COLORADO COURT OF APPEALS

DATE FILED: December 14, 2017
CASE NUMBER: 2016CA1696

Court of Appeals No. 16CA1696
El Paso County District Court No. 11DR2337
Honorable Marla R. Prudek, Judge

In re the Marriage of

Amy Christine May,

Appellee,

and

Steven Lee May,

Appellant.

ORDER AFFIRMED

Division I
Opinion by JUDGE FURMAN
Taubman and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 14, 2017

Black & Graham, PC, Carl O. Graham, Clifton L. Black, Jennifer L. Helland, Aaron P. Gaddis, Jennifer L. Knies, Kelly J. McPherson, William C. Beck, Brandon A. Prenger, Mariah Dylla, Colorado Springs, Colorado, for Appellee

Torbet, Tuft & McConkie, LLC, Angela C. Jones, Colorado Springs, Colorado; Beltz & West, P.C., Daniel A. West, Colorado Springs, Colorado, for Appellant

¶ 1 In this post-dissolution of marriage proceeding between Amy Christine May (mother) and Steven Lee May (father), father appeals the district court's order modifying parenting time. Father contends that the court erred by applying an endangerment standard under section 14-10-129(2)(d), C.R.S. 2017, instead of a best interests of the child standard under section 14-10-129(1)(a)(I). Father also contends that the court did not make sufficient findings "as to whether the alleged change of physical care of the minor child was consensual" — assuming the integration standard in section 14-10-129(2)(b) applies. We disagree that the district court erred by making findings concerning endangerment and whether the child had integrated into mother's family. But, we also conclude that apart from those findings, the court made other findings sufficient to sustain its order even under the best interests of the child standard urged by father. Accordingly, we affirm the district court's order.

I. The Parties' Separation Agreement

¶ 2 The parties' six-year marriage was dissolved in Colorado in 2012. The parties' separation agreement, incorporated into the

decree, provided that mother and father agreed to "share 50/50 parenting time" with their then five-year-old child.

¶ 3 In 2016, mother, who serves in the military, filed a verified motion to modify parenting time and child support. In this motion, she asserted that in 2014, she received orders transferring her to Hawaii and that father agreed to allow her and the child to move there. She also asserted that by agreement of the parties, she had been the child's primary residential parent since July 2014. She sought an order that would essentially formalize that parenting time arrangement.

¶ 4 Father filed a response and "counter-motion." In this motion, he asserted that he had agreed to allow the child to reside primarily with mother only temporarily and that mother was "attempting to transmute a temporary arrangement . . . for a discrete period . . . into a permanent concession working to her sole benefit." Father requested an order requiring mother to return the child to Colorado to live with him. He later asked the court to allow the child to live with him for the next two or three years.

¶ 5 Following an evidentiary hearing, the district court granted mother's motion and denied father's motion by ordering that mother

continue as the child's primary residential parent. The court found as follows:

- father had agreed in 2014 that the child would relocate to Hawaii with mother;
- mother was not endangering the child; and
- it was in the child's best interests to continue the parenting time arrangement that had been in place since the relocation.

The district court ultimately entered an order modifying father's child support obligation. Father has not appealed that order.

II. Endangerment/Integration Findings

¶ 6 We affirm the district court's order modifying parenting time because the court's findings are sufficient and supported by the record.

¶ 7 We review de novo whether the district court applied correct legal standards. *In re Marriage of Vittetoe*, 2016 COA 71, ¶ 17. In general, when allocating parenting time, a court must focus on the child's best interests. *See* §§ 14-10-123.4(1)(a), 14-10-124(1.5), (1.7), 14-10-129(1)(a)(I), C.R.S. 2017; *see also In re Marriage of*

Barker, 251 P.3d 591, 592 (Colo. App. 2010) (noting that the child's best interests control when entering a parenting time order).

¶ 8 But, as pertinent here, if a party seeks to modify parenting time and the proposed modification would "substantially change" the parenting time and change "the party with whom the child resides a majority of the time," the modification may not occur unless the court also determines that the child "has been integrated into the family of the moving party with the consent of the other party," or the child's "present environment endangers the child's physical health or significantly impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." § 14-10-129(2)(b), (d).

¶ 9 In this case, it is undisputed that during the approximately two-year period leading up to mother's and father's modification motions, the child had resided primarily with mother in Hawaii with father's consent. It is also undisputed that father was seeking a modification that would require mother to return the child to Colorado to live primarily with father for the next two or three years.

¶ 10 Under these circumstances, the district court could properly conclude that it was addressing a proposed modification that would both substantially change parenting time and change the party with whom the child resided a majority of the time. *See* § 14-10-129(2). Accordingly, the court did not err in making findings concerning the child's integration into mother's family with father's consent and whether the child was endangered in his present environment living with mother. *See* § 14-10-129(2)(b), (d).

¶ 11 Concerning the issue of consent, the parties disputed the nature of father's agreement and, specifically, whether he agreed that mother would be the child's primary residential parent going forward or, instead, agreed only to allow the child to reside primarily with mother temporarily. The court found that father agreed that the child would relocate to Hawaii with mother and also later agreed that the child should remain with mother in Hawaii for another year. The court also found that after some initial struggles, the child had been integrated into mother's home; was doing very well; had no medical issues; was getting good grades; was happy, social, and outgoing; and had a number of friends.

¶ 12 Father does not challenge most of these factual findings. In any event, they are binding because they are supported by the evidentiary record and are therefore not clearly erroneous. *See In re Marriage of Bregar*, 952 P.2d 783, 785 (Colo. App. 1997).

¶ 13 These findings, in turn, support the court's ultimate findings that the child was not endangered and that he had been integrated into mother's family with father's consent. *Cf. In re Marriage of Chatten*, 967 P.2d 206, 208 (Colo. App. 1998) (concluding that the "consent" requirement is satisfied when a parent has voluntarily placed the child with the other parent and "willingly permitted the child to become integrated" into the other parent's family). Allowing a parent to revoke such consent once a child has become settled into the other parent's home is "inconsistent with the policies of stability and continuity underlying the modification statute." *Id.*

¶ 14 For these reasons, we conclude that the district court did not err by making findings under section 14-10-129(2)(b) and (d). We further conclude that, based on those findings, the court did not abuse its discretion in modifying the parties' existing parenting time order. *See Barker*, 251 P.3d at 592 (district courts have broad discretion when modifying existing parenting time orders); *In re*

Marriage of Hatton, 160 P.3d 326, 330 (Colo. App. 2007) (noting that "every presumption" will be exercised in favor of upholding trial court's parenting time decisions).

III. Best Interests Findings

¶ 15 In any event, the district court made further findings sufficient to uphold the modification under the "best interests" standard urged by father. In addition to its findings under section 14-10-129(2)(b) and (d), the court expressly found that it was in the child's "best interests . . . to continue the schedule that the parties have been following since [the child's] relocation to Hawaii" two years earlier in 2014. The court also noted in its oral ruling that after the child's first year in Hawaii, "both parents decide[d] together that [it was] in [the child's] interest not to switch his school back to Colorado."

¶ 16 Hence, the court's findings are sufficient to sustain its modification ruling under the more general "best interests" standard. *See* § 14-10-129(1)(a)(I); *see also In re Marriage of West*, 94 P.3d 1248, 1251 (Colo. App. 2004) (noting that the endangerment standard will "necessarily encompass best interests").

IV. Conclusion

¶ 17 The district court's order is affirmed.

JUDGE TAUBMAN and JUDGE RICHMAN 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: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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