

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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In re the Matter of:

AMANDA BORJA, *Petitioner/Appellant*,

*v.*

MATTHEW BORJA, *Respondent/Appellee*.

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NICHOLAS BORJA and VIVIAN BORJA, *Intervenors/Appellees*.

No. 1 CA-CV 21-0554 FC

FILED 12-20-2022

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Appeal from the Superior Court in Yavapai County

No. P1300DO202000106

The Honorable Michael P. McGill, Judge

**AFFIRMED IN PART; VACATED AND REMANDED IN PART**

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COUNSEL

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BORJA v. BORJA/BORJA  
Opinion of the Court

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**OPINION**

Judge Jennifer M. Perkins delivered the opinion of the Court, in which Presiding Judge David D. Weinzweig and Judge Brian Y. Furuya joined.

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**PERKINS**, Judge:

¶1 Amanda Borja (“Mother”) appeals the superior court’s order granting paternal grandparents Nicholas and Vivian Borja (collectively “Grandparents”) visitation with Mother’s three minor children. The court’s order mandates visitation with Grandparents on major holidays, birthdays, one weekend per month, and two summer weeks, and requires Mother to provide Grandparents with regular updates of the children’s yearly and seasonal schedules and daily activities.

¶2 Mother and the children’s father disagreed about Grandparents’ visitation request and the court exercised its discretion to award visitation. Because the record sufficiently supports that decision, we do not disturb it. But the court erred in the amount of visitation awarded, which must be minimally intrusive on a parent’s rights. The expansive visitation awarded, and the court’s decision to vest all discretion in implementing the visitation with Grandparents, improperly intrudes on Mother’s constitutional rights. We therefore affirm the court’s grant of visitation but vacate and remand the order for proceedings consistent with this opinion.

**FACTS AND PROCEDURAL BACKGROUND**

¶3 Mother and Matthew Borja (“Father,” collectively “Parents”) divorced in September 2020 and have three minor children. The divorce decree awarded Mother sole legal decision-making authority. Father ultimately requested and received no parenting time, due to his concerns about COVID-19. Grandparents later petitioned for visitation with the children, filing four proposals over the course of the lawsuit. Their final request sought three visits per month, two-day visits during spring and winter breaks, the ability to take the children “to distant places” within the country, and notification of and ability to participate in the children’s activities. Mother opposed a formal visitation schedule but did not oppose visitation altogether. After court-ordered mediation failed, the court scheduled an evidentiary hearing for July 2021.

BORJA v. BORJA/BORJA  
Opinion of the Court

¶4 At the two-hour hearing, Nicholas Borja testified about the time Grandparents historically spent with the children and the types of activities they enjoyed. Grandparents acknowledged Mother allowed visitation with the children when asked. Father stated he generally supported Grandparents' request, but he did not express a preference on the extent of visitation.

¶5 Mother testified she did not want a formal visitation schedule because of what she perceived to be Grandparents' overbearing demands during Parents' marriage. Mother favored one visit per month, and she believed that anything more imposed "unnecessary constraints on the children's activities" and their preferences. Mother also indicated support for a progressive plan if the superior court granted visitation because Grandparents had not regularly seen the children during the 18 months preceding the hearing.

¶6 In August 2021, the superior court granted Grandparents the following visitation schedule:

- one weekend each calendar month, from 4:00 p.m. Friday to 4:00 p.m. Sunday, with three-weeks' notice to Mother;
- two weeks during summer break, at Grandparents' discretion to exercise visitation in a single, two-week period or over separate, one-week periods and with the ability to take the children out of state;
- visitation from 12:00 p.m. to 5:00 p.m. on Easter, Thanksgiving, and/or Christmas;
- five hours with all of the children on each child's birthday or a weekend day immediately following the birthday, to end no later than 6:00 p.m.;
- five hours with the children on each grandparent's birthday or a weekend day immediately following the birthday, to end no later than 6:00 p.m.; and
- weekly calls with the children.

The court also ordered Mother to provide Grandparents with the children's yearly and seasonal schedules, and two-days' notice of activities, including school, athletic, club, or any other extracurricular activities.

¶7 Mother timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(2).

## DISCUSSION

¶8 Parents have a fundamental right, protected by the Fourteenth Amendment, to the “care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Graville v. Dodge*, 195 Ariz. 119, 123–24, ¶ 19 (App. 1999). This right limits arbitrary intrusion into fit parents’ decisions regarding their children, including the decision to limit or deny third-party visitation. *See McGovern v. McGovern*, 201 Ariz. 172, 178, ¶ 19 (App. 2001).

### I. Grandparents may petition under A.R.S. § 25-409 for reasonable visitation

¶9 Arizona law authorizes “a person other than a legal parent” – including grandparents – to petition for visitation with a child. *See* A.R.S. § 25-409(C)(3). A parent’s objection to a third-party petition is not dispositive but is one relevant factor the court must consider. A.R.S. § 25-409(E)(3). Grandparent visitation granted within the parameters of § 25-409 “does not substantially infringe on parents’ fundamental rights.” *McGovern*, 201 Ariz. at 175, ¶ 9 (quoting *Graville*, 195 Ariz. at 125, ¶ 23). In *McGovern*, we held that courts should presume “a fit parent acts in his or her child’s best interest[s]” and give “special weight” to a fit parent’s determination regarding whether to grant grandparent visitation. 201 Ariz. at 177, ¶¶ 17, 18. After our decision in *McGovern*, the legislature incorporated the “special weight” requirement into the statute. *See* A.R.S. § 25-409(E) (amended 2012).

¶10 We review the superior court’s decision to grant or deny visitation for an abuse of discretion. *McGovern*, 201 Ariz. at 175, ¶ 6. An abuse of discretion occurs “when the record is devoid of competent evidence to support the court’s decision.” *Woyton v. Ward*, 247 Ariz. 529, 531, ¶ 5 (App. 2019) (internal quotations omitted). While we defer to the superior court’s factual findings that are supported by competent evidence, *In re Marriage of Friedman & Roels*, 244 Ariz. 111, 120, ¶ 36 (2018), we review any issues of statutory interpretation and constitutional law *de novo*, *McGovern*, 201 Ariz. at 175, ¶ 6.

#### A. Courts must give special weight to legal parents’ opinion regarding visitation

¶11 In determining whether third-party visitation is in the children’s best interests, “the court shall give special weight to the legal parents’ opinion of what serves their child’s best interests,” A.R.S. § 25-409(E), and give “significant weight” to a parent’s voluntary agreement to

BORJA v. BORJA/BORJA  
Opinion of the Court

provide some visitation, *McGovern*, 201 Ariz. at 177–78, ¶ 18 (citing *Troxel*, 530 U.S. at 70–72); *see also Friedman*, 244 Ariz. at 113, ¶ 1. A parent is entitled to special weight for her opinion as long as she remains the legal parent. A.R.S. § 25-401(4); *Friedman*, 244 Ariz. at 119, ¶ 32. Mother remains a legal parent and her opinion is entitled to special weight. A.R.S. § 25-409(E). And despite his lack of parenting time, Father remains a legal parent. *See* A.R.S. § 25-401(4) (legal parent includes a “biological . . . parent whose parental rights have not been terminated”); *see also Friedman*, 244 Ariz. at 119, ¶ 31 (legal parent need not be a “model parent[]” or the custodial parent for special weight requirement to apply). Father’s opinion regarding visitation is also entitled to special weight. A.R.S. § 25-409(E).

**B. Legal parents’ conflicting opinions regarding visitation give way to the court’s best interest finding**

¶12 If parents disagree whether third-party visitation is in the children’s best interests, “both parents’ opinions are entitled to special weight under § 25-409(E)” and “the parents’ conflicting opinions must give way to the court’s finding on whether visitation is in the child’s best interests.” *Friedman*, 244 Ariz. at 113, ¶ 1. In determining whether third-party visitation is in the children’s best interests, the court must “consider all relevant factors,” including: the historical relationship between the children and requesting party; the requesting party’s motivations; the motivations of the person objecting to visitation; the amount of requested time and any adverse impact that visitation could have on the children’s activities; and the benefit in maintaining an extended family relationship if one or both of the children’s parents are deceased. A.R.S. § 25-409(E); *see also Friedman*, 244 Ariz. at 120, ¶ 37.

¶13 We view the record in the light most favorable to supporting the court’s visitation order. *Friedman*, 244 Ariz. at 113, ¶ 2. At the conclusion of the evidentiary hearing, the court acknowledged each party’s sincerity in articulating what he or she believed to be in the children’s best interests. Faced with Mother and Father’s disagreement over Grandparents’ visitation requests, the court examined the best-interest factors under § 25-409(E) and concluded the benefits of having an extended family are in the children’s best interests because Grandparents had effectively been eliminated from the children’s lives due to Father’s lack of parenting time; the children spent significant time with Grandparents before the divorce; Grandparents had a meaningful relationship with the children historically and wanted to continue the relationship; and Mother’s objections to Grandparents’ request stemmed from her frustrations with Father and

BORJA v. BORJA/BORJA  
Opinion of the Court

Grandparents' approach to seeking visitation, rather than what she believed to be in the children's best interests.

¶14 In its ruling, the court stated that although Mother "truly wants what is in the best interests of her children," it could not ignore the fact that "Mother's motivations for objecting are, in part, due to her lack of trust and respect for Father and Grandparents and have nothing to do with the best interests of the children." The court found that Grandparents and the children would be deprived of meaningful visits and concluded a visitation order would be in the children's best interests.

¶15 The decision to award visitation rests within the family court's discretion upon finding that visitation is in the children's best interests. *Friedman*, 244 Ariz. at 120, ¶ 36. We will not disturb the court's decision absent an abuse of discretion in the best interests finding. *Id.* Because competent evidence supports the court's factual findings, we hold the court did not abuse its discretion in granting visitation.

**II. Any visitation awarded to third parties must be minimally intrusive**

¶16 Once the court grants third-party visitation rights, it must decide the amount of visitation to order. Any visitation awarded "must be as minimally intrusive as possible" because grandparent visitation orders must adhere to the "parents' superior right to the custody and care of their children." *McGovern*, 201 Ariz. at 177, ¶ 16 (quoting *Graville*, 195 Ariz. at 127, ¶ 33). We review the court's decision concerning the amount of visitation awarded under substantial evidence and abuse of discretion standards. *Graville*, 195 Ariz. at 128, ¶ 38 (citations omitted).

¶17 In its ruling, the court found the quantity of visitation time requested is "not significant under the circumstance" and "provides little to no adverse impact on the children's customary activities." We disagree because the court's visitation order is not "as minimally intrusive as possible."

**A. Mandatory visits during holidays and birthdays**

¶18 The superior court granted Grandparents visitation from 12:00 to 5:00 p.m. on Easter, Thanksgiving, and Christmas. Mother must also facilitate five hours of visitation on or near each child's birthday and each grandparent's birthday. Mother's compliance with this order requires her to disrupt every celebration, every year, of Easter, Thanksgiving, Christmas, and her three children's birthdays.

BORJA v. BORJA/BORJA  
Opinion of the Court

¶19 A.R.S. § 25-409 enables the court to craft a visitation order that places a “minimal burden on the rights of the child’s parents.” *McGovern*, 201 Ariz. at 177, ¶ 16 (quoting *Graville*, 195 Ariz. at 125, ¶ 23). Mandatory visits with Grandparents for all family celebrations is more than a minimal burden and violates Mother’s fundamental parenting rights. *See Troxel*, 530 U.S. at 66; *Graville*, 195 Ariz. at 125, ¶ 23. The record contains no evidence supporting the court’s summary conclusion that an award of mandatory visitation during major holidays and birthdays is minimally intrusive. The superior court erred by ordering this extensive and recurring visitation requirement.

**B. Scheduling at Grandparents’ discretion**

¶20 The superior court’s visitation order awards Grandparents approximately 51 days of visitation and vests much of the scheduling discretion with Grandparents, rather than Mother. While the court may order visits to occur on specific weekends or summer weeks, *see Graville*, 195 Ariz. at 127, 128, ¶¶ 36, 39, the court improperly let Grandparents pick their preferred weekends and failed to adequately consider Mother’s objections.

¶21 A flexible visitation schedule that accounts for family members’ schedules is reasonable and not an abuse of discretion. *See id.* at 128, ¶ 39. In *Graville*, we concluded the superior court’s visitation order awarding grandparents at least eight hours a month and five days annually during vacation periods (equivalent to nine 24-hour days during each year) was not excessive. *Id.* at 127, ¶ 37. We upheld the order as “minimally intrusive” on the parents’ and children’s lives because it did not “specify a day of the week on which the visitation must take place.” *Id.* at 128, ¶ 39.

¶22 The superior court’s order here goes much further, resulting in more than a minimal intrusion. In addition to major holidays and the children’s birthdays, Grandparents have the discretion to schedule full weekend visits every month, two weeks of time during the summer months, and days on or around Grandparents’ birthdays. This award of visitation discretion to Grandparents overshadows Mother’s superior right to the care, custody, and control of her children. *Troxel*, 530 U.S. at 66; *McGovern*, 201 Ariz. at 177, ¶ 16.

¶23 We do not suggest that Mother’s parental rights override Grandparents’ reasonable visitation requests. *See Troxel*, 530 U.S. at 69–70; *Graville*, 195 Ariz. at 125, ¶ 23; *McGovern*, 201 Ariz. at 177, ¶ 16. But an order imposing significant scheduling constraints in favor of third-party

BORJA v. BORJA/BORJA  
Opinion of the Court

preferences is not consistent with a parent’s constitutional rights. *See Egan v. Fridlund-Horne*, 221 Ariz. 229, 238, ¶ 31 (App. 2009) (“Consistent with the constitutional right to parent, the legislature has provided nonparents with fewer rights than parents.”). A.R.S. § 25-409 allows the superior court to make grandparent visitation “a minimal burden on the rights of the child’s parents,” and any order must be as “minimally intrusive as possible.” *McGovern*, 201 Ariz. at 177, ¶ 16 (recognizing the legislature’s awareness of “parents’ superior right to the custody and care of their children”). This record is devoid of safeguards protecting Mother’s parenting interests. Giving Grandparents such wide discretion in setting their preferred visitation schedule is contrary to Mother’s rights and is thus not minimally intrusive.

¶24 For these reasons, a third-party visitation order cannot vest total discretion in the third party to pick and choose a visitation schedule because that infringes on a parent’s constitutional rights. A court can designate the frequency of visits and amount of time, such as ordering visitation at least one weekend a month. *See, e.g., Graville*, 195 Ariz. at 127, 128, ¶¶ 36, 39. But any discretion as to the specific dates and times for visitation must reside with the legal parent absent a showing that the parent will exercise it in a way that circumvents the order.

**C. Advance notice of children’s activities**

¶25 The court’s requirement that Mother give Grandparents at least two-days’ advance notice of “all activities of the children” in addition to notice of their yearly and seasonal schedules is excessive. Court-ordered visitation awards must be sufficiently flexible as to accommodate the children’s customary activities. *Id.* at 129, ¶ 47. A parent’s duty to manage the ever-changing schedules of his or her children is demanding. Mother has three schedules to coordinate, in addition to handling her own affairs. This order compels Mother to provide regular updates about her children’s potentially extensive activities at risk of a contempt proceeding should she fail. While such a requirement and attendant risk is common in orders issued under joint parenting circumstances, Grandparents are not jointly parenting—indeed any order to that effect is legally impermissible. *See Hustrulid v. Stakebake*, 253 Ariz. 569, 575, ¶ 16 (App. 2022) (“[C]ourts cannot award joint ‘custody’ to a legal parent and a third party.”).

¶26 The superior court’s extensive notice requirements improperly infringe on Mother’s rights to direct the activities of her children.



BORJA v. BORJA/BORJA  
Opinion of the Court

**D. Weekly telephone calls**

¶27 The court *required* Mother to facilitate weekly calls between her children and Grandparents. This was error. Indeed, court orders requiring a parent to *encourage* weekly telephone calls impinge directly on a parent's communication with her children, intrude upon her ability to exercise parental control, and are an unconstitutional exercise of the superior court's authority. *See Graville*, 195 Ariz. at 128, ¶¶ 41-42.

**III. Attorneys' Fees**

¶28 Grandparents request attorneys' fees and costs incurred on appeal under A.R.S. § 25-324. Mother made no request for fees. Because neither party advanced an unreasonable position, and the record contains no evidence about the parties' financial resources, we decline to award attorneys' fees. Mother is entitled to recover her costs on appeal upon compliance with ARCAP 21.

**CONCLUSION**

¶29 We affirm the grant of third-party visitation but vacate the visitation order and remand for the superior court to craft a minimally intrusive order attentive to the children's best interests and otherwise consistent with this opinion. An evidentiary hearing might be necessary.



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