IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

KIMBERLY CLARKE,
Petitioner/Appellee,

v.

CODY LEROY WILLIS,
Respondent/Appellant.

No. 2 CA-CV 2020-0161
Filed November 1, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. SP20161149
The Honorable Patricia A. Green, Judge Pro Tempore

AFFIRMED

COUNSEL

Domingo DeGrazia, Tucson
Counsel for Petitioner/Appellee

The Huff Law Firm PLLC, Tucson
By Laura J. Huff
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Cody Willis appeals from the trial court's ruling on his petition to modify the parties' visitation agreement, in which the court concluded it was in his children's best interests to continue to have visitation with their maternal aunt, Kimberly Clarke. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the record in the light most favorable to upholding the trial court's visitation order. *See In re Marriage of Friedman & Roels*, 244 Ariz. 111, ¶ 2 (2018). Cody Willis and Courtney Clarke shared two children together, C.W., born in February 2011, and H.W., born in August 2013. The children lived with Courtney and her sister, Kimberly Clarke, until Courtney's death in February 2019. At that time, the children moved into Willis's home, and Clarke filed a petition seeking primary physical custody and sole legal decision-making authority. In July 2019, the court entered a temporary order reflecting the parties' agreement that Clarke would have *in loco parentis* parenting time on alternating weekends and Wednesday evenings.

¶3 In August 2019, Willis moved to modify the temporary order, arguing Clarke had "refused to comply" with the children's "reasonable dietary requirements" and "medical routine," and refused to provide "information regarding . . . persons having contact with the children while in [her] care." The trial court denied Willis's motion but granted Clarke's motion for appointment of an advisor "to assist the Court in making its decision regarding the legal decision making and parenting time of the minor children." In October 2019, following a settlement conference, the parties agreed Willis would have sole legal decision-making authority and Clarke would have overnight visits every other weekend. Additionally, Clarke agreed to comply, subject to agreed-upon exceptions, with Willis's

instructions regarding the children's medical and dietary needs during her visits.

¶4 In December 2019, Willis moved to modify the October agreement with respect to visitation, asserting that Clarke had "refused to abide by the terms of that agreement to the detriment of the children" and requesting that he be permitted "to determine [the] frequency and duration of any visitation between the children and [Clarke]."[1] The trial court suspended Clarke's visits with the children in March 2020. In September, following a two-day hearing, the court affirmed the visitation agreement with several modifications, ordering that Clarke would have visitation with the children twice a month on alternating Saturdays and every Wednesday afternoon in June and July, but the children would not have any overnight visits with Clarke. Willis timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).[2]

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[1]Although A.R.S. § 25-411(A) prohibits "motion[s] to modify a legal decision-making or parenting time decree earlier than one year after its date," the trial court concluded this statute was inapplicable because the "visitation agreement and resulting order" did not constitute a "legal decision-making or parenting time decree." And, although Clarke argued below for denial of Willis's motion "[g]iven the short amount of time that ha[d] passed since the Agreement was reached," she does not argue in her answering brief that this statute precluded modification. In any event, we "will not reverse for alleged noncompliance with § 25-411 on appeal absent a showing of prejudice." *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 12 (App. 2000). Indeed, "[e]rrors in preliminary procedures, such as those in § 25-411, must be addressed prior to a resolution on the merits." *Id.* ¶ 11.

[2]The trial court's order adopting the parties' settlement agreement lacked finality language pursuant to Rule 78, Ariz. R. Fam. Law P., and therefore was not a final judgment. Accordingly, because the court's ruling on Willis's motion to modify at issue in this appeal stated it was a final judgment but failed to specify that "no further matters remain[ed] pending" and cite the relevant subsection as required under Rule 78(c), *cf. McCleary v. Tripodi*, 243 Ariz. 197, ¶ 7 (App. 2017) (requiring no further matters remain pending recitation and citation of subsection (c) for finality under Rule 54(c), Ariz. R. Civ. P.), we stayed the appeal until the court entered an amended ruling conforming with the rule's requirements. No final, appealable order existed in this matter until the court entered that amended ruling.

Discussion

¶5 Willis argues the trial court erred in affirming Clarke's visitation with the children "contrary to the recommendations of the children's therapist and court-appointed advisor and in the absence of any evidence to support a finding that such visitation was in their best interests." We review the court's ruling on visitation for an abuse of discretion, *see McGovern v. McGovern*, 201 Ariz. 172, ¶ 6 (App. 2001), accepting the court's findings of fact absent clear error, *see* Ariz. R. Fam. Law P. 82(a)(5); *Engstrom v. McCarthy*, 243 Ariz. 469, ¶ 4 (App. 2018). The court abuses its discretion when it commits an error of law or "when the record is 'devoid of competent evidence to support'" its decision. *Woyton v. Ward*, 247 Ariz. 529, ¶ 5 (App. 2019) (quoting *Little v. Little*, 193 Ariz. 518, ¶ 5 (1999)). We review issues of law and the application of statutory provisions *de novo*. *See Egan v. Fridlund-Horne*, 221 Ariz. 229, ¶ 8 (App. 2009).

¶6 Under A.R.S. § 25-409(C), the trial court may grant visitation rights to a person other than a child's legal parent if it finds "visitation is in the child's best interests" and any one of four enumerated prerequisites, including that "[o]ne of the [child's] legal parents is deceased," is fulfilled. When assessing whether to grant third-party rights, courts should "apply a presumption that a fit parent acts in his . . . child[ren]'s best interest[s] in decisions concerning the child[ren]'s care, custody, and control, including decisions concerning" third-party visitation. *McGovern*, 201 Ariz. 172, ¶ 17. A nonparent seeking visitation "has the burden of rebutting the presumption that a decision made by a fit parent to deny or limit visitation was made in the child[ren]'s best interest[s]."[3] *Id.* (quoting *Crafton v. Gibson*, 752 N.E.2d 78, 96-97 (Ind. Ct. App. 2001)).

¶7 Further, in determining whether to grant third-party visitation, the trial court "shall give special weight to the legal parents' opinion of what serves their child's best interests and consider all relevant factors including" the following:

[3] Because the trial court presumed Willis's request to terminate Clarke's visitation was in the children's best interests but found that presumption rebutted, we need not determine what level of deference, if any, a fit parent is afforded in visitation modification proceedings. Thus, we assume without deciding that the standards governing an initial third-party-visitation determination apply in this case.

> 1. The historical relationship, if any, between the child and the person seeking visitation.
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> 2. The motivation of the requesting party seeking visitation.
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> 3. The motivation of the person objecting to visitation.
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> 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 deceased, the benefit in maintaining an extended family relationship.

§ 25-409(E); *see McGovern*, 201 Ariz. 172, ¶ 18 (court must give "some special weight" to fit parent's determination of whether visitation is in children's best interests and "'significant weight' to a parent's voluntary agreement to some visitation" (quoting *Troxel v. Granville*, 530 U.S. 57, 70, 72 (2000))).[4] Courts should not enter visitation orders "'based solely on the judge's determination of the child's best interests' or on the judge's 'mere disagreement' with a fit parent's choice." *McGovern*, 201 Ariz. 172, ¶ 19 (quoting *Troxel*, 530 U.S. at 67-68).

¶8 Here, the trial court found "[t]he children have a significant relationship" with Clarke. Supporting this finding, the court noted the court-appointed advisor's statement that "[b]oth children enjoy the freedom afforded them at [Clarke's] house. They like to visit there, see old

[4]Both parties rely on *Goodman v. Forsen*, 239 Ariz. 110, ¶¶ 13, 14 (App. 2016)—Willis for the proposition that "special weight" means a "parent's determination regarding nonparent visitation 'is controlling unless a parental decision clearly and substantially impairs a child's best interests,'" and Clarke for the proposition that a "nonparent must prove that the child's best interests will be substantially harmed absent judicial intervention." However, in *Marriage of Friedman & Roels*, 244 Ariz. 111, ¶¶ 19, 20, our supreme court rejected *Goodman*'s "broader interpretation of 'special weight'" and held that a nonparent need not be subject to "a heightened burden of proof beyond that required under *Troxel* and *McGovern*."

friends, play [games] on a large tv, ride scooters, jump on the trampoline, [and] see their half-brother . . . . [Clarke] helps them remember their mom." The court also found Clarke's motivation in seeking visitation was to continue her relationship with the children, "along with the children's relationship with their older brother who lives with [her]" and "other family members on Mother's side." And, it acknowledged Willis's objection to visitation was based on Clarke's failure to "follow the rules he has in place in his home," including dietary restrictions and bedtime, the fact that she allows the children to "have contact with people he does not know," and her "failure to turn over personal property that Mother and/or [Clarke] . . . purchased for the children to use in their home." The court ultimately concluded "it is in the children's best interests that [Clarke] continue to have visitation with the children," noting that they had "expressed a desire for some contact, and it is unlikely that [Willis] will allow any contact without a formal court order."

¶9 Willis argues "[a]ll evidence and testimony presented at the visitation hearing indicated that [he] is a fit and appropriate parent who acts in the minor children's best interests and was competent to and should determine when [Clarke]'s visits with the minor children should occur," and by ordering him to provide Clarke visitation with the children, the trial court "effective[ly] diminish[ed]" his parental rights. And, he contends Clarke failed to present evidence "rebutt[ing] the presumption that [he], as a fit parent, was not acting in the children's best interests in limiting her time with" them. Specifically, he argues the evidence establishes that Clarke "undermines [his] parental authority, encourages the children to lie to him, disregards the dietary guidelines for the children that make them feel better and improve their health, and refuses to allow the children to take their belongings—including [H.W.]'s comfort item given to her by her mother—with them to [his] home." In addition, he contends the evidence shows that Clarke disregards court orders, fails to communicate with him regarding the children, and exercises "questionable judgment" in her personal life.

¶10 Supporting his argument, Willis points to evidence indicating Clarke knew about the children's dietary restrictions but disregarded them and provided "access to desserts and sweets." Further, he points to the court-appointed advisor's statement that Clarke violates his visitation rules by encouraging the children to lie or withhold information from him "regarding what they did, who they were with, and what they ate" and undermining his parenting. He also points to the advisor's opinion that "[t]here is no reason not to allow [Willis] . . . to make decisions regarding

the best interests of the children including decisions about appropriate visitation between the children and their aunt." Additionally, Willis emphasizes the advisor's statements that Clarke is "very critical of [Willis], his rules, [and] his household," "does not believe his dietary restrictions are supported by medical professionals, and believes his rules are excessive." And, he highlights the children's grief counselor's conclusions that they "should no longer be exposed to the risks to their emotional and medical health that they have experienced during ordered visits with" Clarke, and "future visitations [should] be supervised, and solely at [Willis]'s discretion."

¶11 In response, Clarke argues that the trial court "gave proper consideration to [Willis]'s 'fit parent' wishes" and that Willis "incorrectly asserts that the fit parent standard requires rebuttal for the court to make a best interest finding that is contrary to the wishes of the parent." Specifically, Clarke argues that even if her "in loco parentis standing and the court's previous best-interest findings did not rebut the fit parent presumption," the presumption is "not controlling on the court's decision [as to] what ultimately constitutes the best interests of the minors." Moreover, she contends, the evidence is sufficient to support the court's finding that visitation is in the children's best interests, asserting the "facts show the children have a significant bond with their aunt who is their connection to their maternal family."

¶12 As an initial matter, Clarke does not appear to dispute the trial court's implicit finding that Willis is a "fit parent" entitled to the benefit of the presumption that he acts in his children's best interests. *See McGovern*, 201 Ariz. 172, ¶ 17. And, we note that the court acknowledged and applied the presumption that Willis "has and will continue to make decisions that are in the children's best interest" and stated that it gave deference to his position in considering whether to grant Clarke visitation. But, to the extent Willis contends that because he is a fit parent his decisions about visitation are controlling, we disagree. *See id.* ¶¶ 17, 18, 19 (evidentiary presumption and "special weight" requirement "affect but do not necessarily control" court's determination of best interests).

¶13 Moreover, competent evidence supports the trial court's ruling affirming Clarke's visitation with C.W. and H.W. Contrary to Clarke's suggestion, "a determination regarding visitation by a nonparent must include specific consideration of the child's best interests"; it is not sufficient to merely show that a nonparent stands *in loco parentis* to the child. *Egan*, 221 Ariz. 229, ¶ 32. However, the parties presented evidence that

C.W. and H.W. had lived with their mother and Clarke for the entirety of their lives until their mother passed away. *See* § 25-409(E)(1). Further, the court found Clarke's motivation in seeking visitation was to continue the relationship between the children and the maternal side of their family, including the children's half-brother who lives with Clarke. *See* § 25-409(E)(2). Indeed, Clarke testified that, to her knowledge, the children do not "have any contact with [her] side of the family other than through [her]." *See* § 25-409(E)(5). And, although the court found that Willis's objection to court-ordered visitation was based on Clarke's "failure to follow his rules when the children are in her physical care," Clarke testified she had "done [her] best . . . to accommodate" the children's dietary restrictions and did not "have any problem going forward with complying with the terms of the agreement as [she] did in the past." *See* § 25-409(E)(3), (4).

¶14 Additionally, the children's counselor testified that both C.W. and H.W. had stated they would like to see Clarke "sometimes but not overnight and not [for] a long time." Clarke testified she facilitates contact between the children and friends "they've had most of their life," and, to her knowledge, the children had not had "any contact with these friends aside from in [her] home." Further, contrary to Willis's argument that "[t]he record is devoid of any testimony or evidence that [he] would not permit the children to visit with" Clarke, he testified that he did not "believe the [visitation] agreement was in the children's best interest," and although he had been allowing virtual visits, he had "not allowed any in-person [visitation] at all between [Clarke] or any of the other family since March" of 2020. *See Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 429 (App. 1977) ("A finding of fact cannot be clearly erroneous if there is substantial evidence to support it, even though there also might be substantial conflicting evidence.").

¶15 To the extent Willis points to conflicting testimony and evidence supporting his position, we do not reconsider the trial court's assessment of witness credibility or reweigh the evidence on appeal. *See Clark v. Kreamer*, 243 Ariz. 272, ¶ 14 (App. 2017); *Gutierrez v. Fox*, 242 Ariz. 259, ¶ 49 (App. 2017). On this record, the court did not abuse its discretion by affirming the parties' agreement with regard to Clarke's visitation with C.W. and H.W. *See McGovern*, 201 Ariz. 172, ¶ 6.

Costs on Appeal

¶16 As the prevailing party, Clarke is entitled to her taxable costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.

Disposition

¶17 For the foregoing reasons, we affirm.