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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 05/31/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

In re the Matter of:) 1 CA-CV 10-0085
)
DONALD MARQUEZ,) DEPARTMENT E
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
TRACY ANN COLBERT,)
)
Respondent/Appellee,)
)
and)
)
KATHY MARQUEZ,)
)
Intervenor/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2004-012669

The Honorable Colleen L. French, Judge Pro Tempore

AFFIRMED

Law Offices of Zofia Rawner
by Zofia Rawner
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Scottsdale

Gregg R. Woodnick, PLLC
by Gregg R. Woodnick
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Phoenix

S W A N N, Judge

¶1 Kathy Marquez ("Marquez") appeals from the family court's order denying her petition for visitation with her grandchild. Finding no abuse of discretion, we affirm the order.

FACTS AND PROCEDURAL BACKGROUND

¶2 Marquez is the mother of Donald Marquez ("Father") and the grandmother of Father's daughter, N. Father never married N.'s mother, Tracy Colbert ("Mother").

¶3 N. was born in December 2003. Mother, Father, and N. lived together briefly, but the parents then parted and reached an agreement for joint legal custody and a split-week parenting plan.

¶4 Both Mother and Father were users of illegal drugs. Mother suffered a stroke on October 2, 2004, and spent months recovering in a hospital. Because Father was still using drugs, Child Protective Services ("CPS") found that he was an inappropriate caregiver, and accordingly took custody of N. A dependency action (Maricopa County Superior Court No. JD14287) ensued, and the Maricopa Superior Court appointed Marquez to serve as N.'s temporary guardian on April 5, 2005. N. then resided with Marquez and N.'s grandfather.

¶5 Marquez served as N.'s primary caregiver until December 2006. Meanwhile, Mother was recovering from her stroke and being therapeutically reunited with N.

¶16 The record reflects that, during the reunification process, Marquez called the police, and later CPS, to report that N. had bruises. Marquez told the investigating officer on May 5, 2006, that N.'s bruises were consistent with the use of a "switch object" and that N. had no marks on her prior to visitation with Mother the previous day. Marquez also told the officer that Mother was "a heavy drug user and currently had suffered a stroke that paralyzed her on her right side, and has short term memory loss." The officer completed the report without contacting Mother.¹

¶17 Marquez again called CPS and the police in 2006 after Father reported that Szabo, who provides logistical support, had undressed N. in a public place after picking her up. Marquez also claimed that she had a court order granting her custody of N. As it turned out, Szabo had been following a caseworker's instructions to check the child for injuries. Marquez's attorney attributed the custody statement to Marquez's misunderstanding of the law.

¹ In December 2006, Father reported bruises on N. after her visit with Mother. N. allegedly stated that Mother and Jessica Szabo, a friend of Mother's, hit her. CPS rejected the physical abuse charge as unsubstantiated. Earlier that year, a family court found during a status hearing that N.'s five-year-old half-brother, D., had sexually abused her, and that Mother had dropped N. or fell on top of her while carrying her. The family court nevertheless allowed Mother to continue her parenting time with N.

¶18 CPS ultimately determined that N. should be returned to Mother, notwithstanding her compromised condition, which includes mobility issues and aphasia. In 2008, Father reported another injury to N., buttressed by Marilyn Daniels, a visitation supervisor for Father. Father's attorney presented photos of N.'s bruise to a different family court. Notwithstanding that evidence, that court ordered that Mother serve as N.'s sole caregiver and custodian. In a signed order filed on September 4, 2008, the family court specified that Mother was to have temporary sole custody of N. and there be "no contact" between N. and Marquez. The order also provided for Father to have reasonable parenting time, dependent upon the results of his tests for methamphetamine use.

¶19 Marquez petitioned for grandparent visitation on February 23, 2009. She sought to spend two weekends per month with N., two weeks in the summer, and holiday time. Mother objected, explaining that

[a]fter a multi day trial, Judge Foster removed Ms. Marquez from contact with the child AND further involvement in the case.

. . . .

[] The issue of Grandparents [sic] visitation has been well litigated in this matter, to re-litigate the issue is neither in the child's best interests nor in the interest of judicial efficiency.

¶10 A best interests attorney, John Worth, recommended against grandparent visitation and filed a report proposing that: (1) Mother retain sole custody; (2) Marquez have no visitation with N. at that time; and (3) the family court find that Marquez had continually harassed Mother and therefore violated A.R.S. § 13-2921. Father, however, supported Marquez's visitation request.

¶11 In May 2009, Father began serving a prison term that ended October 26, 2009. Shortly before his incarceration, Father reported to Marquez that he had seen a huge bruise on N.'s leg during his parenting time, and Marquez accordingly called CPS about the bruise in April 2009.

¶12 Ultimately, the family court determined that grandparent visitation would not be in N.'s best interests and denied Marquez's petition in a signed order filed November 27, 2009. Marquez timely appeals.²

DISCUSSION

I. THE FAMILY COURT DID NOT ABUSE ITS DISCRETION IN DENYING MARQUEZ'S VISITATION PETITION.

¶13 The family court may award grandparent visitation if it finds that visitation is in the child's best interests.

² On August 10, 2010, Mother moved to strike Marquez's Opening Brief based upon its lack of record citations. Mother reiterates this request in the Answering Brief. This court previously denied the motion, and ordered Marquez to supply the trial transcript by October 22, 2010. The transcript arrived on September 28, 2010. We decline to revisit these issues.

A.R.S. § 25-409(A)(3). We review the family court's decisions to deny or grant grandparent visitation for abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6, 33 P.3d 506, 509 (App. 2001). A family 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) (quotation marks omitted). This court will not reverse the visitation decision "[u]nless it clearly appears that the trial judge has mistaken or ignored the evidence." *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970).

¶14 A family court may award reasonable visitation rights to the grandparents of a child born out of wedlock if the court finds that visitation is in the child's best interests. A.R.S. § 25-409(A)(3). To assess the 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(C).

¶15 In making its determinations under A.R.S. § 25-409, the family court applies a rebuttable presumption that "a fit parent acts in his or her child's best interest in decisions governing the child's care, custody, and control, including decisions concerning grandparent visitation." *McGovern*, 201 Ariz. at 177, ¶ 17, 33 P.3d at 511. A fit parent's determination as to whether visitation is in the child's best interests is therefore entitled to "special weight." *Id.* at 177-78, ¶ 18, 33 P.3d at 511-12. See also *Troxel v. Granville*, 530 U.S. 57, 69-72 (2000).

¶16 On appeal, Marquez contends that the family court committed an abuse of discretion by admitting a report prepared by therapist Holly Judge at Worth's direction. She also claims that her counsel never received a copy of the document prior to or during trial, but acknowledges that none of the other parties received the report when it was completed and no copies were available at the hearing. Marquez has also failed to supply this court with this exhibit.

¶17 As the appealing party, Marquez is responsible for providing not only the transcript but also other items necessary to consider the issues raised on appeal. See *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). "When a party fails to include necessary items, we assume they would support the court's findings and conclusions." *Id.* Without the exhibit, this court is also unable to evaluate what prejudice, if any, Marquez sustained as a result of the document's admission. In any event, strict compliance with the Arizona Rules of Evidence -- including the hearsay rules -- had not been required. See Ariz. R. Fam. L.P. 2(B) (absent a party's timely pre-hearing request for strict compliance with the evidentiary rules, all relevant evidence is generally admissible). Accordingly, we will not reverse on this basis.

¶18 Marquez also contends that the record is devoid of competent evidence to support the family court's ruling that visitation was not in N.'s best interests. To the contrary, testimony from Mother and Judge, recommendations obtained from other child-care professionals, together with documents filed by Marquez, furnish sufficient evidentiary support even without Judge's report.

¶19 Because Mother suffers from aphasia as a result of a stroke, her testimony was limited. Mother did express that N. was "happy," has friends to play with, and was learning from

Mother how to do cartwheels. Mother opined that Marquez was "psycho" and that N. was a "wild child again" when she was with Marquez. According to Mother, N. was fearful of her closet and sleeps with a nightlight on because Marquez had told N. that someone would steal her out of that closet. Further, Mother accused Father and Marquez of calling CPS "on a daily basis."

¶120 Judge, a family therapist who interviewed the witnesses at Worth's request, testified that N. appears "very happy," is "doing fine in school," had "positive things to say about her mother" and has a "strong relationship" with Mother. Judge's investigation also revealed that Marquez had previously told N. negative things about Mother, would ask N. to hit Mother, and would generally try to sabotage N.'s relationship with Mother. Consequently, Judge testified that she recommended against a grant of visitation.

¶121 Likewise, five other child-care professionals -- in addition to Judge -- opposed a grant of visitation for Marquez: CPS Case Manager Charlotte Smith, CPS Supervisor Warren Terry, former guardian ad litem Emilie Halladay, CASA Nancy Haines, and Virginia Matte, guardian ad litem for Mother. Although Worth's report provides no specific examples of Marquez's baseless reports of child abuse, and Judge supplied none during her testimony, Marquez conceded at trial that she made an abuse report in April 2009 even though she had not seen N. since

January 2008 and had made no effort to contact anyone connected to Mother.³

¶122 Marquez denied that she had told N. negative things about Mother, and elicited testimony from Michael Givler and Daniels, two witnesses who had supervised Father's visits with N. and had observed N. and Marquez interact. Marquez and Daniels described N.'s relationship with Marquez as loving. In addition, Daniels and Givler testified that they had never heard Marquez make negative remarks about Mother in front of N. Givler further testified that N. was "basically . . . a pretty sad child to start with" but he had not seen N. since her last visit with Marquez.

¶123 Marquez herself supplied a conciliation report as an exhibit to her Answer to Response to Deny Grandparent Visitation. That document, prepared by Court Conciliator Christine Austin on April 24, 2008, concludes that Mother should

³ Marquez acknowledged that she had met with Dr. Fox Shipley at one point. In a report dated May 14, 2007, the doctor stated:

I do not recommend contact between Mother and the paternal family unless the paternal family can demonstrate significant behavioral change [sic] which would probably require them to participate in extensive services. I do not recommend contact between them and the child.

Marquez complains on appeal that this evidence was read into the record by Mother's counsel, but Marquez never raised any objection at trial. Accordingly, she has waived the argument. See *Harris*, 215 Ariz. at 351 n.3, ¶ 24, 160 P.3d at 230 n.3.

have sole custody of N., and states that the court should consider limiting Marquez's contact with N., and terminate all contacts if Marquez violates constraints about alienating N. from Mother. Austin's report notes that Halladay, who had served as a co-guardian ad litem, had recommended the appointment of a best interests attorney "to insure that Mother could speak up about Grandmother, rather than any concerns regarding Mother." The report further states:

Ms. Halladay asserted that Grandmother's heart is in the right place, but she did not comprehend that Mother and Father are the parents, which is understandable since [sic] had the child and took on that responsibility. She acknowledged that [N.] loves Grandmother and she loves her, but her pattern in the past was serious alienation against Mother, even more than Father did. . . . She believed that the allegations made against Mother were false and that Grandmother "absolutely alienated" the child in the past.

Austin's report concludes: "This is a contentious case that involved numerous reports to CPS, all of which were unsubstantiated." Moreover,

a decision to put [N.] in Mother's primary care will not settle this issue and Father and Grandmother may continue to fight for [N.] and continue to make allegations against Mother. In a worst case scenario, Father and Grandmother might be capable of taking drastic measures to regain custody of [N.], including taking her, or other means to discredit Mother.

¶124 In evaluating whether the A.R.S. § 25-409(C) factors support the family court's decision, we find the facts would support a finding that N. had a strong relationship with Marquez, who had served as N.'s primary caregiver during her early years. See A.R.S. § 25-409(C)(1). However, there was evidence that Mother denied Marquez visitation to prevent Marquez from alienating N. from Mother. See A.R.S. § 25-409(C)(3). Although Marquez produced evidence from visit supervisors that she had not criticized Mother in N.'s presence, other evidence substantiated that Marquez had attempted to alienate N. from Mother. Mother testified that Marquez tried to engender fears in N. of a closet at Mother's house, and Austin opined that Marquez was capable of drastic action with respect to N., including taking her. See A.R.S. § 25-409(C)(2). Finally, Marquez had requested a substantial amount of visitation. A.R.S. § 25-409(C)(4).

¶125 On this record, the trial court could properly conclude that Marquez had failed to rebut the presumption that Mother's decision to forbid visitation was in N.'s best interests. So because the issue of N.'s best interests was dispositive, see A.R.S. § 25-409(A), the family court did not abuse its discretion by declining to grant visitation. See generally *Little*, 193 Ariz. at 520, ¶ 5, 975 P.2d at 110

(explaining that an appellate court upholds a decision supported by competent evidence).

II. MARQUEZ RECEIVED AN APPROPRIATE OPPORTUNITY TO INTRODUCE EVIDENCE CONCERNING THE CIRCUMSTANCES SURROUNDING HER REPORTS TO CPS AND THE POLICE.

¶126 Marquez further complains that the family court failed to permit her to introduce evidence concerning the reports Marquez and others made to CPS. She claimed that such evidence was needed to establish that Marquez had not lied to CPS when relaying concerns about N.'s treatment while under Mother's care, and that the evidence was relevant to impeachment and Mother's motivation in denying visitation.

¶127 However, Marquez fails to cite any part of the transcript in which the family court precluded her from developing such evidence. Furthermore, the police report evidence was already before the family court as an attachment to Marquez's Answer to Response to Deny Grandparent Visitation, as was the previous family court's ruling about Mother dropping N.

¶128 At trial, Marquez cross-examined Judge extensively and established that she could not provide specifics on any instance of Marquez making a false report. Marquez also elicited testimony, without objection, from Givler and Daniels that they had made independent reports to CPS regarding N.'s care.

¶129 The family court reviewed this evidence -- including the police report -- as it explicitly based its ruling upon its

review of "all of the pleadings in this matter" as well as the testimony and other evidence presented at trial. Therefore, Marquez was allowed to present evidence concerning the alleged abuse of N. and to impeach Judge on the subject despite the family court's conclusion that such evidence was irrelevant to the best interests issue.

CONCLUSION

¶30 We affirm the family court's rulings in all respects. We deny Mother's request for attorney's fees because she has failed to cite a statutory basis for the request. See *Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 172, ¶ 25, 7 P.3d 973, 978 (App. 2000). As the successful party, Mother is entitled to her costs upon compliance with ARCAP 21(c).

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

PATRICK IRVINE, Judge

/s/

MAURICE PORTLEY, Judge