IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ALMA KITAGAWA AND JIMMY KITAGAWA,
Petitioners/Appellees,

v.

ALESKA TARIN,
Respondent/Appellant.

No. 2 CA-CV 2021-0105-FC
Filed November 15, 2022

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NOT FOR PUBLICATION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 Pinal County
No. S1100DO202001050
The Honorable Richard T. Platt, Judge Pro Tempore
The Honorable Kelly Neal, III, Judge Pro Tempore

AFFIRMED

COUNSEL

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By Regina M. Pangerl
Counsel for Petitioners/Appellees

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By Katherine A. Winkley
Counsel for Respondent/Appellant

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Aleska Tarin appeals from the trial court's order granting third-party visitation with her daughter, R.T., to appellees Alma and Jimmy Kitagawa. We affirm.

Factual and Procedural Background

¶2 We view the record in the light most favorable to supporting the trial court's visitation order. *In re Marriage of Friedman & Roels*, 244 Ariz. 111, ¶ 2 (2018). The Kitagawas are R.T.'s maternal great-grandparents. R.T., who was born out of wedlock, resides with Tarin. The Kitagawas filed a petition for third-party rights over R.T. in July 2020, and eventually personally served Tarin in December 2020.

¶3 All parties appeared telephonically at a review hearing in January 2021, and the trial court scheduled another telephonic review hearing for February 2021. The minute entry issued after the January hearing stated:

> The Court advises the parties that they shall appear telephonically at the next hearing. However, the parties must contact this Court's Judicial Assistant . . . with a telephone number, not less than two judicial days prior to the hearing.
>
> The Court shall initiate the call as near to the scheduled time as the Court's calendar permits.
>
> Parties are responsible for ensuring that they have a good connection and that they are available for the hearing. If the Court is unable to reach a party at the time of the hearing, or if the connection is inadequate, the Court may proceed with the hearing in the party's absence.

¶4 Tarin filed her response contesting the Kitagawas' petition, claiming that it is not in R.T.'s best interests for the Kitagawas to have any third-party rights. Her response alleged that Alma "always threatened to take [Tarin's] daughter away if [Tarin] didn[']t respond to her," that Tarin did "not feel comfortable" with Alma around her daughter, and that it is "a toxic envi[ro]nment when Alma is always projecting negative comments." No more specific allegations were provided.

¶5 All parties attended the February review hearing telephonically, at which the trial court set an evidentiary hearing for April 2021. The minute entry issued after the February hearing repeated the instructions that the parties must provide a phone number ahead of time, the court will initiate the call, the parties are responsible for ensuring they are available and have a good connection, and the court may proceed without them if the court is unable to reach them. It further warned:

> Failure of a party to appear may result in the Court allowing the party who does appear to proceed in the absence of the other party. Failure to present the Pretrial Statement in proper form and in a timely manner, without good cause, shall result in the imposition of any or all sanctions pursuant to [Rule 76.2, Ariz. R. Fam. Law P.], including proceeding to hear this matter by default based upon the evidence presented by the appearing party.
>
> Failure of both parties to appear may result in the matter being dismissed.

¶6 The parties filed pre-trial statements with lists of exhibits before the evidentiary hearing. According to the minute entry, the Kitagawas appeared at the hearing telephonically and Tarin did not appear either personally or through counsel. The minute entry for the evidentiary hearing states "the Court attempted to contact [Tarin] via telephone without success." The court proceeded without Tarin, and the Kitagawas offered exhibits and testimony. It also adopted temporary orders granting visitation to the Kitagawas on the third weekend of each month, from 9:00 a.m. on Saturday to 5:00 p.m. on Sunday, and took the matter of final orders under advisement.

¶7 The next day, Tarin filed a motion for reconsideration and request for hearing, explaining that she "was not present during the trial . . . due to telephone difficulties," and she "did not rec[ei]ve a call on [her]

end." She also stated that she "[did] not feel it is safe for [R.T.] to stay overnight at Alma's house" because R.T. "is not familiar with Alma[']s environment," claimed that there is "speculation of a convicted felon living in [Alma's] house," and alleged that Alma did not want to release R.T. to Tarin during their last visit. Tarin also attached screen shots of her cell phone purporting to show her own attempts to call the trial court during the evidentiary hearing. The court summarily denied the motion.

¶8 In June 2021, the trial court granted the Kitagawas permanent visitation rights in accord with the earlier temporary orders, finding that the ordered visitation is "appropriate and in the child's best interests." Tarin appealed. We suspended the appeal to permit Tarin time to obtain a judgment including finality language required by Rule 78(c), Ariz. R. Civ. P. Final judgment was thereafter entered. We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and 12-120.21(A)(1).

Analysis

¶9 On appeal, Tarin argues that the trial court violated her "due process right to provide evidence and testimony in opposition to the Petition for Third Party Rights by failing to take additional steps to ensure her appearance or resetting the hearing." Tarin also contends that the court "must hear evidence when the best interest of Minor Children is at issue," and the court's "refusal to allow her to participate fully in this matter" prevented it from properly considering the best interests of the child.

¶10 "We review the interpretation of statutes and constitutional issues de novo." *Marriage of Friedman*, 244 Ariz. 111, ¶ 11. "[T]he decision to award visitation rests within the family court's discretion upon finding that visitation is in the child's best interests," and "we will not disturb the court's decision absent an abuse of discretion in making the best-interests finding." *Id.* ¶ 36. We review a court's decision to deny a motion for reconsideration for abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, ¶ 6 (App. 2001). A court abuses its discretion if it "commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or the record fails to provide substantial evidence to support the trial court's finding." *Duckstein v. Wolf*, 230 Ariz. 227, ¶ 8 (App. 2012) (quoting *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, ¶ 27 (App. 2007)).

Due Process

¶11 Due process encompasses a party's right to notice of proceedings and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S.

319, 348 (1976). Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Instead, the opportunity to be heard is "tailored to the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970), meaning that, in light of the decision to be made, the trial court's procedures must ensure that a person is given a meaningful opportunity to present his case, *Mathews*, 424 U.S. at 349. Generally, as in this case, when a court must make factual determinations, it must provide an opportunity for the parties to present testimony and challenge the testimony of their opponent. *Volk v. Brame*, 235 Ariz. 462, ¶¶ 14-17 (App. 2014) (explaining that *Goldberg*'s holding "goes to the essence of the courts' function and it applies with equal force in all judicial proceedings"); *Goldberg*, 397 U.S. at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

¶12 On appeal, Tarin asserts that she was denied the opportunity to be heard at the evidentiary hearing when the trial court went forward with the hearing in her absence. She relies principally on *Volk*, 235 Ariz. 462. In *Volk*, the trial court violated Father's due process rights when it limited an evidentiary hearing to fifteen minutes, would only consider documents Father submitted, and "expressly rejected" Father's efforts to testify. *Id.* ¶¶ 14, 19-22. There, we explained, "[w]hen the court allows *no* time to hear testimony, or when the time available for each necessary witness does not allow for meaningful direct testimony and efficient but adequate cross-examination, the court violates the parties' due process rights." *Id.* ¶ 21.

¶13 Tarin argues, similarly, that "the Court's actions eliminated her opportunity to provide evidence and testimony that would support her position to deny third party rights." She claims that the trial court did not call her and that she attempted to call the court herself because she "became concerned that the Court might be having trouble reaching her." To be sure, if the court *excluded* Tarin from the evidentiary hearing, intentionally or otherwise, Tarin's comparison to *Volk* would have merit. However, Tarin offers no evidence in the record that the court did any such thing. The minute entry from the evidentiary hearing reflects that "the Court attempted to contact [Tarin] via telephone without success." Neither the minute entry nor the record shows if Tarin provided a phone number to the court before the evidentiary hearing as instructed, or what phone number the court attempted to call at the outset of the evidentiary hearing.

¶14 In her motion for reconsideration, Tarin provided the trial court with "screen shots" of her multiple calls to the court after the evidentiary hearing had begun. However, she provided no evidence, such as phone records, demonstrating that the court did not call her as stated in the minute entry. In the absence of any evidence in the record to the contrary, we presume that the minute entry accurately reflects what the court did.[1] *See State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16 (App. 2003); Ariz. R. Civ. App. P. 11(c). The court therefore did not have any basis to reconsider its decision, nor do we have a basis to second-guess the court here.

¶15 This case is, therefore, unlike *Volk*. There, in the evidentiary hearing, the trial court "expressly rejected" a party's efforts to testify and thereby denied him the meaningful opportunity to be heard. *Volk*, 235 Ariz. 462, ¶ 14. Here, the court provided Tarin an opportunity to be fully heard by setting an evidentiary hearing, it warned her of the consequences of non-attendance, and, had Tarin attended, we presume that the court would have given her at least the same opportunity as the Kitagawas to testify and present evidence.

Best-Interests Analysis

¶16 Tarin also argues that, "[i]n addition to due process rights, Courts in this state have held that the Court must hear evidence when the best interest of Minor Children is at issue," and the trial court's "refusal to allow her to participate fully in this matter" violated her "rights . . . to present evidence and testimony in matters involving custody, parenting time, and the best interest of the child." We examine, then, whether the court abused its discretion in finding that visitation was in R.T.'s best interests without hearing from Tarin.

¶17 Tarin relies on *Hays v. Gama*, 205 Ariz. 99, ¶ 22 (2003). In *Hays*, the trial court had imposed evidentiary sanctions on the mother in a

[1]Tarin also argues that the parties were not "permitted to appear in person at the courthouse due to . . . COVID-19 restrictions," and "[b]ut for the COVID-19 restrictions, she would have appeared in person at the time of the hearing and presented her case." This claim is unpersuasive because Tarin appeared at prior telephonic hearings without issue, and aside from her allegation that the court did not call her (or answer her calls), she raises no other defect or failure in the proceedings that would suggest that holding a telephonic hearing violated her right to due process. *See Tracy D. v. Dep't of Child Safety*, 252 Ariz. 425, ¶ 38 (App. 2021).

child-custody matter, thereby excluding her evidence bearing on the best-interest factors in A.R.S. § 25-403. *Id.* ¶¶ 21-23. Our supreme court held that such sanctions under the circumstances were improper because "the child's best interest is paramount in custody determinations" and the court "unnecessarily interfered with its duty to consider the child's best interest in determining custody" by "effectively preclud[ing] potentially significant information from being considered in the custody determination." *Id.* ¶¶ 18, 22. Tarin argues that *Hays*'s holding means "that the superior court must hear evidence that pertains to the best interest of the minor child, despite a party's failure to comply with rules . . . or procedure." We disagree with this characterization of *Hays*'s holding and its application to this case.

¶18 In *Hays*, the court barred the party from providing evidence necessary for the court to determine the child's best interests. Here, as we explained above, the trial court provided Tarin the opportunity to provide evidence and testimony in opposition to the Kitagawas' petition for visitation, but she failed to attend. *Hays* is therefore factually distinct.

¶19 Under A.R.S. § 12-409(C), the trial court "may grant visitation rights . . . on a finding that the visitation is in the child's best interests" and on finding at least one of four other listed factors. Unlike in a custody (parenting time and legal decision-making) determination, the court is not required to make specific best-interests findings on the record. *Compare* A.R.S. § 25-403(B) ("In a contested legal decision-making or parenting time case, the court shall make *specific findings on the record* about all relevant factors and the reasons for which the decision is in the best interest of the child.") (emphasis added), *with* A.R.S. § 25-409(C) ("The superior court may grant visitation rights during the child's minority *on a finding* that the visitation is in the child's best interest.") (emphasis added).

¶20 Here, the Kitagawas asserted that visitation was in R.T.'s best interests in their petition for third-party rights, which resulted in the temporary order granting them visitation. Tarin made it clear in her response to the Kitagawas' petition, and in her motion for reconsideration, that she did not believe visitation was in R.T.'s best interests. Then, following the evidentiary hearing for final orders, at which the trial court considered the evidence and case history, observed the witnesses' demeanor, and reviewed the exhibits—and "after significant deliberation"—the court affirmed its earlier granted visitation as "appropriate and in the child's best interests." Tarin cites no authority, and we are aware of none, that suggests that these findings, albeit spare, are insufficient under § 25-409(C).

Attorney Fees on Appeal

¶21 The Kitagawas request attorney fees and costs incurred on this appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P. Section 25-324(A) requires us to consider the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings. Neither party has taken unreasonable positions in this appeal, and we do not have sufficient information before us to compare the financial positions of both parties. Therefore, each party shall bear its own fees on appeal. *Solorzano v. Jensen*, 250 Ariz. 348, ¶ 14 (App. 2020). The Kitagawas, however, as prevailing parties on appeal, are entitled to their costs upon compliance with Rule 21. *In re Marriage of Margain & Ruiz-Bours*, 251 Ariz. 122, ¶ 27 (App. 2021).

Disposition

¶22 For the foregoing reasons, we affirm.