COLORADO COURT OF APPEALS

DATE FILED: February 13, 2020
CASE NUMBER: 2019CA420

Court of Appeals No. 19CA0420
City and County of Denver District Court No. 17DR2167
Honorable Catherine A. Lemon, Judge

In re the Marriage of

Janet Corniel,

Appellant,

and

Christopher P. Brown,

Appellee.

ORDER AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE PAWAR
Furman and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 13, 2020

Janet Corniel Pro Se

Broxterman Alicks McFarlane PC, Margo F. Alicks, Madeleine R. Sheahan, Denver, Colorado, for Appellee

¶ 1 In this post-dissolution of marriage proceeding between Janet Corniel (mother) and Christopher P. Brown (father), mother appeals the district court's January 2019 order adopting a magistrate's ruling that 1) denied her motion to modify child support, 2) required her to file a motion if she wants to relocate out of Colorado with the children, and 3) held her renewed motion for attorney fees in abeyance. Because we agree that section 14-10-122(1)(a), C.R.S. 2019, and not the parties' stipulation, sets the standard for seeking a modification of child support, we affirm the order in part, reverse it in part, and remand the case for further proceedings.

I. Background

¶ 2 The parties' marriage ended in 2014, and their partial stipulation for maintenance and child support was approved and incorporated into the decree of dissolution. The stipulation provides in relevant part:

> 1. Father shall pay maintenance of $5500 per month for the first 12 months, $5000 for the next 50 months and $4500 for the next 12 months. During the period of maintenance, child support shall be $1500 per month.
>
> a. No recalculation of maintenance or child support unless:

> b. Mother's income is greater than $5500 per month on an annualized basis, or
> c. Father's salary is greater than $20,000 per month, or
> d. Father's salary is reduced to less than $12,500 per month.
> e. The child support amount is an intended deviation from the child support guideline based upon the total financial agreements of the parties contained herein.
>
> . . . .
>
> 9. The parties agree that the Father's bonus or other sources of income (restricted stock excepted from this provision) will not be included in determination of maintenance but that when only child support is paid the statutory guidelines for income for calculating child support shall control for both parties.
>
> . . . .
>
> 16. There will be no recalculation of child support unless there is a modification of overnights to greater than 125 per year.

¶ 3 In 2017, mother moved to modify child support under section 14-10-122(1)(a), alleging that father's income had increased dramatically since the dissolution. Pending a hearing on her motion, mother moved for attorney fees under section 14-10-119, C.R.S. 2019. Her motion for attorney fees was denied by the

magistrate, and she petitioned for district court review of that order. Before the district court reviewed the order denying her request for attorney fees, however, mother filed a renewed motion with the magistrate, requesting attorney fees under both section 14-10-119 and section 13-17-102, C.R.S. 2019.

¶ 4 After a hearing, the magistrate denied mother's motion to modify child support, held her renewed motion for attorney fees in abeyance until the district court entered an order reviewing the order denying her first motion for fees, and ordered her to file a motion if she sought to relocate from Colorado in the future. Mother petitioned for district court review of the magistrate's order, and the district court affirmed and adopted the order. This appeal followed.

II. Child Support Modification

¶ 5 Mother first contends that the magistrate erred by finding that the parties' stipulation divested or otherwise limited the court's jurisdiction to modify child support and that the district court further erred by adopting the magistrate's order. We agree.

A. Standard of Review

¶ 6 We review child support orders for abuse of discretion. *In re Marriage of Boettcher*, 2019 CO 81, ¶ 12. We review de novo, however, whether the district court applied the correct legal standards when determining child support. *Id.*

B. Legal Standards

¶ 7 The district court retains continuing jurisdiction over child support after the issuance of a dissolution decree. *In re Marriage of Chalat*, 112 P.3d 47, 53 (Colo. 2005); *see also In re Marriage of Price*, 727 P.2d 1073, 1076 (Colo. 1986) (parents' duty to support their children exists independent of, and is not limited to, the terms of their dissolution decree). The court retains such jurisdiction even if the support terms of the decree originated as terms of a separation agreement. *Chalat*, 112 P.3d at 53.

¶ 8 A decree incorporating a separation agreement may preclude or limit modification of its terms "[e]xcept for terms concerning the support . . . of children." § 14-10-112(6), C.R.S. 2019; *see Chalat*, 112 P.3d at 53; *see also Combs v. Tibbitts*, 148 P.3d 430, 434 (Colo. App. 2006) (parents cannot, by contract, escape their responsibility to provide adequate child support). After a separation agreement is

incorporated into the decree, its child support provisions are no longer enforceable as contract terms, § 14-10-112(5), and are instead modifiable under section 14-10-122(1)(a) on a finding of substantial and continuing changed circumstances. *See Chalat*, 112 P.3d at 52-53, 56.

¶ 9 In determining whether substantial and continuing changed circumstances exist, a court must consider the statutory child support guidelines, which establish a rebuttable presumption with respect to modification. *See* § 14-10-115(8)(e), C.R.S. 2019; *see also In re Marriage of Aldrich*, 945 P.2d 1370, 1375 (Colo. 1997) (The "court is required to apply the guidelines initially to the evidence of change in order to determine whether modification should be granted."). And the court must still apply the guidelines to the parties' changed circumstances, even when the original child support terms were based on the parties' agreement rather than on the guidelines. *See In re Parental Responsibilities Concerning M.G.C-G.*, 228 P.3d 271, 272-73 (Colo. App. 2010) (noting that the child support "bargain" the parties struck in connection with the decree ceased to exist as a contract term after it was incorporated into the decree and thus could be modified under section 14-10-122(1)(a)).

C. Analysis

¶ 10 The magistrate erred in finding that the parties' stipulation "deprives the Court of jurisdiction" to modify child support except under the stipulation's terms. Instead, modification is controlled by section 14-10-122(1)(a) after an agreement's terms are incorporated into the decree. *See Chalat*, 112 P.3d at 52-53, 56; *M.G.C-G.*, 228 P.3d at 272-73.

¶ 11 Additionally, in determining modification under the statute, the magistrate was required to first find the presumed amount of support under the guidelines based on the parties' changed circumstances and incomes. *See Aldrich*, 945 P.2d at 1375; *M.G.C-G.*, 228 P.3d at 272-73; *see also* § 14-10-115(8)(e). Thus, the magistrate further erred by stating that she could not find that the children's needs were not being met under the current order and that therefore setting aside the parties' stipulation was not warranted *See In re Marriage of Boettcher*, 2018 COA 34, ¶ 17 (noting that income shares model, on which the child support guidelines are based, is designed to allow children to share in a parent's significant increase in income), *aff'd*, 2019 CO 81; *see also In re Marriage of Bohn*, 8 P.3d 539, 542 (Colo. App. 2000) ("Nothing

in the child support statute precludes the trial court from ordering a support payment that exceeds the known needs of the child.”).

¶ 12 The district court erred in adopting the magistrate’s order denying modification on similar grounds. It reasoned that, regardless of whether the requirements to modify child support under the parties’ stipulation can be characterized as jurisdictional, none were met based on the evidence. The district court, however, also did not apply section 14-10-122(1)(a)’s modification standard. Instead, it relied on the magistrate’s finding that mother failed to show that the children’s needs were not being met under the current support order and similarly found that, therefore, relief from the stipulation was not warranted. In doing so, it did not apply the correct legal standard for modifying the child support terms of a decree — regardless of whether the terms came from the parties’ stipulation. *See M.G.C-G.*, 228 P.3d at 272-73.

¶ 13 Father’s reliance on the parties’ agreement in their 2014 stipulation to deviate from the child support guidelines based on their overall dissolution settlement is misplaced. The stipulation specifies that the *amount* of child support — $1500 per month — is intended as a deviation. But this provision does not affect the

court's obligation to consider mother's motion to modify under section 14-10-122(1)(a). *See Chalat*, 112 P.3d at 52-53, 56; *M.G.C-G.*, 228 P.3d at 272-73. Moreover, the parties' negotiated child support terms in their comprehensive settlement are not enforceable as contract terms. Rather, after they were incorporated into the decree, the terms became modifiable under section 14-10-122(1)(a). *See Chalat*, 112 P.3d at 52-53, 56; *M.G.C-G.*, 228 P.3d at 272-73.

¶ 14 Accordingly, we reverse the order denying mother's motion to modify child support and remand the case for the court to reconsider mother's motion for modification under section 14-10-122(1)(a).

¶ 15 In doing so, the court must determine father's income under the statutory guidelines. *See Combs*, 148 P.3d at 434 (parents cannot, by contract, escape their responsibility to provide adequate child support); *see also* § 14-10-115(5). We note that paragraph nine of the parties' stipulation provides — consistent with this standard — that father's bonus or other sources of income will not be included *in determining maintenance*, but that the statutory

guidelines for income shall control for both parties when only child support, as opposed to maintenance, is at issue.

¶ 16 Based on the disposition of this issue, we need not address mother's additional arguments that the court erred by refusing to modify child support when it had divided the children's expenses based on the parties' current incomes and that the finding that the children's needs were being met under the existing order is not supported by the record.

III. Relocation

¶ 17 Mother further contends that the magistrate and district court erred by requiring her to file a motion to relocate from Colorado with the children. We disagree.

¶ 18 Before mother, as the children's majority time parent, may relocate to a residence that substantially changes the geographical ties between the children and father, the court must take into account the children's best interests and all relevant factors including those under section 14-10-124(1.5)(a), C.R.S. 2019, and section 14-10-129(2)(c), C.R.S. 2019, in determining whether to grant the request. *See In re Marriage of Ciesluk*, 113 P.3d 135, 140 (Colo. 2005). Accordingly, the magistrate did not err in requiring

mother to file a motion if she wishes to relocate in the future. Rather, the magistrate followed the statute. And, because mother may file a motion and ask the court to decide the issue, the magistrate did not “give Father power and control over Mother’s movement,” as mother argues.

¶ 19 The district court also did not err in adopting this provision of the magistrate’s order and noting that the issue of whether mother may ultimately relocate is not ripe until she actually files a motion to relocate to a particular location, and the court rules on it. *See Jessee v. Farmers Ins. Exch.*, 147 P.3d 56, 59 (Colo. 2006) (ripeness requires an actual controversy between the parties, and a court will not consider uncertain future matters because any injury is speculative and may never occur).

IV. Mother’s Renewed Motion for Attorney Fees

¶ 20 Last, mother’s contention that the magistrate erred by refusing to address her renewed motion for attorney fees and her request for a hearing on the motion are moot because the district court’s register of actions reflects that a hearing was held on mother’s renewed motion on June 25, 2019. *See In re Marriage of Tibbetts*, 2018 COA 117, ¶¶ 7-8 (an appellate court will not render an

opinion on an issue that has been mooted by subsequent events, meaning that a decision on the issue can have no practical legal effect).

V. Father's Request for Appellate Attorney Fees

¶ 21 We deny father's request for appellate attorney fees. Based on the disposition, we do not agree that the appeal is frivolous such that a fee award is appropriate under C.A.R. 38(b) or section 13-17-102. *See Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925, 934-35 (Colo. 1993) (sanctions should be imposed only in clear and unequivocal cases when the appellant presents no rational argument or the appeal is prosecuted for the sole purpose of harassment or delay); *see also Mission Denver Co. v. Pierson*, 674 P.2d 363, 365-66 (Colo. 1984).

VI. Conclusion

¶ 22 The child support portion of the order is reversed, and the case is remanded for the district court to reconsider mother's motion to modify child support consistent with section 14-10-122(1)(a). In all other respects, the order is affirmed.

JUDGE FURMAN and JUDGE WELLING concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

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