18CA2362 Marriage of Aguero 03-26-2020

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA2362
El Paso County District Court No. 17DR718
Honorable David Prince, Judge

In re the Marriage of

Devyn Lea Aguero, n/k/a Devyn Lea Ratliffe,

Appellant,

and

Reynaldo Aguero, Jr.,

Appellee.

ORDERS AFFIRMED

Division III
Opinion by JUDGE GRAHAM*
Román and Dunn, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 26, 2020

Arthur W. Porter, P.C., Arthur W. Porter, Colorado Springs, Colorado, for Appellant

Marrison Family Law, LLC, M. Patricia Marrison, Michael A. Lucas, Joseph A. Ditlow, Mikayla Shearer, Leslie A. Shafer, Catherine H. Ford, Colorado Springs, Colorado, for Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 In this post-dissolution of marriage proceeding, Devyn Lea Aguero, now known as Devyn Lea Ratliffe (mother), appeals from the district court's parenting time modification order allowing Reynaldo Aguero, Jr. (father) to relocate their child to his home in Hawaii. She also appeals from the district court's denial of her C.R.C.P. 59 request for a new trial. We affirm the orders.

I. Relocation Motion

A. Background

¶ 2 The parties have one child, who was born in 2012. The child has always lived in Colorado Springs with mother. Father has not lived in Colorado since 2015 and, at the time of the February 2018 permanent orders hearing, was stationed in Hawaii.

¶ 3 In its permanent orders, the court found that both parents were loving and engaged, and that the child would thrive with an equal parenting time schedule if one could be made available. Because it could not, however, the court named mother the child's primary parent, finding that the child's best interests were served by maintaining her current bonds in Colorado Springs. Father was given uninterrupted parenting time during the child's yearly

summer, fall, and spring breaks, and during her winter break every other year.

¶ 4 Mother was remarried in June 2018. Two months later, she filed a "Verified Notice of Relocation," in which she "advise[d]" the court and father that she was relocating with the child from Colorado Springs to South Korea because of her new husband's military assignment. Mother claimed that the move would "not have any adverse effect, if any affect [sic] at all, upon the parenting plan between the parties."

¶ 5 Father immediately filed his own verified motion to modify parenting time, arguing that (1) mother failed to confer before filing her motion to modify, which deprived him of the opportunity to respond, and (2) it was in the child's best interests to relocate to his home in Hawaii rather than to South Korea with mother. In turn, mother responded that she had *not* filed a motion to modify but merely "a Notice of Change of Address," or "Notice of Change of Location that does not affect parenting time."

¶ 6 After a contested hearing, the court again found that the child would thrive with either parent and would order equal parenting time if it could. And, once again, the court found that the child's

"stability" was paramount to its parenting time decision. This time, however, the court found that the "significant changes in [mother]'s plans (social, geographic, housing, and economic) . . . in just a few months after the [permanent orders]" raised "at least some questions about the long term stability of the situation for [the child] if relocated to South Korea." Thus, the court determined that it was in the child's best interests to designate father as her primary residential parent and allow her to relocate to the "familiar and stable surroundings represented by Hawaii." Mother was given the parenting time schedule that father previously exercised (uninterrupted time during the child's school breaks).

¶ 7 After mother was unsuccessful at obtaining a new hearing, she filed this appeal.

B. Standard of Review and Relevant Law

¶ 8 Under section 14-10-129(1)(a)(II), C.R.S. 2019, when a majority time parent seeks to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party, the court must consider "all relevant factors" including all statutory best interests factors in section 14-10-124(1.5)(a), C.R.S. 2019, and the nine relocation factors in

section 14-10-129(2)(c). *See In re Marriage of Ciesluk*, 113 P.3d 135, 140 (Colo. 2005).

¶ 9 We review the district court's order resolving such a relocation request for an abuse of discretion. *Id.* at 148. An abuse of discretion occurs when the court's decision is arbitrary, unreasonable, or unfair. *In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007).

¶ 10 Because the district court has broad discretion in modifying existing parenting time orders, we must exercise every presumption in favor of upholding its decisions. *Id.* We review de novo, however, the legal standard that the district court applied when modifying parenting time. *In re Parental Responsibilities of Reese*, 227 P.3d 900, 902 (Colo. App. 2010).

C. Analysis

¶ 11 Mother argues that the district court erred by considering her motion under the framework of section 14-10-129 because she did not seek to change father's parenting time and her relocation would not change the "geographical ties" between him and the child. We are not persuaded.

¶ 12 True, mother's proposed relocation would not significantly affect the actual number of overnights father spends with the child. And, arguably, mother's proposed relocation would not significantly increase either the number of hours of flight time for the child or the physical distance between father and the child.

¶ 13 Even so, mother's relocation was not just a simple "change of address." As the court found, mother's international relocation would require her to "establish[] a new situation in nearly all aspects" and would "separate" the child "from her emotional and practical support networks and the community that has been familiar to her throughout her life." These facts and findings alone lead us to reject mother's claim that the relocation would not "substantially change[] the geographical ties between the child and the other party."

¶ 14 Further, father, as the minority time parent with a constitutionally protected right to the care and control of the child, *see Ciesluk*, 113 P.3d at 142, should have a say in where the child resides, even if the "logistics" of his current parenting time schedule would remain unaffected. *See* § 14-10-129(2)(c)(II) (allowing minority time parent to give reasons for objecting to a proposed

relocation); *Ciesluk*, 113 P.3d at 147 (minority time parent has the opportunity to contest a relocation and seek to become the majority time or primary residential parent or object to the majority time parent's proposed parenting time plan).

¶ 15 Further still, *the child* had the right to have the court examine whether it was in her best interests to move to South Korea with mother, even if her parenting time with father would remain unchanged. *See* § 14-10-123.4(1), C.R.S. 2019 (providing that children have certain rights in the determination of matters relating to parental responsibilities); § 14-10-124(1.7) (children have the right to have all parental responsibilities determinations made based on their best interests). This would include the court's consideration of the issues father raised in his motion regarding the difficulties the child might encounter in moving to a different country. *See* § 14-10-129(2)(c)(IV) (educational opportunities for the child at the existing location and at the proposed new location), (V) (presence or absence of extended family at the existing location and at the proposed new location), (VII) (anticipated impact of the move on the child), (IX) (any other relevant factors bearing on the best interests of the child).

¶ 16 Mother's relocation was not inconsequential to father and the child. Thus, the court was correct to determine whether, under section 14-10-129, the existing parenting time order would continue to meet the child's best interests if she lived in South Korea. We see no abuse of discretion in this decision.

D. Indirect Benefits

¶ 17 *Ciesluk* directs the district court to consider the indirect benefits the child may enjoy by relocating with the majority time parent. 113 P.3d at 148, 150. Mother argues that the court failed to do that here because it did not consider (1) that the child would be able to fly accompanied between South Korea and Hawaii (instead of unaccompanied as she historically traveled), or (2) mother's happiness in living with her new husband. Mother offered evidence on these issues at the hearing, so we must presume that the court considered it. *See In re Marriage of Udis*, 780 P.2d 499, 504 (Colo. 1989).

¶ 18 However, the court expressly chose to make factual findings only on those factors that it deemed "relevant to this relocation decision." Therefore, we may presume that these indirect benefits were "relatively neutral" in the court's eyes and did not warrant

further analysis. *See In re Marriage of Finer*, 920 P.2d 325, 327 (Colo. App. 1996) (holding that the district court need not make specific findings on the best interests factors if the reviewing court determines that the decision is supported by competent evidence).

¶ 19 Mother's fourth argument (that father's living situation is not truly stable) simply challenges the court's resolution of the conflicting evidence and its finding that father could offer the child more stability in Hawaii. The court did not err just because it weighed this evidence in father's favor. *See Hatton*, 160 P.3d at 330 (holding that district court has responsibility as trier of fact to determine the credibility of witnesses and the sufficiency, probative effect, and weight of the evidence).

¶ 20 As to mother's third argument (father's objection to her relocation was disingenuous), mother does not explain, and we fail to see how this argument supports her contention that the court failed to consider indirect benefits to the child. We thus do not address it. *See Holley v. Huang*, 284 P.3d 81, 87 (Colo. App. 2011) (declining to consider bald assertions of error lacking meaningful explanation).

II. Application of *Spahmer* to a Post-Decree Proceeding

¶ 21 Mother argues that the district court failed to apply the "more stringent standard" referenced in *Spahmer v. Gullette*, 113 P.3d 158, 163 (Colo. 2005), and give credence to her statement that she would not relocate without her child.[1] *See id.* (noting that in a post-decree modification proceeding, the parties are on unequal footing with respect to parental responsibilities so a "more stringent standard" for relocation is necessary to protect the parents' already vested rights). For two reasons, we do not consider this argument.

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[1] Mother changed her mind on this point during the proceedings. She initially claimed that she would definitely relocate, then said she would not leave Colorado without her child, and finally asserted that she would never have considered relocating at all if she knew that she could lose her status as primary residential parent. Mother's statements put the court in a difficult position, forcing it to entertain orders that could keep her in Colorado and potentially chill her constitutional right to travel. *See In re Marriage of Ciesluk*, 113 P.3d 135, 142 (Colo. 2005) ("[I]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether.") (quoting *Jaramillo v. Jaramillo*, 823 P.2d 299, 306 (N.M. 1991)). In our view, the court prudently recognized that it had no authority over where mother chose to live and assumed she would actually relocate. *Cf. Spahmer v. Gullette*, 113 P.3d 158, 159 (Colo. 2005) (in initial allocation proceedings, the court must accept the location in which each party intends to live and allocate parental responsibilities accordingly).

¶ 22 First, *Spahmer* guides the court's review of a relocation request made before the initial allocation of parental responsibilities; it does not govern this post-decree relocation request. *See id.* at 161 (granting certiorari to determine whether, in an initial allocation of parental responsibilities, the court may order a parent to live in a specific location).

¶ 23 Second, mother concedes that she did not preserve the argument for appeal. *See Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1188 n.4 (Colo. App. 2011) ("We review only the specific arguments a party pursued before the district court."). While we may, under certain circumstances, exercise our discretion to address unpreserved arguments on appeal, *see Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 550 (Colo. 2006), we do so only in the "rare" civil case, involving "unusual or special" circumstances and only "when necessary to avert unequivocal and manifest injustice." *Wycoff v. Grace Cmty. Church of Assemblies of God*, 251 P.3d 1260, 1269 (Colo. App. 2010) (citation omitted).

¶ 24 Though we recognize that the parents' constitutional rights were an issue in this proceeding, *see Ciesluk*, 113 P.3d at 142 (describing the parents' competing constitutional interests), there

were no unusual or special circumstances that made this case rare. Indeed, mother's only allegation is that, by failing to apply *Spahmer*, the court did not attribute significant weight to her statement that she would not relocate without the minor child. (We do not consider those new allegations raised in mother's reply brief. *See In re Marriage of Fabos*, 2019 COA 80, ¶ 32.) This allegation does "not come close to meeting this demanding standard." *See Wycoff*, 251 P.3d at 1269.

¶ 25 We thus decline to address this contention.

¶ 26 Accordingly, we uphold the relocation order.

III. Motion For New Trial

¶ 27 Mother contends that she was entitled to a new trial under C.R.C.P. 59(d) due to the irregularity and surprise created by her former attorney's conduct. We are not persuaded.

A. Relevant Facts

¶ 28 Shortly after filing her "notice," mother moved for a child and family investigator (CFI) "to examine the minor daughter's feelings about moving to [South] Korea with her [m]other and [s]tep [f]ather." Father objected. On its own motion, the court set a status

conference “to discuss the CFI request with counsel [and] to determine if a CFI was truly needed.”

¶ 29 Before that conference occurred, however, father was contacted by a CFI and learned that a CFI had already interviewed mother and the child. Father moved to strike the CFI report. Mother responded it would be “appropriate” for the court to review the CFI report because the only thing the CFI did was talk to the child about the move. Mother pointed out that the CFI was not asked to and did not make “any type of CFI recommendations.”

¶ 30 At the start of the status conference, mother’s counsel provided the CFI report to the court and father’s attorney. Pointing out that it had not appointed a CFI, the court elected to keep the CFI report under seal and not review its contents. The court decided to go forward with the modification hearing and decide then whether a CFI would be required. Ultimately, no CFI was ever appointed.

¶ 31 After the relocation order issued, mother filed an extensive C.R.C.P. 59 motion seeking a new trial. As relevant here, mother argued that her former attorney’s “irregular actions” surrounding the CFI issue and his failure to tell her that the court did not accept

the CFI's report "created surprise" that prejudiced her at the relocation hearing. In a detailed and thoughtful written order, the district court rejected mother's arguments and denied her request for a new trial.

B. Standard of Review and Applicable Law

¶ 32 C.R.C.P. 59 allows a district court to order a new trial based upon "irregularity in the proceedings, by which any party was prevented from having a fair trial," or "surprise, which ordinary prudence could not have guarded against." C.R.C.P. 59(d)(1), (3).

¶ 33 We review a district court's decision on a motion for a new trial under C.R.C.P. 59 for an abuse of discretion. *Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 608 (Colo. App. 2007). A court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law. *Rains v. Barber*, 2018 CO 61, ¶ 8.

C. Irregularity

¶ 34 Mother's former attorney's conduct is not an "irregularity" that warrants a new trial. *See In re Marriage of Jaeger*, 883 P.2d 577, 582-83 (Colo. App. 1994) (allegations of attorney misconduct do not

form the basis for granting a motion for new trial under Rule 59(d)(1)).

¶ 35 Nevertheless, mother has not demonstrated that "but for [her attorney]'s conduct, a CFI might have been appointed." *See Rains*, ¶ 14 (to obtain a new trial based on "irregularity," a party must show that an improper occurrence affected or likely affected the outcome of the trial). The court clarified at the status conference that while it would not read the existing CFI report, it might still appoint a CFI based on the evidence presented at the hearing. Thus, mother has not persuaded us that the only reason she did not obtain a CFI was because of her former attorney's conduct or that any CFI report would have affected the outcome.

D. Surprise

¶ 36 Mother argues that because her former attorney failed to tell her that the court sealed the CFI report, she did not understand the posture of the case at the hearing. By that, mother means she was "surprised" to learn after the hearing that the court did not review the CFI report or understand that the child expressed a preference to relocate with her to South Korea. Again, we are unpersuaded.

¶ 37 The court made an "assumption" at the relocation hearing that the child would want to stay with her mother, who was her "primary bond parent/primary caregiver." *See In re Marriage of Lewis*, 66 P.3d 204, 207 (Colo. App. 2003) (district court has the discretion to draw inferences and conclusions from the evidence). This assumption is borne of mother's assertions in pleadings and through testimony that the child was "excited" by the idea of relocating to South Korea. Thus, any statement by the CFI concerning the child's preference would only have been cumulative.

¶ 38 To the extent mother argues she was prejudiced by the court's failure to make the child's preference dispositive, we reject this argument. A court must consider a child's wishes, if he or she is sufficiently mature to express reasoned and independent preferences. *See* § 14-10-124(1.5)(a)(II). As the court correctly recognized, it was not bound to order parenting time based solely on the then-six-year-old child's statement, concluding that "[g]iven [the child]'s youth, [her] preference is of limited relevance." *See In re Marriage of Chester*, 907 P.2d 726, 731 (Colo. App. 1995) (district court is not bound to rule in a manner consistent with the child's expressions).

IV. Attorney Fees

¶ 39 We deny father's summary request for appellate attorney fees. *See* C.A.R. 39.1 (requiring that party claiming attorney fees must "explain the legal and factual basis" for the award).

V. Conclusion

¶ 40 The orders are affirmed.

JUDGE ROMÁN and JUDGE DUNN concur.