19CA2271 Marriage of Cleveland 02-18-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 19CA2271
Arapahoe County District Court No. 05DR2290
Honorable Peter F. Michaelson, Judge

In re the Marriage of

Jimmy D. Cleveland,

Appellee,

and

Lisa Puerner-Cleveland,

Appellant.

ORDER AFFIRMED IN PART
AND REVERSED IN PART

Division VII
Opinion by JUDGE HARRIS
Fox and Grove, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 18, 2021

Elizabeth Henson Mediator, P.C., Elizabeth Henson, Greenwood Village, Colorado, for Appellee

Lewis Roca Rothgerber Christie, LLP, Kenneth F. Rossman, IV, Denver, Colorado, for Appellant

¶ 1 In this post-dissolution of marriage child support proceeding, Lisa Puerner-Cleveland (mother) appeals the district court's order adopting a magistrate's ruling modifying the support owed by Jimmy D. Cleveland (father) for the parties' two children. We affirm the order in part and reverse it in part.

I. Background

¶ 2 The parties' marriage ended in 2006. Their amended separation agreement was adopted by the district court and incorporated into the decree.

¶ 3 In 2017, father moved to modify his child support obligation under the agreement alleging substantial and continuing changed circumstances. A hearing was held before a district court magistrate, after which the magistrate determined father's child support obligation going forward and ordered retroactive support for the preceding five years based on the parties' incomes during each year. The magistrate relied on section 14-10-122(5), C.R.S. 2020, which allows child support to be modified as of a change in the children's physical care. She therefore determined that father owed mother $41,367.50 in retroactive child support and ordered him to

pay the current monthly child support of $1,375.84 plus $50 toward the retroactive support amount.

¶ 4 Mother petitioned for district court review of the magistrate's order, and the court denied the petition. This appeal followed.

II. Section 14-10-122(5)

¶ 5 Mother contends that the magistrate erred by applying section 14-10-122(5) to retroactively modify child support without finding a change in the children's physical care arrangements. We agree.

A. Legal Standards

¶ 6 We review de novo the magistrate's interpretation and application of section 14-10-122(5). *See In re Marriage of Gross*, 2016 COA 36, ¶¶ 8, 12-20.

¶ 7 When child support is modified, the modification is ordinarily effective as of the date the motion to modify was filed. *In re Marriage of Garrett*, 2018 COA 154, ¶ 21; *see* § 14-10-122(1)(a), (d). Section 14-10-122(5) provides an exception to this rule, however, for circumstances where a change in the physical care arrangements for the child has occurred. It provides:

> [W]hen a court-ordered, voluntary, or mutually agreed upon change of physical care occurs, the provisions for child support of the obligor

> under the existing child support order, if modified pursuant to this section, will be modified or terminated as of the date when physical care was changed. . . . The court shall not modify child support pursuant to this subsection (5) for any time more than five years prior to the filing of the motion to modify child support, unless the court finds that its application would be substantially inequitable, unjust, or inappropriate.

§ 14-10-122(5).

¶ 8 The statute "provides a remedy for a parent who has effectively overpaid child support due to a change in care of the child." *In re Marriage of Weekes*, 2020 COA 16, ¶ 33.

B. Analysis

¶ 9 Father did not bring his motion under section 14-10-122(5) nor did he allege that the children's physical care arrangements had changed, resulting in him having overpaid child support. Instead, he alleged substantial and continuing changed circumstances because his child support obligation under the separation agreement had ended in 2008 and although he had continued to support the children thereafter, a definitive child support order was necessary due to changes in the parties' jobs, incomes, and in the costs of raising the children.

¶ 10 Mother also did not invoke section 14-10-122(5) in her response to father's motion. Rather, she asserted that father's obligation had not terminated under the separation agreement.

¶ 11 At the hearing, both parties testified that the children's physical care arrangements had *not* changed because although the amended separation agreement had contemplated that the parties would incrementally move to an equal parenting time schedule, they had never done so. Father testified that mother did not allow him to have equal time and gave him very few overnight visits before he moved to Texas in 2009. Mother testified that she did not deny father parenting time, but that he moved to Texas and therefore could not increase his time. She argued in closing that section 14-10-122(5), "the only exception" allowing child support to be modified other than as of the date a motion to modify is filed, did not apply under the circumstances.

¶ 12 Nonetheless, the magistrate applied section 14-10-122(5), finding "a mutually agreed-upon change in circumstances," in that by choosing to move to Texas, father effectively gave up equal parenting time because the court could not order equal time after he moved. However, the statute requires that a "change of *physical*

care occur[]" in order to retroactively modify child support as of the change. § 14-10-122(5) (emphasis added); *see Gross*, ¶ 1 (concluding that the district court erred in applying section 14-10-122(5) when no change in the children's physical care had occurred).

¶ 13 Contrary to father's argument, the magistrate did not find, nor does the record reflect, a change in the children's physical care. Rather, the magistrate relied on the "change in circumstances" of father choosing to move to Texas where he would be unable to exercise equal parenting time. *See Gross*, ¶¶ 12-20 (concluding that the district court erred in applying section 14-10-122(5) based on the changed circumstances of the father having agreed to relinquish his parental rights because the statute applies only when child support is modified based on a change in a child's physical care). The record reflects that mother always had primary care of the children, father had only limited visits, and that this arrangement had never changed. The mere fact that the parties hoped to transition to equal parenting time beginning the year before father moved to Texas does not trigger the application of the

statute because the statute requires that the change in the children's physical care to have actually occurred.

¶ 14 Father argues that he would have been exercising equal parenting time before he went to Texas, but mother prevented him from doing so. However, the record is conflicting regarding whether mother denied father parenting time, and the magistrate did not find that mother had prevented him from transitioning to equal time. Thus, we do not address whether section 14-10-122(5) applies under such circumstances.

¶ 15 Additionally, similar to the situation in *Gross*, the magistrate's order was not premised on a change in physical care — i.e., on father having actually exercised equal parenting time and then moving to Texas where he could no longer do so. Indeed, had there been such an actual change in care, father's child support obligation would have been increased under the child support statute's shared physical care provisions because he would have been spending less time with the children. *See Gross*, ¶¶ 17-19; *see also* § 14-10-115(1)(b)(III), (8), C.R.S. 2020. But, as in *Gross*, that is not what happened. *See Gross*, ¶¶ 17-19. The magistrate did not modify child support so as to *increase* father's prior

obligation because of his more limited time with the children while living in Texas. Instead the magistrate used section 14-10-122(5) as a means to reach back and modify child support for five years before the motion to modify was filed based on the parties' changed incomes during those years. And in doing so, the magistrate erred. *See Gross*, ¶¶ 1, 12-20; *see also* § 14-10-122(1)(a), (d).

¶ 16 Accordingly, we reverse the portion of the order retroactively modifying child support under section 14-10-122(5) for the five years before father's motion to modify was filed.

¶ 17 Based on this disposition, we need not address mother's alternative contention that even assuming the magistrate properly applied section 14-10-122(5), the magistrate erred by effectively modifying child support for more than five years prior to the filing of the motion. Nor need we address mother's contention that the magistrate abused her discretion in ordering that father pay the resulting retroactive child support amount at only $50 per month.

III. Enforcement of Child Support Under the Separation Agreement

¶ 18 We reject mother's additional argument that instead of determining retroactive child support under section 14-10-122(5),

the magistrate should have enforced the $3,000 per month child support obligation from the parties' amended separation agreement. The magistrate found mother's argument in this regard unpersuasive because the separation agreement "was very clear about when" the $3,000 per month child support obligation expired. The magistrate noted that her interpretation of the agreement was consistent with mother's behavior in failing to move to enforce child support after 2008.

A. Legal Standards

¶ 19 We review de novo the magistrate's interpretation of the amended separation agreement as incorporated into the decree. *See In re Marriage of Crowder*, 77 P.3d 858, 860 (Colo. App. 2003).

¶ 20 The primary goal in interpreting the agreement is to determine and give effect to the parties' intent as determined from the language of their agreement. *Id.* at 860-61. An agreement must be construed in its entirety, according to the plain and generally accepted meaning of the language used, harmonizing and giving effect to all provisions, if possible. *Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, 198 P.3d 1217, 1221 (Colo. App. 2008).

B. The Amended Separation Agreement

¶ 21 Under the amended separation agreement, father was obligated to pay $3,000 in monthly child support beginning February 1, 2006. The agreement further provides:

> The parties herein agree that this support obligation is significantly higher than that required to be paid per statute and that this obligation has been so determined so as to reflect [mother's] continued obligation of full time care of the minor children until the youngest reaches the age of 30 months, which shall occur in the 24th month after execution of this agreement. Pursuant to Section 14-10-115, C.R.S., the parties agree that it is appropriate for the Court to deviate from the child support guidelines inasmuch as [mother] is abating her right to request maintenance so long as [father] pays child support in the sum of $3,000.00 per month. Thereafter, child support shall be determined pursuant to statute and incorporating both [father's] and [mother's] actual earnings and income.

¶ 22 And, as to mother's abatement of maintenance, the agreement provides:

> For the next 24 months, provided [father] continues to pay child support in the sum of $3,000.00 per month, [mother] agrees to abate her request for an award of maintenance . . . . Should [father] pay child support in the sum of $3,000.00 per month through January 31, 2008; thereafter, [mother] waives maintenance fully understanding that she has the right to

> ask the Court . . . to award maintenance, and, that by waiving maintenance, [mother] does so forever . . . .

¶ 23 Considering these provisions together and harmonizing them as we must, we conclude, as the magistrate did, that the agreement does not obligate father to pay $3,000 per month indefinitely but rather for two years, or until January 31, 2008. To the extent the child support provisions are ambiguous in referring to the twenty-fourth month after the execution of the agreement as the date mother's full-time care obligation for the children will end, the maintenance provision clarifies that father's obligation to pay $3,000 per month ends on January 31, 2008.

¶ 24 We reject mother's argument that under the agreement, the end of the $3,000 obligation is "explicitly contingent" on the parties moving to equal parenting time and on the recalculation of her maintenance. The agreement imposes no such contingencies. It states that the higher $3,000 child support obligation was "determined so as to reflect" mother's "obligation" for full-time care of the children which will end when the youngest is thirty months old, and that "[t]hereafter," child support shall be determined by statute according to the parties' incomes. And, as to maintenance,

the agreement states that the $3,000 monthly child support obligation ends after twenty-four months, and that as long as father pays that amount for that term, or until January 31, 2008, mother forever waives maintenance. The agreement says nothing about the parties transitioning to equal parenting time or about recalculating maintenance in relation to the end of the $3,000 obligation.

¶ 25 Nor does the agreement require the parties to file a motion to modify in order to have child support paid thereafter based on their incomes. Instead, the agreement already provides that after the initial two-year obligation, child support will be determined under the statute based on the parties' incomes. These are the agreed terms that the court adopted in 2006 and incorporated into the decree at the parties' request and after finding that the terms were in the children's best interests. *See* § 14-10-112(1), C.R.S. 2020. Thus, contrary to mother's argument, father did not have to move to modify in order to have child support be based on the parties' incomes after January 31, 2008.

¶ 26 Father testified that the parties discussed and agreed on the amount of child support he would pay in 2008 and thereafter. And, although mother testified to the contrary, the magistrate found

father, and not mother, credible on the issue. The magistrate noted that for over ten years mother did not ask the court to enforce child support, which she would have done had she believed there was no agreement based on income and she was still entitled to receive $3,000 per month.

¶ 27 The form support order that the court entered in 2006 for the $3,000 obligation, which provides that the support is owed "until further Order of the Court," does not persuade us otherwise. This order does not supersede the terms of the decree on which it is based. Further, the amended separation agreement, incorporated into the decree, was entered *after* the form support order and, as such, is a further court order that the $3,000 per month child support obligation ends in two years.

IV. Arrearages Before 2008

¶ 28 Last, mother contends that father did not fully comply with his obligation to pay her $3,000 per month between 2006 and 2008. Therefore, she argues that the magistrate erred by not finding arrearages during that time and ordering father to pay them. Because this contention was not raised by mother in the district court, it has not been preserved.

¶ 29 Mother did not allege in her response to father's motion to modify that he had not fully paid child support between 2006 and 2008. Nor did she testify or argue at the hearing that arrearages had accrued before 2008 and that the court should order father to pay any such arrearages. And because the issue was not raised at the hearing or ruled on by the magistrate, it was also not raised in mother's petition for review of the magistrate's ruling. We will not address an argument raised for the first time on appeal. *See In re Marriage of Ensminger*, 209 P.3d 1163, 1167 (Colo. App. 2008).

¶ 30 We recognize that our disposition of these issues leaves mother with only prospective child support of $1,375.84 per month. But the magistrate specifically ruled, based on findings supported by the record, that absent section 14-10-122(5), she would have only awarded mother prospective child support from the date of father's motion to modify.

V. Appellate Attorney Fees

¶ 31 Father requests an award of his attorney fees incurred on appeal under section 13-17-102, C.R.S. 2020. Based on the disposition, we do not agree that the appeal lacks substantial

justification as is required to award fees under the statute and therefore deny the request.

VI. Conclusion

¶ 32 The portion of the order modifying child support retroactively under section 14-10-122(5) is reversed. The order is otherwise affirmed.

JUDGE FOX and JUDGE GROVE concur.