eight months of parenting time out of the

year for Brandon Nicholson (father) in Arizona, and four months of parenting time per year for mother in Ohio. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The parties were never married. They met and began a relationship in Ohio; child was born in October 2006. The parties lived together until child was about one year old and separated in 2007. Mother moved back to Ohio with child in May 2007. In July 2008, the Arizona trial court ordered joint legal custody of child, with mother having physical custody eight months out of the year and father having physical custody four months of the year.¹ Father filed a petition to modify custody, parenting time, and child support in March 2009, and requested sole legal custody of child. Father claimed that mother denied him visitation with child in Ohio in October 2008, after having given mother two weeks formal written notice as required by the custody order.

¶3 After an evidentiary hearing, which mother attended telephonically from Ohio, the trial court denied father's request for sole custody of child but awarded him eight months of physical custody of child out of the year, with four months of parenting

¹ The order further gave father additional parenting time with child in Ohio so long as he paid his own transportation for the visit and gave mother two weeks' notice in writing.

time out of the year to mother.² Thus, the court's order essentially kept the same parenting schedule but substituted father for mother as the parent with twice as much parenting time. Mother timely appealed. We have jurisdiction.

DISCUSSION

¶4 On appeal, mother argues that the trial court erred in changing the custody order because 1) father failed to show a substantial change in circumstances, 2) father failed to show that a modification to the custody order was in child's best interest, and 3) the court failed to make specific findings of fact before modifying the custody order. She also argues that the order modifying custody was an inappropriate penalty for her failure to comply with the original custody order. We will not disturb the trial court's decision on child custody absent a clear abuse of discretion. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982) (citations omitted).

¶5 "In considering a motion for change of custody, the court must initially determine whether a change of circumstances has occurred since the last custody order. Only after the court finds a change has occurred does the court reach the question of whether a change in custody would be in the child's best interest." *Id.*

² The court's order also provided additional parenting time for mother in Arizona if she paid her own transportation costs and gave father two weeks' formal written notice.

Arizona Revised Statutes (A.R.S.) section 25-403(B) provides that, “[i]n a contested custody case, the court shall 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 change in parenting time constitutes a change of custody under A.R.S. section 25-403(B) (2009). *Owen v. Blackhawk*, 206 Ariz. 418, 421, ¶ 11, 79 P.3d 667, 670 (App. 2003) (“[S]tatute requiring specific findings is not limited to contested ‘legal’ custody cases and applies equally to physical custody matters.”) A.R.S. § 25-403(A) provides a list of the relevant factors:

- A. 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:
 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.

¶6 The trial court's signed minute entry order in this case states that the court considered the statutory factors listed in A.R.S. § 25-403, and that the factors were stated on the record. At the close of the evidence, the judge made the following findings orally:

Under 25-403(A) I will make the following findings. The wishes of the child's parents is for father to have primary physical custody and mother wishes to have primary physical custody with regular visitation. . . . The wishes of the child are irrelevant insofar as the child is too young to make such meaningful wishes and has not expressed those wishes. At least I've heard no evidence of it. The interaction in the relationship of the child with his or her parents, he does well with both parents. The child is adjusted well to his home school and community. There is no school, there is day care. Dad has not had an opportunity to have the child in Arizona for whatever reason. There has been no following of the Court's orders The mental and physical health of all individual [sic] involved are sound. Both parents are fit custodians. . . . [F]ather is more likely to allow the child frequent and meaningful contact with mother. There is no reason why after a period of - it's a year and a half that none of the Arizona visitation has taken place. . . . I do find that father has made meaningful efforts in an attempt to see his

child. He's gone to Ohio several times. . . . [I]t appears likely that . . . mother had been the primary caretaker when [mother and father] were together. And [she] has remained the primary caretaker de facto matter because the child has remained in Ohio. Neither party has taken the parenting information program as required by Arizona law. The Court has ordered that each parent do so within 60 days. Neither parent has been convicted of an act of false reporting of child abuse or neglect. The Court finds there is insufficient evidence of domestic violence, although . . . an order of protection was taken. It was also quashed at mother's request and the Court finds that the evidence is insufficient to invoke provisions of 25-403.

Mother does not argue that the A.R.S. § 25-403 factors must be made in writing. Instead, she argues that the trial court "relied solely on A.R.S. 25-403(A)(6) to modify the previous custody order." This argument is without merit. Although not in writing, the trial court made all of the required statutory findings. We find no error.

¶7 Mother next argues that the trial court abused its discretion because father failed to show that there was a substantial change of circumstances. There is evidence that mother and child's grandmother interfered with father's exercise of his lawful visitation in Ohio. In light of this evidence, mother's failure to follow the court's joint custody order and the fact that father received close to no parenting time with child since 2008 was enough to constitute a substantial change of circumstances. We find no abuse of discretion. Nor can we find that father failed to

show that the custody modification was in child's best interest. The trial court found, and the evidence showed, that child did well in both parents' care, and that both parents were fit custodians. Finally, we do not find that the trial court's modification to the parenting plan was a "penalty" to mother. Rather, we conclude that the modification to the parenting plan was supported by the evidence and within the discretion of the trial court.

CONCLUSION

¶10 We find no abuse of discretion in the trial court's order. Accordingly, the trial court is affirmed.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

MAURICE PORTLEY, Judge

/s/

JOHN C. GEMMILL, Judge