COLORADO COURT OF APPEALS

Court of Appeals No. 09CA2046
Pueblo County District Court No. 04DR662
Honorable David W. Crockenberg, Judge

In re the Marriage of
Mr. C,

Appellee,

and
Ms. W,

Appellant.

ORDER VACATED IN PART AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE MILLER
Russel and Kapelke*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced February 24, 2011

Mr. C, Pro Se

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const.

art. IV, § 5(3), and § 24-51-1105, C.R.S. 2010

In this post-dissolution of marriage matter between Ms. W, and Mr.C, mother appeals from the trial court's August 24, 2009 permanent order modifying parenting time. We vacate the order in part and remand for further proceedings.

I. Facts

The parties married in 2000 and have two children together. The appeal concerns parenting time for the younger child (child) only.

The parties' marriage was dissolved in 2005. The court entered permanent orders initially giving father only daytime parenting time with the child while mother was breast-feeding her, and transitioning father to two overnights every other weekend after the child was weaned. In 2006, the orders were modified to give father weekday parenting time to accommodate his new job, which required him to work weekends.

Both parties filed motions to modify. Mother requested that a child's legal representative (CLR) be appointed for the children, pursuant to section 14-10-116(2), C.R.S. 2010; father requested that a parental responsibilities evaluator (PRE) be appointed,

pursuant to section 14-10-127, C.R.S. 2010; and a district court magistrate granted both requests.

Thereafter, mother moved approximately 130 miles away without requesting permission from the court or father. The magistrate entered a temporary order, pending receipt of the PRE report, increasing father's parenting time to three overnights every week. The CLR then filed a written report (to which neither party objected) applying the best interests of the child standard and recommending that the parties share parenting time equally on a week-to-week basis until the child started school. After a hearing, at which the PRE also recommended equal parenting time, the magistrate entered a second temporary order that the parties alternate parenting time on a week-to-week basis.

The parties shared parenting time under this schedule for the next two years until the child approached school age. At that time, the CLR filed a second report stating that the child's starting school made the weekly alternate parenting-time arrangement no longer possible due to the geographical distance between the parents. Thus, the CLR recommended that (1) father would be the primary residential parent for the child from kindergarten to sixth grade,

with mother having parenting time three weekends a month and for most of the time during school breaks and over the summer, and (2) when the child reached seventh grade, mother would become the primary residential parent through twelfth grade, with father having parenting time three weekends a month and for most of the time during school breaks and over the summer.

Mother filed an objection to the CLR report, contending that its recommendations were not in the child's best interests and that the CLR impermissibly acted in the role of a child and family investigator. The CLR denied mother's allegations but moved to withdraw from the case. The trial court granted her request.

A hearing was then held, after which the trial court recognized that mother's move had made it difficult to schedule parenting time, applied the best interests of the child standard, and adopted the CLR's parenting-time recommendations. Mother's appeal followed. Justice for Children, a child advocacy organization, filed an amicus curiae brief in support of mother.

II. Applicable Legal Standard

Mother contends that the trial court erred by modifying the existing 2006 order, under which she was majority-time parent, so

that father became majority-time parent, without applying the endangerment standard. Although we are not persuaded that the endangerment standard controls, we agree that the 2009 order must be vacated and the case remanded for rehearing on the issue of parenting time and further findings under section 14-10-129(2), C.R.S. 2010.

A.

An appellate court reviews de novo whether the trial court applied the correct legal standard when modifying parenting time. *See In Interest of C.T.G.*, 179 P.3d 213, 221 (Colo. App. 2007).

The procedure for modifying an existing parenting-time order is governed by section 14-10-129, C.R.S. 2010. Although pursuant to section 14-10-129(1)(a)(I), C.R.S. 2010, a parenting-time order may be modified whenever doing so would serve the best interests of the child, section 14-10-129(2) imposes additional requirements when a modification would substantially change parenting time as well as change the party with whom the child resides a majority of the time. *See In re Parental Responsibilities of M.J.K.*, 200 P.3d 1106, 1112 (Colo. App. 2008). In that situation, the court must find that there has been a change in the child's circumstances or of

the party with whom the child resides a majority of the time and that modification is necessary to serve the child's best interests. § 14-10-129(2); *C.T.G.*, 179 P.3d at 221. Even if these findings are made, however, the court still must retain the parenting-time schedule from the existing order unless, as relevant here, one of the following circumstances applies:

> (c) [t]he party with whom the child resides a majority of time is intending to relocate . . . to a residence that substantially changes the geographical ties between the child and the other party . . . ; or
>
> (d) [t]he child's present environment endangers the child's physical health or significantly impairs the child's emotional development and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the child.

§ 14-10-129(2).

Here, both parties filed motions to modify, and neither disputed that there was a change in the child's circumstances requiring modification. Additionally, the record indicates that mother had relocated and the child was going to start school, which would mean, as a practical matter, that the parties could no longer share parenting time during the week (as they had under the

amended permanent orders and the 2006 modification order) or by alternating weeks (as they had under the temporary orders).

B.

Mother's attorney argued at the hearings on temporary orders that any change whereby mother would no longer be the majority-time parent would require an endangerment finding, as provided in section 14-10-129(2)(d), C.R.S. 2010. In response, the magistrate indicated that he did not intend to change mother's status as the majority-time parent and, accordingly, that he would give her one more day of parenting time in the year than father to maintain her majority-time status. The magistrate further stated that he did not view the issue as one of relocation because the two-and-one-half-hour drive between homes was not so great as to prevent sharing parenting time on weekly basis. In his written order entered after the first temporary orders hearing, the magistrate further found that "[father] is *not* alleging physical danger to the children but rather psychological trauma (primarily alienation), and the standard to be applied by this [c]ourt is the 'best interests' standard."

We agree with mother that the magistrate misstated the circumstances under which the endangerment standard applies

pursuant to section 14-10-129(2). But we do not agree that, under the facts here, the trial court was required to find endangerment before designating father as the child's majority-time parent. Because mother had relocated, the geographical distance between the parties was the only reason that, after the child started school, the parties could no longer exercise parenting time under the then-existing 2006 modification order schedule. The court therefore did not err in applying the best interests standard rather than the more stringent endangerment standard in determining which parent should be the child's primary residential parent. *See* § 14-10-129(2)(c), C.R.S. 2010; *In re Marriage of Ciesluk*, 113 P.3d 135, 140 n.12 (Colo. 2005) ("The endangerment statute . . . no longer applies when a majority-time parent seeks to relocate."); *In re Marriage of DeZalia*, 151 P.3d 647, 650 (Colo. App. 2006) (holding that court does not err by applying best interests standard, rather than endangerment, to majority-time parent's motion to relocate).

C.

We recognize that the magistrate found that this was not a relocation case because of the distance of mother's move. But the magistrate made that finding at *temporary* orders, before the child

was of school age and when mother's move created no impediment to shared parenting time during the week.

Father's motion to modify parenting time is determined by reference to the existing 2006 modification order and not by reference to any temporary or interim orders entered by the magistrate. *See In re Marriage of Monteil*, 960 P.2d 717, 719 (Colo. App. 1998) ("[A] temporary order does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceedings."); *cf. In re Marriage of Fickling*, 100 P.3d 571, 574 (Colo. App. 2004) (holding that only permanent orders grant parenting-time rights, and so the question whether such rights have been restricted such that an endangerment finding is necessary under section 14-10-129(1)(b)(I), C.R.S. 2010, need only be answered when permanent orders, and not temporary orders, are modified); *C.T.G.*, 179 P.3d at 222 (same). The rule that temporary orders do not grant parenting-time rights applies even when, as here, such temporary orders have been in effect for several years. *See C.T.G.*, 179 P.3d at 222.

Accordingly, when determining whether a modification results in a change of the child's majority-time parent, we must look to the

existing 2006 order and not the temporary orders that were entered pending the 2009 modification order. Although the 2006 order did not expressly designate mother as the primary residential parent, father does not dispute that she had the majority of parenting time under that order and was thus effectively the majority-time parent.

Once the child approached school age, the trial court and the CLR found that it was mother's move that had made the prior parenting-time schedule unworkable. At that point, mother's move did substantially change the geographical ties between the child and father because, if mother continued to be the majority-time parent, the child would live too far away to continue having parenting time with father during the week while attending school. Thus, because of mother's move, it was no longer possible to retain the parenting-time schedule from the existing 2006 order, as section 14-10-129(2) provides, and the trial court should therefore have determined parenting time under section 14-10-129(2)(c).

D.

On remand, the court must reconsider parenting time, applying the relocation factors in section 14-10-129(2)(c) together with the best interests factors in section 14-10-124(1.5)(a), C.R.S.

2010. The court must determine whether it is in the child's best interests to relocate with mother, who was the child's majority-time parent under the existing 2006 order, or to remain in the same geographical area contemplated by that order, with father becoming the majority-time parent. *See Spahmer v. Gullette*, 113 P.3d 158, 162 (Colo. 2005); *Ciesluk*, 113 P.3d at 147; *DeZalia*, 151 P.3d at 648. Because the court applied an incorrect standard in modifying parenting time, a rehearing under the correct standard is necessary on remand. After the rehearing, the trial court shall disclose the reasons for its decision and make specific findings as to the required statutory factors. *See Ciesluk*, 113 P.3d at 148.

E.

Because of our disposition, we need not reach mother's contention that the trial court did not properly consider and weigh the statutory best interests factors.

We also need not address mother's contentions concerning the role of the CLR and whether the court's adoption of the CLR's recommendations violated mother's due process rights. "An issue is moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy." *In re Marriage of Dauwe*, 148

P.3d 282, 284 (Colo. App. 2006). An appellate court will not render an opinion on the merits of an issue that has become moot because of subsequent events. *Id*. Because we vacate the 2009 modification order and remand for a rehearing on the parties' motions to modify parenting time and the CLR has withdrawn from representing the child's best interests in the case, the contentions concerning the proper role of the CLR are moot. *See id*. (holding that the contention that the special advocate should have been terminated was moot when the advocate had withdrawn from the case). On rehearing, because the CLR is no longer involved in the case and does not represent the child, the court should not consider the CLR's opinions or report when reconsidering parenting time.

III. Parental Alienation

Mother further contends that the trial court erred by admitting the PRE's opinion that mother had engaged in parental alienation. We need not address this contention because mother did not raise it in the trial court. *See In re Marriage of Atencio*, 47 P.3d 718, 722 (Colo. App. 2002) (declining to address issue not raised first in the trial court).

The record reflects that (1) mother failed to object to the

admission of the PRE's parental alienation opinion on the ground that parental alienation was not a valid theory, and (2) she agreed that she had engaged in alienating behavior, acknowledged that she needed to overcome the behavior, and said she would follow the PRE's recommendations for doing so. She did not contend, as she does here, that the court could not consider her behavior.

We further note for assistance on remand, however, that a parent's ability to encourage the sharing of love, affection, and contact between the child and the other parent is one factor that a court considers in determining best interests. *See* § 14-10-124(1.5)(a)(VI), C.R.S. 2010; *see also In re Marriage of Yates*, 148 P.3d 304, 309 (Colo. App. 2006). Evidence of parental alienation is relevant to this factor and thus may be considered. *See Monteil*, 960 P.2d at 719. Similarly, the court should also consider whether one of the parties has been a perpetrator of child abuse or neglect or of spouse abuse. § 14-10-124(1.5)(a)(IX)-(X), C.R.S. 2010.

The portion of the 2009 permanent order allocating parenting time between the parties is vacated, and the case is remanded for further proceedings, as provided herein. Pending the entry of a new parenting-time order, however, the parenting-time provisions of the

2009 order shall remain in effect.

JUDGE RUSSEL and JUDGE KAPELKE concur.