Survey of Family Law Cases 2004-2013

2010 Family Law Survey

ALLOCATION OF PARENTAL RESPONSIBILITIES

An adoptive mother appeals from an order awarding sole decision-making authority and majority parenting time to petitioners in In re the Parental Responsibilities of Reese, 227 P.3d 900 (Colo. App. 2010). Mother began caring for E.B.H., the biological child of her husband's cousin, soon after the child was born. Petitioners offered to assist her in caring for the child. Petitioners' care gradually increased until the child was living with them full time and had only minimal contact with mother. Nonetheless, Mother adopted the child. Petitioners eventually filed a petition for allocation of parental responsibilities pursuant to C.R.S. §14-10-123. The trial court found it was in the child's best interest to grant Petitioners sole decision-making responsibility and nearly all of the parenting time.

C.R.S §14-10-123 permits a **non-parent to petition for allocation of parental responsibilities**. When a non-parent has standing under C.R.S §14-10-123, the court has statutory authority to allocate parental responsibilities based on the best interests of the child. Nevertheless, the Supreme Court has consistently held that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57 (2000).

The Court found that the "special factors" and "special weight" requirements of Troxel are equally applicable in the context of non-parent petitions under C.R.S. §14-10-123. The Court concluded that when a non-parent seeks an allocation of parental responsibilities contrary to the wishes of a parent, the court may not allocate parental responsibilities to the non-parent unless it complies with the Troxel requirement to accord "special weight" to the parent's determination of the best interests of the child. To do so, a court must consider all relevant factors including those listed in C.R.S. §14-10-124(1.5)(a) and (b). In addition, the court may allocate parental responsibilities to the non-parent only if it enters findings based on clear and convincing proof that the best interests of the child justify such an allocation.

The Court held that explicit application of the clear and convincing standard of proof is necessary to accord special weight to the parent's determination of the child's best interests and therefore, a parent's liberty interest in the care, custody, and control of his or her child is not infringed when the parent's determination regarding the best interests of the child is overcome by clear and convincing proof of relevant factors and the court's determination of the best interests of the child. Further, the Court rejected Adoptive Mother's contention that in accordance with Ciesluk, "in the absence of 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." Ciesluk, 113 P.3d 135 (Colo. 2005).

Although the court found that the Petitioners had "more than established by clear and convincing evidence as a matter of fact that they are psychological parents to this child," this finding was not sufficient to gain parental rights. Instead, this finding only determined that the Petitioners had standing to seek parental responsibilities under the statute. A court must make its allocation of parental responsibilities based on clear and convincing evidence. The trial court failed to do so. The Court remanded the case for a determination of whether the Petitioners met their burden of proving by clear and convincing evidence that allocation of parental responsibilities to them was in the best interests of the child.

In re the Marriage of Parr and Lyman, 240 P.3d 509 (Colo. App. 2010) was the first published case to address parenting time after the Medical Marijuana Registry became established. Father appeals the trial court's order affirming the magistrate's order and adding additional **restrictions to his parenting time**. The parties entered into a parenting plan that provided Father's parenting time would gradually increase from short supervised visits to unsupervised alternating weekends, and that Father's visits "should be governed by…ongoing UA's [urinalysis tests] and drug screenings to demonstrate that he does not return to marijuana use." The day the parenting plan was incorporated into the decree by the court, Father was approved for listing on the State of Colorado Medical Marijuana Registry. At no time had Father reported that he was seeking this listing. Father filed a motion to waive the urinalysis testing in light of his approved medical marijuana use. The trial court found that Father voluntarily submitted to the terms of the parenting time plan, thus the plan should remain. Father petitioned for review of the magistrate's order on the basis that the testing requirement was contrary to his constitutional right to use medical marijuana (Colorado Constitution, article XVIII, section 14); Father's motion was denied one year later. In affirming the magistrate's Order, the court also added additional provisions, that Father parenting time would be supervised until he demonstrates "by clear and convincing evidence that his use of medical marijuana is not detrimental to the child," and that he may petition for unsupervised time after he provides a clean hair follicle test. Mother filed a Motion to Restrict Father's parenting time for not providing proof of clean tests; no hearing was held.

Husband contends that the court erred by adding additional restrictions to his parenting time. Pursuant to C.R.S. §14-10-129(1)(a)(I), the court may make orders or modifications to parenting time if it would serve the best interests of the child. But the court shall not restrict a parent's parenting time unless the parenting time would endanger the child's physical health or significantly impair the child's emotional development. The Court of Appeals found that the trial court's additional Order prohibiting marijuana use was not a restriction, requiring a finding of endangerment, as it was consistent with the Parenting Plan that Father not use marijuana. But the trial court did err when it returned Father's time to supervised because there was no finding that "absent the restriction, the child would have been physically endangered or her emotional development would have been significantly impaired." The Court of Appeals found that this was a restriction, and that the trial court did not take additional evidence, made no finding of endangerment, or a finding that Father's use of medical marijuana threatened the child's physical or emotional safety. Thus the restriction was improper and vacated. For the same reasons, the court vacated the requirement for hair follicle testing and petitioning for unsupervised visits.

The Court specifically did not address whether medical marijuana use may constitute endangerment, or Father's argument that he had a constitutional right to use medical marijuana. Concurring, Judge Furman reiterated that the existing parenting plan remains in effect, but was concerned that Mother had filed a motion to restrict parenting time and was not afforded a hearing.

In this parental responsibilities action, paternal biological Grandparents appeal the trial court's order in favor of Mother and Adoptive Father, terminating grandparents' visitation in In re the Parental Responsibilities of A.M. and Concerning Goebel, 2010 WL 3584398 (Colo. App. Sept. 2010). In 2005, Mother was awarded sole residential parental allocation and sole decision-making. Father was not awarded any parenting time, as he was then incarcerated. Mother was voluntarily permitting paternal biological grandparents visitation. In 2008, Grandparents sought and were granted an order for

grandparent visitation. In 2009, Mother moved to terminate the grandparent visitation, on grounds that Father's parental rights had been terminated, Mother's Husband had adopted the child, and that termination of grandparent visitation would be in A.M's best interests.

The issue before the court, one of first impression in Colorado, is what is the proper **burden of proof and which party bears it when a parent seeks to modify or terminate grandparent visitation previously granted by the court under C.R.S. §19-1-117**.

Grandparents argue that preponderance of the evidence is the correct legal standard to use in modification of grandparent visitation cases, similar to modifications of parental responsibilities under C.R.S. §14-10-129 and §14-10-131. Though the court previously applied clear and convincing evidence when they initially sought visitation, this standard is no longer applicable in modification cases. Mother contends, and the court relied on the standard from In re the Adoption of C.A., 137 P.3d 318 (Colo. 2006); specifically that "for orders concerning grandparent visitation under C.R.S. §19-1-117, a presumption must be applied in favor of the parent's decision concerning grandparent visitation, which could be rebutted by grandparents only through clear and convincing evidence that the parent's visitation decision was not in the child's best interests and, conversely, that the visitation they sought was in the child's best interests." The Court reiterated that a dispute between parents and grandparents is not a "contest between equals." The Court found nothing in a grandparent visitation modification proceeding that suggests parent's constitutional rights to care custody and control of their children are in any way diminished, nor did it find that grandparent's have gained any standing equal to that of parents merely because they have been granted statutory noncustodial visitation rights.

Additionally, grandparents argued that the trial court should not have admitted evidence that predated the original award of grandparent visitation. The Court of Appeals held that when conditions have changed, or previously unknown material facts are discovered, evidence that predated the decree or award may be considered if it is relevant to the issues on which the requested modification is based.

In this dissolution of marriage case, In re the Marriage of Hall, 241 P.3d 540 (Colo. 2010) the parties could not reach an agreement on parenting time, likely due to Mother's out of state relocation with the child. Mother sought an **allocation of parental responsibilities (APR) evaluation by a licensed mental health professional under C.R.S. 14-10-127.** The trial court denied it, stating that it could determine relocation without an evaluation. Mother filed a writ of mandamus.

The court of appeals may exercise original jurisdiction under C.A.R. 21 where a trial court abused its discretion and an appeal is not an adequate remedy. In this case, the court of appeals found that an appeal was not an adequate remedy, thus it could exercise original jurisdiction.

Pursuant to C.R.S. 14-10-127(1)(a)(I), "in all proceedings concerning allocation of parental responsibilities…the court shall upon motion of either party" order a licensed professional to perform an evaluation and file a written report "concerning disputed issues relating to the allocation of parental responsibilities." Allocation of parental responsibilities includes parenting time. Pursuant to C.R.S. 14-10-124(1.5)(a)(VIII), the court must take into account the "physical proximity of the parties to each other." Further the court must accept the location in which each party intends to live. C.R.S. 14-10-124(1.5). Since relocation involves the determination of parental decision-making and parenting time, the trial court must order an APR evaluation when requested by either party where one party seeks to relocate. The court may only deny the request if it was made for the purpose of delay.

The court reviewed whether the standards in Troxel v. Granville, 530 U.S. 57 (2000) and In re the Adoption of C.A., 137 P.3d 318 (Colo. 2006) apply in cases where a **non-parent seeks an allocation of parental responsibilities over the objection of a fit parent** in In re the Parental Responsibilities of B.J. and K.J.: Glab v. Julian, 243 P.3d 1128 (Colo. 2010).

During eleven months of a dependency and neglect case, the foster parents cared for the children. At the conclusion of the D&N case, Father was granted sole custody of the children. For the next three and a half years, Father allowed the children to have significant contact with foster parents, even allowing the children to live with foster parents for periods of time. In March 2009, Father ceased the children's contact with foster parents. Foster parents filed a petition for allocation of parental responsibilities (APR) under C.R.S. 14-10-123(1)(c). The district court found that, the foster parents had standing, as they filed their motion within six months of termination of their physical care of the children; with Father's consent, the foster parents became psychological parents of the children; that the children adjusted well to life without the foster parents; that granting temporary parenting time to the foster parents would disrupt the children's stability; that Father had a due process interest in the care, custody and control of his children; and that Father was a fit parent. The CFI requested by foster parents recommended three weekend day visits with the foster parents "after which he would meet with the children and observe their interactions with [foster parents]," and then two weekend overnight parenting stays "to assist his report." Despite Father's objections, the district court granted both parenting time recommendations, concluding that standards from Troxel and C.A. are inapplicable in the investigatory stages of an APR case. Father sought a rule to show cause.

Even though a non-parent may have standing to pursue an allocation of parental responsibilities, parents have a fundamental right to make decisions concerning the care, custody and control of their children. Troxel, 530 U.S. at 65. Due process requires that a court give "special weight" to a parent's determination, and any interference with a parent's determination must be based upon "special factors." Id. at 72, 68. Recently, Colorado determined that Troxel and C.A. are applicable to all non-parent requests for an APR. In re Parental Responsibilities of Reese, 227 P.3d 900, 903 (Colo. App. 2010). Child and Family Investigators may be appointed in APR cases, but neither C.R.S. 14-10-116.6, nor Chief Justice Directive 04-08 addresses the issue of investigatory parenting time. The court held that there is no exception to a parent's fundamental liberty interest during the investigatory phase, otherwise the exception would negate the constitutional right, as it did in this case.

The Supreme Court held that the constitutional presumptions of Troxel and C.A. apply to all stages of an APR proceeding. The standard when considering parenting time requests by non-parents against the objection of a fit parent includes (1) a presumption in favor of the parental determination; (2) an opportunity to rebut this presumption with a showing by the non-parents through clear and convincing evidence that the parental determination is not in the child's best interests; and (3) placement of the ultimate burden on the non-parents to establish by clear and convincing evidence that allocation of parenting time to them is in the best interests of the child. In this case, there were less intrusive means for the CFI to ascertain the children's best interests.