247 Ariz. 529
Court of Appeals of Arizona, Division 1.

In re the Marriage of: Lucas Alexander WOYTON, Petitioner/Appellant,
v.
Ticiane WARD, Respondent/Appellee.

No. 1 CA-CV 18-0677 FC
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FILED 10/24/2019

Synopsis

Background: Wife filed petition for dissolution. The Superior Court, Yuma County, No. S1400-DO-2017-00838, John Paul Plante, J., awarded wife and husband joint legal decision-making, ordered that wife, living in another state, be child's primary residential parent, and awarded husband parenting time. Husband appealed.

Holdings: The Court of Appeals, Perkins, J., held that:

[1] designating mother, who lived outside of child's home state, as primary residential parent effected a "relocation" of child, requiring consideration of child custody statute's relocation provisions;

[2] trial court was required to considered child's best interests under relocation provisions of child custody statute, rather than statute governing legal decision-making and parenting time;

[3] trial court's error in not applying relocation provisions of child custody statute warranted remand;

[4] rule governing temporary orders without notice, rather than rule governing evidentiary disclosures in family law cases, governed timeliness of a letter and testimony from wife's physician; and

[5] evidence was not competent to support childcare expenses, in awarding **child support**.

Reversed and remanded.

Procedural Posture(s): On Appeal; Petition to Set **Child Support**; Motion to Enforce Divorce or Dissolution Decree; Petition for Emergency or Immediate Custody.

West Headnotes (13)

[1] **Child Custody** Discretion

The Court of Appeals reviews parenting time orders for an abuse of discretion.

1 Cases that cite this headnote

[2] **Child Custody** Joint custody

As a general rule equal or near-equal parenting time is presumed to be in a child's best interests. Ariz. Rev. Stat. Ann. § 25-403.

[3] **Child Custody** Trial de novo

Whether relocation provisions of child custody statute apply in a dissolution of marriage proceeding is an issue of statutory interpretation that the Court of Appeals reviews de novo. Ariz. Rev. Stat. Ann. § 25-408.

[4] **Child Custody** Removal from jurisdiction

A trial court may resolve child relocation issues in dissolution of marriage proceedings regardless of whether both parents reside in the state or have pre-existing custody orders or agreements. Ariz. Rev. Stat. Ann. § 25-408(A).

[5] **Child Custody** Removal from jurisdiction

In making determination of whether to allow a parent to relocate child, in dissolution proceedings, trial court is required to apply provisions of child custody statute providing that parent who is seeking to relocate child must prove what is in child's best interests and setting forth the applicable relocation factors, regardless of whether notice of relocation was required under that statute. Ariz. Rev. Stat. Ann. §§ 25-408(A), 25-408(G), 25-408(I).

[6] **Child Custody** Removal from jurisdiction

Designating mother, who lived outside of child's home state, as primary residential parent effected a "relocation" of child, requiring consideration of child custody statute's relocation provisions. Ariz. Rev. Stat. Ann. § 25-408.

[7] **Child Custody** Removal from jurisdiction

Trial court was required to consider child's best interests under relocation provisions of child custody statute, rather than statute governing legal decision-making and parenting time, in dissolution proceedings; trial court's decision designating wife, who lived outside the state, as primary residential parent involved a relocation. Ariz. Rev. Stat. Ann. §§ 25-403, 25-403.01, 25-408(I).

1 Cases that cite this headnote

[8] **Child Custody** Determination and disposition of cause

Trial court's error in not applying relocation provisions of child custody statute in granting primary custody of child to wife, who lived outside state, warranted remand for a new trial to determine a parenting plan in child's best interests, in dissolution proceedings, even though trial court considered some best interests of child factors under statute governing legal decision-making and parenting time. Ariz. Rev. Stat. Ann. §§ 25-403, 25-408.

[9] **Divorce** Discovery

Rule governing temporary orders without notice, rather than rule governing evidentiary disclosures in family law cases, governed timeliness of disclosure of letter and testimony from wife's physician in dissolution of marriage proceedings; husband objected to the late disclosure of physician by motion in limine before the temporary orders hearing. Ariz. R. Fam. Law P. 48(b).

[10] **Divorce** Admissibility

Letter and testimony from wife's physician was not inadmissible hearsay, in dissolution of marriage proceedings; hearsay was not barred in family court proceedings unless a party requested strict compliance with the Rules of Evidence. Ariz. R. Fam. Law P. 2(b)(1).

[11] **Divorce** Presentation and reservation in lower court of grounds of review

Husband waived for appellate review his claim that wife's physician did not qualify as an expert, in dissolution of marriage proceedings, where husband did not object to wife's physician's qualifications as an expert before the trial court. Ariz. R. Evid. 103(a).

[12] **Child Support** Discretion

The Court of Appeals reviews the trial court's **child support** order in dissolution of marriage proceedings for an abuse of discretion.

[13] **Child Support** Weight and Sufficiency

Evidence was not competent to support $1,300 in monthly childcare expenses, in awarding **child support** in dissolution of marriage proceedings; trial court relied on an exhibit that was not received into evidence. Ariz. Rev. Stat. Ann. §§ 25-320, 25-403.09.

****809** Appeal from the Superior Court in Yuma County, No. S1400-DO-2017-00838, The Honorable John Paul Plante, Judge. **REVERSED AND REMANDED**

Attorneys and Law Firms

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Judge Jennifer M. Perkins delivered the opinion of the Court, in which Presiding Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

OPINION

PERKINS, Judge:

***530** ¶1 Lucas Woyton ("Father") appeals the trial court's parenting time and **child support** orders in its decree of dissolution. Father argues the court erred by improperly considering the factors in A.R.S. § 25-403. Father also contends the court erred by failing to consider the factors set forth in A.R.S. § 25-408 relating to the relocation of a child. Finally, Father argues the court erred in making evidentiary rulings and in its **child support** calculation. We hold that A.R.S. § 25-408 applies to parenting plans that necessarily relocate the child out of state, over the other parent's objection, whether entered as part of a dissolution decree or a post-decree modification. For these reasons and those that follow, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Father and Ticiane Ward ("Mother") married in August 2015 and have one child, born in 2016. Father and Mother serve, or have served, in the military and lived in Yuma with their child for at least six months before Father filed for legal separation. In early June 2017, Mother left Arizona for ****810** ***531** Massachusetts with the child without Father's consent. Two days later, Father filed a petition for legal separation and motion for emergency temporary orders without notice. Based on Father's allegations, the court granted Father's motion the day it was filed and awarded him sole legal decision-making on a temporary basis. The court also temporarily ordered primary parenting time to Father and allowed Mother supervised visitation in Yuma. Around the same time, a Massachusetts court granted Mother and the child an order of protection against Father. Father then petitioned the Arizona court seeking an order directing law enforcement to return the child to Arizona. Father traveled to Massachusetts and successfully requested that a local court enforce a custody warrant. While he was in Massachusetts, law enforcement took custody of the child and the court later released her to Father's care.

¶3 In Arizona, Mother filed a petition for dissolution, responded to Father's petition for legal separation and challenged the temporary orders. The court held a three-day temporary orders hearing ending in September 2017 and modified the temporary orders to grant joint legal decision-making, with Father as the temporary primary residential parent in Arizona. The court also granted Mother additional parenting time.

¶4 After a February 2018 dissolution trial, the court awarded Mother and Father joint legal decision-making. The court further ordered that Mother, still living in Boston, be the child's primary residential parent and awarded Father parenting time. The court denied Father's subsequent motion for a new trial. Father now appeals.

DISCUSSION

[1] ¶5 We review parenting time orders for an abuse of discretion. *Nold v. Nold*, 232 Ariz. 270, 273, ¶ 11, 304 P.3d 1093, 1096 (App. 2013). The trial court abuses its discretion when it commits legal error, *State v. Bernstein*, 237 Ariz. 226, 228, ¶ 9, 349 P.3d 200, 202 (2015), or when the record is "devoid of competent evidence to support" the court's decision, *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). We review matters of law, including the interpretation of statutes and court rules, *de novo*. *Duckstein v. Wolf*, 230 Ariz. 227, 231, ¶ 8, 282 P.3d 428, 432 (App. 2012).

I. Presumptively Equal Parenting Time

[2] ¶6 When entering a decree of dissolution involving minor children, the "court shall determine ... parenting time ... in accordance with the best interests of the child." A.R.S. § 25-403(A). When the parties contest parenting time, "the court shall adopt a parenting plan that ... maximizes [the parents'] respective parenting time." A.R.S. § 25-403.02(B). Section 25-403 provides a non-exhaustive list of factors the court must consider when determining parenting time orders. *See* A.R.S. § 25-403(A)(1)–(11). As a general rule equal or near-equal parenting time is presumed to be in a child's best interests. *See Maricopa Cty. Juv. Action No. JD-4974*, 163 Ariz. 60, 62, 785 P.2d 1248, 1250 (App. 1990) ("A father has a right to co-equal custody of his child but not exclusive custody absent a court order to that effect."). Thus, the court errs, as a matter of law, when it applies a presumption against equal parenting time. *Barron v. Barron*, 246 Ariz. 580,

584, ¶ 10, 443 P.3d 977, 981 (App. 2018) (*"Barron I"*), *vacated in part on other grounds by* *Barron v. Barron*, 246 Ariz. 449, 452, ¶ 21, 440 P.3d 1136, 1139 (2019). Equal parenting time, however, may not always be possible, particularly when the parties live in different states or are separated by a considerable distance.

A. Relocation Factors Under Section 25-408

¶7 Father argues that because this is a relocation case, the court erred by failing to consider the best interest factors of A.R.S. § 25-408(I). This court has previously held that compliance with A.R.S. § 25-408(I) is not required absent satisfaction of § 25-408(A)'s conditions that: (1) the parties' have a written agreement or pre-existing orders about legal decision-making or parenting time, and (2) both parties reside in the state. *Buencamino v. Noftsinger*, 223 Ariz. 162, 163, ¶¶ 8–10, 221 P.3d 41, 42 (App. 2009). The *Buencamino* court held that although an analysis of § 25-408 is not required in the absence of the ****811** ***532** § 25-408(A) conditions, a court may consider those factors where appropriate. *Id.* at ¶ 10 n.3. Father asserts that failing to apply § 25-408(I)'s factors when allowing the relocation of a child from the home state during an initial custody decision is inconsistent with the statute's plain language and denies parents equal protection under the law.

[3] **[4]** ¶8 Whether § 25-408 applies is an issue of statutory interpretation that we review *de novo*. *See Duckstein*, 230 Ariz. at 231, ¶ 8, 282 P.3d at 432. When interpreting a statute, we begin with its plain language. *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 559–60, ¶ 22, 423 P.3d 348, 354–55 (2018). *Buencamino* limited § 25-408's application based on the language in § 25-408(A), [1] which states:

> A. If by written agreement or court order both parents are entitled to joint legal decision-making or parenting time and both parents reside in the state, at least forty-five days' advance written notice shall be provided to the other parent before a parent may do either of the following: 1. Relocate the child outside the state. 2. Relocate the child more than one hundred miles within the state.

By its terms, this subsection does not limit the court's authority to determine relocation issues or define what constitutes a "relocation" under § 25-408. *See Berrier v. Rountree*, 245 Ariz. 604, 606, ¶ 9 n.2, 433 P.3d 8, 10 (App. 2018) (Section 25-408(A)'s condition that both parties reside in the same state "describes the circumstances under which a party must give *notice* before effecting certain types of relocations. Nothing in the statute provides that subsection (A) limits the types of relocation issues that the court may decide."). Thus, the court may resolve relocation issues regardless of whether both parents reside in the state or have pre-existing orders or agreements. Here, Father asserts the court must apply § 25-408 before changing the child's primary residence over Father's objection. We agree.

[5] ¶9 "The court shall determine whether to allow the parent to relocate the child in accordance with the child's best interests. The burden of proving what is in the child's best interests is on the parent who is seeking to relocate the child." A.R.S. § 25-408(G). In assessing the child's best interests, the court "shall consider," *inter alia*, the reasons for the relocation, the potential advantages of the relocation to both the parent and the child, and "[w]hether the relocation will allow a realistic opportunity for parenting time with each parent." § 25-408(I). Based on this language, the legislature has placed the burden of proving that a proposed relocation is in the child's best interests on the parent seeking relocation. Thus, the court must apply § 25-408(G) and § 25-408(I) when resolving any contested relocation, regardless of whether § 25-408(A) requires particular notice.

¶10 Our conclusion that § 25-408 applies is consistent with our published decisions since *Buencamino*. First, *Gutierrez v. Fox* recognized that it is not error for the trial court to consider § 25-408's relocation factors even when not required to consider those factors under *Buencamino*. 242 Ariz. 259, 270, ¶ 44, 394 P.3d 1096, 1107 (App. 2017). Later, in *Berrier*, this Court addressed the viability of *Buencamino* directly, albeit in a different context. *See Berrier*, 245 Ariz. at 605–06, ¶¶ 2–7, 433 P.3d at 9–10. In *Berrier,* the parties, who lived in separate states, shared roughly equal parenting time until the child started school. *Id.* at 605, ¶ 3, 433 P.3d at 9. At that point, Father petitioned to modify the parenting plan so that the child could attend school in Arizona. *Id.* at 605, ¶ 4, 433 P.3d at 9. On appeal, this Court held that the change in the parenting schedule was effectively a relocation because it required the trial court to establish a single home state and primary residence for the child. *Id.* at 606, ¶ 8, 433 P.3d at 10. "When deciding a relocation issue that implicates a change in

parenting time, the court must determine whether relocation would serve the child's best interests by considering and making specific findings with respect to all relevant ****812** ***533** factors, including those set forth in § 25-408(I)." *Id.* at ¶ 9.

[6] **[7]** ¶11 Mother contends that consideration of § 25-408 is unnecessary because this case does not involve a relocation. The record belies this contention. Arizona is the child's home state, and Arizona's courts have exclusive continuing jurisdiction under A.R.S. § 25-1032(A). Any change in residence outside Arizona is necessarily a relocation. Thus, designating Mother, who lives in Boston, as the primary residential parent effects a relocation of the child from Yuma to Boston. Mother also asserts that even assuming the court was required to consider § 25-408(I)'s factors, remand is unnecessary because the court considered at least some of those factors.

[8] ¶12 The court considered the child's best interests under §§ 25-403 and 25-403.01 but did not apply all of the factors included in § 25-408(I) nor did it require Mother to prove relocation was in the child's best interests. Moreover, the trial court's denial of Father's motion for new trial stated that § 25-408 did not apply and that the court did not consider the factors in § 25-408(I). Simply put, the trial court was required to apply A.R.S. § 25-408 but did not do so. Accordingly, we vacate the parenting plan in the dissolution decree and remand for a new trial to determine a parenting plan in the child's best interests. *See* *Hart v. Hart*, 220 Ariz. 183, 188, ¶¶ 18–19, 204 P.3d 441, 446 (App. 2009) (vacating a trial court's order and remanding for application of the proper standard).

B. Section 25-403 Factors

¶13 Father also argues the trial court erred in determining the child's best interests under § 25-403. First, we agree that the court erred to the extent it relied on Mother's role as the child's primary caregiver during the marriage to determine that she should be the primary residential parent after the entry of the divorce decree. *Accord* *Barron I*, 246 Ariz. at 586, ¶ 15, 443 P.3d at 983. Second, while we agree that the court made troubling gender-based comments in overruling a trial objection, the court's written findings do not contain any biased findings, and the court affirmatively disclaimed any gender bias in reaching its conclusions. Because we vacate the parenting time plan for failure to apply § 25-408 and remand for further proceedings, and because the trial court that presided over the matter before this appeal has recused and will have no involvement on remand, we decline to address Father's remaining § 25-403 arguments and allegations of gender-bias.

II. Mother's Personal Physician

¶14 Father argues the trial court erred by admitting into evidence a letter and testimony from Mother's physician. Father alleges the court erred because Mother's physician was not timely disclosed under Arizona Rule of Family Law Procedure 49(j), the letter was inadmissible hearsay, and Mother's physician was not qualified as an expert. Father objected to the late disclosure of the physician by motion *in limine* before the July 7, 2017 temporary orders hearing. At the hearing, Father also objected to the admission of the letter, arguing it was improper hearsay. The court overruled the objection. Father did not object to the physician's qualifications as an expert. To the extent they are preserved for appellate review, we review the trial court's evidentiary rulings for abuse of discretion. *Davis v. Davis*, 246 Ariz. 63, 65, ¶ 6, 434 P.3d 152, 154 (App. 2018).

[9] ¶15 Rule 48—rather than 49(j)—governs the procedure for hearings on temporary orders entered without notice to the non-movant. Rule 48 requires the court to set a hearing on temporary orders without notice within ten days of the entry of the order and does not contain any disclosure requirements. Ariz. R. Fam. Law P. ("ARFLP") 48(b). Thus, the court did not err in denying Father's motion *in limine* for untimely disclosure.

[10] **[11]** ¶16 Next, the letter from Mother's physician was not inadmissible hearsay because hearsay is not barred in family court proceedings unless a party requests strict compliance with the Rules of Evidence. ARFLP 2(b)(1) (select Arizona Rules of Evidence, including those related to hearsay, are suspended absent request for strict compliance). Finally, Father did not object to Mother's ****813** ***534** physician's qualifications as an expert before the trial court. Failure to raise an issue before the trial court constitutes a waiver on appeal. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000); *see also* Ariz. R. Evid. 103(a). Thus, we decline to address Father's argument that Mother's physician could not qualify as an expert under the Arizona Rules of Evidence.

III. Child Support Calculation

[12] ¶17 Father argues the trial court incorrectly calculated **child support** and erroneously included childcare costs without supporting evidence. We review the court's **child support** order for an abuse of discretion. *McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6, 49 P.3d 300, 302 (App. 2002). Because we remand for redetermination of parenting time, a new **child support** calculation will be necessary on remand. *See* A.R.S. §§ 25-403.09, 25-320.

¶18 Father's contention that the court made a mathematical error in calculating **child support** is incorrect. The court attributed childcare costs of $650 to Mother, subtracted $50 for the federal childcare tax credit, and used the resulting $600 in its calculations for Father's final obligation of $840 per month. There was no error.

[13] ¶19 Father is correct, however, in noting that the court improperly included childcare costs without supporting evidence. The trial court's findings of fact and conclusions of law include the following statement: "The court does not recall any evidence of mother's claim of $1,300 of monthly childcare expense. The court feels that half of this amount is a reasonable childcare expense." In denying Father's motion for a new trial, the court stated that Mother *did* present evidence of childcare costs at trial in exhibit 6. The record, however, shows that exhibit 6 was not received in evidence. Though the court has "broad latitude" to determine appropriate **child support**, that determination must be supported by competent evidence. *Nash v. Nash*, 232 Ariz. 473, 478, ¶ 16, 307 P.3d 40, 45 (App. 2013). Mother introduced no evidence to support her claim of $1,300 in monthly childcare expenses. Similarly, nothing in the record supports the $650 per month attributed to Mother.

CONCLUSION

¶20 Based on the foregoing, we reverse the trial court's determination of parenting time, vacate the parties' parenting plan and **child support** order, and remand for further proceedings consistent with this opinion.

¶21 Father requests his attorney fees and costs on appeal under A.R.S. § 25-324. Relying on the same statute, Mother requests only her costs on appeal. Because Mother is not the prevailing party, we decline to award her costs on appeal. A.R.S. § 12-341; ARCAP 21.

¶22 After considering the reasonableness and financial resources of both parties, we award Father his reasonable attorney fees and costs on appeal pursuant to A.R.S. § 25-324, upon compliance with ARCAP 21.

All Citations

247 Ariz. 529, 3 Arizona Cases Digest 10, 453 P.3d 808

Footnotes

1 The limitations in *Buencamino* were based on A.R.S. § 25-408(B) (2009), recodified in 2009 at § 25-408(A) (2019).