COLORADO COURT OF APPEALS

DATE FILED: December 3, 2020
CASE NUMBER: 2019CA1537

Court of Appeals No. 19CA1537
Routt County District Court No. 17DR30043
Honorable Mary C. Hoak, Judge

In re the Parental Responsibilities Concerning A.F., a Child,

and Concerning Converse Smith Fields,

Appellant,

and

Monique Joy Cressey,

Appellee,

and Concerning Bryan C. Cressey and Christina Cressey,

Intervenors-Appellees.

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

Division VII
Opinion by JUDGE NAVARRO
Tow and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 3, 2020

Jolein A. Harro P.C., Jolein A. Harro, Littleton, Colorado; Norman Wohlgemuth, Ben Aussenberg, Tulsa, Oklahoma, for Appellant

The Law Office of Sarah D. Claassen, P.C., Sarah D. Claassen, Steamboat Springs, Colorado, for Appellee

J. Ryan Law, P.C., Jessica A. Ryan, Steamboat Springs, Colorado, for

Intervenor-Appellee Bryan C. Cressey

The Angel Law Firm of Colorado, LLC, Braden C. Angel, Avon, Colorado, for Intervenor-Appellee Christina Cressey

¶ 1 In this allocation of parental responsibilities case involving Converse Smith Fields (father), Monique Joy Cressey (mother), and Bryan C. Cressey (maternal grandfather), father appeals the district court's judgment concerning parenting time, decision-making responsibility, and grandparent visitation. We affirm in part, reverse in part, and remand the case to the district court for further proceedings.

I. Relevant Facts

¶ 2 Father and mother became romantically involved shortly after meeting in February 2013. In December, mother gave birth to their only child, a daughter. During their relationship, mother struggled with a longstanding addiction to alcohol.

¶ 3 One morning in October 2017, mother was arrested and charged with two misdemeanors, one count of domestic violence, and one count of child abuse. The arresting officer reported that mother exhibited signs of intoxication.

¶ 4 A few months later, father petitioned for an allocation of parental responsibilities for the child.

¶ 5 Seeking grandparent visitation under section 19-1-117, C.R.S. 2020, maternal grandfather moved to intervene in the case. The district court granted the intervention.

¶ 6 The district court then appointed a parental responsibility evaluator (PRE) — a licensed mental health professional — to investigate, report, and make recommendations on parenting time, decision-making responsibility, and grandparent visitation.

¶ 7 In 2019, the district court held a five-day permanent orders hearing. At the close of the hearing, the court entered the following oral findings of fact:

- In October 2017, the parents "were in a physical fight that . . . was started by [mother] in attempt to get a phone away which [was] poor judgment on her part." "She was drunk at the time [and] that doesn't excuse her actions."
- The incident was an act of domestic violence as defined by section 14-10-124(1.3)(a), C.R.S. 2020.
- The incident, however, did not amount to child abuse under section 18-6-401, C.R.S. 2020, because even though the child was present, "nothing did happen to [her]."

- Mother “disappeared” from the child’s life perhaps due to a mandatory protection order in her criminal case. She completed a residential treatment program but relapsed once she saw the child again. After realizing that she wanted to work toward reunification with the child, she resurfaced in August of 2018. Her assertion that she had been sober ever since was credible.
- Before their separation, the parents were supportive of each other, equally involved in the child’s care, and able to cooperate and make decisions jointly.
- The parents were successfully communicating through a messaging service called Talking Parents. For example, one recent message indicated that they were able to resolve a dispute over a school-choice issue.
- The child shared a bond with both parents.
- The child was “building a relationship with her mother at this point.”
- The parents had done remarkably well placing the child’s needs first.

- "I think that [mother], when she's sober, can do the right thing [and] I think that she can parent [the child]."
- Father's "gate keeping [was] absolutely correct when [mother] [was] . . . on an alcoholic tune. No question. [He] did the right thing. But now she's back and she's trying to show [him]. I get that [he] [is] not ready to sign on. I'm not completely ready to sign on, but I'm willing to give her a chance. And I hope that [he] [is] willing to give her a chance."
- It is presumed that father, a fit parent, appropriately decided to discontinue the relationship between the child and maternal grandfather, who was living in Chicago.
- But maternal grandfather rebutted that presumption by presenting clear and convincing evidence that it was in the child's best interests to maintain a relationship with him.
- The child "is attached to her maternal grandfather, there's no question" and "they have a strong, solid, good relationship."

- Father made an "incredibly credible, honest, and true" statement that the child would not be hurt or harmed by a relationship with maternal grandfather.

¶ 8 From those findings, the district court (1) named father the child's primary residential parent; (2) imposed a phased-in parenting plan whereby mother would begin with a highly intensive parenting time schedule and graduate to equal time within approximately four months; (3) ordered mother to submit to an alcohol test before, during, and after her parenting time, and, if she tests positive, she will immediately return to supervised parenting time; (4) required mother to continue therapy until being discharged; (5) allocated joint-decision making responsibility; and (6) granted maternal grandfather visitation but only if mother reverts to supervised parenting time and she has had at least sixty days of supervised parenting time.

¶ 9 Father now appeals.

II. Parental Responsibilities

A. Parenting Time

¶ 10 Father contends that the district court erred by establishing a goal of equal parenting time given mother's alcohol abuse, arrests,

abandonment of the child, and denial of accountability. We are not persuaded.

¶ 11 A district court has broad discretion in deciding what allocation of parenting time is in the child's best interests, and we may not disturb its decision absent a showing of an abuse of that discretion. *See* § 14-10-124(1.5). The court abuses its discretion when its decision is manifestly arbitrary, unreasonable, unfair, or contrary to law. *In re Parental Resps. Concerning D.P.G.*, 2020 COA 115, ¶ 32. Because the court's discretion on parenting issues is very broad, we will exercise every presumption in favor of upholding its decision. *In re Marriage of Rodrick*, 176 P.3d 806, 813 (Colo. App. 2007).

¶ 12 The district court must allocate parenting time according to the child's best interests. § 14-10-123.4(1)(a), C.R.S. 2020 (child has the right to have parental responsibilities determined based on their best interests); § 14-10-124(1.5), (1.7). The court is required to consider the nine statutory factors listed in section 14-10-124(1.5)(a) that may be relevant to its determination. *In re Custody of C.J.S.*, 37 P.3d 479, 482 (Colo. App. 2001).

¶ 13 The district court is also required to consider any allegations of domestic violence or child abuse. § 14-10-124(1.5)(a), (4)(a). If the court finds by a preponderance of the evidence that one parent has committed domestic violence or child abuse, it shall consider, as the primary concern, the safety and well-being of the child and the abused person. § 14-10-124(4)(d).

¶ 14 Still, a finding that a parent has been a perpetrator of domestic violence or child abuse does not automatically preclude an award of parenting time. *See In re Marriage of Hatton*, 160 P.3d 326, 333 (Colo. App. 2007) ("[E]ven in those circumstances of serious criminal conduct and domestic abuse, which by their nature would likely establish endangerment and thus be most susceptible of an order denying parenting time rights, the best interests standard applies to the determination of whether parenting time should be permitted."); *see also In re Marriage of Yates*, 148 P.3d 304, 308-09 (Colo. App. 2006) (district court did not abuse its discretion in naming the mother the child's primary parent after she was convicted of misdemeanor child abuse and felony menacing stemming from an incident in which she threatened the father with a knife in the presence of the child); *In re*

Marriage of Bertsch, 97 P.3d 219, 220-22 (Colo. App. 2004) (district court did not abuse its discretion in granting primary residential parent status to the father who had been abusive to the children in the past but was in therapy and was recommended as their primary parent by evaluators).

¶ 15 Father's contention centers primarily on whether the district court discounted the evidence of mother's prior alcohol abuse. Though her alcohol problems led to criminal activity and a ten-month disappearance from the child's life, the court found that she understood how her history of alcohol abuse affected the child, made significant progress in her recovery, and had been sober for approximately four months. Taken together, the court determined that it was in the child's best interests to give mother, after thirteen months of sobriety, a chance at equal parenting time. The court then established a highly intensive parenting plan with several safety measures to protect the child.

¶ 16 The record supports the district court's findings and ultimate determination. Mother, whom the court found credible, testified that, in August 2018, she re-entered a residential treatment program and had been sober since. *See In re Marriage of Farr*, 228

P.3d 267, 270 (Colo. App. 2010) (determining the witnesses' credibility and resolving conflicts in the evidence are within the district court's province, and an appellate court will not disturb such findings on appeal). And she had shown a sincere commitment to sobriety. She felt regret for disappearing from the child's life and was actively participating in reunification therapy. Furthermore, she took accountability for her behavior during the October 2017 incident.

¶ 17 The PRE recommended an equal split of parenting time in six months, which would amount to a year of sustained sobriety. The PRE cautioned that such parenting time would be appropriate only if mother satisfied certain conditions, including compliance with alcohol testing. The PRE testified about the advantages of having an equal parenting time schedule: "[C]hildren who have access to a reasonable relationship with both parents, generally . . . tend to do better in terms of . . . education, substance abuse, [and] mental health related problems." The PRE opined that, if mother works through the graduated parenting time schedule, she would provide a safe and secure environment for the child. Additionally, when

asked if mother had acquired the ability to remain sober, a clinical psychologist at her past treatment facility said the following:

> I do and that's largely in part to her self-initiative in wanting to monitor herself and to continue getting treatment. And . . . [w]hen she left this last time, her stated intent was to even come back again and do some follow-up work. So she's showing all the intent that a person could possibly show to stay sober.

¶ 18 Under the circumstances, we cannot say that the district court abused its broad discretion in crafting a graduated parenting time schedule comparable to the one recommended by the PRE and gives consideration to the express public policy of encouraging frequent and continuing contact between each parent and child and to the child's safety. *See* § 14-10-124(1), (1.5), (4)(d); *see also Rodrick*, 176 P.3d at 813; *In re Marriage of Plummer*, 709 P.2d 1388, 1390 (Colo. App. 1985) (parenting time order must promote a healthy relationship between a child and parent).

¶ 19 We reject father's related assertion that the district court, when determining the child's best interests, failed to consider evidence that mother travels frequently and attempted to relocate with the child to Chicago without his knowledge or consent. We may presume that the court, in reaching its decision, considered all

the evidence before it, even if it did not make express findings on those issues. *See In re Marriage of Udis*, 780 P.2d 499, 504 (Colo. 1989); *see also In re Marriage of Finer*, 920 P.2d 325, 327 (Colo. App. 1996) (when determining the best interests of a child, the district court need not make specific findings on each factor).

B. Decision-Making Responsibility

¶ 20 Next, father contends that the district court erred in granting joint decision-making responsibility when mother had committed domestic violence and child abuse. We disagree as to domestic violence but agree as to child abuse. Therefore, we remand the case for further proceedings concerning the child abuse issue.

¶ 21 Like parenting time, the district court has a duty to determine decision-making responsibility in accordance with the child's best interests, considering the same factors in section 14-10-124(1.5)(a) plus the three additional factors in section 14-10-124(1.5)(b). The court may allocate decision-making responsibility either mutually between the parents or individually to one parent. *See Rodrick*, 176 P.3d at 813. Either allocation is a matter within the court's sound discretion. *See In re Marriage of McSoud*, 131 P.3d 1208, 1214 (Colo. App. 2006).

1. Domestic Violence

¶ 22 When the district court finds by a preponderance of the evidence that one parent has committed an act of domestic violence, it is not in the child's best interests to allocate joint decision-making responsibility over the other parent's objection, unless the court finds credible evidence of the parents' ability "to make decisions cooperatively in the best interest of the child" and "in a manner that is safe for the abused [parent] and the child." § 14-10-124(1.5)(b), (4)(a)(II)(A).

¶ 23 As defined by section 14-10-124(1.3)(a), "domestic violence"

> means an act of violence or a threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship, and may include any act or threatened act against a person or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

¶ 24 Here, the district court found that the October 2017 incident was an act of domestic violence. Despite this finding, the court determined that it was in the child's best interests to award joint decision-making responsibility. The court considered the evidence

that both parents worked well together in the past and will continue to do so. For example, mother testified that, when they were together, they always agreed on the child's medical, educational, and therapy needs. In addition, after the domestic violence incident, they met with mother's therapist to improve their communication skills. The therapist described the session as "cordial," "respectful," and emphasized that they were "kind" and "considerate." Moreover, their most recent exchanges on Talking Parents were friendly and mutually agreeable, and one in particular instance demonstrated their cooperation in deciding the child's kindergarten.

¶ 25 Because mother and father were able to work together and make major decisions regarding the child's best interests, the district court did not abuse its broad discretion in allocating joint decision-making responsibility in this regard. *See* § 14-10-124(4)(a)(II); *see also In re Marriage of Morgan*, 2018 COA 116M, ¶ 25 (where the father had committed domestic violence and had a permanent protection order entered against him, the district court did not abuse its discretion in allocating joint decision-making responsibility because the parents' Talking Parents messages

showed that they were able to make joint decisions like choosing a therapist, scheduling dental appointments, adjusting exchange times, discussing illnesses, and discussing activities and schedules); *McSoud*, 131 P.3d at 1214.

¶ 26 While we recognize that other evidence may have supported a finding that the parents were unable to make decisions cooperatively in the child's best interest, we will not substitute our own judgment for that of the district court. *See In re Marriage of Nelson*, 2012 COA 205, ¶ 35 (while evidence may support a different conclusion, appellate court will not substitute its judgment for that of the fact finder); *see also Farr*, 228 P.3d at 270.

2. Child Abuse

¶ 27 If the district court finds by a preponderance of the evidence that one parent has committed child abuse, as defined by section 18-6-401, then it shall not be in the child's best interests to allocate joint decision-making responsibility over the objection of the other parent. § 14-10-124(1.5)(b), (4)(a)(I).

¶ 28 Section 18-6-401(1)(a) provides in relevant part that "a person commits child abuse if such person causes an injury to a child's life

or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health."

¶ 29 This issue involves the district court's interpretation and application of section 18-6-401(1)(a), which we review de novo. *See Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 825 (Colo. 2008); *see also In re Marriage of Vittetoe*, 2016 COA 71, ¶ 17. "In construing a statute, we strive to give effect to the intent of the legislature and adopt the statutory construction that best effectuates the purposes of the legislative scheme, looking first to the plain language of the statute." *In re Marriage of Ciesluk*, 1135 P.3d 135, 141 (Colo. 2005). If a statute's language is clear, we apply it as written. *In re Marriage of Wollert*, 2020 CO 47, ¶ 20.

¶ 30 The record reflects that mother became upset with father when he began to record her on his phone. According to her testimony, they "scuffled" over the phone "for maybe a minute," which resulted in him being "scratched." She also testified that the child was in the house during the incident but did not witness it.

¶ 31 Father gave a somewhat different account of the incident, stating that mother was screaming, hitting him, and grabbing the phone while the child was standing right behind him. He testified

that he was trying to keep mother away from the child and that the incident lasted a "couple of minutes."

¶ 32 In denying the child abuse claim, the district court found that father was video recording mother "in an attempt to deter her from escalating"; the parents were in a "physical fight" over a telephone that was initiated by mother; and even though the child was present during the incident, "[n]othing did happen to [her]." But actual injury is not required to sustain a finding of child abuse under section 18-6-401(1)(a). Child abuse may involve the unreasonable placement of the child in a situation that poses a *threat* of injury to the child's life or health. *See id.* Because the court disregarded that part of the definition, the court committed legal error.

¶ 33 Accordingly, we reverse this portion of the judgment and remand the case to the district court to apply the correct statutory definition of child abuse. The court on remand should make findings on whether the child saw or heard the incident. And the court must bear in mind that "health," as used in the statute, *see id.*, includes the child's mental well-being. *See People v. Sherrod*, 204 P.3d 472, 475 (Colo. App. 2007), *rev'd on other grounds*, 204

P.3d 466 (Colo. 2009). Based on its factual findings, the court shall make an explicit determination as to whether mother unreasonably placed the child in a situation that posed a threat of injury to the child's life or health

¶ 34 On remand, if the district court again finds that this incident did not constitute child abuse, it may allocate joint decision-making responsibility. On the other hand, if the court finds that mother committed child abuse, the court may not allocate joint decision-making responsibility over father's objection because, unlike with domestic violence, there is no exception under section 14-10-124(4)(a)(I) that allows for joint decision-making responsibility despite a finding of child abuse. Accordingly, the court must allocate decision-making responsibility separately. *See Bertsch*, 97 P.3d at 221-22 (upholding district court's grant of sole decision-making responsibility to the father who had committed child abuse); *see also Yates*, 148 P.3d at 308-09 (upholding district court's split of decision-making responsibility [not joint decision-making responsibility] for parents who had engaged in domestic violence in the presence of the child).

III. Grandparent Visitation

¶ 35 Last, father contends that the district court erred by granting visitation to maternal grandfather. We are not persuaded.

¶ 36 A fit parent has a fundamental constitutional right to make decisions concerning the care, custody, and control of her or his child without unwarranted government intrusion. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). But, under section 19-1-117(1), the district court may order reasonable grandparent visitation, even over a fit parent's objection. *In re Custody of C.M.*, 74 P.3d 342, 343-44 (Colo. App. 2002).

¶ 37 When ordering grandparent visitation, the district court does not unconstitutionally infringe on a fit parent's fundamental rights if it (1) gives "special weight" to a parent's wishes by presuming that they are in the child's best interests; (2) finds by clear and convincing evidence that the parent's wishes are not in the child's best interests; and (3) finds by clear and convincing evidence that the grandparents' visitation schedule is in the child's best interests. *See Troxel*, 530 U.S. at 65, 70; *see also In re Adoption of C.A.*, 137 P.3d 318, 322, 327-28 (Colo. 2006).

¶ 38 If the district court orders grandparent visitation, it must also make findings of fact identifying the "special factors" that led to its ruling. *See C.A.*, 137 P.3d at 322, 328; *see also Troxel*, 530 U.S. at 68 (district court must demonstrate consideration and resolution of those "special factors that might justify the State's interference with [the parents'] fundamental right to make [parental] decisions"). The court may not enter a grandparent visitation order unless it finds that the visitation is in the child's best interests. § 19-1-117(2); *C.A.*, 137 P.3d at 323.

¶ 39 In accordance with *Troxel* and *C.A.*, the district court found that father was a fit parent and afforded him the presumption in favor of his wishes to end the relationship between the child and maternal grandfather. The court then found, by clear and convincing evidence, that maternal grandfather rebutted the presumption by demonstrating that he had a strong relationship with the child. The court also found that severing that relationship would not be in the child's best interests, especially given that father "honestly and credibly" stated that maternal grandfather had not done anything to alarm him.

¶ 40 Then, the district court found that limited visitation between the child and maternal grandfather in order to maintain their relationship was in her best interests. The "special factors" cited by the court were the maternal grandfather's interaction and interrelationship with the child, as well as his ability to put her needs ahead of his own, including protecting her from mother if necessary. The court ultimately ordered that maternal grandfather have visitation but only if mother reverts back to supervised parenting time.

¶ 41 The record supports the district court's findings. Maternal grandfather testified that the child nicknamed him "G-Daddy" and spent time with him reading books, learning math, creating art, playing games, and touring Chicago. He added that he could be "a very positive force, role model, loving presence of an older generation who will be an important part of her life as my grandparents were of mine." The PRE testified that it was in the child's best interests to have maternal grandfather in her life because they had a "close" and "loving" relationship. The PRE added that maternal grandfather "could provide a very positive psychological, supportive, and loving resource" to the child.

¶ 42 Thus, the district court did not err in granting maternal grandfather visitation with the child.

IV. Appellate Attorney Fees and Costs

¶ 43 Mother asks for her appellate attorney fees and costs under C.A.R. 38(b) and section 13-17-102(4), C.R.S. 2020, asserting that father's contention regarding parenting time is substantially frivolous. Although we disagree with his contention, we do not find it so lacking that it qualifies as substantially frivolous. *See Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006) ("[An appeal 'lacks substantial justification' and is 'substantially frivolous' under § 13-17-102(4) when the appellant's briefs fail to set forth, in a manner consistent with C.A.R. 28, a coherent assertion of error, supported by legal authority."). So we deny mother's request.

V. Conclusion

¶ 44 The portion of the judgment allocating joint decision-making responsibility is reversed, and the case is remanded for further proceedings as directed herein. In all other respects, the judgment is affirmed.

JUDGE TOW and JUDGE LIPINSKY concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

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: March 5, 2020

***Notice to self-represented parties**: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at https://www.cobar.org/For-Members/Committees/Appellate-Pro-Bono*