Survey of Family Law Cases 2004-2013

2008 Family Law Survey

ALLOCATION OF PARENTAL RESPONSIBILITIES

Husband appeals from orders relating to parental responsibilities, child support and division of marital property in In re the Marriage of Rodrick, 176 P.3d 806 (Colo. App. 2007); *cert. denied* (Colo. 2008). In 1999, the parties accepted an offer to raise a friend's child. In 2001, the parties filed a "Verified Petition for Parental Responsibility for a Child." The court's subsequent order stated that Husband and Wife should be awarded permanent parental responsibility, but biological parents have a duty to support the Child. In 2003 the parties received documents to effect an adoption of Child, but never filed them, as the parties separated shortly after. Though Husband stated that he and Wife had legal guardianship of Child, that he financially support child, and that he wanted parenting time with Child, Husband argued that Child was neither adopted nor his biological child, thus C.R.S. §14-10-115 did not require him to pay child support.

The Court of Appeals determined that Husband and Wife had a statutory duty, not merely a contractual duty, to provide support for Child. The court's order granting parental responsibility to the parties was a prelude to the Child's adoption and did not merely create a guardianship relationship. The parties satisfied three different standing requirements to request parental responsibilities under C.R.S. §14-10-123(1) (b)-(d). The court's parental responsibility order, entered under C.R.S. §14-10-123, established a child support obligation by imposing duties on the parties to provide for the child's necessities of life. Thus C.R.S. §14-10-115 provides authority for the court to order Husband to pay child support.

With regard to decision-making, the court must determine the best interests of the child by considering the factors in C.R.S. §14-10-124(1.5) (a) and (b). Here, the Court affirmed the trial court's order that both parties should contribute to decision-making but that Mother should have sole decision making in the event the parties' disagree, due to Husband's history of alcohol abuse.

With respect to interest accruing on a promissory note executed by Husband to Wife, post judgment interest begins to accrue on the date the judgment is entered, pursuant to C.R.S. §5-12-102(4). Property valuation, not post judgment interest, is calculated on the date the hearing concludes, or the date the decree of dissolution was entered, whichever is earlier. C.R.S. §14-10-113(5).

If the Court does not receive information to classify or value assets, then the court cannot err in omitting this property from division. Here the Court did not receive information to support Wife's claim to Husband's separately inherited property, thus the Court did not err when it relied on information provided solely by Husband.

Mother appeals from a post-decree order permitting Father to exercise parenting time despite his Air Force deployment by having his current wife care for the children during his absence in In re the Marriage of DePalma, 176 P.3d 829 (Colo. App. 2007); *cert. denied* (Colo. 2008).

In the past, Father coordinated his parenting time with Mother, both taking into account Father's Air Force Reservist schedule. During his deployment, his current wife, (Stepmother) has cared for the children. In January 2006, despite imminent deployment, Father sought to modify parenting time to allow the children to spend equal time with both parents. Father argued that it was in the best interests of the children to have a normal schedule and to maintain their bonds with Stepmother and Stepbrother.

Mother argued there is a presumption in favor of a natural parent over a nonparent Stepmother. The court determined that there is a presumption that a biological parent has a first and prior right to custody of her children over a nonparent. But this case is a dispute between two fit biological parents, not a parent and a stepparent. A fit parent is presumed to act in the best interests of their children. The court did not err by presuming that Father was acting in the best interests of the children when allowing Stepmother to care for the children.

Mother also argued that this order violated her constitutional right to the care, custody and control of her children. The court disagreed, stating that the order did not grant any parental rights to parenting time or decision-making to Stepmother. Stepmother's parenting time is limited to time she accepts from Father to care for the children in his absence.

Though the court did not make specific findings regarding the best interests of the children, neither party contended that Stepmother inadequately cared for the children, and both parties agreed that the children had a good relationship with Stepmother. The court presumed that Father was acting in the best interests of the children when allowing Stepmother to care for them in his absence.

Finally, Mother argued the right of first refusal contained within their parenting plan was defeated by this order. The court determined that the right of first refusal should be applied only to the parties and that "Father's decision to have Stepmother care for the children during his absence did not require that the children be offered first to mother." To the extent the court modified parenting time, it was within the court's discretion to modify the right of first refusal.

Petition for certiorari was denied, *en banc*, but Justice Bender would have granted certiorari as to the following issues in In re the Marriage of Tai, f/k/a Gingras v. Gingras, No. 06CA0800, 2008 WL 115528 (Colo. Jan. 14, 2008). (1) Whether the balancing test for relocation set forth in In re the Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005), applies when a primary residential parent with sole decision-making authority requests modification of a prior custody order in advance of relocation but does not propose any change to the existing parenting time. (2) Whether an order, which denies a parent with sole decision-making the right to relocate with a child, and therefore restricts that parent's constitutional right to travel, is reviewed under a strict scrutiny standard or an abuse of discretion.

In In re the Marriage of Slowinski and Pagnozzi, No. 05CA0465, 05CA2523, & 06CA1830, 2008 WL 451739 (Colo. App. Feb. 21, 2008); petition for rehearing denied, Father appeals from, among other issues, orders restricting his parenting time. Mother filed a Motion to Restrict Father's Parenting Time under C.R.S. §14-10-129(4), alleging that the children were emotionally endangered by Father's disparaging behavior towards Mother. Eleven days later on June 14, 2004, the trial court, without a hearing, ordered that Father's parenting time be supervised under C.R.S. §14-10-129(4) and the matter will be set for a "forthwith" hearing. The court held several hearings from July 1, 2004 through October 11, 2004, during which Father had supervised parenting time only. On October 14, 2004, the Court granted Father unsupervised parenting time every other Saturday.

Though the trial court had subsequently addressed the issues on appeal, thus making the issues moot, the court of appeals may still consider "moot questions involving great public importance and issues capable of repetition but evading review."

C.R.S. §14-10-129(4) provides that a motion to restrict parenting time that alleges that a child is in imminent physical or emotional danger due to parenting time "shall be heard and ruled upon by the court not later than seven days after the day of filing the motion. Any parenting time which occurs during such seven-day period…shall be supervised." The immediate restriction protects the child, while the seven-day

time limit protects a parent's constitutional right to the care, custody and control of their children. In sum, the court held that upon the filing of the motion pursuant to C.R.S. §14-10-129(4), supervised parenting time takes immediate effect and continues until the hearing, which is required to occur within seven days. If the hearing does not occur within seven days, supervised parenting time terminates under §14-10-129(4), though the Court may still proceed under C.R.S. §14-10-129(1)(b)(I). A hearing is required unless the allegations within the motion are "facially insufficient," meaning that if all the allegations were true, the circumstances could not give rise to the conclusion that the children are in imminent danger of physical or emotional injury.

A failure to adhere to the requirements of C.R.S. §14-10-129(4), as in this case, is a statutory violation, and the court must use a two-part test to determine whether such violation constitutes reversible error. Specifically, (1) whether the failure is an essential condition of the statute that may implicate due process, and (2) whether the party has been prejudiced. Here the seven-day limitation is an essential condition of the statute and Father's constitutional right to parent his children was restricted without the benefit of a hearing, therefore, due process implications arise. Finally several months of supervised parenting time certainly prejudiced Father.

A C.R.S. §14-10-129(4) motion does not require any third party verification; a party's own verification is sufficient. If a C.R.S. §14-10-129(4) motion is substantially frivolous, groundless or vexatious, the court is required to impose attorney fees pursuant to §14-10-129(5). Before imposing sanctions under C.R.S. §14-10-129(5), the court must hold a hearing and the hearing must be based upon a verified motion.

Father sued Mother for damages, alleging that Mother breached contracts and committed torts during a parenting time dispute over relocation stemming from the dissolution of marriage in Marshall v. Marshall, 183 P.3d 699 (Colo. App. 2008). The trial court dismissed Father's action under C.R.C.P. 12(b)(1), finding that the domestic court had exclusive jurisdiction over the subject matter of Father's complaint.

Father argues that C.R.S. §14-10-129.5(4) does not "preclude a party's right to a separate and independent legal action in tort." The Court of Appeals finds that C.R.S. §14-10-129.5(4) does not create a new cause of action, it "merely recognizes that parenting time disputes may involve conduct that constitutes a statutory or common law tort." Id. at 700. Additionally, if a tort claim for damages does arise in a parenting time dispute, then such claim must be brought in a court having jurisdiction over the parties and the subject matter, and not brought in the dissolution court. Finally, C.R.S. §14-10-129.5(4) does not suggest that a breach of contract claim may be based upon a parent's failure to comply with a parenting time order.

The trial court properly dismissed Father's claims for breach of contract, as they were based upon Mother's alleged failure to comply with the parenting time order, and any relief should have been granted by the dissolution court only. The trial court erred in dismissing Father's tort claims under C.R.C.P. 12(b)(1) because the court did have jurisdiction over the claims, even though they arose in a parenting time dispute.

Judge Marquez concurred, stating that the General Assembly's addition in C.R.S. §14-10-129.5(4) that nothing in this section shall preclude a party's right to a separate and independent legal action in tort, is unclear. But in his opinion, it should not be interpreted to "recognize an independent action brought under the guise of an intentional tort but with the purpose of enforcing or modifying parenting time." Id. at 702.

In In re the Marriage of Newell, 192 P.3d 529 (Colo. App. 2008), Father appeals from the post-decree Magistrate's Orders (affirmed by the District Court) modifying parenting time and decision-making responsibilities.

Under the 1999 Separation Agreement, the child lived primarily with Mother who also had sole decision making except that Father had decision making related to surgery, behavioral medication issues and potentially life-threatening conditions. In 2004, the court appointed a special master under C.R.C.P. 53, who recommended modification of parenting time such that both parents would have nearly equal parenting time. Mother objected, sought a further evaluation of the child's developmental issues, and requested the child reside with her during the school week. The evaluation recommended equal parenting time as well. The Magistrate found that the special master's recommendation and the evaluation were not in the child's best interests, granted Mother sole decision making and granted Father parenting time on alternate weekends.

Father argues the Magistrate erred by concluding that the special master applied the endangerment standard rather than the best interest standard, and erred by setting aside the special master's report. Pursuant to C.R.S. §14-10-129(1)(a)(I), parenting time may be modified whenever it would serve the best interests of the child. Only if the modification would result in a change in the party with whom the child primarily resided would the court apply the endangerment standard. C.R.S. §14-10-129(2). Since there was not a change in residency in this case, the Magistrate applied the correct standard when finding that the special master's plan was not in the child's best interest. Moreover, since determinations made by a special master appointed under C.R.C.P. 53 are only recommendations, the court may make different findings and accept other expert testimony. The Magistrate did not err in finding Mother's experts' testimony about the child's need for consistency and stability more persuasive than the recommendations of the special master and evaluator.

Father argued that the Magistrate erred when modifying decision-making to provide Mother with sole decision-making. Pursuant to C.R.S. §14-10-131(2)(c), if the existing decision-making responsibilities would endanger the child's physical health or significantly impair the child's emotional development, decision-making may be modified. Since Father's lack of support and opposition to further testing of the child made treatment providers reluctant to proceed with evaluations scheduled by Mother, the Magistrate did not err in finding that the current decision-making does endanger the child's development.

Father argues that the Magistrate's Order barring him from voicing his objections about the child's health care and education violates his fundamental right to make decisions regarding the care, custody and control of his child, and violates his **right to free speech** under the U.S. and Colorado Constitutions. Since limits on Father's speech are content-based restrictions, the court's Order "may be upheld only if the restriction imposed … promotes a compelling state interest and is the least restrictive means of promoting that interest." Id. at 525. Though no Colorado court has found a compelling state interest that would overcome the right to free speech, the Court of Appeals has found that proof that a "parent's exercise of parental responsibilities caused actual or threatened physical or emotional harm to a child would be sufficient to establish a compelling state interest sufficient to justify interference with the parent's right to exercise another First Amendment right, the right to the free exercise of religion." Id. at 536, citing In re the Marriage of McSoud, 131 P.3d 1208, 1216 (Colo. App. 2006). The Court applied the same principle to the right to free speech. To be a compelling state interest, the harm must be "substantial" and must be "demonstrated in detail."

In the instant action, the Magistrate found that Father was unable to cooperate or consult with Mother, and used his joint decision making to the child's detriment, however the court of appeals found this was not adequate to justify the restriction imposed. On remand, the court must reconsider whether restrictions

against Father's speech to third party providers are warranted, and if warranted, what type and degree of harm would the child suffer, and what would be the least restrictive alternative to denial of all speech that would still prevent harm to the child.

When requesting attorney fees for defending an appeal, C.A.R. 39.5 requires that attorney fees be specifically requested in the principal brief and the legal basis, including the specific grounds that justify an award of fees, be provided. Merely citing a statute is not sufficient.