COLORADO COURT OF APPEALS

Court of Appeals No.: 05CA0783
Jefferson County District Court No. 05DR70
Honorable Margie L. Enquist, Judge

In the Interest of C.T.G., a Child,

Upon the Petition of P.G and T.L.W.,

Appellants,

and Concerning K.R.W.,

Appellee.

ORDERS REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by: JUDGE ROTHENBERG
Márquez and Bernard, JJ., concur

Announced: February 8, 2007

DiGiacomo & Jaggers, LLP, David R. DiGiacomo, Douglas J. Perko, Arvada, Colorado, for Appellants

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P.G. (father) and T.L.W. (mother) (collectively, the parents) appeal from the trial court's orders denying their request to terminate the parenting time awarded to K.R.W. (stepfather) for their minor child, C.T.G. They also appeal from the trial court's award of attorney fees to stepfather. We reverse the order related to stepfather's parenting time and the order awarding him attorney fees, and we remand with directions.

The salient facts are undisputed. In 1997, while mother and stepfather were married and living in Minnesota, she had intimate relations with father and became pregnant. C.T.G. was born on August 12, 1998. In 1999, mother and father learned father and not stepfather was the biological father of the child. However, stepfather was not informed of this fact until 2001, when father filed a paternity action and tests were conducted. By that time the child was three years old.

In 2002, the Minnesota court decreed that father was the biological father and awarded joint legal custody of C.T.G. to father and mother, with sole physical custody to mother. The court's order also provided that stepfather would have visitation "on an interim

basis to be established by the parties and a guardian ad litem pending further agreement or court orders."

In 2003, the marriage between mother and stepfather was dissolved. Mother and father were then living together with the child, and they relocated to Colorado and later married. Thereafter, stepfather traveled to Colorado one weekend per month to visit the child.

In February 2005, jurisdiction was transferred to Colorado, and the parents filed an emergency motion to suspend stepfather's visitation. Stepfather responded by filing a motion to enforce parenting time pursuant to § 14-10-129.5, C.R.S. 2006.

Following a brief evidentiary hearing, the trial court reinstated stepfather's visitation of one weekend per month, finding he was a "psychological parent" to C.R.C.P.G. at the time of the Minnesota order and the termination of his relationship with her would likely result in psychological harm to her.

Mother and father then filed a motion to terminate stepfather's visitation rights, and the court conducted a full evidentiary hearing. Following that hearing, the trial court found that (1) stepfather is a

psychological parent to C.T.G.; (2) the child is not in any danger of emotional or physical harm when she is with him; (3) the parents' actions created stress around the visits; and (4) their attempts to eliminate stepfather's contact with the child endangered her emotional development. The court ordered stepfather's parenting time to continue. The parents appeal from that ruling.

I.

Initially, we address and reject the parents' contention that stepfather, as a nonparent, lacks standing to assert parenting time rights.

Stepfather had standing based on the Minnesota court's judgment and decree awarding such rights to him, see People v. J.M., 22 P.3d 545 (Colo. App. 2000)(party directly affected by order has standing to challenge it), and on the trial court's finding that he is a psychological parent to C.T.G. See In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004)(recognizing psychological parenting and concluding a third party has standing if that person can show the existence of a "parent-like" relationship as evidenced by recent physical care, even if such care is not exclusive); see also § 14-10-

123(1)(b) and (c), C.R.S. 2006 (permitting a proceeding for the allocation of parental responsibility by a person other than a parent "only if the child is not in the physical care of one of the child's parents" or "by a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care"); In re Marriage of Dureno, 854 P.2d 1352 (Colo. App. 1992)(permitting stepparent visitation based on child's best interests).

II.

However, we agree with the parents that the trial court erred in concluding the visitation award contained in the Minnesota paternity decree and order was a permanent order, in treating their motion as a request for modification, and in applying the endangerment standard in § 14-10-129(2)(d), C.R.S. 2006.

A.

Whether an order for allocation of parental responsibility or custody is temporary or final is determined from the substance and effect of the order. In re Marriage of Murphy, 834 P.2d 1287 (Colo.

App. 1992), disapproved on other grounds by In re Marriage of Wall, 868 P.2d 387 (Colo. 1994).

Permanent orders establish parental rights that stay in effect until one party establishes a change in circumstances sufficient to support a modification. Temporary orders regarding parenting time and decision-making responsibility are intended to determine those matters pending final orders, and they do not carry res judicata effect. In re Marriage of Fickling, 100 P.3d 571 (Colo. App. 2004).

In Fickling, the parents entered into a stipulated parenting plan which provided that the child would alternate between the mother's and the father's residences on a weekly basis. Thereafter, the trial court entered permanent orders significantly reducing the amount of overnights the child spent with the father. On appeal, the father challenged the trial court's ruling, contending it erred as a matter of law by applying the best interests of the child standard in substantially reducing his parenting time instead of the endangerment standard in § 14-10-129(1)(b)(I).

A division of this court disagreed, concluding the parties' stipulated agreement for parenting time was a temporary order and

was modifiable under the best interests of the child standard under § 14-10-124(1.5), C.R.S. 2006, which has historically been applied to original determinations of parental responsibility. See In re Marriage of Monteil, 960 P.2d 717 (Colo. App. 1998)(addressing former version of statute which allocated physical and legal custody).

In this case, the Minnesota court fully adjudicated the issue of paternity and awarded joint custody of C.T.G. to the parents. However, the parenting time awarded to stepfather specifically stated that it was to occur according to an "interim" schedule, that the court and the parties were unable to set a permanent schedule because of mother and father's anticipated relocation, and that the existing schedule which had been established in conjunction with a guardian ad litem would remain in effect. The Minnesota court thus recognized the need for future changes in the visitation schedule because of the parents' anticipated relocation. See Johnson v. Johnson, 223 Minn. 420, 428, 27 N.W.2d 289, 293-94 (1947)(recognizing that orders affecting custody and the maintenance of children are not final).

Interim is defined as "[d]one, made, or occurring for an intervening time; temporary or provisional." Black's Law Dictionary 819 (7th ed. 1999)(emphasis added).

We therefore conclude that the Minnesota paternity decree operated as a final order and permanent allocation as to paternity and custody, but that its award of parenting time to stepfather was a temporary order. The fact that the parties adhered to the schedule for nearly three years does not change the nature of the order. We would reach the same conclusion applying Minnesota or Colorado law.

Accordingly, we further conclude that in ruling on the parties' motions, the trial court here should have applied the standard for an original determination of visitation, which is based on the best interest of the child. See In re Marriage of Fickling, supra.

Nor was the court's error in applying the wrong standard harmless because the court applied the statute governing the modification of parenting time, which contains an endangerment standard. That statute provides, in pertinent part:

> The court shall not modify a prior order concerning parenting time that substantially

> changes the parenting time as well as changes the party with whom the child resides a majority of the time unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child . . . and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the parenting time schedule established in the prior decree unless:
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> . . .
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> (d) 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.

Section 14-10-129(2)(d) (emphasis added).

Therefore, we agree with the parents that the trial court erred as a matter of law in treating their motions to suspend or terminate stepfather's visitation as requests for modification of a permanent order and in applying the endangerment standard in § 14-10-129(2)(d), rather than the best interests standard.

Given our conclusion that the Minnesota order permitting stepfather's visitation was a temporary order, we need not decide whether —even if that order had been permanent -- the

endangerment standard could still be applied without violating the due process rights of the parents.

B.

In addition, Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), and In re Adoption of C.A., 137 P.3d 318 (Colo. 2006), have changed the legal landscape by recognizing that a parent has a "fundamental right to the care, custody, and control of his or her children." In re Adoption of C.A., supra, 137 P.3d at 324.

In Troxel, a plurality of the Supreme Court explained that parents have a protected liberty interest in the care, custody, and control of their children and that this fundamental right of parents encompasses the presumption that a fit parent will act in the best interests of his or her child. Therefore, the Supreme Court concluded some special weight must be accorded to a parent's own determination.

In In re Adoption of C.A., supra, which was announced after the trial court's ruling in this case, the Colorado Supreme Court examined how the special weight prescribed in Troxel is to be defined in the context of grandparent visitation. The court in C.A.

rejected a standard that required a showing of unfitness or emotional harm, because such a standard did not provide sufficient latitude.

However, the court required the application of a presumption that parental determinations are in the child's best interests, and specified that this presumption could only be rebutted by clear and convincing evidence the parent is unfit to make the visitation decision, or that the parent's visitation decision is not in the child's best interests. In re Adoption of C.A., supra, 137 P.3d at 327-28; see People v. Taylor, 618 P.2d 1127 (Colo. 1980)(proof by "clear and convincing evidence" is proof which persuades the trier of fact that the truth of the contention is highly likely; it is evidence which is stronger than a preponderance of the evidence).

We conclude the same analysis is applicable to visitation with other third parties who are able to establish standing and to demonstrate to the court that they are the psychological parents of a child. See Middleton v. Johnson, 369 S.C. 585, 633 S.E.2d 162 (Ct. App. 2006)(concluding there was overwhelming evidence of compelling circumstances to overcome the presumption that the

mother's decisions to deny her ex-boyfriend's visitation with child was in child's best interests). Troxel and C.A. thus require that the trial court give presumptive effect to the parents' wishes regarding a third party's visitation, and place upon the third party the burden of proving by clear and convincing evidence that the visitation is in the child's best interests and is based on special circumstances.

Here, the effect of the trial court's ruling was to place the burden on the parents to show endangerment. However, Troxel and C.A. have made it clear that the parents are presumed to act in the best interests of their children and that the burden is on the third party to show otherwise. Contrary to stepfather's contention, the trial court's finding in this case that he is a psychological parent to C.T.G. does not place him on equal footing with the natural parents.

We recognize that the trial court here did not have the benefit of C.A. when it ruled. Nevertheless, we are bound by that precedent, and we conclude the trial court erred in several respects.

First, it did not afford the parents the presumption that they were acting in the child's best interests, as required by C.A. To the contrary, the trial court placed upon the parents the burden of

demonstrating that visitation with stepfather would endanger the child.

Second, the trial court did not apply the clear and convincing evidence standard required by C.A.

Third, while there is record support for the trial court's finding that stepfather was a psychological parent at the time of the Minnesota decree, which was approximately three years earlier, the court did not address the current circumstances of the child, which have changed significantly. The parents and the child now reside in Colorado, the child is of school age, and there was expert testimony that her ties to father have been strengthened while those to stepfather appear to have been dissipated by time and distance.

Fourth, the trial court did not point to any "special circumstances" that would justify stepfather's continued visitation in Colorado.

Fifth, while there was testimony supporting the court's finding that visitation would not endanger the child, we have found no competent evidence in the record to support the court's finding that C.T.G. would suffer emotional harm if stepfather's parenting time

with her were terminated, or that it was in her best interests for such visitation to continue. The guardian ad litem in Minnesota (a family attorney) originally recommended that stepfather's contact be continued, but she admitted during her testimony by telephone that she had not seen or spoken to the child since the family moved to Colorado several years earlier. Neither the report of the special advocate nor that of the parental responsibility evaluator supports a finding that continued visitation was in the child's best interests, much less that termination of stepfather's parenting time would psychologically harm her by impairing her emotional development.

Dr. Lee Hockman, a licensed psychologist, was the only expert who testified at the hearing. He testified, as relevant here, as follows: (1) the child told him in interviews she does <u>not</u> want to visit stepfather; (2) the significance of her bond with stepfather "has been affected by the last . . . four and a half years" and he is a less significant emotional figure than he had been in the past; (3) father "has increasingly become a significant and a consistent father figure to the child" and he has always been at least privately opposed to the visits; (5) in terms of the child's attachment, stepfather's

“significance is different”; and (6) at times stepfather shows a lack of empathy for the child and minimizes the degree of her stress.

The expert testified that the child at times felt uncomfortable talking to him about the stepfather’s role and his marriage to her mother. The expert also observed that the parties “have different versions of the truth in this case,” and that the child “gets exposed to different perspectives of it, that keep her constantly in the middle.” He also expressed his opinion that the parents actually “believe this is best for [the child], that she not have a relationship with [stepfather].”

Although the child’s current therapist did not testify, the record contains a letter from her stating: (1) the child had been in that expert’s care “off and on since she arrived in Colorado”; (2) there was stress for the child “around [stepfather’s] visits and has been since their onset”; (3) the child “has now well adjusted to the family she experiences with [the parents] and [she] gets frustrated when that is interrupted”; (4) the child expressed to the therapist that “she would like not to see [stepfather] again”; and (5) “[a]n environment with little stress and conflict would be the healthiest

for [her]."

Sixth, the trial court criticized the parents' motives in discouraging C.T.G.'s relationship with stepfather, concluding they were based on the parents' concern about their reputations and their inability to recognize the harm they were causing by sabotaging the visits and creating stress for her. The trial court also emphasized the fact that the parties had created this problem and that the child would have to live with this confusion for the rest of her life.

While we agree with the trial court that the parents may have made unwise decisions in the past, this does not provide a reason to continue stepfather's visitation where, as here, the parents oppose it, and there was no competent evidence that continuation of such visits was in the child's best interests or that she would suffer emotional harm if the visits were terminated.

Thus, even if we view the evidence in the light most favorable to stepfather and assume he is a psychological parent to C.T.G., we conclude as a matter of law that (1) he failed to present clear and convincing evidence to rebut the presumption that the parents were

acting in their child's best interests by terminating his visitation and (2) he failed to show special circumstances that would justify the court's order allowing visitation against the wishes of the parents. See Troxel, supra; C.A., supra. In other words, we perceive no basis for embroiling the child in an indeterminate, confusing, and stressful situation based on this record.

In Middleton v. Johnson, supra, the South Carolina Court of Appeals addressed an issue analogous to the one we face here. The court considered the type of special circumstances that would warrant visitation by a third person over the parents' objection. There, the mother invited Middleton to act as a father. She sent him pictures of the baby boy (Josh) and insinuated that he was Josh's father. When Josh was three years old, the mother and Middleton worked out a schedule whereby he had Josh from Thursday through Sunday every week. Middleton paid at least half of the daycare costs and was listed as the emergency contact on the daycare registration.

Middleton accompanied Josh to his first day of kindergarten, brought him to school almost every morning, picked him up almost

daily, and accompanied him on school field trips. Middleton took him to doctor and dentist appointments, and Josh attended family reunions and functions with Middleton.

The court observed:

> For the first ten years of his life, Josh spent a considerable amount of time with Middleton. Mother cultivated this relationship by giving Middleton parental responsibilities and by allowing Josh to spend a significant amount of his childhood with Middleton. In essence, Josh lived with Middleton at least half of the week for most of his life. Mother, by ceding over a large part of her parental responsibilities to Middleton, fostered the parent-child bond between Middleton and Josh.
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> . . . Josh had his own room, clothes, and school books in Middleton's house.
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> . . . Middleton assumed the obligations of parenthood by taking significant responsibility for Josh's care, education, and development. Middleton paid for Josh's preschool. Additionally, he paid mother $250 dollars per month while Josh was in Mother's custody. . . [H]e was able to document approximately $12,000 he had given Mother over the years. Further, Middleton established a savings account for Josh's education.
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> . . . On Sundays, Middleton and Josh attended church. [The biological father], on the other hand, made no attempt to fulfill Josh's emotional need for a father. In fact, other than

> seeing Josh one time when he was three days old, [he] has never visited Josh. This parental void left by Josh's biological father coupled with the parental obligations assumed by Middleton compel us to find that Middleton undertook the responsibilities necessary to meet the [requirements] of the psychological-parent test.
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> . . . Dr. Newman, the court-appointed therapist, opined that Middleton is a psychological parent to Josh. She stated that even though Josh has not seen Middleton in two years, he wanted her to tell the court that he misses Middleton and wants to see Middleton. In her clinical opinion, the emotional attachment between Josh and Middleton is so strong that despite the passing of two years' time, Josh still feels a sense of loss [and] the severance of the relationship between Middleton and Josh will have a profound, negative impact for the rest of his life.
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> . . . .
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> Dr. Newman, who counseled Josh for eighteen months prior to the final hearing, explained that . . . Josh, who was ten years old when his relationship with Middleton abruptly ended, was particularly devastated by the loss because he was at a stage in life when he was learning how to socialize [and] that [his] loss of contact with Middleton rendered Josh "at-risk regarding his ability to trust, [and to] form and maintain close relationships."

<u>Middleton v. Johnson</u>, <u>supra</u>, 369 S.C. at 599-603, 633 S.E.2d at

171-73 (footnote omitted). The South Carolina court added: "Dr. Newman says that Josh knows he has a biological father, but does not sense a loss in not knowing him. Josh's sense of loss is directly related to the loss of Middleton in his life." Middleton v. Johnson, supra, 369 S.C. at 601 n.3, 633 S.E.2d at 170.

Unlike in Middleton, where the record was "replete with evidence illustrating how Mother's refusal to allow Middleton to visit with Josh has caused Josh significant harm," Middleton v. Johnson, supra, 369 S.C. at 603, 633 S.E.2d at 172, here, there was no competent evidence demonstrating that the termination of stepfather's visitation would result in a negative impact on the child or that it was in her best interests to continue with such visitation.

We therefore agree with the parents that the trial court's visitation order infringed upon their fundamental right to direct the upbringing of their child because, as in Troxel, the order "was not founded on any special factors that might justify the State's interference with [the mother's] fundamental right to make decisions" regarding her children. Troxel, supra, 530 U.S. at 68, 120 S.Ct. at 2061.

In reaching our conclusion, we are not without sympathy for stepfather, and we do not doubt his sincerity and his commitment to this child. However, we agree with other courts that have expressed "extreme trepidation" in expanding the psychological parent doctrine beyond the perimeters set forth in Troxel and C.A. See Middleton v. Johnson, supra, 369 S.C. at 605, 633 S.E.2d at 173 (Kittredge, J., concurring).

Accordingly, we conclude the trial court erred in not granting the parents' motion to terminate such visitation.

III.

We also vacate the trial court's award of attorney fees to stepfather.

Stepfather based his request for fees on §§ 13-17-102, 14-10-119, and 14-10-129.5, C.R.S. 2006. See In re K.M.B., 80 P.3d 914 (Colo. App. 2003)(a court may award attorney fees in a domestic proceeding including a parental responsibility action brought by a nonparent under either § 13-17-102 or § 14-10-119, C.R.S. 2006).

However, the trial court did not specify the statutory basis upon which it relied in making the award or make findings as to the

parties' financial resources. Although some language in the trial court's December 2005 order suggests the court considered the parents' motion to terminate frivolous and groundless, our conclusions above preclude an award of attorney fees to stepfather on that basis. And, while the record contains a fee affidavit and the expert opinions submitted by the parties, we do not have the benefit of a transcript of the attorney fee hearing and any comments by the trial court that might have revealed the basis for its determination.

Accordingly, we vacate the award of attorney fees to stepfather and also deny his request for attorney fees on appeal under C.A.R. 38(d).

The orders are reversed, and the case is remanded with directions to grant the parents' motion forthwith and for such further proceedings as are necessary and consistent with the views expressed in this opinion.

JUDGE MÁRQUEZ and JUDGE BERNARD concur.