

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

FILED BY CLERK

SEP 16 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	2 CA-CV 2010-0062
)	DEPARTMENT B
ANGEL A. WINSTANLEY,)	
)	<u>MEMORANDUM DECISION</u>
Petitioner/Appellant,)	Not for Publication
)	Rule 28, Rules of Civil
and)	Appellate Procedure
)	
JASON WINSTANLEY,)	
)	
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO200900013

Honorable Charles A. Irwin, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Angel Winstanley appeals from the trial court's order awarding her former husband, Jason Winstanley, sole legal and physical custody of their two minor children. She asserts the court abused its discretion by failing to make the findings required by A.R.S. §§ 25-403 and 25-403.01 and erred in weighing and applying the evidence to these factors in determining the best interests of the children. Finding no error, we affirm.

Background

¶2 We view the facts in the light most favorable to upholding the trial court's custody decree and will not disturb its ruling absent an abuse of discretion. *See Maher v. Maher*, 17 Ariz. App. 22, 22, 495 P.2d 147, 147 (1972). At the time of trial, the parties' daughter was six years old, and their son was fourteen months old. Angel was on active duty with the military. Both parties had provided primary care of the children at times. Prior to the birth of their son, Jason had been the primary caretaker of their daughter for a total of seventeen months during Angel's two deployments.

¶3 During the dissolution proceedings, the parties had continued to live together. Jason had been the primary caretaker for the children, and Angel had spent time with the children on weekends and holidays when not on duty. Angel testified that she had submitted her resignation from the military so she could spend more time with her children. However, her service obligation would not be complete until January 1, 2011. Jason was taking medication for generalized anxiety disorder, but the condition did not interfere with his ability to parent the children.

¶4 Jerry Beasley, the therapist who treated the parties' daughter for anxiety caused by the dissolution of her parents' marriage, testified that she was spending most of her time with Jason and that "she enjoyed spending that time with her Father." Beasley also testified the daughter had spent time separately with Angel. And, he reported that the daughter spoke positively about her relationship with Jason's parents in Florida and had a closer relationship with them than with her maternal grandparents.

¶5 Although Angel initially sought sole legal and physical custody of the children, she later changed her position and requested joint legal and physical custody. Jason also requested sole legal and physical custody. He testified that there was "no communication" between the parties and that Angel made "unilateral decisions" and "walk[ed] away" when he tried to discuss the children with her. The trial court dissolved the parties' marriage on January 7, 2010, and awarded Jason sole legal and physical custody of the children. Angel was granted visitation rights and was ordered to pay child support. This appeal followed.

Discussion

Custody Order

¶6 Angel first argues the trial court failed to make the findings required by § 25-403 and incorrectly weighed the evidence in support of its custody order. We review a trial court's custody determination for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003). Pursuant to § 25-403(A), when determining custody "either originally or on petition for modification," a trial court,

“in accordance with the best interests of the child[ren],” must consider all relevant factors, including:

1. The wishes of the child[ren]’s parent or parents as to custody.
2. The wishes of the child[ren] as to the custodian.
3. The interaction and interrelationship of the child[ren] with the child[ren]’s parent or parents, the child[ren]’s siblings and any other person who may significantly affect the child[ren]’s best interest.
4. The child[ren]’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[ren] 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[ren] 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[ren].
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 [A.R.S.] § 13-2907.02.
11. Whether there has been domestic violence or child abuse as defined in § 25-403.03.

¶7 In a contested custody case, like the one before us, the trial 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.” § 25-403(B). It is “statutorily required to document” its weighing of these factors. *Hart v. Hart*, 220 Ariz. 183, ¶ 13, 204 P.3d 441, 444-45 (App. 2009). The court’s failure to do so “can constitute an abuse of discretion requiring reversal and a remand.” *Id.* ¶ 9; *see also Hurd v. Hurd*, 223 Ariz. 48, ¶ 11, 219 P.3d 258, 261 (App. 2009) (abuse of discretion for family court not to make requisite findings pursuant to § 25-403).

¶8 A trial court’s compliance with this statutory requirement permits us to discern which factors the court relied upon and to ensure it did not give inappropriate weight to a single factor “to the exclusion of other relevant considerations.” *Owen*, 206 Ariz. 418, ¶ 12, 79 P.3d at 670-71. Moreover, as noted in *Reid v. Reid*, 222 Ariz. 204, ¶ 18, 213 P.3d 353, 358 (App. 2009), 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.’”

¶9 Here, the trial court’s order contained findings pertaining to factors (1) through (7) and stated that factors (8) through (11) were “not applicable.” Angel argues the court abused its discretion because it “fail[ed] to give any indicia on the record that those relevant factors were even considered,” and she contends “[t]he Decree is absolutely [de]void of which evidence the judge considered and weighed in determining

that these factors were not applicable.”¹ She argues the record contained evidence the parties had attended a parenting education program, relating to § 25-403(A)(9), and the court should have considered certain witness testimony about domestic violence related to § 25-403(A)(11).

¶10 Angel also argues the trial court ignored and misapplied evidence pertaining to certain factors when making its best interests determination. Specifically, she contends the court misapplied the facts when considering her wishes as to custody, § 25-403(A)(1);² misinterpreted the meaning of “the children’s adjustment to home, school and community” pursuant to § 25-403(A)(4); ignored evidence about the mental

¹Citing *Banales v. Smith*, 200 Ariz. 419, 26 P.3d 1190 (App. 2001), Jason contends that Angel waived this issue on appeal by failing to raise it in the trial court proceedings. In *Banales*, we found the father had waived on appeal the trial court’s failure to make a finding on one of the required factors by failing to specifically object in the trial court. *Id.* ¶ 8. In her reply brief, Angel argues *Reid*, 222 Ariz. 204, ¶ 16, 213 P.3d at 357 is controlling. In *Reid*, the lower court stated only that it had considered all of the relevant factors listed in § 25-403(A) but did not state how it weighed the factors or explain why the custody arrangement was in the children’s best interests. *Reid*, 222 Ariz. 204, ¶ 13, 213 P.3d at 356. The *Reid* court declined to apply the waiver rule adopted in *Banales* because mechanically applying waiver principles to situations involving a lack of findings would “inappropriately deprive the family court and all parties of the baseline information required for future petitions involving a child’s or children’s best interests.” *Id.* ¶ 19. Here, the court made detailed findings on the seven factors it considered relevant. Although we could deem Angel’s argument waived under *Banales*, in our discretion we address the adequacy of the court’s custody order as a whole.

²The trial court found that “each parent wishes to be awarded sole legal and physical custody” and noted that Angel had testified she should be awarded physical custody of the children subject to Jason’s parenting time. The transcript of the hearing reflects Angel’s testimony that she believed she and Jason could communicate well enough to share joint legal custody and that she wanted the children to live with her. Later, she testified that she preferred joint legal and joint physical custody, with each parent caring for the children half of the time.

health of the father, § 25-403(A)(5); ignored evidence that both parents completed the parent education course pursuant to § 25-403(A)(9); ignored testimony regarding domestic violence for purposes of § 25-403(A)(11); and ignored evidence about the ability of the parents to cooperate, *see* § 25-403.01(B)(3).

¶11 The trial court is required to discuss only those factors it finds relevant under the facts of the case. *See* § 25-403(B); *Hart*, 220 Ariz. 183, ¶ 9, 204 P.3d at 443-44. Here, the court made specific findings about the factors it deemed relevant and indicated whether those factors were neutral or weighed in favor of either party. We cannot say the court abused its discretion in giving more weight to certain evidence or in determining that certain factors were “not applicable.” It is not the province of this court, but of the trier of fact, to weigh the evidence and determine the credibility of the witnesses. *Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262. There is reasonable evidence in the record to support the trial court’s factual findings and ultimate conclusion that awarding Jason sole legal and physical custody of the children was in their best interests, and we therefore cannot say it abused its discretion. *See Owen*, 206 Ariz. 418, ¶ 7, 79 P.3d at 669.

Joint Custody Determination

¶12 Angel next argues the trial court abused its discretion in determining that joint custody was not in the children’s best interests pursuant to § 25-403.01(B). That statute permits a court to order joint custody “if the court makes specific written findings of why the order is in the child[ren]’s best interests.” But here the court found a joint custody order “would not be in the best interests of the children” and awarded sole

custody to Jason subject to Angel's parenting time. Therefore, by its own terms § 25-403.01(B) does not apply. The court's detailed findings addressed the factors listed in § 25-403 and provided an adequate explanation of its reasons for finding that joint custody was not in the children's best interests.

Disposition

¶13 The trial court's order awarding Jason sole legal and physical custody is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge