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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 01/6/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF:) No. 1 CA-CV 10-0025
)
MELODY LYNN MUNARI,) DEPARTMENT B
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
JOHN and JUDI WINIARSKI,) Civil Appellate Procedure)
)
Intervenors/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. DR 1996-015476

The Honorable Sheila A. Madden, Judge *Pro Tempore*
The Honorable Colleen French, Judge *Pro Tempore*

AFFIRMED

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J O H N S E N, Judge

¶1 Melody Munari appeals from the superior court's orders
modifying visitation rights of John and Judi Winiarski and

refusing to terminate a long-standing sanctions order. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Winiarskis are grandparents of Munari's 13-year-old son, J.T. The Winiarskis raised J.T. during the first several years of his life; Munari voluntarily appointed them as guardians of the child over that period of time.

¶3 Shortly after Munari married Brian Munari in 2003, she withdrew her consent and terminated the guardianship.¹ The Winiarskis petitioned for custody. In May 2005, citing *McGovern v. McGovern*, 201 Ariz. 172, 33 P.3d 506 (App. 2001), the superior court granted the Winiarskis visitation of two consecutive weeks in the summer, one week at Christmas, the second Sunday of each month and the fifth weekend in each month that has five Saturdays, and ordered that they be allowed to talk to the child during 10-minute telephone calls three nights a week. No appeal was taken from the order.

¶4 After Munari moved to Missouri, the Winiarskis complained that she had failed to allow the visitation to which they were entitled. In February 2006, the court found that Munari's "continuing contempt of Court is extremely egregious," imposed sanctions and modified the Winiarskis' visitation rights

¹ Brian Munari officially adopted J.T. on August 11, 2006.

to two weeks in the summer and a week every other Christmas and reaffirmed their existing telephone rights. Munari appealed and was denied relief. *Munari v. Winiarski*, 1 CA-CV 06-0211 (Ariz. App. Feb. 13, 2007) (mem. decision).

¶15 In February 2009, the Winiarskis moved to modify their visitation rights. They argued that because Munari and J.T. had moved to California, visitation should be enlarged. They also asserted Munari had not complied with existing visitation orders. Munari responded by filing an emergency petition requesting the court to temporarily suspend all grandparent visitation pending an evidentiary hearing. Based on transcripts of recorded telephone calls, she argued visitation should be terminated because the Winiarskis were seeking to undermine her authority over the child and to alienate him from her.

¶16 After an evidentiary hearing, the superior court denied Munari's motion and granted the Winiarskis a modified visitation schedule. Munari timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. The Superior Court's Modification of the Winiarskis' Visitation Rights Was Proper.

1. Legal principles.

¶7 We review the superior court's decision to grant or deny grandparent visitation for an abuse of discretion. *McGovern*, 201 Ariz. at 175, ¶ 6, 33 P.3d at 509. The court abuses its discretion "when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision." *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (citation omitted).

¶8 Grandparents' visitation rights under these circumstances are afforded by A.R.S. § 25-409 (2007), which provides in relevant part:

A. The superior court may grant the grandparents of the child reasonable visitation rights to the child during the child's minority on a finding that the visitation rights would be in the best interests of the child and any of the following is true:

* * *

3. The child was born out of wedlock.

* * *

C. In determining the child's best interests the court shall consider all relevant factors, including:

1. The historical relationship, if any, between the child and the 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 the potential adverse impact that visitation will have on the child's customary activities.

5. If one or both of the child's parents are dead, the benefit in maintaining an extended family relationship.

A.R.S. § 25-409(A), (C). In *McGovern*, we upheld the constitutionality of A.R.S. § 25-409, noting specifically that the statute has self-limiting features that narrow its application. 201 Ariz. at 177, ¶ 15, 33 P.3d at 511.²

¶9 In considering visitation rights under A.R.S. § 25-409, courts are required to recognize and apply a rebuttable presumption that "a fit parent acts in his or her child's best interest in decisions concerning the child's care, custody and control." *McGovern*, 201 Ariz. at 177, ¶ 17, 33 P.3d at 511. A fit parent's determination of whether visitation is in the best interest of the child should be given "special weight," and the

² This court observed that "the statute is framed in permissive rather than mandatory terms, allowing but not requiring the superior court to grant 'reasonable visitation rights' to grandparents." *McGovern*, 201 Ariz. at 177, ¶ 15, 33 P.3d at 511 (citation omitted). Further, the statute is "structured to enable the court to make grandparent visitation a minimal burden on the rights of the child's parents" by requiring the visitation order to be as "minimally intrusive as possible." *Graville v. Dodge*, 195 Ariz. 119, 125, 127, ¶¶ 23, 33, 985 P.2d 604, 610, 612 (App. 1999).

court is required to give "significant weight" to a parent's voluntary agreement to limited visitation. *Id.* at 177-78, ¶ 18, 33 P.3d at 511-12.

2. The court's order modifying visitation.

¶10 Although Munari's motion argued that all visitation should be suspended pending an evidentiary hearing, she later offered to allow the Winiarskis one monitored, 30-minute phone call with J.T. between 9 a.m. and noon every Saturday. Upon the child's fourteenth birthday the frequency of the phone calls would change to one every other Saturday. She further proposed three weekends per year of in-person visitation (8 a.m. to 8 p.m. on Saturdays and Sundays) at a location of the Winiarskis' choice within 50 miles of the Munari residence in San Diego. She insisted, however, that all visits be supervised by herself and her husband.

¶11 In support of her motion, Munari argued the telephone transcripts demonstrated a pattern of parental alienation. She argued the Winiarskis used profanity to disparage her and her husband and asserted that the Winiarskis encouraged the child to falsely accuse Munari of abuse. For their part, the Winiarskis testified that Munari repeatedly denied them court-ordered access to J.T. and that she had failed to comply with a prior order to provide the Winiarskis with her home address and telephone number. Further, the Winiarskis claimed that Munari

frustrated the allowed telephone access by disabling J.T.'s voicemail and turning off the telephone's ringer.

¶12 In its post-hearing order, the court found the Winiarskis' relationship with J.T. was "strong and loving." Although it acknowledged that some of the Winiarskis' remarks in the transcripts were "negative, inappropriate and could be considered attempts at parental alienation," the court concluded "that those comments were only a very small part of the recorded conversations," and that on the whole, the transcripts revealed conversations that "related to the wellbeing [sic] of the child, plans for future visits, and school issues."

¶13 The court also found that Munari "is a fit parent and loves her child," but concluded that Munari "does not always act in the best interests of the child." It concluded Munari had acted "to thwart" the Winiarskis' visitation rights and had refused to provide her address despite court orders to do so. It concluded, "The Court further finds that Mother attempted to manipulate the child by putting him in the middle of her feud with the grandparents and such conduct is detrimental to the wellbeing [sic] of the child."

¶14 Based on these findings, the court reaffirmed the Winiarskis' existing visitation rights over Christmas and summer and added an additional week of visitation during alternate years. The court also granted one weekend of visitation in

March and in October. In response to Munari's contention that the Winiarskis had made disparaging remarks to J.T. about her and her husband, the court ordered the Winiarskis to "immediately cease from making any negative comments" to the child about Munari or her husband. The court added, "Grandparents should understand that any violation of this order could result in a contempt finding by the Court and possible sanctions, including further modification or cessation of ordered visitation."

3. The court acted within its discretion.

¶15 We cannot conclude the superior court abused its discretion in denying Munari's motion and modifying the visitation schedule. The telephone transcripts confirm the superior court's finding that inappropriate remarks by the Winiarskis constituted only a small part of the numerous conversations. Moreover, weighing against the presumption that as a fit parent, Munari acts in the best interests of her child, ample evidence supports the court's finding that Munari does not always act in her son's best interests.

¶16 For example, Munari testified police officers came to her house three to five times to enforce the court's prior visitation orders and that she refused to release her son to the Winiarskis, knowing she was in direct violation of the order. She also admitted she denied the Winiarskis any telephone access

to J.T. for a period of time (she relented only when they garnished her husband's pay to satisfy sanctions orders). And even after relenting on telephone access, Munari attempted to thwart the court's order by disabling J.T.'s voicemail and turning off the ringer on his cell phone. Moreover, Munari still has failed to provide the Winiarskis with her home address despite being ordered to do so in 2006. Indeed, she vowed while testifying during the hearing to continue to defy that order. She also admitted to having "tortured [the Winiarskis] by denying them access to the grandson whom they loved and helped raise[]."

¶17 Lastly, there is sufficient evidence to support the court's conclusion that Munari has "manipulated the child by putting him in the middle of her feud with the grandparents." The conciliation services report observed that J.T. "was afraid that his mother might go to jail" as a result of her feud with her parents, and "he was told that they moved away from Arizona for that reason." Although Munari denied involving J.T. in the conflict, she was unable to explain why J.T. was under the impression that she was in danger of being incarcerated.

¶18 Munari argues on appeal that because the court found her to be a fit parent, it necessarily erred by failing to grant her request to restrict the Winiarskis' visitation rights. Although courts are required to recognize the presumption that

"a fit parent acts in his or her child's best interest in decisions concerning the child's care, custody and control," this presumption is rebuttable. *McGovern*, 201 Ariz. at 177, ¶ 17, 33 P.3d at 511; see *Troxel v. Granville*, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting). Munari argues the superior court failed to make express findings that the evidence defeated the presumption arising from its finding that she is a fit parent, but she cites no law for the proposition that the court must make such findings on the record. See A.R.S. § 25-409 (court may grant grandparent visitation "on a finding that the visitation rights would be in the best interests of the child . . ."). In light of the evidence in the record, we are unable to conclude that the superior court abused its discretion in modifying the Winiarskis' visitation schedule. See *Little*, 193 Ariz. at 520, ¶ 5, 975 P.2d at 110 (appellate courts will affirm trial courts' decisions if record contains competent evidence supporting the decision).

B. Denial of Motion to Terminate Sanctions.

¶19 Munari also argues the superior court erred by failing to terminate a daily fine imposed against her in 2006 for failing to comply with court orders. In a motion filed just prior to the hearing on the visitation issues, Munari argued the fine should be terminated because she had been in "full compliance" with visitation orders "for several years."

¶120 Munari's motion contained no evidence to support her assertion that she had fully complied with existing visitation orders.³ In the absence of evidence to support a finding that Munari does not remain in contempt of court, we hold that the superior court did not abuse its discretion in denying her relief. Our decision in this regard is without prejudice to Munari's filing another motion to modify or terminate the daily sanctions against her, and we express no opinion on the merits of any such motion.

CONCLUSION

¶121 Because sufficient evidence supports the superior court's findings, we affirm its order modifying visitation. We also affirm the order denying Munari's motion to terminate sanctions. We deny the Winiarskis' request for attorney's fees pursuant to A.R.S. § 12-349(A)(1) and (2) (2003) because we do not conclude that Munari brought or defended a claim without substantial justification or solely or primarily for delay or harassment. The Winiarskis also seek attorney's fees pursuant to A.R.S. § 25-324 (2010), but because they direct us to nothing

³ The commissioner who heard evidence on the competing visitation motions did not rule on Munari's motion to terminate sanctions; another commissioner ruled on the motion to terminate. Nevertheless, Munari points to no evidence in the record from the visitation hearing supporting her assertion that she was in full compliance with existing orders; to the contrary, as we have observed, the evidence supported the court's finding that she had violated prior orders.

in the record evidencing the parties' respective financial positions, we deny the request. As the prevailing party, however, the Winiarskis are entitled to reimbursement of their costs upon compliance with Arizona Rule of Civil Appellate Procedure 21(a).⁴

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge

⁴ In their answering brief, the Winiarskis request this court to direct the superior court to reconsider certain vacated judgments against Munari's husband. Because they did not bring this issue before the superior court (nor did they file a cross-appeal on this issue), we will not consider their request. See *Webber v. Grindle Audio Prods., Inc.*, 204 Ariz. 84, 90, ¶ 26, 60 P.3d 224, 230 (App. 2002); ARCAP 9(a). Our decision is without prejudice to the Winiarskis' raising the matter in the superior court, and we express no opinion on the merits of any such request.