DIVISION ONE
FILED: 06/05/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	No. 1 CA-CV 11-0583
	)	
MELANIE HUSTON,	)	DEPARTMENT E
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
VALERIANA SLOAN,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300DO20090584

The Honorable Elaine Fridlund-Horne, Judge

AFFIRMED

McCarthy Weston, PLLC — Flagstaff
By Philip "Jay" McCarthy, Jr.
Attorneys for Appellee

Valeriana Sloan — Denver, CO
In propria persona

H A L L, Judge

¶1 Appellant Valeriana Sloan appeals the family court's ruling modifying the long distance in loco parentis visitation

schedule between Appellee Melanie Huston and Sloan's biological child, Liam. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In September 2009, Huston petitioned for in loco parentis status and visitation with Liam. Huston stated that Huston and Sloan had been "residing together as a couple with the intent of co-parenting" Liam at the time of his birth in 2005.[1] Huston further stated that she had "been treated as a parent by [Liam] and [had] formed a meaningful relationship with [Liam] for a substantial period of time."[2] In December 2009, the court found that Huston stood in loco parentis to Liam and created a temporary visitation schedule.

¶3 At a March 24, 2010 hearing addressing Huston's petition, the parties entered into an Arizona Rules of Family Law Procedure (Rule) 69 Agreement acknowledging Huston's status as in loco parentis and creating a visitation schedule between Huston and Liam. The family court found that the Rule 69 Agreement was voluntarily entered into by the parties, met the clear and convincing standards under Arizona Revised Statutes (A.R.S.) sections 25-415(C) (Supp. 2011) and -409 (2007), and was a binding court order. The parties subsequently amended the

[1] Huston elaborated that Liam "was born out of wedlock and no biological father is listed on [Liam's] birth certificate."

[2] Huston and Sloan ended their relationship in May 2007.

order in June 2010 and July 2010 due to scheduling conflicts and other concerns not at issue on appeal.

¶4 On April 19, 2011, the family court held an evidentiary hearing to address the following motions filed by the parties: (1) motion to require visitation exchanges be through a neutral party; (2) petition to prevent relocation of minor child or, in the alternative, request for long-distance visitation schedule; (3) motion to find respondent in contempt of court; and (4) petition for modification of visitation. Sloan argued that Huston's visitation with Liam should be reduced because "it's intrusive and invasive." She continued, "I'm not saying that there should be no visitation, but if [Huston] wants to continue her relationship with Liam, I think it's appropriate for her to come [to Denver] and that she have the expenses that come with it." Sloan also stated that, "I understand that Liam has a relationship with [Huston] and that he enjoys spending time with her. . . . I'm not looking to take Liam away or to . . . interrupt any type of visitation." Sloan additionally requested that all visits occur during the daylight hours.

¶5 After the parties finished their closing arguments, the court found that: (1) it was necessary to have a neutral third party present during visitation exchanges; (2) Sloan was allowed to relocate with Liam and the rest of her family to

Denver, Colorado; (3) Sloan was not in contempt of court;[3] and (4) because the evidence presented at the hearing did not support supervised visitation, the court denied the petition for modification of visitation. The court also reduced the total visitations between Liam and Huston from approximately seventy-two days a year to forty to forty-four days per year due to Sloan and Liam's move to Denver and because "travel costs and distance [made it] not feasible to order more significant time." The court further stated that despite the parties' previous agreement that Sloan would provide the transportation and incur the costs related to visitation exchanges, it amended that agreement to provide that once Sloan moved to Denver, the parties had to meet in Santa Fe, New Mexico for the exchanges in order to prevent Sloan from incurring significant transportation expenses.

¶6 Sloan timely appealed the court's ruling. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶7 Sloan argues on appeal that the family court's ruling (1) violated her fundamental right to parent under the Fourteenth Amendment and (2) abused its discretion by granting substantial visitation between Liam and Huston.

[3] The issue concerned whether Sloan was in contempt for failing to bring Liam to his visitation with Huston on two separate occasions.

¶8 Huston contends that Sloan waived the first issue because she failed to raise it in the family court. *See Orfaly v. Tucson Symphony Society*, 209 Ariz. 260, 265, ¶ 15, 99 P.3d 1030, 1035 (App. 2004) (arguments presented for the first time on appeal are untimely and deemed waived). Our review of the record reveals that Sloan summarily raised this issue, following the court's July 2010 amended order, in a motion for clarification before the family court by "request[ing] the Court's Order comply with the procedural rights of due process pursuant to the 14th Amendment to the U.S. Constitution [and] [b]ecause [Sloan's] rights supersede visitation, [Sloan] requests the Court modify its [July 7, 2010] order to eliminate interference with parental responsibility." The court denied Sloan's motion by a minute entry ruling in December 2010. Because Sloan failed to appeal the denial in a timely manner, we lack jurisdiction over that ruling. Further, because she failed to renew this claim as one of the issues at the April 19, 2011 hearing, Sloan waived the issue on appeal.[4] However, even if Sloan had not waived the issue, the following analysis demonstrates that we would nevertheless conclude it lacks merit.

[4] Because we have determined that Sloan waived the issue on appeal, it is unnecessary to address Huston's arguments regarding judicial estoppel and equitable estoppel.

¶9 We review de novo alleged constitutional violations. *State v. McGill*, 213 Ariz. 147, 159, ¶ 53, 140 P.3d 930, 942 (2006). The Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." Although a parent has a constitutionally protected right under the Fourteenth Amendment to the care, custody, and control of his or her child, that right is "not without limit or beyond regulation." *Graville v. Dodge*, 195 Ariz. 119, 123-24, ¶¶ 19-20, 985 P.2d 604, 608-09 (App. 1999).

¶10 Pursuant to A.R.S. § 25-415(G)(1), in loco parentis "means a person who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child for a substantial period of time." Sloan argues that Huston "is not a parent as a matter of law" and does not have the same parental legal rights as Sloan. We agree. *See Riepe v. Riepe*, 208 Ariz. 90, 94-95, ¶¶ 17-18, 91 P.3d 312, 316-17 (App. 2004). However, Sloan fails to demonstrate how Huston's recognized right to in loco parentis visitation with Liam violates her parental rights under the Fourteenth Amendment. Thus, Sloan's argument on appeal that the family court's ruling deprived her of fundamental, constitutional rights is not persuasive.

¶11 Sloan next contends that the court abused its discretion by granting substantial visitation between Liam and

Huston. A family court has "considerable discretion" in shaping an in loco parentis visitation order and we review such an order for an abuse of that discretion. *See Egan v. Fridlund-Horne*, 221 Ariz. 229, 240-41, ¶ 43, 211 P.3d 1213, 1224-25 (App. 2009); *see also Graville*, 195 Ariz. at 128, ¶ 38, 985 P.2d at 613. Sloan maintains that the court abused its discretion by: awarding substantial visitation between Huston and Liam in the modified long distance schedule; failing to prohibit overnight visitations; failing to require the visitations to occur in Denver only; and creating a significant expense on Sloan by ruling that she had to drive to Santa Fe for the visitation exchanges. There is no merit to Sloan's argument.

¶12 Sloan and Huston voluntarily entered into a Rule 69 Agreement that permitted Huston to have in loco parentis visitation rights with Liam and set forth a mutually acceptable visitation schedule between the parties. The family court found that the Rule 69 Agreement was binding because the parties voluntarily entered into it and because it met the standards under A.R.S. §§ 25-409 and -415(C). *See* Ariz. Rev. Stat. § 25-409(C) (in determining child's best interest court shall consider all relevant factors, including: (1) the historical relationship, if any, between the child and person seeking visitation; (2) the motivation of the requesting party in seeking visitation; (3) the motivation of the person denying

visitation; (4) the quantity of visitation time requested and potential adverse impact that visitation will have on the child's customary activities; and (5) if one or both the child's parents are dead, the benefit in maintaining an extended family relationship); *see also* Ariz. Rev. Stat. § 25-415(C) (the superior court may grant a person who stands in loco parentis to a child and who meets the requirements of § 25-409). Further, Sloan acknowledged the relationship between Huston and Liam at the April 19 hearing and stated that she was "not looking to take Liam away or to . . . interrupt any type of visitation."

¶13 The court's ruling following the April 19 hearing appeared to largely be in Sloan's favor and not an abuse of discretion: It permitted Sloan and her family to relocate to Denver; reduced the amount of visitation time between Huston and Liam from seventy-two days a year to forty to forty-four days a year; did not find Sloan in contempt of court; and ordered Huston to incur half of the transportation cost and time, despite an earlier order that placed the burden entirely on Sloan. The court's additional findings that visitations may be overnight and need not occur in Denver were not abuses of discretion. We therefore conclude that the court did not abuse its discretion.

¶14 Huston seeks an award of attorneys' fees and costs on appeal due to Sloan's failure to comply with the Arizona Rules

of Civil Appellate Procedure 13(a)(4). In the exercise of our discretion, we decline Huston's request.

CONCLUSION

¶15 For the foregoing reasons, we affirm the family court's ruling.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MAURICE PORTLEY, Presiding Judge

_/s/_____
DIANE M. JOHNSEN, Judge