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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

TRAVIS SMITH, *Petitioner*,

v.

THE HONORABLE PAULA WILLIAMS, Commissioner of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Commissioner*,

KATHLEEN A. BIBBEE, *Real Party in Interest*.

No. 1 CA-SA 22-0145
FILED 6-1-2023

Petition for Special Action from the Superior Court in Maricopa County
No. FC2015-050872
The Honorable Paula Williams, Judge *Pro Tempore*

**JURISDICTION ACCEPTED; RELIEF GRANTED;
VACATED AND REMANDED**

COUNSEL

Woodnick Law PLLC, Phoenix
By Markus W. Risinger
Counsel for Petitioner

Phelps & Moore PLC, Scottsdale
By Jon L. Phelps
Counsel for Real Party

MEMORANDUM DECISION

Presiding Judge Jennifer M. Perkins delivered the decision of the Court, in which Judge James B. Morse Jr. and Judge Michael J. Brown joined.

P E R K I N S, Judge:

¶1 In this special action, Travis Smith ("Father") challenges the superior court's ruling awarding maternal grandmother, Kathleen Bibbee ("Grandmother"), sole legal decision-making authority over Father's minor child ("Child"). The court issued its ruling as an amended order to earlier temporary orders, which gave Father joint legal decision-making and limited parenting time, and Grandmother final legal decision-making authority and physical custody over Child.

¶2 Father argues that no new evidence was presented before the court's amended order, and that the court failed to provide necessary findings in making its legal decision-making determination. For the following reasons, we accept special action jurisdiction, grant relief, and vacate the court's ruling.

FACTS AND PROCEDURAL BACKGROUND

¶3 Father and Melissa Bibbee ("Mother") are the biological parents of Child, born in 2010. The parents separated in 2012, and Mother petitioned for dissolution in 2015. The court awarded Father primary residential custody of Child in its 2016 temporary orders in the dissolution proceeding. In 2017, the superior court restricted Father's parenting time with Child to "the full day of Christmas Eve until 8:00 p.m. and for two weeks during the summer," and granted Mother sole legal decision-making and sole physical custody. After the divorce, Father moved to Texas, where he currently resides with his fiancé and her three children.

¶4 Mother passed away on June 2, 2022, and Grandmother took physical custody of Child. On June 13, Father filed an emergency ex parte motion for sole custody and sole legal decision-making authority over Child. On June 15, Grandmother intervened and petitioned for placement and legal decision-making.

¶5 The superior court held temporary orders hearings on July 7 and July 20. At the July 20 evidentiary hearing, the court heard testimony

from Father, Grandmother, and Mother's ex-fiancé, Shawn Warren ("Fiancé").

¶6 Grandmother testified that Father exercised his parenting time with Child "[o]nce on Christmas Eve of 2019," had not contacted Child since then, and had not paid child support. Father does not dispute these statements, but alleges he contacted Mother to schedule visits with Child, which Mother denied. Grandmother also alleged that the 2019 visit made Child "upset," and that it would be detrimental for Child to be with Father because she does not have a relationship with him, Father has not contacted her, and she is dealing with Mother's death.

¶7 Fiancé testified that he lived with Mother and Child from 2019 until Mother's passing in 2022. He stated that Grandmother saw Child less than ten times over the course of those two and a half years. Fiancé claimed he was present at all visitations between Child and Grandmother and described their relationship as a "[t]ypical passive grandmother/granddaughter relationship."

¶8 The superior court entered temporary orders on July 26, finding that Grandmother stood *in loco parentis* to Child. The court ordered joint legal decision-making between Father and Mother (deceased), with Grandmother having final legal decision-making authority. And it designated Grandmother as the primary residential "parent." Father's parenting time was limited to "[e]very other Saturday from noon to 3:00 p.m., supervised by a professional therapeutic supervisor within 10 miles of the child's residence with Maternal Grandmother."

¶9 On August 2, Father petitioned this Court for special action relief, arguing the temporary orders deprived him of his rights as a fit parent without making necessary findings. He also asked this court to stay the temporary orders, fearing contempt of court if he could not exercise his designated parenting time due to his Texas residency. During the stay hearing, Grandmother represented that (1) she would not seek a contempt order and did not object to Father exercising his visitation time telephonically or virtually, and (2) given obvious infirmities in the superior court order, she would ask that court to alter or amend its ruling. We stayed this special action and denied as unnecessary the request to stay the temporary orders.

¶10 On August 5, Grandmother moved to alter or amend the superior court's judgment and to amend the findings of fact. She asked the

court to make necessary factual findings supporting its orders and award her sole legal decision-making.

¶11 The superior court amended the temporary orders in November 2022 and awarded Grandmother sole legal decision-making authority. In doing so, the court found that Grandmother rebutted the statutory presumption that a legal parent should have legal decision-making authority by clear and convincing evidence. The apparent basis for this finding was that, before Mother's death, Father had not seen Child since December 2019. The court also found it would be "significantly detrimental" for Child to be placed in Father's care.

¶12 We appointed Father pro bono counsel and ordered supplemental briefing on all pertinent issues.

JURISDICTION

¶13 Because this case presents purely legal questions affecting important rights, including the best interests of Child, and Father has no adequate remedy by appeal, we accept special action jurisdiction. *See Grand v. Nacchio*, 214 Ariz. 9, 17–18, ¶¶ 20–22 (App. 2006).

DISCUSSION

¶14 Arizona allows third parties, including grandparents, to petition the court for legal decision-making authority and physical custody of a child. A.R.S. § 25-409(A). A third party must establish all four threshold requirements before the court can even consider granting the petition: (1) petitioner stands *in loco parentis* to the child, (2) allowing the child to remain in the care of legal parent who wishes to acquire decision-making authority would be significantly detrimental to the child, (3) no court of competent jurisdiction has entered orders of legal decision-making or parenting time within the preceding year, and (4) one of the legal parents is deceased. A.R.S. § 25-409(A).

¶15 The court must first consider whether the third party's "initial pleading" contains "sufficient factual allegations" that, if true, would establish these four threshold requirements. *Hustrulid v. Stakebake*, 253 Ariz. 569, 578, ¶ 28 (App. 2022); A.R.S. § 25-409(A). Only if the petition sufficiently establishes the threshold requirements does the court receive evidence at a hearing. *Id.* The court "shall" otherwise "summarily deny" the petition. A.R.S. § 25-409(A).

¶16 Assuming the petitioner passes the threshold requirements, at the ensuing hearing she must rebut, by clear and convincing evidence, the presumption "that awarding legal decision-making to a legal parent serves the child's best interests[.]" A.R.S. § 25-409(B). The petitioner's burden here is thus "elevated" from that required to establish a child's best interests in a dispute between legal parents. *Compare* A.R.S. § 25-403(A) *with* § 25-409(B).

¶17 Father argues the court erred by finding that Grandmother satisfied all statutory factors to support legal decision-making authority. First, he contends her petition did not establish the first two threshold requirements: the third party "stands in loco parentis to the child," Section 25-409(A)(1), and "[i]t would be significantly detrimental to the child to remain or be placed in the care of either legal parent who wishes to keep or acquire legal decision-making," Section 25-409(A)(2). Second, he argues the court erred by finding that she successfully rebutted the legal parent presumption under Section 25-409(B). We review the court's interpretation and application of Section 25-409 *de novo*. *Chapman v. Hopkins*, 243 Ariz. 236, 240, ¶ 14 (App. 2017).

I. *In Loco Parentis*

¶18 In its temporary orders, the court found that Grandmother stands *in loco parentis* to Child. *In loco parentis* "means a person who has been treated as a parent by a child and who has formed a meaningful parental relationship with a child for a substantial period of time." A.R.S. § 25-401(1); *see also Garay Uppen v. Superior Court*, 116 Ariz. 81, 83 (App. 1977) (A person acts *in loco parentis* "by assuming the obligations incident to the parental relation."). And the third party must establish her contemporaneous *in loco parentis* status at the time she files the petition. A.R.S. § 25-409(A).

¶19 Grandmother asserted in her petition that she historically had a "significant and strong" relationship with Child. Mother and Child lived with Grandmother for three years, during which Grandmother and Child developed a close and bonded relationship and Grandmother served as a "primary caretaker." But Grandmother also acknowledged that Mother and Child moved into a separate residence one and a half years before Mother's death. In short, even if the petition sufficiently established Grandmother stood *in loco parentis* earlier, the petition failed to establish *contemporaneous* facts that Child treated Grandmother as a parent or continued to have a meaningful *parental* relationship.

¶20 The superior court should have summarily denied Grandmother's petition as facially insufficient to establish her *in loco parentis* status. But even taking into account the evidentiary hearing, Grandmother failed to create a record of contemporaneous facts establishing her status as *in loco parentis*. Grandmother testified, consistent with her petition, that Mother and Child lived at Grandmother's house for three years, and that during this time, she served as Child's room mom at school, signed school documents for Child, and took Child to extracurricular activities. But Grandmother acknowledged that after Mother and Child moved out in January 2021, her interactions with Child became limited to weekly or biweekly visits. And Fiancé testified that while he lived with Mother and Child, Child saw Grandmother during holidays, for an occasional lunch or movie, and sometimes at church. Grandmother's activities appear to be consistent with that of a grandmother. And she presented no evidence, and does not argue, that Child considered her a parent. The record lacks competent evidence showing that Grandmother "assum[ed] the obligations incident to the parental relation," *Garay Uppen*, 116 Ariz. at 83, or that Child "treated [her] as a parent," *Riepe v. Riepe*, 208 Ariz. 90, 93, ¶ 10 (App. 2004).

¶21 Neither the petition nor the evidentiary hearing record support the threshold finding that Grandmother stood *in loco parentis* to Child. We therefore vacate the court's ruling.

II. Significant Detriment

¶22 Father argues the court erred in finding that it would be "significantly detrimental" for Child to be placed with him. The only fact Grandmother offered in her petition is the same single fact that the court relied on in its ruling: that "Father had not seen the child since December 2019." But Father testified that Mother denied his multiple requests for visits with Child. Grandmother contends that Father's failure to enforce his parenting time over Mother's apparent objections renders him an unfit parent, but the court made no such finding. In fact, the court's temporary orders initially gave Father joint legal decision-making authority.

¶23 Establishing that placement with Father would be "significantly detrimental" is akin to establishing Father's present unfitness to parent. *Chapman*, 243 Ariz. at 244, ¶ 29 (allegation of significant detriment amounted to allegation of parental unfitness). The court's temporary orders do not explain how Grandmother established this threshold requirement. And the record evidence does not reasonably support the conclusion that it would be significantly detrimental for Child to be placed in Father's care or

allow him to have legal decision-making authority. This is thus an alternative basis on which we vacate the superior court's order.

III. Presumption in Favor of the Legal Parent

¶24 Arizona law establishes a rebuttable presumption that "awarding legal decision-making to a legal parent serves the child's best interests because of the physical, psychological and emotional needs of the child to be reared by a legal parent." A.R.S. § 25-409(B). A third party rebuts that presumption if she establishes, "by clear and convincing evidence that awarding legal decision-making to a legal parent is not consistent with the child's best interests." *Id.* Put another way, the legislature has directed that a legal parent starts out as presumptively the prevailing party in a legal decision-making dispute with a non-parent. The legislature created layers of barriers to a third party's ability to overcome that presumption. *See e.g.*, A.R.S. § 25-409(A) (the court *shall* summarily deny third party's petition unless it finds that *all* statutory elements are established); A.R.S. § 25-409(B) (third party may rebut legal parent presumption *only* with clear and convincing evidence); A.R.S. § 401(1) (third party's relationship with child must be found *meaningful* and for a *substantial* period of time to achieve *in loco parentis* status); A.R.S. § 25-403(A) (the court *must* consider specific statutory factors in determining child's best interests for purposes of a legal decision-making award).

¶25 Section 25-409 proceedings are not the same as those that occur *between* legal parents with equally strong constitutionally protected rights. In short, while Section 25-403(A) provides specific factors for the court to consider in determining a child's best interests, the showing required under Section 25-409(B) is heightened from the standard evaluation of a child's best interests in a dispute between legal parents.

¶26 Although it did not make any specific findings under Section 25-403(A), the court stated that it considered the parties' arguments regarding Grandmother's motion to amend the court's judgment and award her legal decision-making. Consistent with the constitutional rights at issue, the legislature has directed that a third party seeking to displace a legal parent must meet a heightened burden to overcome a legal presumption. We cannot say from this record and the court's ruling that Grandmother met her heightened burden. And so, even if Grandmother's petition sufficiently established the threshold requirements for *in loco parentis* status, this record does not support stripping Father of his presumptive legal authority over Child.

ATTORNEYS' FEES AND COSTS

¶27 Both parties request an award of fees pursuant to Section 25-324. "[A]fter considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings," we decline to award fees. A.R.S. § 25-324(A). As the prevailing party, however, Father is entitled to his costs incurred in this special action upon compliance with ARCAP 21.

CONCLUSION

¶28 We accept special action jurisdiction, grant relief, and vacate the court's July 26, 2022, temporary orders as amended by its November 8, 2022 order. We remand for further proceedings consistent with this decision.

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