19CA0623 Marriage of Rose 02-13-2020

COLORADO COURT OF APPEALS

Court of Appeals No. 19CA0623
Boulder County District Court No. 18DR30262
Honorable Andrew R. MacDonald, Judge

In re the Marriage of

Margot Lynne Rose,

Appellee,

and

Kurt Clarence Rose,

Appellant.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE TERRY
Webb and Tow, JJ., concur

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

Cooper Tanis P.C., Leonard D. Tanis, Broomfield, Colorado, for Appellee

Law Office of Roger Seat, LLC, Roger Seat, Loveland, Colorado, for Appellant

¶ 1 This case required the district court to strike a difficult balance between the rights of Kurt Clarence Rose (father) and Margot Lynne Rose (mother) in determining parenting time and decision-making with respect to the parties' son together, L.R. Mother has been accused in a criminal case of felony sexual assault on a child and aggravated incest with respect to J.R., father's son from a prior relationship. We affirm.

I. Background

¶ 2 At the permanent orders hearing, father sought to prohibit mother from having any parenting time — including supervised parenting time — with L.R. until the criminal case was resolved. Father also wanted sole decision-making responsibility for L.R.

¶ 3 Mother argued that, given that there were no allegations that she had abused L.R., it was in the child's best interests for the parties to share equal parenting time and joint decision-making responsibility. Though mother did not believe her parenting time with L.R. needed to be supervised, she did not object to such supervision.

¶ 4 The court found that equal parenting time was not appropriate, but that it was in L.R.'s best interests to have mother

involved in his life and exercising parenting time. The court ordered that mother would have supervised parenting time with L.R. up to four times each week for two-hour sessions, and said that it would need to revisit this order once the criminal case was resolved. The court also found that awarding father sole decision-making authority was not in L.R.'s best interest. It ordered the parties to share joint decision-making responsibility, finding that they could continue to cooperate and make decisions as they had done in the past.

¶ 5 The court later denied father's C.R.C.P. 59 motion.

II. Section 14-10-124(4)

¶ 6 Father contends that the district court misapplied section 14-10-124(4), C.R.S. 2019, in deciding how to allocate parental responsibilities for L.R. We disagree.

¶ 7 Although allocating parental responsibilities is a matter within the sound discretion of the district court, we review the legal standard applied by the court de novo. *In re Parental Responsibilities Concerning B.R.D.*, 2012 COA 63, ¶ 15.

¶ 8 The district court must allocate parental responsibilities in accordance with the best interests of the child. § 14-10-124(1.5).

In determining what is in the child's best interest, the court must consider all relevant factors, including, for parenting time, the factors set forth in section 14-10-124(1.5)(a), and, for decision-making responsibilities, those set forth in section 14-10-124(1.5)(b).

¶ 9 Subsection (4)(a) applies when child abuse or neglect has been alleged with respect to a parent seeking allocation of parental responsibilities. It provides:

> When a claim of child abuse or neglect . . . has been made to the court, or the court has reason to believe that a party has committed child abuse or neglect . . . prior to allocating parental responsibilities, including parenting time and decision-making responsibility, and prior to considering the factors set forth in paragraphs (a) and (b) of subsection (1.5) of this section, the court shall consider the following factors:
>
> (I) Whether one of the parties has committed an act of child abuse or neglect as defined in section 18-6-401, C.R.S. [2019], or as defined under the law of any state, which factor must be supported by a preponderance of the evidence. If the court finds that one of the parties has committed child abuse or neglect, then it shall not be in the best interests of the child to allocate mutual decision-making with respect to any issue over the objection of the other party or the legal representative of the child.

§ 14-10-124(4)(a).

¶ 10 The district court said that section 14-10-124(4) would apply if it made a finding by a preponderance of the evidence that a party had engaged in child abuse or neglect. The court correctly found that there were no allegations of child abuse, assault, or neglect made against mother as to L.R.

¶ 11 To the extent the court indicated that section 14-10-124(4)'s application is limited to the child of the divorcing spouses, it was wrong. In *In re Marriage of McCaulley-Elfert*, 70 P.3d 590, 591 (Colo. App. 2003), the court found that a father had committed child abuse against his stepdaughter. The father argued on appeal that his alleged conduct with the stepdaughter was not pertinent to the issues before the court concerning the parties' son. *Id.* at 592. A division of this court disagreed, and pointed to section 14-10-124(1.5), C.R.S. 2002, which, as it was worded at the time, required the district court to consider "[w]hether one of the parties has been a perpetrator of child abuse or neglect . . . ." § 14-10-124(1.5)(a)(IX), (1.5)(b)(IV), C.R.S. 2002; *see McCaulley-Elfert*, 70 P.3d at 592; *see also* Ch. 218, sec. 2, § 14-10-124, 2013

Colo. Sess. Laws 996-97 (repealing subsections (1.5)(a)(IX) and (1.5)(b)(IV) and enacting subsection (4)(a)). The division held:

> Nothing within these statutory provisions precludes the court's inquiry into the alleged abuse or neglect when it involves other children. Such a restriction would unduly hinder a court's ability to carry out the statutory directive of assessing all relevant factors when making the best interests determination. Evidence of abuse or neglect, even when the victim is unrelated to the perpetrator, is probative of the overall home environment and the interaction of the parties with their children, issues that lie at the core of any parental responsibility or parenting time proceeding.

McCaulley-Elfert, 70 P.3d at 592.

¶ 12 Construing the statute de novo, *Cowen v. People*, 2018 CO 96, ¶ 11, we conclude that the district court was required to consider the allegations of sexual assault against J.R. as part of its parenting time and decision-making analysis regarding L.R. *See* § 14-10-124(4)(a)(I) ("[P]rior to allocating parental responsibilities, including parenting time and decision-making responsibility . . . *the court shall consider the following factors: (I) Whether one of the parties has committed an act of child abuse or neglect*[.]") (emphasis added).

¶ 13 Father argues that the district court must not have considered mother's alleged sexual assault against J.R. as required by section 14-10-124(4) because it did not make a finding that she committed child abuse. True, the court did not make a *finding*, based on a preponderance of the evidence, as to whether mother committed child abuse. But section 14-10-124(4)(a)(I) does not contain a requirement that the court make such a finding. The only statutory requirement is that, before considering the factors set forth in subsections (1.5)(a) and (b), the court must *consider* the statutory factors set out in subsections (4)(a)(I)-(IV).

¶ 14 If, in considering those factors, the court had found by a preponderance of the evidence that mother had committed child abuse, it would have had to find that it was not in the child's best interest to allocate mutual decision-making. § 14-10-124(4)(a)(I). In the ordinary case, where a parent's criminal child abuse case was not still pending trial, the court would proceed to make findings on that issue.

¶ 15 Here, the court *did consider* the allegation against mother. It did not make a *finding* about whether mother had committed child abuse, and given the pendency of mother's criminal trial, it is

understandable why the court was hesitant to make a such a finding before the criminal charges were resolved.

¶ 16 We conclude that the court complied with the statute by appropriately considering the criminal allegations against mother in fashioning its order and making the required determinations for allocating parenting time.

¶ 17 The court found that mother was the defendant in the criminal case; recited the charges against her; noted that she was subject to a mandatory protection order that prevented her from having contact with children under the age of eighteen, including L.R.; found that mother denied all allegations against her; and acknowledged father's concerns about mother's parenting time with L.R. The court's pronouncements on those matters are enough to assure us that the court considered mother's alleged sexual assault against J.R. as part of evaluating the propriety of allowing mother parenting time with L.R. and granting decision-making to her for the child. *See id.*; *see also* § 14-10-124(1.5)(a) (court shall consider "all relevant factors" for parenting time); § 14-10-124(1.5)(b) (same for decision-making).

III. Supervised Parenting Time

¶ 18 Father next contends that the district court erred in granting supervised parenting time to mother. We disagree.

¶ 19 Though father argues that the written order does not sufficiently explain why it awarded mother supervised parenting time, any failure to make express findings does not require reversal where, as here, the record is sufficient for us to determine the basis of the ruling. *See Foster v. Phillips*, 6 P.3d 791, 796 (Colo. App. 1999); *see also In re Marriage of Nelson*, 2012 COA 205, ¶ 41.

¶ 20 Father objected to mother having supervised parenting time with L.R. because L.R. was to be a witness in the criminal case. Addressing this objection, the court said:

> I understand [that L.R. is] a witness. . . . [T]hat issue is why I think the supervised parenting time in the interim here makes some sense . . . until that's resolved. . . . [A]nd what I'm talking about with supervised is — I'm very familiar with how Children First work[s]. I'm also familiar with how other professionals work in supervis[ing] parenting time. So the concern about any improper communication [that] may occur regarding the criminal case would be alleviated — or that would be noticed relatively quickly and brought to the attention of the court. . . . I'm not hearing, aside from the potential witness issue, any concern

> regarding [mother's] contact with [L.R.], as long as that issue is addressed.

¶ 21 The court reiterated in its written order that father "was only worried about [m]other having parenting time with [L.R.] because of the charges in 2018CR2013 and the fact that [L.R.] may be a witness in that case." The court also found, as mentioned above, that it was in L.R.'s best interest "to have [m]other involved in his life and exercising parenting time."

¶ 22 The court's solution of ordering supervised parenting time adequately addressed any safety concerns stemming from the criminal allegations while still permitting mother to exercise appropriate parenting time with her child. *See* § 14-10-124(1.5)(a); *see also In re Marriage of Martin*, 42 P.3d 75, 77 (Colo. App. 2002) (reasonable parenting time is mandated and undue restrictions are prohibited unless the court finds such endangerment); *In re Marriage of Sepmeier*, 782 P.2d 876, 878 (Colo. App. 1989) (the child's well-being guides a parenting time determination).

¶ 23 We therefore uphold the court's order granting mother supervised parenting time.

IV. Conclusion

¶ 24 The judgment is affirmed.

JUDGE WEBB and JUDGE TOW concur.