

Survey of Family Law Cases 2004-2013

2006 Family Law Survey

PARENTAL AUTHORITY AND ITS LIMITS

In *In re the Marriage of McSoud*, Mother appeals from Permanent Orders allocating decision-making responsibilities regarding medical and religious issues to Father, from the Order denying her motion for relief under C.R.C.P. 59 and 60, and from the Order denying her C.R.C.P. 97 motion to disqualify the court.

Mother argues that deficiencies in the record caused by malfunctioning recording equipment deprived her of meaningful appellate review. If a transcript is unavailable, a party may prepare a statement of the proceedings based on her recollection of event. If a party fails to reconstruct the record, as Mother did here, the party may not thereafter complain that the record is inadequate.

Mother argues that the trial court abused its discretion in granting decision-making authority relative to medical issues to Father. The court must allocate parental responsibilities, including decision-making responsibilities, in accordance with the best interests of the child. After considering the parties' inability to cooperate and to make decisions jointly, the court concluded shared decision-making was not in the best interests of the child.

Mother argues that the trial court violated her First and Fourteenth Amendment rights by granting decision-making responsibilities regarding religion to Father and restricting her influence on Child's religious upbringing. The Permanent Orders, which adopted the special advocate's recommendation restricting Mother's right to take Child to church with her unless she supports the religion chosen by Father, are unconstitutional. A parent's right to determine the religious upbringing of a child derives from a parent's right to exercise religion freely and a fundamental right to make decisions regarding the care, custody and control of their children. If an exercise of parental responsibilities causes actual or threatened, physical or emotional harm, to a child, then a compelling state interest sufficient to permit state interference with parental rights is found.

Thus, "in the absence of a demonstrated harm to the child, the best interests of the child standard is insufficient to serve as a compelling state interest overruling the parents' fundamental rights," such as the right to exercise religion. Although *In re the Marriage of Ciesluk* addresses parents' constitutional right to travel, the Court remands for further findings in light of extending *Ciesluk* to religious upbringing issues.

Husband appeals post-dissolution orders in *In re the Marriage of Dauwe*. The trial court granted equal parenting time, and joint decision-making, but allowed Wife to obtain therapy for the children without Husband's prior notice and consent. It ordered a parenting coordinator and the special advocate was ordered to remain on the case. It denied Husband's request for release of documents within the special advocate's file.

The Court of Appeals determined that the record demonstrated the children needed a forum to express their emotional issues, and the Order permitting Wife to obtain therapy for the children simply made a determination concerning a long-standing disputed issue between the parties.

Husband argued that he was denied due process when the court quashed a subpoena for one of his potential witnesses. Since Husband was granted the parenting time he sought without the potential witnesses' testimony, the Court found he was not prejudiced, nor denied due process.

Standard 12 of the Chief Justice Directives states that the special advocate shall provide underlying data or reports; however, the comment to this standard states the special advocate should inform the court if he or she believes that releasing their files would endanger any person's welfare and await direction from the Court. In this case, the court found that releasing the file would endanger the children.

The Court of Appeals declined to address termination of the special advocate and appointment of the parenting coordinator since these issues are now respectively moot and statutorily altered.

In sum, a parenting coordinator may "help [parents] realistically identify the sources and causes of conflict between them; and help them develop parenting strategies to minimize conflict" but a parenting coordinator does not have arbitration powers, nor are they permitted "to make decisions or resolve disputes that parents are unable to resolve."

In *In re the Petition for the Adoption of C.A.*, C.A.'s paternal grandparents, Petitioners, conditionally objected to the adoption of C.A. by C.A.'s maternal aunt and uncle, following the death of each of C.A.'s parents. Petitioners sought visitation rights under Colorado's grandparent visitation statute. The magistrate granted the adoption and despite C.A.'s adoptive parents' objections, ordered visitation with the grandparents. On appeal, the Court of Appeals concluded that due process of law requires proof "...that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child," and that such harm must be "substantial" in order for a grandparent to obtain a visitation order.

Thus, the Colorado Supreme Court held that, pursuant to the "special weight" and "special factors" requirements of *Troxel v. Granville*, and the General Assembly's "best interests of the child" intent, the appropriate standard for issuance of an order for grandparent visitation requires: (1) a presumption in favor of the parental visitation determination; (2) to rebut this presumption, a showing by grandparents through clear and convincing evidence that the parental visitation decision is not in the child's best interests; and (3) placement of the ultimate burden on grandparents to establish by clear and convincing evidence that the visitation schedule they seek is in the best interests of the child. The court must apply this standard in grandparent visitation actions and, if it orders grandparent visitation, it must make findings of fact and conclusions of law identifying those "special factors" on which it relies. A showing of harm is not required.

In *In re the Marriage of Yates*, Husband argues that the trial court erred in permanent orders when it awarded maintenance, primary parenting time and sole decision-making to Wife, despite her convictions for felony menacing as to Husband and misdemeanor child abuse as to Child.

A court may order maintenance as it deems just after considering all relevant factors, including the financial resources of the party seeking maintenance; the recipient's future earning capacity; the standard of living established during the marriage; the duration of the marriage; the age and condition, physical and emotional, of the spouse seeking maintenance; and the ability of the other spouse to meet the needs of the spouse seeking maintenance. The trial court's findings support both the award of permanent maintenance to Wife and the denial of maintenance to Husband. Further, the order requiring Husband to

pay a portion of the parties' attorney fees is reasonable in light of the equitable purpose of C.R.S. § 14-10-119.

Addressing minor issues, the court held there was no error when the special advocate filed pleadings and participated as an attorney to obtain her fees since both attorneys approved these procedures. Also, the trial court did not conclude the parties were an imminent threat to each other, nor was the order entered on the statutorily appropriate forms, thus it was an error to issue a permanent injunction enjoining the parties from being within ten yards of each other and requiring Husband to attend anger management therapy. This matter must be remanded.

The Court of Appeals held: (1) whether a parent has been a perpetrator of child abuse or spousal abuse must be considered when allocating parenting time, and decision-making responsibilities; (2) a finding that a parent has been a perpetrator of child abuse or spousal abuse does not bar an award of parenting time or decision making responsibility to that parent; (3) both counsel agreed to a time limitation to present their cases, thus Husband's attorney's management of that time could bind the client; (4) there was no abuse of discretion in imputing income to Husband since income is defined as "actual gross income of a parent, if employed to full capacity, or potential income, if unemployed or underemployed."

Father appeals from an order allowing Mother to relocate with Children in *In re the Marriage of Dezalia*. Father argued that since both parents shared parenting time and decision-making, C.R.S. §14-10-129(1)(a)(II) did not apply, neither did the best interests of the child standard, and thus the court should have applied the endangerment standard of C.R.S. §14-10-129(1)(b)(I).

Generally, parenting time is modifiable whenever it would serve the best interests of the child. C.R.S. §14-10-129(1)(a)(II) provides for modification of parenting time when the parent with the *majority* of the parenting time seeks to relocate. But neither C.R.S. §14-10-129 nor *In re the Marriage of Ciesluk* addressed a situation where parents *share* parenting time and one parent seeks to relocate. The endangerment standard, presented in C.R.S. §14-10-129(1)(b)(I), states that parenting time may not be restricted unless the parenting time would endanger the child's physical health or significantly impair the child's emotional development. Relocation affects both the relocating parent's right to travel and the remaining parent's right to parent the child. Utilizing the endangerment standard would create a presumption in the non-relocating parent, making it significantly more difficult to meet the burden to relocate.

In sum, to protect the best interests of the child, the relocating parent's right to travel, the remaining parent's right to parent the child, and the intent of C.R.S. §14-10-129, the portions of C.R.S. §14-10-129 that refer to the parent with the majority of parenting time should be construed to include parents who share parenting time equally. Thus, the best interests of the child standard should be utilized rather than the endangerment standard when determining relocation by a parent with equal parenting time seeking to relocate to become the majority time parent.