IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 01/10/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

In re the Matter of:	)	1 CA-CV 11-0252
	)	
HEATHER LEE SWANSON,	)	DEPARTMENT C
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
SHAUNYETTA D. ASHFORD,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-003875

The Honorable Daniel J. Kiley, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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H A L L, Judge

¶1 Shaunyetta D. Ashford (Mother) appeals from the trial court's order awarding sole legal custody of her child to

Heather Lee Swanson (Swanson). We affirm the custody order, but vacate the parenting time order and remand for reconsideration.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Mother had a child in 2002, when she was fifteen years old and unmarried. Mother raised the child until approximately 2005, when Mother moved from her home in Arkansas to Louisiana to attend college. At that time, the child lived with Mother's mother (Grandmother) in Arkansas, and Mother visited on weekends. Later in 2005, Grandmother and the child moved to Arizona. Mother remained in college in Louisiana.

¶3 Eventually, Mother, Grandmother, and Swanson agreed that the child would live with Swanson while Mother finished her college education. Swanson is a family friend and business partner of Mother's uncle. The parties did not intend the arrangement to be permanent.

¶4 During the four-year period that Mother attended college, she did not provide any financial support for the child. She did, however, claim her daughter as a dependent and received financial aid based, at least in part, on that representation.

¶5 On August 20, 2009, Mother graduated from college. On August 24, 2009, she began working in Dallas, Texas. At that point, Mother and Grandmother discussed having the child begin

transitioning to live with Mother. Swanson contends that no one discussed this with her.

¶6 When Mother asked Swanson for the child's school records, Swanson said she would request them. Instead, Swanson hired an attorney and filed a petition to establish in loco parentis custody and child support.

¶7 In July 2010, the trial court ordered that the child remain in Swanson's temporary custody pending a custody evaluation and full evidentiary hearing. Diana Vigil conducted a custody evaluation. Vigil recommended that Swanson have sole legal custody of the child, and Mother have regular parenting time with the child twice a month in Arizona and the majority of school holidays in Texas.

¶8 The trial court issued a lengthy ruling explaining its reasons for awarding custody to Swanson and citing evidence in support of that decision. The court found that Swanson proved by clear and convincing evidence "that it would be significantly detrimental to [the child], and contrary to her best interests, to be removed from [Swanson's] care and placed in [Mother's]." The court ordered that Mother's parenting time occur in Arizona two weekends a month in addition to any other times to which the parties agree.

¶9 Mother filed a timely notice of appeal from this order. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (Supp. 2011).

DISCUSSION

I. Custody Order

¶10 Mother contends that the trial court erred by awarding custody of the child to Swanson.

¶11 As set forth in the Fourteenth Amendment to the United States Constitution, no state shall "deprive any person of life, liberty, or property, without due process of law." "The liberty interests parents have in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court." *Egan v. Fridlund-Horne*, 221 Ariz. 229, 234, ¶ 15, 211 P.3d 1213, 1218 (App. 2009) (internal quotation omitted). "It is also well established, however, that parents' rights are not without limit or beyond regulation." *Id*. at ¶ 16. Indeed, "[s]tates may regulate the well-being of children and thus restrict the control of parents[.]" *Id*.

¶12 A petition for in loco parentis custody shall be summarily dismissed unless the pleadings establish, among other things, that it would be significantly detrimental to the child

to remain or be placed in the custody of the legal parent. A.R.S. § 25-415(A)(2).

> Once the court decides the pleadings are sufficient and proceeds to examine the merits of the custody petition, . . . § 25-415(B) imposes a statutory presumption "that it is in the child's best interest to award custody to a legal parent because of the physical, psychological and emotional needs of the child to be reared by the child's legal parent."

Downs v. Scheffler, 206 Ariz. 496, 500, ¶ 11, 80 P.3d 775, 779 (App. 2003) (quoting A.R.S. § 25-415(B)). This presumption can only be rebutted by "clear and convincing evidence that awarding custody to a legal parent is not in the child's best interests." A.R.S. § 25-415(B). The statute allows the court to award custody to only one of the parties. *See Thomas v. Thomas,* 203 Ariz. 34, 37, ¶ 18, 49 P.3d 306, 309 (App. 2002).

¶13 We review de novo the trial court's interpretation and application of A.R.S. § 25-415 (Supp. 2011). *Riepe v. Riepe,* 208 Ariz 90, 92, ¶ 5, 91 P.3d 312, 314 (App. 2004). However, we review the court's decision concerning custody for an abuse of discretion. *Aksamit v. Krahn,* 224 Ariz. 68, 70, ¶ 8, 227 P.2d 475, 477 (App. 2010).

¶14 Mother argues that the court should have summarily denied Swanson's petition because it did not establish that it would be "significantly detrimental" for the child to be placed

in Mother's custody. *See* A.R.S. § 25-415(A)(2). Swanson's petition for in loco parentis custody stated that Swanson had continuous custody of the child for five of the child's eight years. The petition alleged that Mother gave up all responsibility for the child and Swanson provided all care and support for the child since 2005. Swanson alleged that Mother has not developed a parental relationship with the child over the past five years, yet planned to relocate the child to Texas without any advance notice. The child would be uprooted from her positive and established relationships, school, and activities and moved to Texas where the child knows only Mother, to whom she is not close.

¶15 Mother argues that her fitness as a parent was not disputed and that she maintained a close relationship with the child. The parties disputed whether Mother and the child had a close relationship at the evidentiary hearing. Nonetheless, the allegations in Swanson's *petition* were sufficient to establish that removing the child from Swanson's care and placing her with Mother would be significantly detrimental to the child. The statute requires only that the *pleadings* establish, among other things, that placing the child with Mother would be significantly detrimental to the child. *See* A.R.S. § 25-415(A)(2). The court conducts an evidentiary hearing to

determine the appropriate custody arrangement only *after* this threshold showing is met.

¶16 The trial court properly declined to summarily reject Swanson's petition for in loco parentis custody based on the allegations made therein. Swanson was entitled to an evidentiary hearing based on her petition.

¶17 Mother also argues that the final order was erroneous because the evidence at the hearing did not establish that it would be "significantly detrimental" for the child to be placed in Mother's custody. The evidence at the hearing regarding Mother and child's relationship was disputed. The trial court, however, made detailed findings in support of its decision. The following findings set forth clear and convincing evidence that it would be significantly detrimental and not in the child's best interests to be placed in Mother's custody in Texas. *See* A.R.S. Section 25-415(B) (requiring clear and convincing evidence to rebut presumption that "it is in the child's best interest to award custody to a legal parent").

¶18 The court found that the child "has expressed ambivalent and conflicted feelings toward" Mother. This is supported by the custody evaluator's interview with the child. The trial court also questioned Mother's testimony that she and the child share a close affectionate relationship based on the

first-hand observations of the custody evaluator. Swanson and the child, on the other hand, appeared to have a comfortable and loving bond during the interview.

¶19 The trial court was legitimately concerned about Mother's misperception of her relationship with the child. The change of custody would be significantly detrimental due to Mother's lack of awareness regarding the emotional impact being separated from Swanson would have on the child. In Mother's opinion, the loss of friends was the only detriment to relocating the child. The child would, therefore, suffer once from the separation from the person she has known most of her life as her mother-figure and again as a result of Mother's failure to comprehend the emotional trauma this loss would entail.[1]

¶20 The trial court also concluded that relocating the child would be significantly detrimental because Mother "would actively attempt to exclude [Swanson] from the [child's] life altogether." Notwithstanding Mother's claim at the evidentiary hearing that she now recognized that the child would benefit by having continued contact with Swanson, the trial court concluded

[1] In its February 2, 2011 minute entry, the trial court noted that "[e]ntirely missing from [Mother's] testimony is any indication that [she] recognizes or appreciates the *emotional* impact on the Minor child of being removed from [Swanson's] care."

that Mother's recent behavior did not support her claim. The court's order sets forth the evidence supporting this conclusion. These findings are, indeed, supported by the evidence and Mother's actions in October 2010.

¶21 Mother relies on her own testimony and view of the custody evaluation. The trial court, however, as the finder of fact, rejected Mother's characterization of a close mother-child relationship and questioned, generally, Mother's honesty and credibility.[2] "We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez,* 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998).

¶22 Mother argues that the parties did not dispute her fitness as a parent and, therefore, she is presumptively entitled to custody. Mother's fitness does not prevent the court from considering the child's best interests. "It is inappropriate to defer an examination of the child's best interests until parental inappropriateness is established." *Downs,* 206 Ariz. at 502, ¶ 27, 80 P.3d at 781. Mother's wishes, however, as a fit parent, "are entitled, at a minimum, to special weight as a measure of protection for the parent's

[2] In its detailed minute entry findings, the trial court stated that it "d[id] not believe" portions of Mother's testimony and found that other portions of Mother's testimony were "simply not true."

constitutional right to rear the child." *Id.* at ¶ 25, 80 P.3d at 781. The court must also consider evidence regarding the child's best interests and whether those interests overcome the statutory presumption in favor of Mother. *Id.* ¶ 24.

¶23 There was sufficient evidence at trial that placing the child in Mother's custody would be significantly detrimental and not in the child's best interests. Accordingly, we affirm the custody order.

II. Constitutionality of A.R.S. § 25-415

¶24 Mother argues that A.R.S. § 25-415 unconstitutionally distinguishes between married and unmarried parents by allowing in loco parentis petition only in cases involving children of unmarried parents. Mother did not raise this claim in the trial court and we therefore do not consider it. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) (explaining appellate courts "do not consider issues, even constitutional issues, raised for the first time on appeal").

III. Parenting Time Order

¶25 Mother contends that the trial court's order awarding her parenting time two weekends a month in Arizona was unreasonable as a matter of law. The "trial court has considerable discretion in shaping a visitation order based on

in loco parentis." *Egan*, 221 Ariz. at 240-41, ¶ 43, 211 P.3d at 1224-25.

¶26 In addition to the parenting time ordered by the court, the custody evaluator recommended that Mother have parenting time for several school breaks in Texas, all three-day weekends in Arizona, and summers in Texas. Swanson did not object to this recommendation, but asked to have visitation with the child in Texas during the long summer break. The trial court did not adopt these recommendations and, other than stating "[t]he Court is not inclined . . . to issue orders granting [Mother] parenting time with the Minor Child in Texas[,]" gave no specific reasons for refusing to allow parenting time in Texas or refusing to allow extended parenting time during school breaks and the summer.

¶27 Given the obvious financial impediment to frequent long distance travel, we cannot ascertain how the court's parenting time order accomplishes its stated goal of allowing Mother to spend time with the child on a regular basis to develop a stronger bond. Mother has been unable to afford regular travel to Arizona despite not paying anything to support the child. Thus, the elimination of a child support order will not entirely alleviate the financial burden of frequent long distance travel. Mother has been able to drive to Arizona from

Texas. Allowing longer visits would make driving a viable option for exercising regular parenting time.

¶28 Swanson argues that Mother waived any objection to the parenting time order by failing to offer an alternative schedule. Mother sought full custody and, therefore, did not address a visitation schedule. Swanson also requested sole custody and failed to offer an alternative visitation schedule. We decline to base our decision on waiver given the fact that a child's best interests are involved.

¶29 Absent any specific explanation by the trial court justifying the imposition of what amounts to an impractical visitation schedule, we agree with Mother that denying her all school breaks and a block of summer parenting time was unreasonable in light of the recommendation of the custody evaluator, lack of objection from Swanson, and the reality of Mother's inability to afford frequent weekend trips to Arizona. We note that lengthier blocks of parenting time will also further the trial court's stated goal of allowing Mother and child to spend time together on a regular basis to develop a stronger bond. We offer no opinion as to the location of the longer blocks of parenting time. We vacate the parenting time order and remand for reconsideration.

IV. Attorneys' fees

¶30 Both parties request an award of attorneys' fees pursuant to A.R.S. § 25-324 (Supp. 2011). Neither party provides any evidentiary basis for such an award. Accordingly, we hold each party shall bear her own attorneys' fees and costs on appeal.

CONCLUSION

¶31 We affirm the order awarding legal custody to Swanson, but vacate and remand for reconsideration the parenting time awarded to Mother. Each party shall bear her own attorneys' fees and costs on appeal.

PHILIP HALL, Judge

CONCURRING:

MICHAEL J. BROWN, Presiding Judge

PATRICIA K. NORRIS, Judge