

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



DIVISION ONE  
FILED: 6/13/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Matter of: ) 1 CA-CV 12-0600  
)  
NATHAN YOUNG, ) DEPARTMENT D  
)  
Petitioner/Appellant, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules  
) of Civil Appellate  
MARGARET VAN DEN ACRE, ) Procedure)  
)  
)  
Respondent/Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Yavapai County

Cause No. P1300DO201000572

The Honorable Ethan A. Wolfinger, Judge *Pro Tempore* (Retired)

**AFFIRMED**

Nathan Young  
Petitioner/Appellant

Liberty, MO

Steven C. Dagilis  
Attorney for Respondent/Appellee

Prescott

O R O Z C O, Judge

¶1 Nathan Young (Young) appeals the trial court's order

denying him in loco parentis visitation.<sup>1</sup> For the reasons stated below, we affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 Young and Margaret Van Den Acre (Mother) lived together as friends between 2001 and August 2009. During that time, Mother gave birth to a son (Child) in June 2005.<sup>2</sup>

¶3 In August 2009, Young went on a trip to Puerto Rico and became ill. Shortly thereafter, he went to Missouri to receive treatment for his illness. During this time, Child and Mother moved from Chandler, Arizona, where they had been residing with Young, to Prescott, Arizona. In December 2009, Young returned to Arizona in search of Child. He approached Mother and Child in a shopping center parking lot and an altercation between Young and Mother ensued. Mother subsequently obtained an order of protection (OOP) against Young. Apart from the incident in December 2009, Young has not seen or spent any time with Child since August 2009. On June 21, 2010, Young filed a petition for custody or, in the alternative, reasonable visitation pursuant to Arizona Revised Statutes (A.R.S.) section 25-415 (Supp. 2012) (repealed 2013).

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<sup>1</sup> Young does not appeal the portion of the ruling denying him in loco parentis custody and has conceded that issue to the trial court. Therefore, his appeal is only concerned with the portion of the order denying Young visitation.

<sup>2</sup> Young is not the biological father of Child.

¶14 At the hearing on June 29, 2012,<sup>3</sup> Mother testified that Child does not remember or ask about Young. She stated that Child is doing well in school and is involved in activities such as Cub Scouts and attending church. Mother also testified that she does not believe that it is in Child's best interest to have contact with Young because she does not "feel that there is any kind of bond" between Young and Child. Mother further testified that any contact with Young "would be very hurtful to [Child] and make [Child] very unbalanced in his emotional state." However, Mother did concede that at one point, Young had a relationship with Child and was present when she gave birth to Child. She also conceded that Young attended some of Child's doctor's appointments and surgeries during the time they lived together.

¶15 Young testified that he was as equal a caregiver to Child as Mother was. He stated that he treated Child like his own son and that he financially provided for Child. Young claimed that Child looked up to him as a father figure and that he would like to continue that relationship. Young also testified that Mother was a good parent to Child, that he had no significant issues with Mother's care of Child, and that she never abandoned or neglected Child.

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<sup>3</sup> The hearing was held approximately two years after the petition was filed due to difficulties serving notice on Child's biological father. See A.R.S. § 25-415.E.1.

¶16 During the hearing, Mother's counsel moved for a directed verdict under A.R.S. § 25-415.B, alleging that Young had not proven by clear and convincing evidence that custody of Child should not be awarded to Mother. The trial court granted this motion but reserved ruling on visitation until the conclusion of the hearing.

¶17 After reviewing exhibits and the testimony of the witnesses, the trial court concluded that Young had a meaningful relationship with Child from June 2005 until August 2009. It found that there was evidence that Mother had viewed Young as a guardian to Child at one point based on pictures, gift receipts and the fact that she listed Young as a guardian to Child on paperwork at a child care facility. However, the trial court also found that, in spite of Young's efforts to contact Child, there had been no contact between Young and Child for almost three years. It further found that transcripts of phone calls made by Young to Mother showed "that there was a level of hostility and certainly a significant fracture in the relationship [Young] previously had with [Mother]."

¶18 After considering the factors for visitation listed under A.R.S. §§ 25-403 (Supp. 2012)<sup>4</sup> and -409 (2007) (repealed 2013), the trial court concluded that it was not in the best

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<sup>4</sup> See the version of the statute that is effective until January 1, 2013.

interest of Child for the court to award visitation to Young. It based its ruling on the lack of interaction and interrelationship between Young and Child for the past three years, the past issues of domestic violence, the inability of Young and Mother to work together to co-parent, and the fact that Child had moved on with his life and was doing well in school.

¶19 Young timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21.A.1 (2003) and -2101.A.1 (Supp. 2012).

#### **DISCUSSION**

¶10 Young argues that the trial court erred in refusing to grant him visitation rights under A.R.S. § 24-415.C. He alleges that the evidence does not support the trial court's findings and the evidence presented by Mother was not accurate. He also contends that the trial court erred by refusing to allow him to introduce exhibits into evidence. Finally, Young argues that the trial court violated his right to reasonable accommodation under the Americans with Disabilities Act (ADA) because it did not allow his wife to speak for him when he was short of breath during the hearing.

#### **Visitation**

¶11 "The superior court may grant a person who stands in loco parentis to a child . . . reasonable visitation rights to the child on a finding that the visitation is in the child's

best interests . . . ." A.R.S. § 24-415.C. However, the trial court should "apply a presumption that a fit parent acts in his or her child's best interest in decisions concerning the child's care, custody, and control, including decisions concerning [non-parent] visitation." *McGovern v. McGovern*, 201 Ariz. 172, 177, ¶ 17, 33 P.3d 506, 511 (App. 2001).

¶12 The trial court is in the best position to determine the best interests of the child, and we will not disturb its findings concerning custody and visitation absent an abuse of discretion. *Borg v. Borg*, 3 Ariz. App. 274, 277, 413 P.2d 784, 787 (1966). Abuse of discretion occurs when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). In addition, to support a finding that the trial court abused its discretion, "the record must be devoid of competent evidence to support the decision of the trial court." *Borg*, 3 Ariz. App. at 277, 413 P.2d at 787.

¶13 Here, the record supports the trial court's findings that it is not in the best interest of Child to grant Young visitation. At the time of the hearing, almost three years had passed since Young had any meaningful contact with Child, and the trial court found that this was a relevant factor in determining Child's best interest. See A.R.S. § 25-403.A.3

("The court shall consider all relevant factors, including . . . [t]he interaction and interrelationship of the child with . . . any other person who may significantly affect the child's best interest."). Mother testified that Child does not ask about Young or remember him. She also stated that he was doing well in school and other activities.

¶14 In addition, the trial court found that the OOP filed against Young by Mother showed a significant fracture in their relationship, as well as a history of domestic violence. See A.R.S. § 25-403.03.B (Supp. 2012) ("The court shall consider evidence of domestic violence as being contrary to the best interests of the child."). Mother testified that Child was present at the time of the altercation that led to the OOP, and she affirmed that the incident "traumatized" Child.

¶15 The evidence supports the trial court's order denying Young visitation. Therefore, we find no abuse of discretion.

#### **Mother's Testimony**

¶16 Young also alleges that Mother's testimony at trial was false and that the trial court should not have relied upon it. However, on appeal, we do not reweigh the evidence, *Hollis v. Indus. Comm'n*, 94 Ariz. 113, 116, 382 P.2d 226, 228 (1963), and "[w]e 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, ¶ 13,

972 P.2d 676, 680 (App. 1998). Therefore, the trial court did not abuse its discretion by relying on Mother's testimony.

### **Evidentiary Issues**

¶17 Young alleges that the trial court erred in refusing to allow him "to utilize important filed evidence that was previously entered as evidence/exhibits." "The trial court has broad discretion in ruling on discovery and disclosure matters, and we will not disturb its ruling absent an abuse of discretion." *Link v. Pima Cnty.*, 193 Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App. 1998) (citation and internal quotation marks omitted). Because the record indicates that the trial court did allow Young to enter exhibits into evidence during trial, Young's arguments are unfounded.

¶18 During the hearing, Young referenced a copy of an email that he had in his possession while he was questioning Mother. In response to Young's line of questioning, Mother's counsel stated, "Your Honor, for the record, I would be objecting to any introduction of any other exhibits. It may make things move quicker without the search." To which the trial court responded, "Thank you." Young replied, "That is fine. Just for the record, there was - there are e-mails that were submitted but not on the list, so that is perfectly fine."

¶19 Young alleges that this interaction prevented him from entering exhibits into evidence. However, Young never sought to



enter any exhibits into evidence during or after that line of questioning, which prevented the trial court from having an opportunity to rule on their admission. In fact, the record shows that the trial court did allow Young to introduce exhibits into evidence during the hearing. Therefore, we find no abuse of discretion.

#### **Compliance with ADA**

¶20 Young argues that the trial court violated his rights under the ADA by not allowing his wife to speak for him when he became short of breath at the hearing due to his pulmonary hypertension. Pursuant to 42 U.S.C. § 12132 (2012), "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

¶21 There is nothing in the record that shows the trial court did not allow Young's wife to speak on his behalf. Moreover, the record reflects that the trial court was willing to allow Young's wife to speak for him if needed. In any event, Young did not raise this argument to the trial court and, consequently, has waived it. See *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 452, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) ("We generally do not consider objections raised for the first time on appeal.").

**CONCLUSION**

¶22 For the foregoing reasons, we affirm the trial court's order denying Young in loco parentis visitation.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

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ANDREW W. GOULD, Presiding Judge

/S/

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MARGARET H. DOWNIE, Judge