Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2012-000709 07/13/2012

HONORABLE JANICE CRAWFORD

CLERK OF THE COURT
J. Escarcega
Deputy

IN RE THE MATTER OF
JANNELL GAIL DUDDING

J VINCENT GONZALEZ

AND

MILES DEARTH

MILES DEARTH
1044 S 76TH PL
MESA AZ 85208

APRIL MCCOLLUM
1044 S 76TH PL
MESA AZ 85208

UNDER ADVISEMENT RULING

This matter was taken under advisement after an evidentiary hearing on July 11, 2012 on Petitioner/Paternal Grandmother's Petition for Grandparent Visitation. The Court has considered the testimony of the witnesses, including the parties, the evidence presented and, after significant deliberation, makes the following Findings and enters the following Orders.

Respondents are Mother, April McCollum, and Father, Miles Dearth. Paternal Grandmother seeks an order permitting her to have visitation with the minor child Paige Dearth (born 04/07/2008) to Mother and Father. Mother and Father are not, and have not been married. Paige has lived with both Mother and Father since her birth.

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GRANDPARENT VISITATION

The child who is subject to this order is Paige M. Dearth (born 04/07/2008). Jannell G. Dudding is the natural paternal grandmother of Paige and seeks visitation with Paige. The Court must determine whether granting visitation is in Paige's best interests, and if so, under what terms and conditions.

Jurisdiction

The determination of grandparent visitation is controlled by statute. A.R.S. § 25-409. Under A.R.S. § 25-409(A), this Court may award a grandparent reasonable visitation rights if visitation would be in the child's best interests, as long as one of the following is true:

> 1. The marriage of the parents of the child has been dissolved for at least three months.
>
> 2. A parent of the child has been deceased or has been missing for at least three months. For the purposes of this paragraph, a parent is considered to be missing if the parent's location has not been determined and the parent has been reported as missing to a law enforcement agency.
>
> 3. The child was born out of wedlock.

THE COURT FINDS that it has jurisdiction because the child was born out of wedlock.

Constitutional and Statutory Factors

Because this Court has jurisdiction to consider Paternal Grandmother's request for visitation with Paige, the Court must consider all relevant factors, including those factors enumerated in A.R.S. § 25-409(C). Further, the consideration of these issues must also be in the context of certain constitutionally safeguarded principles.

Constitutional Factors

Court-ordered visitation under A.R.S. § 25-409 touches upon a parent's fundamental right to the custody and control of his or her child. *See Graville v. Dodge*, 195 Ariz. 119, 123-25, ¶¶

19-23, 985 P.2d 604, 608-10 (App.1999). In *McGovern v. McGovern*,[1] the Court addressed A.R.S. § 25-409. As applied, *McGovern* said:

> [W]e distill the following constitutionally based principles that a trial court should . . . follow in determining and quantifying grandparent visitation rights under § 25-409. First, the court should recognize and apply a presumption that a fit parent acts in his or her child's best interest in decisions concerning the child's care, custody, and control, including decisions concerning grandparent visitation.. . . That presumption, however, is rebuttable.
>
> Second, a trial court must consider and give "some special weight" to a fit parent's determination of whether visitation is in the child's best interest and give "significant weight" to a parent's voluntary agreement to some visitation, albeit not as much visitation as the grandparent desires.. . . The amount of weight a trial court should place on these factors is not entirely clear because *Troxel's* plurality opinion "does not describe precisely the extent to which [a parent's decision on visitation] will control" and "left that issue for development on a case-by-case basis."
>
> Nonetheless, the evidentiary presumption and weight requirements, in our view, should help avoid 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. In sum, the foregoing principles affect but do not necessarily control a trial court's determinations of "best interests of the child" and "reasonable [grandparent] visitation rights" under our statute.
>
> In our view, a parent's willingness to allow some visitation is but one factor to consider under § 25-409. As noted above, a trial court should give "significant weight" to that fact. As long as the trial court extends the aforementioned safeguards and makes the necessary findings pursuant to § 25-409, however, the statute permits the court to grant "reasonable [grandparent] visitation rights," which may vary from those agreed to or urged by the parent.

[1] *McGovern v. McGovern*, 201 Ariz. 172, 33 P.3d 506 (App. 2001), *review denied*, *certiorari denied*, 536 U.S. 959 (2002).

Statutory Factors

Grandparents have no constitutional right to visitation with their grandchildren. Such rights are limited to those conferred by statute. As for the statutory provisions, the Court is required to makes specific findings in accordance with A.R.S. § 25-409(C). The Court does so while remaining mindful of the parent's determination of whether visitation is in their child's best interest.

1. *The historical relationship, if any, between the child and the person seeking visitation.*

Based on the credible evidence, Paternal Grandmother had visitation with Paige on approximately 9 separate occasions between Paige's birth in April 2008 and April 2009. Paternal Grandmother has had only 1 visit with Paige since Mother and Father relocated to Arizona with Paige in or around April 2009 without telling Paternal Grandmother. Since the relocation, Paternal Grandmother had 1 visit with Paige during the 2010 Thanksgiving holiday.

Paige has never been in Paternal Grandmother's care without Mother and Father being in the near proximity. Paternal Grandmother's visitation with Paige has always occurred during visits with Mother and Father.

Paternal Grandmother has tried to maintain communications and a relationship with Paige by sending cards and gifts on appropriate occasions. Paternal Grandmother has also provided financial assistance for daycare expenses, although Father and Mother question Paternal Grandmother's motives in sending them money.

2. *The motivation of the requesting party in seeking visitation.*

The Court believes that Paternal Grandmother's motivation is based on her sincere desire to have a relationship with Paige.

3. *The motivation of the person denying visitation.*

Mother and Father are adamantly opposed to Paternal Grandmother having visitation with Paige. Mother and Father both testified that Paternal Grandmother criticizes and belittles Father. Father testified that he feels bad every time he sees Paternal Grandmother because of how she treats him and what she says to him. The significant level of conflict between Father

and Paternal Grandmother was very noticeable during Father's cross-examination of Paternal Grandmother and extends well beyond the present litigation. Credible evidence indicates that Paternal Grandmother's and Father's relationship has been strained since Father was a teenager.

The Court gives significant weight to this factor because Mother and Father are, and have been, in a relationship, are raising Paige together, and are both strongly opposed to the visitation. As such, this is not the typical grandparent visitation case.

4. *The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities.*

Paternal Grandmother seeks an order for visitation as follows: (1) several days over the Thanksgiving holiday; (2) one week during the Christmas holiday; and (3) four weeks during the summer. Considering the historical relationship between Paige and Paternal Grandmother, and considering Paige's age, Paternal Grandmother's request is excessive. In addition to Mother's objection to any visitation, Mother objects to the amount of requested visitation as too much time and taking away from the family's time together during important holidays.

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

This factor does not apply. However, as this is not the typical grandparent visitation case, Father's determination not to maintain an extended family relationship with Paternal Grandmother is entitled to special weight.

Based upon *McGovern* and A.R.S. § 25-409, this Court has considered all relevant factors regarding Paige's best interests, but has done so giving deference to Mother's and Father's position. This Court accepts and has applied the presumption that the parents have and shall continue to make decisions that are in the child's best interests. Because the presumption is rebuttable, the Court also considers Paternal Grandmother's evidence to support visitation with Paige.

Paternal Grandmother's historic visitation with Paige is not extensive enough to overcome the presumption that Mother's and Father's decision not to allow grandparent visitation is in Paige's best interest. Further, there was no evidence showing that Paige wants or needs a relationship with Paternal Grandmother. While the Court believes that Paternal Grandmother is sincere in her desire to have a relationship with Paige, the circumstances and

credible evidence in this case do not overcome the presumption that Mother's and Father's decision is in Paige's best interest.

THE COURT FINDS that Paternal Grandmother has not overcome the presumption that Mother and Father are acting in Paige's best interest by refusing to allow Paternal Grandmother to have visitation with Paige.

THE COURT THEREFORE FINDS that, after considering all relevant factors, including those expressly outlined in A.R.S. § 25-409(C), it is not in Paige's best interests that Paternal Grandmother have court ordered visitation with Paige.

IT IS THEREFORE ORDERED that pursuant to A.R.S. § 25-409, Paternal Grandmother's request for court-ordered visitation is denied.

During the hearing, Paternal Grandmother requested an order that Mother and Father keep Paternal Grandmother informed of their current address and contact information. The Court is sympathetic to Paternal Grandmother's want to know where her Granddaughter is living. However, the Court is not aware of any legal authority by which such an order would be appropriate. Accordingly,

Paternal Grandmother's request for an order that Respondents keep Petitioner advised as to where they are living is **denied**.

FILED: Exhibit Worksheet

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, *Arizona Rules of Family Law Procedure*.

DATED the 13th day of July, 2012

/s/ Janice K. Crawford

_____

HONORABLE JANICE K. CRAWFORD
JUDICIAL OFFICER OF THE SUPERIOR COURT

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter.