20CA0814 Marriage of Manly 09-09-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA0814
El Paso County District Court No. 19DR30093
Honorable G. David Miller, Judge

In re the Marriage of

Christopher A. Manly,

Appellant and Cross-Appellee,

and

Amber L. Manly, n/k/a Amber O'Donnell,

Appellee and Cross-Appellant.

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

Division II
Opinion by JUDGE ROMÁN
Harris and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 9, 2021

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¶ 1 In this dissolution of marriage case, Christopher A. Manly (Manly), a psychological parent, appeals the portion of the district court's permanent orders that requires him to pay child support for his former stepson, M.M. In a recent opinion, *In re Parental Responsibilities Concerning A.C.H.*, 2019 COA 43, a division of this court concluded that in certain circumstances, a district court could order a psychological parent to pay child support to the child's legal parent. But *A.C.H.* does not say whether such an obligation can be imposed when, as here, a psychological parent does not have any decision-making responsibility and enjoys only limited and infrequent parenting time with the child. Under the facts of this case, we conclude that the district court abused its discretion in imposing a child support obligation on Manly, and thus reverse this portion of the judgment.

¶ 2 Amber L. Manly, now known as Amber O'Donnell (mother), cross-appeals the portion of the district court's permanent orders granting Manly parenting time with M.M. We conclude that the district court did not err in this regard and therefore affirm this portion of the judgment.

¶ 3 We further remand the case to the district court to consider mother's request for appellate attorney fees under section 14-10-119, C.R.S. 2020.

I. Relevant Facts

¶ 4 While the parties were married, mother had four children. The youngest child, M.M., who was born in 2016, is the subject of this dispute.

¶ 5 In January 2019, mother and M.M. began living with Michael J. Perez (Perez). Mother left the three older children in Manly's care.

¶ 6 A few weeks later, Manly filed a petition to dissolve the parties' marriage in El Paso County. As part of the relief requested, Manly sought an allocation of parental responsibilities for all four children.

¶ 7 Perez then initiated a juvenile action in Adams County to establish M.M.'s paternity. In support of his petition, Perez submitted DNA test results showing that M.M. was his biological son. The juvenile court later ruled that M.M.'s paternity would be decided in the pending El Paso County dissolution of marriage proceeding.

¶ 8 In January 2020, the El Paso County district court conducted a paternity hearing. The court adjudicated Perez the legal father of M.M and determined that Manly had established a psychological parent relationship with the child. The court deferred its final ruling on M.M.'s parental responsibilities as well as Manly's child support obligation for M.M. until after the dissolution of marriage permanent orders hearing.

¶ 9 Following the permanent orders hearing, the district court

- named Manly the primary residential parent of the parties' three older children and gave mother parenting time every other weekend;
- found that mother, Perez, and M.M. were residing together as an intact family;
- awarded decision-making responsibility for M.M. to mother and Perez, but required them to confer with Manly;
- granted Manly parenting time with M.M. one weekend a month, one week during the summer, and on certain alternating holidays and school breaks;

- concluded that Manly was "given a fair amount of rights" and therefore should pay mother child support for M.M.;
- accepted the method recommended by the El Paso County Child Support Services Unit (CSSU) to calculate Manly's support obligation for M.M., which used Worksheet A (sole physical care), placing the collective household income of mother and Perez in "one column" and Manly's household income in the other;
- ordered Manly to pay, for the benefit of M.M., the monthly sum of $588 per month plus arrearages of $5,886; and
- directed Manly to pay for one half of M.M.'s out of pocket medical expenses over $250 as well as one half of "all agreed upon" extracurricular activity expenses.

¶ 10 Manly appeals his child support obligation as to M.M., and mother cross-appeals the district court's parenting time determination as to M.M.

¶ 11 We first turn to mother's cross-appeal because her point may be dispositive of Manly's contentions.

II. Mother's Cross-Appeal

¶ 12 On cross-appeal, mother contends that the district court applied the wrong legal standard in ruling that Manly was a psychological father entitled to parenting time. According to mother, once the court found that Manly was a psychological parent with standing to seek parenting time, it simply concluded — without according special weight to the fit parents' decision not to allow contact between M.M. and Manly, and without making findings under a clear and convincing standard — allocating parenting time to Manly was in the child's best interests. We disagree.

A. Standard of Review

¶ 13 We review de novo whether the district court applied the correct legal standard in resolving the parental responsibilities dispute between a parent and a nonparent. *See In re Parental Responsibilities Concerning M.W.*, 2012 COA 162, ¶ 11.

¶ 14 Parenting time is generally a matter within the sound discretion of the district court. *In re Parental Responsibilities Concerning B.R.D.*, 2012 COA 63, ¶ 15. The court's discretion is broad, and we exercise every presumption in favor of upholding its

decision. *In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007).

B. Preservation

¶ 15 To begin, Manly asserts that mother did not preserve this issue for appellate review. We are not persuaded. To preserve an issue, a party must bring it to the district court's attention so that the court has an opportunity to address it. *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010). In her closing argument at the paternity hearing, mother alerted the district court to the correct legal standard to be applied when allocating parental responsibilities to Manly as a nonparent. So the issue was preserved for our review.

C. Discussion

¶ 16 Section 14-10-123(1)(c), C.R.S. 2020, gives a nonparent, such as a psychological parent, a right to seek parental responsibilities, provided that the nonparent has had physical care of the child for at least six months and commences an action within six months of the termination of such care. *In re Parental Responsibilities Concerning D.T.*, 2012 COA 142, ¶ 7.

¶ 17 Once a nonparent has established standing under section 14-10-123(1), the district court considers whether to allocate parenting time to the nonparent based on the best interests of the child, as set forth in section 14-10-124(1.5), C.R.S. 2020. *See M.W.*, ¶ 12.

¶ 18 A parental responsibilities dispute between a child's parent and a nonparent is not a contest between equals. *Id.* at ¶ 13. A parent has a fundamental right under the Due Process Clause to make decisions concerning the care, custody, and control of her or his child. *Id.*; *see Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that this interest "is perhaps the oldest of the fundamental liberty interests" recognized by the Supreme Court). A nonparent does not have a constitutionally protected interest. *B.R.D.*, ¶ 28.

¶ 19 Therefore, when the district court considers allocating parenting time to a nonparent over the objection of a parent, it must employ a three-part analysis: (1) a presumption in favor of the parent's determination regarding the child's best interests; (2) an opportunity by the nonparent to rebut that presumption by showing through clear and convincing evidence that the parental determination is not in the child's best interests; and (3) placement of the ultimate burden on the nonparent to establish by clear and

convincing evidence that the nonparent's requested parental responsibilities is in the child's best interests. *M.W.*, ¶ 15.

¶ 20 If the district court does grant parental responsibilities to the nonparent, it must make findings identifying those "special factors" that justify interfering with the parent's fundamental constitutional right. *Id.*

¶ 21 In its oral ruling from the paternity hearing, the district court

- determined that Manly had standing to pursue an allocation of parental responsibilities for M.M.;
- found that mother, Perez, and Manly were fit;
- accorded a presumption in favor of the wishes of mother and Perez to "purge" Manly's relationship with M.M.;
- concluded that Manly met his burden to show that mother and Perez's determination to sever all contact did not serve M.M.'s best interests because doing so would be "confusing and possibly harmful" to the child; and
- further concluded that Manly met his burden to show that a parenting time order preserving Manly's contact with M.M. was in the child's best interests.

See Friends of Denver Parks, Inc. v. City & Cnty. of Denver, 2013 COA 177, ¶¶ 34-37 (district court's oral findings may supplement its written order). In its written order, the court also identified a number of special factors justifying its parenting time order:

> Manly has been a fit parent, involved in [M.M.'s] life since birth. It would be easier for [M.M.] to feel he is part of the family with the other three children if he is included in the visits they will share with . . . Manly. It is not in the best interests of [M.M.] to be the 'odd man out.'

Moreover, the court applied the best interest factors in its permanent orders, which detailed the ultimate allocation of parental responsibilities for M.M. *See* § 14-10-124(1.5).

¶ 22 Thus, contrary to mother's contention, the district court did not misapply the legal standard in granting Manly parenting time with M.M.

¶ 23 We now address the merits of Manly's contentions.

III. Manly's Appeal

¶ 24 Manly contends that the district court erred in imposing on him, a psychological parent, a duty to provide child support for M.M. Under the circumstances, we agree.

A. Standard of Review

¶ 25 We review a district court's child support decision for an abuse of discretion but review de novo the legal standard applied by the court. *In re Parental Responsibilities Concerning M.E.R-L.*, 2020 COA 173, ¶ 17. The court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or if it is based on a misapplication of the law. *In re Marriage of Boettcher*, 2018 COA 34, ¶ 6, *aff'd*, 2019 CO 81.

B. Waiver

¶ 26 Mother argues that Manly waived any challenge to the child support order as to M.M. We disagree.

¶ 27 "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *McGill v. DIA Airport Parking, LLC*, 2016 COA 165, ¶ 12 (citation omitted). When a party specifically removes an issue from a district court's consideration, the party has waived the issue and we may not review it on appeal. *People v. Geisick*, 2016 COA 113, ¶ 16.

¶ 28 Here, mother points to (1) CSSU's statement in its legal memorandum that Manly did not contest his duty to financially support M.M. during the introductory remarks of the paternity hearing; and (2) Manly's statement in the parties' trial management

certificate that "no child support [should be order[ed] at this time given the fact that [Perez] has not provided any [financial] disclosures to properly calculate his income for child support purposes."

¶ 29 After examining the transcript, we note that Manly, through counsel, said that, as a psychological parent, he was "prepared and willing" to be "financially responsible" for M.M. But when taken in context, that statement was conditional on the court granting him significantly more parental responsibilities than what was ultimately ordered at the permanent orders hearing. The same is true regarding Manly's statement in the trial management certificate filed before the permanent orders hearing. To be sure, Manly strenuously argued at the permanent orders hearing that he should not be required to pay child support unless he is granted substantial parental responsibilities:

> [O]ur general position, I think when analyzing the *A.C.H.* case, the parenting time and responsibilities that were designated to that [psychological] parent were in fact parenting time and decision[-]making. The [psychological] parent was on the same footing as the [legal] parent, which is not where we are in this case. [Manly] hasn't had any say over [M.M.], he's had this every other weekend, and

> then today that time is trying to be reduced again. [Manly's] not being afforded the same opportunities as [mother] and . . . Perez. So based on that case, our position is that the [c]ourt should not order any kind of child support because [Manly's] not on that same footing. And our alternate position was then if [Manly] is going to be responsible for paying child support, we should be ensuring that he is on the same footing as the [legal] parents in this scenario.

¶ 30 We are not convinced that Manly's conditional statements amount to waiver. *See McGill*, ¶ 12.

C. Discussion

¶ 31 The issue presented to us is a narrow one. That is whether Manly, a psychological parent, received significant enough parental responsibilities for M.M. to give rise to a child support obligation. Because we conclude he did not, we therefore conclude that the district court abused its discretion in imposing such an obligation.

¶ 32 In *A.C.H.*, the father, Hill, and the mother were in a four-year relationship. *A.C.H.*, ¶ 3. The mother had a son, A.F., from a previous relationship. A.F.'s biological father had been absent since his birth. *Id.* The parties also welcomed their own child. *Id.* After the parties broke up, Hill remained an active father figure in A.F.'s life with the mother's encouragement and blessing. *Id.* at ¶ 4. Six

years later, based on her decision to move to Texas, the mother petitioned for an allocation of parental responsibilities for their biological child. *Id.* at ¶ 5. Asserting that he was A.F.'s psychological parent, Hill countered with his own petition seeking responsibilities for A.F. *Id.* at ¶ 5. Hill opposed the relocation, sought to become both children's primary residential parent in Colorado, asked for child support from the mother, and urged investigations by more than one parental responsibilities evaluator (PRE). *Id.* at ¶¶ 5-6. The parties subsequently agreed that Hill was A.F.'s psychological parent. *Id.* at ¶ 7.

¶ 33 In its permanent orders, the district court allowed the mother to relocate to Texas with the children. *Id.* at ¶ 8. The court then awarded Hill 107 overnights of parenting time with both children and allocated joint decision-making responsibility, except that the mother would have the final say with respect to education and extracurricular activities. *Id.* at ¶ 8. The court declined to order Hill to pay child support for A.F. because he was not the child's legal father, and the mother appealed that decision. *Id.* at ¶¶ 10-11.

¶ 34 After surveying the legal landscape, a division of this court reversed the district court and concluded that it could not "embrace a situation in which a psychological parent who fights for and obtains all the same responsibilities of a legal parent does not also assume the responsibility to pay child support." *Id.* at ¶ 33. Critical to this conclusion were the following findings:

> Hill held himself out as A.F.'s father, almost from birth, by treating him as his own. They lived together as a family for nearly four years, and Hill is the only father A.F. has ever known. And even after the parties broke up, Hill did not take his relationship with A.F. for granted. He exercised equal parenting time with the child for the next six years. When mother wanted to relocate with the child to Texas, he initiated an allocation of parental responsibilities, including a PRE investigation, and, at all times, he insisted that he be named the child's primary parent in Colorado. In the end, after numerous hearings, the court ultimately granted him an order for parenting time and decision-making responsibility for the child.

Id. at ¶ 32.

¶ 35 But the division in *A.C.H.* expressly stated that its holding was limited to those facts. *Id.* at ¶ 12. And it was careful to emphasize that it was "not creating a new class of stepparent obligors, nor [was] [it] suggesting that the mere existence of a psychological

parent-child relationship, on its own, establishes a support obligation." *Id.* at ¶ 36.

¶ 36 We conclude that *A.C.H.*'s result should not be extended to the instant case where Manly's duty to pay child support solely rested on the district court's conclusion that he gained "a fair amount of rights." In our view, the court's award of parental responsibilities to Manly, when compared to the rights Hill was granted in *A.C.H.*, did not extend so far as to trigger an obligation to provide child support.

¶ 37 For example, unlike Hill, Manly does not share any decision-making responsibility as to the important decisions affecting M.M.'s upbringing. Still, the district court ordered that he pay a portion of M.M.'s medical and extracurricular expenses. We further note that the division in *A.C.H.* was persuaded by two recent out-of-state cases involving psychological parents with decision-making responsibilities who were obligated to pay child support. *See id.* at ¶¶ 30-32; *see also Moore v. McGillis*, 408 P.3d 1196, 1203 (Alaska 2018) (Because former stepfather "remains the psychological father of the son, and because he retains legal custody, he also retains a support obligation — the intervention of the son's biological father notwithstanding."); *A.S. v. I.S.*, 130 A.3d 763, 766 (Pa. 2015)

(stepfather, who litigated and obtained the same legal and physical custodial rights, was liable to pay child support).

¶ 38 And while Manly took affirmative steps post-separation from mother to obtain parenting time for M.M., he did not receive the same legal and physical custodial rights. The record also reflects that the district court intended that Manly's parenting time with M.M. coincide with the time the child shares with his three half-siblings, noting that they were "bonded with one another and [their] relationship [was] strong."

¶ 39 Thus, we conclude that the district court abused its discretion in imposing a child support obligation on Manly for M.M.

¶ 40 In light of our conclusion, we do not address Manly's related contentions that the district court erred in imposing a child support obligation on him for M.M. because (1) the child support statute contemplates only two parents for a child; and (2) the court improperly used a two-household income formula.

IV. Appellate Attorney Fees

¶ 41 Arguing that the parties' financial resources are disparate, mother asks for her appellate attorney fees under section 14-10-119. Because the district court is better equipped than an

appellate court to resolve factual issues regarding the parties' current financial circumstances, it must address mother's request on remand. *See* C.A.R. 39.1; *see also In re Marriage of Alvis*, 2019 COA 97, ¶ 30.

V. Conclusion

¶ 42 We reverse the portion imposing a child support obligation for M.M. on Manly, affirm the portion of the permanent orders allocating parenting time for M.M. to Manly, and remand the case for the district court to address mother's section 14-10-119 request for appellate attorney fees.

JUDGE HARRIS and JUDGE LIPINSKY concur.