18CA2230 Marriage of Short 01-02-2020

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA2230
Boulder County District Court No. 13DR257
Honorable Patrick Butler, Judge

In re the Marriage of

Priscilla Short, n/k/a Priscilla Eagye,

Appellee,

and

Jason Short,

Appellant.

ORDER VACATED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE FOX
J. Jones and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced January 2, 2020

The Burham Law Firm, Aaron Belzer, Boulder, Colorado, for Appellee

Leroux Law LLC, L. Paul Leroux II, Westminster, Colorado, for Appellant

¶ 1 In this post-dissolution of marriage parenting time dispute involving the children of Jason Short (father) and Priscilla Short (mother), now known as Priscilla Eagye, father appeals the district court's order denying his motion to modify the dissolution decree's parenting time right of first refusal provision. We vacate the order and remand the case for a hearing, reconsideration of father's motion, and determination of mother's section 14-10-119, C.R.S. 2019, request for appellate attorney fees.

I. Background

¶ 2 The parties' marriage ended in 2013, and their parenting plan for their two children was incorporated into the decree. The plan's relevant part provides as follows:

> Whenever a party who is scheduled to have parenting time with the children is unable to exercise their overnight parenting time and will be placing the children with a third-party caretaker, for an overnight stay, with someone other than an immediate family member of the children, that party shall first notify the other parent, who shall then have the opportunity to take on the responsibility of caring for the children for that period. For purposes hereof, a step-parent is not considered an immediate family member of the children.

¶ 3 In 2018, father moved to modify the parenting plan to remove this right of first refusal provision. He alleged that he had remarried and the children had a strong relationship with their stepmother. He requested a hearing on the issue. Mother responded, objecting to the modification and disagreeing that the children had a strong relationship with their stepmother.

¶ 4 Three days later and before the expiration of the time provided under the Colorado Rules of Civil Procedure for father to file a reply, *see* C.R.C.P. 121, § 1-15(1)(c) (a moving party "shall" have seven days after a response brief is filed to file a reply), the court denied father's motion, stating that the parties' parenting plan specifically contemplated that they might remarry and provided that a stepparent would not be considered "immediate family" for purposes of the plan's right of first refusal.

¶ 5 Father immediately moved for reconsideration of the order, noting the court's failure to allow him time to reply. He again requested a hearing, asserting that the children's best interests in continuing the right of first refusal could not be determined without a hearing. The court declined to reconsider its order, again citing the parties' parenting plan from the 2013 decree.

II. Father's Motion to Modify

¶ 6 Father contends that the court denied him due process by refusing to hold a hearing on his motion to modify and that it further erred by refusing to consider modifying the right of first refusal provision on the ground that it was part of the parties' parenting plan incorporated into their 2013 decree. We agree.

A. Standard of Review

¶ 7 The district court has broad discretion in modifying an existing parenting time order, and we will not disturb its decision absent an abuse of discretion. *See In re Marriage of Barker*, 251 P.3d 591, 592 (Colo. App. 2010); *In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007).

¶ 8 We review de novo, however, whether the district court applied the correct legal standard in resolving father's motion to modify. *See In re Marriage of Parr*, 240 P.3d 509, 511 (Colo. App. 2010). We also review de novo the constitutional due process issue father raises. *See People in Interest of C.J.*, 2017 COA 157, ¶ 25.

B. Law

1. Due Process

¶ 9 Due process requires that a party be provided a meaningful opportunity to be heard. *Id.* at ¶ 27; *Hatton*, 160 P.3d at 329; *see In re Marriage of Finer*, 893 P.2d 1381, 1388-89 (Colo. App. 1995) (concluding the parent was denied due process when the court refused to hold a hearing on her request to relocate with her child).

2. Modification

¶ 10 After the parties' agreed terms are incorporated into the dissolution decree, they are no longer enforceable as contract terms. § 14-10-112(5), C.R.S. 2019; *see In re Marriage of Chalat*, 112 P.3d 47, 52 (Colo. 2005) (holding that the district court erred by enforcing parties' agreement regarding payment of their children's post-secondary education costs as a contract term after its incorporation into their dissolution decree).

¶ 11 Additionally, once incorporated into the decree, such terms involving children are modifiable — pursuant to the district court's continuing jurisdiction over issues involving children — just as any other such provisions of the decree would be. *See Chalat*, 112 P.3d at 52-53 (holding that agreed upon child support terms were modifiable once incorporated into the decree and "[i]t does not matter that [the terms] may have originated in separation

agreement terms" because children are not bound by their parents' separation agreement); *see also* § 14-10-112(2), (6) (courts are not bound by separation agreement terms involving parental responsibilities, and parties cannot preclude or limit the court's power to modify such terms).

¶ 12 The district court may "modify an order granting or denying parenting time rights whenever such . . . modification would serve the best interests of the child." § 14-10-129(1)(a)(I), C.R.S. 2019; *see Parr*, 240 P.3d at 511; *see also In re Marriage of DePalma*, 176 P.3d 829, 831, 834-35 (Colo. App. 2007) (recognizing district court's discretion to modify decree's parenting time right of first refusal provision that originated in the parties' parenting plan). Children have the right to have all matters relating to parental responsibilities determined based on their best interests. §§ 14-10-123.4(1)(a), 14-10-124(1.7), C.R.S. 2019; *see Barker*, 251 P.3d at 592 (child's best interests is the controlling factor for any parenting time order); *In re Marriage of Sepmeier*, 782 P.2d 876, 878 (Colo. App. 1989) ("It is the well-being of the child, rather than reward or punishment of a parent, that must guide every aspect of a custody determination including visitation.").

C. Analysis

1. Preservation

¶ 13 Initially, we reject mother's argument that father has not preserved his arguments for appellate review. As mother points out, father's initial motion did not assert that eliminating the right of first refusal was in the children's best interests. He did assert, however, that he had remarried and that the children had a strong relationship with their new stepmother. And he requested a hearing, citing *Finer* and other authorities holding that due process requires a hearing to determine best interests in connection with parenting time issues. *See* 893 P.2d at 1388; *see also In re D.R.V-A.*, 976 P.2d 881, 884 (Colo. App. 1999); *In re Marriage of Goellner*, 770 P.2d 1387, 1388-89 (Colo. App. 1989); *Rayer v. Rayer*, 32 Colo. App. 400, 403, 512 P.2d 637, 639 (1973).

¶ 14 Father was then more explicit in his motion to reconsider, filed within the time provided in the rules for filing a reply to mother's response. He argued that the children's best interests were at stake; that a hearing was required to determine whether eliminating the right of first refusal was in their best interests, again citing *Finer*; and that his wife had been involved regularly and

consistently with the children and the children had a "loving and nurturing bond" with her and her family.

¶ 15 Under these circumstances, we conclude that father preserved his due process and best interests arguments. *See In re Marriage of Lohman*, 2015 COA 134, ¶¶ 16-22 (concluding that party sufficiently preserved argument when he "minimally apprise[d]" the district court of potential issue and then raised it more explicitly by post-trial motion); *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010) (to preserve an issue for appeal, the issue must be brought to the district court's attention so the court has an opportunity to rule on it).

2. Sufficiency of Father's Motion

¶ 16 We also reject mother's argument that the district court did not err by refusing to hold a hearing because father's motion and affidavit did not establish adequate cause for one under section 14-10-132, C.R.S. 2019.

¶ 17 A party seeking to modify a parenting decree must file a motion and affidavit "setting forth facts supporting the requested modification," and the court shall deny the motion "unless it finds that adequate cause for hearing the motion is established." *Id.*

Adequate cause for a hearing means changed circumstances and that the modification is in the children's best interests. *In re Marriage of Jones*, 703 P.2d 1328, 1329 (Colo. App. 1985).

¶ 18 As father points out, the district court did not deny his motion under section 14-10-132 for failing to establish adequate cause for a hearing. The court's one-paragraph order did not cite the statute, nor did it find that adequate cause for a hearing was not shown. Instead, the order addresses the merits of father's motion, relying on the parties' 2013 agreement and essentially saying that the agreement cannot be revisited. The court ruled similarly in denying father's motion to reconsider, without relying on or mentioning section 14-10-132.

¶ 19 Father's motion also alleged, albeit briefly, a changed circumstance since the decree — he remarried — and a basis why modifying the right of first refusal provision would be in the children's best interests — the children have a strong relationship with their new stepmother.

¶ 20 Accordingly, we reject mother's section 14-10-132 argument.

3. Requirement for a Hearing

¶ 21 Addressing the merits of father's contention, we conclude that he is entitled to a hearing on his motion to modify the parenting time right of first refusal provision of the decree.

¶ 22 Contrary to the district court's reasoning in denying father's motion without a hearing, the first refusal provision is not rendered nonmodifiable simply because it originated from the parties' agreement. *See Chalat*, 112 P.3d at 52-53; *DePalma*, 176 P.3d at 831, 834-35; *see also* § 14-10-112(6); § 14-10-129(1)(a)(I). Rather, after the provision was incorporated into the decree, it was no longer enforceable as a contract term and became modifiable in the same manner as any other decree term would be. *See Chalat*, 112 P.3d at 52-53; *see also* § 14-10-129(1)(a)(I). Accordingly, the court erred by denying father's motion because he had agreed to the first refusal provision, and to its exclusion of stepparent, in connection with the 2013 decree.

¶ 23 Mother's argument that father waived or is precluded from challenging the parenting plan provisions he agreed to in 2013 is similarly unpersuasive because those provisions are no longer enforceable as contract terms but instead are modifiable under section 14-10-129(1)(a)(I). Thus, waiver and preclusion do not

apply based on the parties' 2013 agreement. *See Chalat*, 112 P.3d at 52-53. And, as father points out, given the district court's stated position that he is bound by the terms of the 2013 agreement as to the right of first refusal, it would be futile for him to move to modify again asserting different allegations, as mother argues he should do.

¶ 24 Last, both parties rely on *DePalma*, 176 P.3d 829, as support for their positions regarding the first refusal provision.

¶ 25 In *DePalma*, the district court entered an order — after a hearing — allowing the father to have his wife care for the children during his parenting time when he was deployed with the Air Force. Like the parties here, the parents in *DePalma* had agreed at dissolution to a right of first refusal requirement and that provision was incorporated into their decree. *Id.* at 831.

¶ 26 A division of this court affirmed the district court's order allowing the father to have his wife care for the children during his deployments. *Id.* The division first rejected the mother's arguments that the court had failed to accord her a presumption as the children's parent and had granted parenting time rights to the stepmother. *Id.* at 831-34. It next addressed the mother's

argument that the court made insufficient findings that modifying the right of first refusal provision was in the children's best interests. *Id.* at 834. The division noted that "when two fit parents disagree, the court must weigh the wishes of both to determine what is in the child's best interests," *id.* at 832, and it found the court's limited findings sufficient because the mother had not disputed that it was in the children's best interests to maintain a relationship with their stepmother. *Id.* at 834.

¶ 27 Contrary to mother's argument, here, unlike in *DePalma*, the parties disagreed specifically over the children's relationship with their stepmother. Father alleged that the relationship was strong, and mother disputed that allegation. Thus, due process requires a hearing to determine whether given the nature of the children's relationship with their stepmother, it would be in their best interests to modify the right of first refusal provision to allow father to leave them with her when he is unavailable during his overnight parenting time. *See Finer*, 893 P.2d at 1388 (noting that determining children's best interests "cannot be accomplished without a hearing"); *see also D.R.V-A.*, 976 P.2d at 883-84 (concluding that the district court erred by continuing to deny a

hearing on request to modify parenting time); *Sepmeier*, 782 P.2d at 877-78 (remanding for a hearing on parent's request to modify restricted parenting time visits).

¶ 28 Mother's argument that a hearing is only required before a court prohibits a parent's parenting time is unpersuasive. This was not the situation in *Finer* where the division concluded that a best interests hearing was required on the mother's motion to relocate with the children. 893 P.2d at 1388-89. Nor was it the situation in *DePalma*, where the court held a hearing before modifying a decree's right of first refusal provision. 176 P.3d at 831, 834-35.

III. Appellate Attorney Fees

¶ 29 Mother requests appellate attorney fees under C.A.R. 38 and section 13-17-102(4), C.R.S. 2019, contending that the appeal lacks substantial justification and is substantially frivolous. In light of the disposition, we deny her request.

¶ 30 Mother also seeks appellate fees under section 14-10-119, contending that "there is a great disparity in income and resources between the parties." We direct the district court to determine this request on remand. *See* C.A.R. 39.1; *In re Marriage of Alvis*, 2019 COA 97, ¶ 30.

IV. Conclusion

¶ 31 The order is vacated, and the case is remanded to the district court to hold a hearing, reconsider father's motion to modify, and determine mother's request for appellate attorney fees under section 14-10-119.

JUDGE J. JONES and JUDGE TOW concur.