

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

DANITA ALUPOAIEI, *Petitioner/Appellee*,

v.

TYLER CORREA, *Respondent/Appellee*.

OANA G. ALUPOAIEI, *Appellant*.

No. 1 CA-CV 22-0366 FC
FILED 12-20-2022

Appeal from the Superior Court in Maricopa County
No. FC2019-000755
The Honorable Michael Rassas, Judge

AFFIRMED

COUNSEL

Law Office of Florence M. Bruemmer, P.C., Anthem
By Florence M. Bruemmer
Counsel for Appellant Third-Party Maternal Grandmother

MEMORANDUM DECISION

Vice Chief Judge David B. Gass delivered the decision of the court, in which Presiding Judge Samuel A. Thumma and Judge Cynthia J. Bailey joined.

G A S S, Vice Chief Judge:

¶1 Maternal grandmother appeals the superior court's order denying her petitions for *in loco parentis* legal decision-making and visitation. Because substantial evidence supports the order, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mother and father share one child, L.A., who was born in March 2016. Because L.A.'s unmarried parents are active military service members, L.A. has lived on-and-off with mother, father, and maternal grandmother. During L.A.'s life, grandmother provided financial resources for him and mother.

¶3 From birth until July 2017, L.A. lived with mother and grandmother in New York. The next month, a New York family court granted mother and father joint custody of L.A. Mother and L.A. then moved to North Carolina to live with father, and grandmother moved to Arizona. In May 2018, the Army deployed father overseas. Mother and L.A. moved to Arizona to live with grandmother. In February 2019, mother filed a petition to modify the parenting plan in Arizona.

¶4 In February 2020, the Army transferred mother to Georgia. At that point, mother says she left L.A. with grandmother in Arizona so he would not miss his scheduled birthday party. Shortly after mother moved to Georgia, the Army deployed her overseas, and L.A. remained with grandmother in Arizona.

¶5 In August 2020, grandmother filed a petition for legal decision-making. About the same time, father sought and obtained a humanitarian transfer back from his overseas deployment to New York, so he could live with and care for L.A. The next month, grandmother petitioned for in-person and virtual visitation as an alternative to legal decision-making. The superior court summarily denied the petition and grandmother appealed. In November 2021, this court reversed and remanded for the superior court to address the merits of the petition.

ALUPOAIEI v. CORREA/ALUPOAIEI
Decision of the Court

Alupoaiei v. Correa, 1 CA-CV 20-0570 FC, 2021 WL 5495286 (Ariz. App. Nov. 23, 2021) (mem. decision).

¶6 While the first appeal was pending, L.A. lived with father in New York for about seven months until April 2021, when the Army transferred mother from her overseas deployment to Georgia. Since then, L.A. has lived with mother in Georgia. In May 2021, mother and father entered a parenting agreement making mother L.A.'s primary residential parent with sole legal decision-making authority. The parenting agreement also includes detailed plans for L.A.'s care in the event of his parents' potential deployment.

¶7 On remand from the first appeal, the superior court heard oral argument on its jurisdiction and found it had jurisdiction. Arizona made a custody determination when it granted mother's 2019 petition to modify the parenting plan because mother and father no longer lived in New York. The superior court, thus, had continuing jurisdiction under A.R.S. § 25-1032.A.2.

¶8 During the evidentiary hearing, the superior court weighed the evidence and found mother and father were fit parents. As to L.A.'s best interests, the superior court found L.A. had adjusted well to his home in Georgia and had a close bond with both parents.

¶9 The superior court found no concerns regarding mother's and father's mental or physical health, drug use, domestic violence, or child abuse. The superior court found granting grandmother visitation would cause L.A. to travel more frequently and could negatively affect his relationship with his parents. The superior court then denied grandmother's petitions for *in loco parentis* legal decision-making and for visitation.

¶10 Grandmother timely appealed. This court has jurisdiction under article VI, section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21.A.1 and -2101.A.

DISCUSSION

¶11 As an initial matter, we exercise our discretion and determine mother's and father's failure to file an answering brief on appeal was not an implied confession of error. *See Nydam v. Crawford*, 181 Ariz. 101, 101 (App. 1994). This court has discretion to treat a party's failure to file a brief as an implied confession of error, and this court is "reluctant to reverse based on an implied confession of error" when the superior court applied

ALUPOAIEI v. CORREA/ALUPOAIEI
Decision of the Court

the law correctly. *Id.* This reluctance is more compelling when a child's best interests are at issue. Given these circumstances, we exercise our discretion and find no implied confession of error by mother's and father's failure to file an answering brief.

¶12 This court reviews *de novo* the superior court's interpretation of A.R.S. § 25-409. *Chapman v. Hopkins*, 243 Ariz. 236, 240, ¶ 14 (App. 2017). This court recognizes the superior court's opportunity to judge the credibility of evidence and will affirm factual findings unless clearly erroneous. *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51-52, ¶ 11 (App. 2009). A factual finding is not clearly erroneous if supported by substantial evidence. *Id.*

I. The superior court did not err when it denied grandmother's petition for *in loco parentis* sole legal decision-making authority.

¶13 Grandmother argues the superior court erred when it denied her petition for sole legal decision-making because she stood *in loco parentis* to L.A. and L.A.'s best interests are not served by allowing mother and father to retain legal decision-making authority.

¶14 Third parties may petition for legal decision-making authority. A.R.S. § 25-409.A. To avoid summary dismissal, the third party must plead four elements in the petition: (1) the third party stands *in loco parentis* to the child; (2) it would be significantly detrimental for the child to remain in the legal parent's care; (3) another superior court has not entered an order concerning legal decision-making within the year preceding the petition; and, relevant here, (4) the child's legal parents are unmarried at the time of filing. *Id.* To prevail on such a request, the petitioner must also overcome the "rebuttable presumption that awarding legal decision-making to a legal parent serves the child's best interests." A.R.S. § 25-409.B. To rebut that presumption, the petitioner must show by "clear and convincing evidence that awarding legal decision-making to a legal parent is not consistent with the child's best interests." *Id.*

¶15 Grandmother argues she stood *in loco parentis* to L.A. when she filed the petition. A third party stands *in loco parentis* if a child treats that person as a parent and has "a meaningful parental relationship" with that person for a substantial period. A.R.S. § 25-401(1). The third-party relationship need not replace, or outrank, the child's relationship with a legal parent. *Riepe v. Riepe*, 208 Ariz. 90, 93, ¶ 10 (App. 2004).

¶16 Grandmother highlights the following evidence to support her argument she stands *in loco parentis*: (1) L.A. lived with her most of his

ALUPOAIEI v. CORREA/ALUPOAIEI
Decision of the Court

life; (2) she shared a close bond with L.A.; (3) she was, at times, L.A.'s sole and primary caregiver; and (4) at times, she provided for L.A.'s financial, physical, and emotional needs.

¶17 Based on all the evidence, the superior court found grandmother did not stand *in loco parentis* at the time of filing. L.A. did not consider grandmother a parent and she did not “[stand] in place of [m]other and [f]ather.” L.A. had not lived with grandmother for nearly 18 months at the time of the evidentiary hearing. The record also shows mother and father substantially provided for L.A., and except for mother’s and father’s concurrent, seven-month overseas deployment, one or both were always involved in his care. On this record, the superior court did not err in finding grandmother did not stand *in loco parentis*.

¶18 Grandmother also argues the superior court erred in finding L.A.’s best interests were served by remaining in his parents’ care. Specifically, grandmother alleges mother and father relied on grandmother for L.A.’s care, left loaded firearms in their home, and abused L.A. Though grandmother claims mother and father hit and yelled at L.A. and neglected him, her only evidence was one dog bite, for which L.A. received medical care.

¶19 Grandmother also alleges mother and father have been inconsistently involved in L.A.’s life. The superior court found, and the record supports, mother and father are fit parents and have been consistently involved in L.A.’s life, except when they were deployed overseas. Even then, father sought and received a humanitarian transfer so he could return to care for L.A. Since living in Georgia, L.A. had perfect attendance at kindergarten, and his teacher praised his academic growth. The superior court, thus, did not err in finding grandmother failed to show, by clear and convincing evidence, that L.A.’s best interests precluded him remaining with mother under the current parenting plan.

II. The superior court did not err when it denied grandmother’s petition for visitation.

¶20 Grandmother argues the superior court erred in denying her visitation because she has a close bond with L.A. and mother and father only restricted her visits out of spite. A superior court may grant third-party visitation if doing so is in the child’s best interests. A.R.S. § 25-409.C.2. Parents’ decision to limit visitation is presumably in their child’s best interests. *McGovern v. McGovern*, 201 Ariz. 172, 177, ¶ 17 (App. 2001) (citation omitted). A superior court “shall give special weight to the legal

ALUPOAIEI v. CORREA/ALUPOAIEI
Decision of the Court

parents' opinion of what serves their child's best interests and consider[:]" (1) the child's historical relationship with the third party; (2) the third party's motivation; (3) "[t]he motivation of the person objecting to visitation"; and (4) the third-party's requested visitation and its potential impact on the child's "customary activities." A.R.S. § 25-409.E.

¶21 Though the superior court found grandmother and L.A. shared a strong relationship, it also found grandmother "[was] trying to usurp [m]other and [f]ather's role as [L.A.'s] parents." It further found mother and father were "primarily motivated by [L.A.'s] best interests" because they feared their toxic relationship with grandmother would affect L.A. Because grandmother requested virtual contact a few times a week and in-person visits every 60 to 90 days, the superior court found granting visitation would negatively impact L.A.'s stability, particularly given that parents' military service likely means they will continue to relocate. The record supports these findings. The superior court, thus, did not err in denying grandmother's petition for visitation.

CONCLUSION

¶22 We affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA