

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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHERISE SUZANNE WINDISH,)	
)	
Petitioner/Appellant,)	2 CA-CV 2008-0059
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DAVID KELLOGG WINDISH,)	Rule 28, Rules of Civil
)	Appellate Procedure
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20003930

Honorable Douglas Mitchell, Judge Pro Tempore

AFFIRMED

Susan Ames-Light, P.C.	
By Susan A. Light	Tucson
West, Cristoffel & Zickerman	
By Dean C. Cristoffel and Edina A.T. Strum	Tucson
and	
Wyland Law, P.C.	
By Dawn Wyland	Tucson
	Attorneys for Petitioner/Appellant

E S P I N O S A, Judge.

¶1 Cherise Windish appeals the trial court's order modifying custody of the parties' minor children and awarding primary physical custody of the children to David Windish. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 In April of 2002, Cherise and David's marriage was dissolved by a decree of dissolution. They had three children during their marriage: D., now eighteen years old; R., age twelve; and B., age eight. Pursuant to the dissolution decree, Cherise was awarded primary physical custody of the children under a joint custody order, and David was granted parenting time every Tuesday and Thursday and every other weekend. In August 2005, the parties agreed to increase the amount of David's time with the children to six days out of every fourteen. Also in 2005, due to problems between Cherise and D., who was then fifteen, D., with Cherise's consent, went to live with David.

¶3 In February 2006, David filed a petition seeking primary legal and physical custody of all three children. Until the trial court entered its January 2008 order, the two younger children had continued to spend eight days with Cherise and six days with David every two weeks.

¶4 In July 2006, the trial court appointed a custody evaluator, Dr. German, to make recommendations to the court regarding disputed issues of custody and parenting time. After meeting with the parties, the children, and other witnesses, German stated his findings and recommendations in a detailed, twenty-page report submitted in August 2007. In his report,

he discussed Cherise’s desire to relocate with the children and her new husband from Tucson to Phoenix and made recommendations concerning this development.

¶5 In January 2008, after a two-day trial in October 2007, the court awarded David primary physical custody of the children and granted Cherise custody every other weekend and the majority of the summer. Cherise filed a combined motion for reconsideration, amendment, clarification, and new trial, which the court summarily denied.¹ We have jurisdiction over Cherise’s appeal from the order modifying custody and the denial of her motion for a new trial pursuant to A.R.S. § 12-2101(B) and (F)(1).

Discussion

¶6 Cherise contends the trial court erred when it awarded primary custody of the children to David. We will not disturb a child custody decision absent a clear abuse of the court’s discretion. *In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 3, 38 P.3d 1189, 1191 (App. 2002).²

¶7 A trial court must award custody “in accordance with the best interests of the child.” A.R.S. § 25-403. Section 25-403(A) sets forth ten factors for the court to consider

¹Cherise’s motion was titled “Motion for Reconsideration of 1/7/08 Custody Ruling/Motion for Clarifica[ti]on/Motion to Amend or Make Additional Findings of Fact Pursuant to ARFLP Rule 82(B) and Motion to Alter or Amend Judge[’]s Ruling Pursuant to ARFLP Rule 84 and Motion for New Trial Pursuant to ARFLP Rule 83(A).”

²David’s answering brief failed to include a certificate of compliance certifying the brief’s total word count, in violation of Form II, Appendix, Ariz. R. Civ. App. P. David was notified of the omission and granted time to correct it, but he failed to do so. Accordingly, his brief was stricken. Although we could regard David’s failure to properly file an answering brief as a confession of error, we decline to do so here because the best interests of children are involved. *See Diezsi*, 201 Ariz. 524, ¶ 2, 38 P.3d at 1190.

in determining a child's best interests. Subsection 25-403(B) further requires the court 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." *See also Downs v. Scheffler*, 206 Ariz. 496, ¶ 8, 80 P.3d 775, 778 (App. 2003).

¶8 Cherise raises three issues on appeal. She first contends the trial court's ruling is deficient because the court failed to make a specific finding as required by § 25-403(B), on the record, regarding which parent is more likely to allow the children frequent and meaningful contact with the other parent, *see* § 25-403(A)(6). Second, she argues the court similarly erred in failing to make a specific finding whether one parent, both parents, or neither parent had historically provided primary care of the children, *see* § 25-403(A)(7). Finally, Cherise maintains the trial court erred in not stating on the record why it did not follow the recommendations of the child custody evaluator in awarding primary physical custody and parenting time.

¶9 Cherise's first and second arguments concerning alleged lack of factual findings on the factors set forth in § 25-403(A)(6) and (7) are waived on appeal because although Cherise raised numerous objections to the court's order in her motion for clarification and a new trial, she failed to challenge or mention the court's lack of findings on these two factors. It is well settled that "a party must have afforded the trial court and opposing counsel the opportunity to correct any asserted defects in order to contest on appeal the absence of a trial court's necessary findings of fact and conclusions of law," including the findings required by § 25-403(B). *Banales v. Smith*, 200 Ariz. 419, ¶ 6, 26 P.3d 1190, 1191

(App. 2001) (argument that trial court failed to make findings under § 25-403(A)(6) waived by failure to raise issue below). Accordingly, we do not address these issues.³

¶10 We do, however, reach the merits of Cherise’s third argument, which was raised below: that the trial court erred in not making findings on the record explaining its apparent disregard of the custody evaluator’s recommendation regarding primary physical custody of the two younger children. Cherise argues that, although German recommended that she and David share physical custody of the two younger children equally if Cherise remained in Tucson, the court failed to provide any explanation of why it did not follow the recommendation and abused its discretion in changing primary custody of the children to David. Cherise cites no authority in support of her argument that the court was required to enter such findings, and our own research discloses none. Accordingly, we cannot say the trial court’s lack of explanation as to why it deviated from a custody evaluator’s recommendations was, in itself, an abuse of discretion.

¶11 Moreover, we will not interfere with a trial court’s determination of child custody unless the record demonstrates the court abused its discretion. *See Diezsi*, 201 Ariz. 524, ¶ 3, 38 P.3d at 1191; *Orezza v. Ramirez*, 19 Ariz. App. 405, 409, 507 P.2d 1017, 1021 (1973). We find sufficient support for the court’s decision in the record before us. Among other things, German reported that the children felt close to David and “are comfortable with his patient and tolerant style,” whereas two of the children perceived Cherise as “controlling,”

³In any event, the court’s detailed ruling demonstrates it attempted to comply with § 25-403 in considering the best interests of the children, and the court noted evidence relating to the factors in both § 25-403(A)(6) and (7).

“dominating,” “angry,” and “insensitive.” He also opined that Cherise possibly “is overly focused on punishment and control with her children and . . . the children have become estranged from her.” Finally, the court noted that Cherise “does not acknowledge any issues between herself and her son even in light of [her son]’s expressed desire to live primarily with his father,” which finding is supported by Cherise’s testimony.

¶12 Cherise notes a portion of the trial court’s order that appears to contradict the record, wherein the court stated, “Unfortunately, [Cherise] never communicated the fact of her move to Phoenix until after Dr. German had completed his Custodial Evaluation so the Court is without professional guidance on how [B.] should be raised with the mother in Phoenix and father in Tucson.” We agree this statement is, at best, confusing. The record demonstrates that German, both in his written report and at trial, did address Cherise’s plan to move to Phoenix and provided alternative custody recommendations, depending on whether Cherise relocated or stayed in Tucson. Accordingly, this statement appears to be incorrect. However, reading the order in its entirety, it is apparent the court was cognizant of both German’s written recommendations and his trial testimony.⁴ The court expressly noted German’s assessment that both David and Cherise were good parents and German’s recommendations for parenting time. But the court was not required to adopt German’s recommendation that the parents share primary custody. *See DePasquale v. Superior Court*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995) (trial court must independently determine

⁴We also note that the trial court’s apparent misstatement was brought to its attention in Cherise’s motion for clarification and a new trial, which the court nevertheless denied.

best interests of children apart from child custody evaluator’s recommendations). And, as noted above, there is support in the record for the court’s decision to award primary custody of the children to David. Accordingly, we cannot conclude that the court abused its discretion in making its custody award.

Disposition

¶13 The trial court’s order modifying child custody is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge