Survey of Family Law Cases 2004-2013

2012 Family Law Survey

ALLOCATION OF PARENTAL RESPONSIBILITES 2012

In re the Parental Responsibilities of B.R.D., 280 P.3d 78 (Colo. App. 2012) concerns a dispute between the biological parents of a child and a couple with whom the child was living. In 2005, when the child was born, the biological mother gave the child up for adoption, and he was placed with the couple. Father was unaware of the existence of the child until after the adoption, but then wished to have parenting time.

In June 2007, the custodial couple, Mother and Father entered into a stipulation allocating parental responsibilities. Mother and Father explicitly reserved the right to ask the court to modify the allocation of parental responsibilities in the permanent orders. In December 2008, Mother moved to increase her parenting time and decision-making authority; and, in 2009, Father also moved to modify parenting time and parental responsibility a change in circumstances. In employing the standard from In re Parental Responsibilities of M.J.K., 200 P.3d 1106 (Colo. App. 2008), the trial court found that the environment the couple provided did not endanger the child or impair his emotional development, and that changing this environment was not in the child's best interests. The trial court ordered that the couple should be the child's primary residential custodians, granted them sole decision-making authority, and gave Mother and Father parenting time on alternate weekends.

On appeal, the Court of Appeals held that, because the Supreme Court has recently rejected the opinion of M.J.K. in its ruling in In re D.I.S., 249 P.3d 775 (Colo. 2011), the trial court's holding based on the application of the standard in M.J.K. should be vacated and remanded. The Court stated as the child's biological parent, Father has a constitutionally protected interest in the child's care, custody, and control, and is presumed to act in the child's best interests. This presumption is not extended to the child's non-biological caretakers.

Ordinarily, the party seeking a modification of parenting time has the burden of proving that the statutory factors justifying the change are present. However, pursuant to D.I.S., that burden shifts from a parent to a non-parent to protect the parent's due process rights. The Court concluded thatD.I.S. and several other cases alter the analysis in four distinct ways:

1. First, rather than presuming that the existing order remains in effect, the court must give "special weight" to Father's request to modify them; there is a presumption in favor of modifying the orders at Father's request.
2. Second, the Court must give the couple an opportunity (1) to rebut this presumption by showing that the proposed modification is not in the child's best interests and that the present allocation of parental responsibilities does not endanger him; and (2) to prove that the present order is in the child's best interests. Father is entitled to present evidence in support of the proposed modification.
3. Third, the couple must satisfy their evidentiary burdens by clear and convincing evidence.
4. Fourth, if the court denies father's request and continues the present allocation of parental responsibilities to the couple, it must make findings of fact identifying the special factors on which it relies. These special factors are found in sections 14-10-124(1.5), 14-10-129(2), and 14-10-131(2).

In relying on D.I.S., there is no practical difference between a parent transferring custody to a non-parent by way of a guardianship and a parent transferring custody to a non-parent through an order allocating parental rights. Thus, the rationale of D.I.S. extends to requests to modify allocations of parental responsibilities in situations involving parents and non-parents.

In In re the Interest of B.B.O.: Olds v. Berry, 277 P.3d 818 (Colo. 2012)the Supreme Court reviewed a decision by the Court of Appeals reversing the trial court's allocation of primary parental responsibilities to the half-sister of a minor child on grounds that the half-sister lacked standing to petition for the allocation of parental responsibilities. The Court held that C.R.S. §§14-10-123(1)(b) and (1)(c) do not require parental consent for a non-parent to establish standing to petition for APR.

The minor child resided with her father and half-sister for six years, until her father's death in 2008, at which time she continued to reside with her half-sister. The child's mother had given consent for the child to live with her father and half-sister and visited the child on a regular basis for the first two years of the child's life. However, the mother had no direct physical contact with the child during the last several years.

Two months after Father's death, the half-sister petitioned for APR. Mother moved to dismiss on the ground that the half-sister lacked standing. The trial court disagreed, and determined that it was in the child's best interest to reside primarily with her half-sister and schedule liberal parenting time with Mother, as recommended by the Child and Family Investigator.

Mother appealed both the standing and best interest determinations of the trial court arguing that a nonparent does not have standing under C.R.S. §§14-10-123(1)(b) or (1)(c) unless the child's parents have consented to the nonparent providing care for the child. Mother argued she had never consented to the child being cared for by the half-sister in Father's absence. The Court of Appeals agreed and held that in order to establish standing under C.R.S. §§14-10-123(1)(b) or (1)(c), a "nonparent must show that the child's parents voluntarily permitted the nonparent to share in or assume the parents' responsibility for the child's care."

The Supreme Court reversed the Court of Appeals and held that there is no statutory basis for reading a consent requirement into the concept of care for standing purposes in C.R.S. §§14-10-123(1)(b) and (1)(c). In relying on In re Custody of C.C.R.S., 892 P.2d 246 (Colo. 2005), the Court of Appeals conflated standing requirements with best interest considerations when it gave undue weight to the mother's voluntary relinquishment of custody. C.C.R.S. does not, therefore, stand for the proposition that parental consent to a nonparent caring for a child is necessary for a nonparent to establish standing to seek an allocation of parental responsibilities, and it is not necessary to read a parental consent requirement into either section 14-10-123(1)(b) or (1)(c) in order to protect the fundamental liberty interests of parents in the care, custody, and control of their children.

Like In re the Interest of B.B.O, In re the Parental Responsibilities of D.T. and Concerning Lavattiata, 2012 COA 142 (Colo. App. 2012) also concerns standing to petition for allocation of parental responsibilities. Here, Crystal Lavattiata (C.L.) appealed from the judgment of the trial court dismissing her petition for parental responsibilities for the child (D.T.) of Christina Trujillo (Mother). After mother gave birth to D.T. in 2003, Mother moved into C.L.'s home, and C.L. assisted her in caring for D.T. Although Mother and D.T. moved out of C.L's home when D.T. was 6 months old, C.L. continued to care for D.T. until 2010, when Mother ended C.L.'s time with D.T.

C.L. petitioned the trial court for parenting time. The trial court found that C.L. served more of a grandmotherly and supervisory role than an actual parental role for D.T. Thus, the Court concluded that

C.L. did not have standing under C.R.S. § 14-10-123(1)(c) and dismissed the petition. This appeal followed. The Court of Appeals deferred to the trial court's interpretation of the testimony in this case, which established that, although C.L. certainly cared for and supervised D.T. for extensive periods of time, Mother at all times acted as D.T.'s parent and directed his care. In other words, Mother was ultimately responsible for D.T.'s safety and well-being, even when he was being cared for by others, including C.L. Furthermore, the Court of Appeals agreed with the trial court that mother, as a young, inexperienced single mother, did not cede parental authority by seeking out C.L's help and advice on parenting matters, or by accepting C.L's willingness to help mother care for D.T. The Court thus concluded that the nature and frequency of C.L.'s care of D.T. was not sufficient to grant C.L. standing under C.R.S. § 14-10-123(1)(c), and further concluded that the Colorado Supreme Court's recent decision in *B.B.O.* did not compel a different result.

In re the Parental Responsibilities of M.W., 2012 COA 162 (Colo. App. 2012) involves the issue of standing of Mother's former boyfriend (Boyfriend), who was not the biological father of the child, to petition for the allocation of parental responsibilities.

Mother and Boyfriend entered into a relationship when Mother was pregnant with M.W. Boyfriend was present when M.W. was born and lived with mother and M.W. for the first two years of M.W.'s life. During this time, Mother considered Boyfriend as M.W.'s father, and encouraged M.W. to do so as well. Mother and Boyfriend ended their relationship when M.W. was two. Boyfriend petitioned for APR.

Mother initiated a child support action against M.W.'s biological Father. After Father's paternity was confirmed, Father intervened in Boyfriend's parental responsibility proceeding, and began exercising parenting time with M.W.

After hearing from the parties and a Parental Responsibilities Evaluator, the trial court found that although Boyfriend was M.W.'s psychological parent and had established standing under section 14-10-123(1)(c), the court could not allocate parenting time to Boyfriend unless it found that Mother and Father were unfit or that they would likely make parenting decisions that were not in M.W.'s best interests. Because this was not the case, the court found that, pursuant to the holding in Troxel, it could not legally allocate parenting time to Boyfriend over M.W.'s parents' objections.

The Court of Appeals reversed and held that, when a nonparent is involved in a child's life to the degree that he or she becomes a psychological parent and meets the strict standing requirements under section 14-10-123(1), a court may intervene, without violating Troxel, and determine, whether it is in the child's best interests to allocate parenting responsibilities to the nonparent.

Thus, the Court of Appeals remanded to the trial court for a determination of parental responsibilities in accordance with the child's best interests, considering *all* relevant factors. In doing so, the court must (1) begin with a presumption favoring mother's and father's parental responsibilities determination; (2) determine whether Boyfriend rebutted this presumption by clear and convincing evidence that the parent's determination is not in M.W.'s best interst; and then (3) place the ultimate burden on Boyfriend to establish by clear and convincing evidence that allocating parental responsibilities to him would be in M.W.'s best interests.

The Court further ruled that the presumption in Troxel did apply to this case, and not the weaker presumption articulated in D.I.S. and B.R.D., because Mother made no conscious decision to formally transfer primary care of M.W. to Boyfriend.

In the Interest of O.C., 2012 COA 161 (Colo. App. 2012), O.C. and her older sibling were removed from the care of biological mother and father due to concerns that mother was not adequately caring for them. After a brief stay with a friend of mother, O.C. was moved to a foster home. O.C.'s grandparents moved to intervene under C.R.C.P. 24(a) and (b), and requested that both children be placed with them. The trial court denied the motion.

Grandfather requested that he be made a special respondent, asserting that he wanted to be a party to the case and to have both children placed with him. The court construed this as a motion to intervene, and denied the motion. Jefferson County moved to terminate both parents' parental rights with respect to O.C. The grandparents again sought to intervene. The Court denied their motion and they now appeal that denial.

The Court of Appeals found that C.R.S. § 19-3-507(5)(a) requires foster parents – but not parents, grandparents, or other relatives – to have had the subject child in their care for at least three months before being permitted to intervene. Accordingly, the Court concluded that C.R.S. § 19-3-507(5)(a) affords to grandparents of a dependent and neglected child the right to intervene in a dependency and neglect proceeding at any time after adjudication, and that such right is not contingent upon a showing that those grandparents have had the child in their care for more than three months.