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SUMMARY
April 8, 2021

2021COA47

No. 20CA0800, *People in the Interest of J.G.* — Children’s Code — Juvenile Court — Dependency and Neglect; Constitutional Law — Fourteenth Amendment — Due Process

Last year, a division of this court published an opinion concluding that parents may regain the *Troxel* presumption that they will act in the child’s best interests following a child’s adjudication as dependent and neglected. *People in Interest of N.G.G.*, 2020 COA 6, ¶¶ 18-19. This case clarifies that if during the dependency and neglect proceeding the court concludes that a parent is fit, it must then apply the *Troxel* presumption.

Court of Appeals No. 20CA0800
Weld County District Court No. 16JV379
Honorable James F. Hartmann, Jr., Judge

The People of the State of Colorado,

Appellee,

In the Interest of J.G. and C.G., Children,

and Concerning A.M., a/k/a A.G.,

Appellant,

and

M.B., Special Respondent,

Intervenor-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE BERGER
Dailey and Tow, JJ., concur

Announced April 8, 2021

Gina G. Bischofs, Guardian Ad Litem

Katayoun A. Donnelly, Office of Respondent Parent Counsel, Denver, Colorado,
for Appellant

Houtchens Greenfield Sedlak & Zacheis, LLC, Kristin M. Zacheis, Mackenzie
Moreno, Greeley, Colorado, for Intervenor-Appellee M.B.

¶ 1 In this dependency and neglect proceeding, A.M. (mother) appeals the juvenile court’s judgment allocating parental responsibilities for her children, J.G. and C.G., to their paternal grandmother, M.B. Mother raises three challenges to the judgment: (1) the grandmother lacked standing to seek parental responsibilities for the children; (2) she was a fit parent and, as such, was entitled to a presumption that she would act in the children’s best interests in accordance with *Troxel v. Granville*, 530 U.S. 57, 68 (2000); and (3) it is unconstitutional to grant sole parental responsibilities to a nonparent over a fit parent’s objections.

¶ 2 We reject mother’s first and third arguments. However, we agree that the juvenile court did not make sufficient findings regarding the second issue. As a result, we reverse the judgment and remand the case to the juvenile court for further proceedings.

I. The Dependency and Neglect Case

¶ 3 This case has a complex history that spans nearly four years in the juvenile court. It began in May 2016 when the Weld County Department of Human Services learned that the children’s father had shot mother in the ankle during an altercation in the paternal

grandmother's home. A police officer responding to the incident shot father. Six-year-old J.G. and two-year-old C.G. were in the home (but not the room) when father shot mother. The Department was also concerned about possible drug use by the parents.

¶ 4 The juvenile court placed the children in the custody of a paternal aunt and uncle. Based on mother's admission, the court adjudicated the children dependent and neglected. It also adopted a treatment plan that required mother to (1) cooperate with the Department; (2) attend parenting time with the children and demonstrate protective parenting skills; (3) complete a substance abuse evaluation and recommended treatment as well as comply with sobriety monitoring; (4) participate in a mental health assessment and recommended treatment; (5) maintain a safe and stable home; (6) complete a domestic violence evaluation and treatment; and (7) comply with a parent-child interactional evaluation.

¶ 5 In early 2017, father pleaded guilty to two menacing counts stemming from the incident that initiated the case and began serving two consecutive, five-year prison sentences.

¶ 6 Later that year, the parties stipulated to increase mother's parenting time as part of a plan to transition the children back to her care. But the children promptly began demonstrating regressive behaviors in response to visits. As a result, the court ended the transition plan and limited mother to only having contact with the children in a family therapy setting.

¶ 7 The court later transferred custody of the children from aunt and uncle to the paternal grandmother. In October 2018, mother moved to have the children returned to her care because she had complied with the treatment plan and made progress in rebuilding her relationships with the children. While that request was pending, the children's guardian ad litem (GAL) moved to allocate parental responsibilities for the children to the paternal grandmother.

¶ 8 In July 2019, the court denied mother's motion to return the children home. After taking six days of evidence, the court determined that mother had complied with the treatment plan and was a fit parent. Still, it concluded that her relationship with the children was compromised and ordered the parties to research reintegration or clarification services.

¶ 9 Shortly after the court issued its ruling, the paternal grandmother also moved for an allocation of parental responsibilities (APR) for the children. A different judge presided over the APR requests filed by the GAL and the grandmother. The judge reviewed the six days of testimony presented during the earlier hearing and took further evidence over five days between January and March 2020.

¶ 10 Ultimately, the juvenile court allocated sole decision-making authority and primary parenting time to the paternal grandmother. As part of the APR order, the court (1) directed the grandmother to confer with mother before making decisions concerning the children; (2) granted mother a minimum of one supervised visit each week; and (3) encouraged the parties to facilitate additional community visits for mother and the children. The APR order was then certified into a domestic relations case.

II. Standing to Seek APR

¶ 11 Mother contends that the juvenile court erred by concluding that the grandmother had standing to request an APR when the children had been temporarily placed in her care over mother's objection. We reject this argument for two reasons.

¶ 12 First, mother's argument in her opening brief rests solely on the provisions of section 14-10-123(1)(c), C.R.S. 2020. In domestic relations proceedings, nonparent standing to seek an APR is governed by section 14-10-123 of the Uniform Dissolution of Marriage Act (UDMA). *In the Interest of B.B.O.*, 2012 CO 40, ¶ 8.

¶ 13 However, issues concerning custody or the allocation of parental responsibilities that arise in a dependency and neglect proceeding are not governed by the UDMA. *People in Interest of L.B.*, 254 P.3d 1203, 1208 (Colo. App. 2011). Rather, they are governed by the Children's Code. *L.A.G. v. People in Interest of A.A.G.*, 912 P.2d 1385, 1390 (Colo. 1996).

¶ 14 The Children's Code expressly authorizes a grandparent to intervene as a matter of right following a child's adjudication as dependent and neglected. § 19-3-507(5)(a), C.R.S. 2020; *People in Interest of O.C.*, 2013 CO 56, ¶ 22. Generally, intervenors are granted the same rights as all other parties. *A.M. v. A.C.*, 2013 CO 16, ¶ 17. Mother does not explain why the grandmother did not have standing to seek an APR as an intervenor under section 19-3-507(5)(a).

¶ 15 Second, the record reveals that the grandmother's motion requesting an APR was duplicative of the GAL's motion for an APR to the grandmother. Indeed, both motions requested the same relief and the court set them for a combined hearing. Mother does not contend that the GAL lacked standing to seek an APR to the paternal grandmother. This is particularly significant because a GAL is obligated to advocate for the child's best interests and is expressly authorized to participate at all steps of the legal proceeding once a dependency and neglect case has been initiated. *C.W.B. v. A.S.*, 2018 CO 8, ¶ 24; *see also People in Interest of M.N.*, 950 P.2d 674, 676 (Colo. App. 1997) (concluding that a GAL has authority to initiate termination proceedings in dependency and neglect cases).

III. APR and the *Troxel* Presumption

¶ 16 Mother next contends that the juvenile court erred by failing to apply the *Troxel* presumption in her favor before allocating parenting time to the paternal grandmother. We conclude that further findings are required.

A. Standard of Review

¶ 17 We will not disturb a juvenile court’s factual findings when they are supported by the record. *People in Interest of A.J.L.*, 243 P.3d 244, 250 (Colo. 2010). However, whether the juvenile court applied the correct legal standard in making its findings is a question of law that we review de novo. *People in Interest of N.G.G.*, 2020 COA 6, ¶ 10.

B. The Legal Framework

¶ 18 When determining custody or allocating parental responsibilities in a dependency and neglect proceeding, the court must consider the legislative purposes of the Children’s Code under section 19-1-102, C.R.S. 2020. *People in Interest of C.M.*, 116 P.3d 1278, 1281 (Colo. App. 2005). These purposes include the following:

- securing for each child the care and guidance, preferably in his or her own home, that will best serve the child’s welfare and the interests of society;
- preserving and strengthening family ties whenever possible, including improving the home environment;
- removing a child from the custody of his or her parents only when the child’s welfare and safety or the protection of the

public would otherwise be endangered, and for the courts to proceed with all possible speed to a legal determination that will serve the child's best interests; and

- securing for any child removed from the custody of his or her parents the necessary care, guidance, and discipline to assist the child in becoming a responsible and productive member of society.

§ 19-1-102(1)(a)-(d).

¶ 19 The overriding purpose of the Children's Code is to protect a child's welfare and safety by providing procedures through which the child's best interests can be served. *L.G. v. People*, 890 P.2d 647, 654 (Colo. 1995). Consequently, the court must allocate permanent custody and parental responsibilities in accordance with the child's best interests. *L.B.*, 254 P.3d at 1208; *see also L.A.G.*, 912 P.2d at 1391.

¶ 20 Even so, parents maintain a fundamental liberty interest in the care, custody, and control of their children. *Troxel*, 530 U.S. at 66. In *Troxel*, the Supreme Court recognized that a parent who is adequately caring for his or her child — a fit parent — is presumed

to act in the child's best interests. *Id.* at 68-69; *see also In Interest of Baby A*, 2015 CO 72, ¶ 23.

¶ 21 The presumption requires that when a fit parent's parenting decision "becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination" regarding the child's best interests. *Troxel*, 530 U.S. at 70; *see In re Adoption of C.A.*, 137 P.3d 318, 324 (Colo. 2006). Thus, in proceedings between a parent and nonparent, the parent is entitled to a constitutional presumption that the parent acts in the child's best interests. *Troxel*, 530 U.S. at 68; *In re Parental Responsibilities Concerning B.J.*, 242 P.3d 1128, 1134 (Colo. 2010).

¶ 22 The presumption may be rebutted by clear and convincing evidence that the parent's determination is not in the child's best interests and that the nonparent's request is in the child's best interests. *N.G.G.*, ¶ 16. The court must also identify special factors that support entering an order contrary to the parent's wishes. *Id.*

C. Analysis

1. Applicability of the *Troxel* Presumption

¶ 23 We start by recognizing that a parent who is subject to a dependency and neglect case is not necessarily entitled to the

presumption that he or she is acting in a child's best interests. *Id.* at ¶ 17. Indeed, the presumption is limited to a parent who is adequately caring for his or her child. *Id.* An order adjudicating a child dependent and neglected overcomes the presumption. *People in Interest of N.G.*, 2012 COA 131, ¶ 33.

¶ 24 Nonetheless, a division of this court recognized in *N.G.G.* that the presumption could be restored to a parent during a dependency and neglect proceeding. 2020 COA 6, ¶¶ 2, 18-19. The *N.G.G.* division determined that the parent was entitled to the *Troxel* presumption because the court (1) found that she had complied with her treatment plan and was able to safely parent the children; and (2) had awarded her primary parenting time and sole decision-making responsibility for the children. *Id.* at ¶¶ 18-19.

¶ 25 Here, in contrast, the court did not award mother primary parenting time or decision-making authority for the children. However, in ruling on the APR request, the court reviewed and adopted the earlier July 2019 order. And, recall, that order contained an express determination that mother had complied with her treatment plan and was a fit parent.

¶ 26 The court further observed that while mother had made poor decisions in the past, she had shown a lot of redeeming qualities and displayed insight since that time. It also concluded that all of the child protection issues had been fully addressed and there was no longer a need for Department involvement.

¶ 27 The court's determination that mother was a fit parent and that all of the child protection issues had been addressed necessarily meant that mother was able to adequately care for the children. As a result, mother was entitled to the *Troxel* presumption that she was acting in the children's best interests.

2. Burden of Proof

¶ 28 Despite the juvenile court's findings, the paternal grandmother argues that the parties only needed to rebut the presumption in mother's favor by a preponderance of the evidence, as opposed to clear and convincing evidence. She claims that this is the appropriate standard to apply because mother did not have custody of the children and the judgment did not result in the termination of parental rights. We reject this argument.

¶ 29 The supreme court has determined that parents who voluntarily placed their child in guardianship with relatives were

not in the same position as custodial parents because they had chosen to delegate custody to a nonparent. *In re D.I.S.*, 249 P.3d 775, 785 (Colo. 2011). Thus, in accordance with *Troxel*, the guardians had the burden to establish by only a preponderance of the evidence that terminating the guardianship was not in the child's best interests. *See id.* at 786. And a division of this court applied the preponderance of the evidence standard when a parent, who had previously consented to an order vesting nonparents with sole decision-making authority and primary parenting time, sought to modify the order. *See In re Parental Responsibilities Concerning B.R.D.*, 2012 COA 63, ¶ 36.

¶ 30 In short, *D.I.S.* and *B.R.D.* concerned parents who chose to formally transfer primary care of and authority over their child to third parties. *In re Parental Responsibilities Concerning M.W.*, 2012 COA 162, ¶ 34. Using the lower burden of proof is permissible when a parent has already agreed to transfer significant legal authority to another person. *In re Parental Responsibilities Concerning E.S.*, 264 P.3d 623, 627 (Colo. App. 2011).

¶ 31 However, it is not permissible to do so here. Although mother lost temporary custody of the children through the dependency and

neglect case, she did not purposefully choose to transfer significant legal authority over the children. As such, it is necessary to apply the higher burden of proof, clear and convincing evidence. *See id.* (concluding that clear and convincing evidence was the appropriate standard when a parent had transferred authority for a brief period pursuant to a temporary guardianship); *see also M.W.*, ¶¶ 33-34 (applying the clear and convincing standard when a parent had only recently become involved in the child's life).

3. Mother's Position

¶ 32 Mother recognized that there were difficulties in her relationships with the children. In response to the court's questioning, mother acknowledged that the children did not trust her or feel safe with her at that time. Thus, although mother expressed her desire to have the children return to her full-time care, she agreed that it was not feasible for that to occur immediately.

¶ 33 Instead, mother testified that she wanted the court to implement a transition plan to return the children home. She also requested that she be awarded joint decision-making authority for the children.

¶ 34 Mother asked the court to apply the *Troxel* presumption to her requests. In a position statement submitted before the APR hearing, mother asserted that she was a fit parent and, as such, was entitled to a presumption that she would act in the children's best interests. During her opening statement, mother reminded the court of the prior judge's determination that she was a fit parent.

¶ 35 And, in closing argument, mother again reiterated that she was a fit parent who was entitled to the presumption that she would act in the children's best interests and that the presumption had to be rebutted by clear and convincing evidence. This assertion was not refuted by the Department or the GAL.

4. The Court's Reasoning

¶ 36 To be sure, the court articulated reasons to support its determination to award primary parenting time and sole decision-making authority for the children to the paternal grandmother. Specifically, it found that

- the primary goal of returning the children to mother's care had not been successful because of the prevalent dynamics that existed in the case;

- the children wanted to be done with the case and constantly meeting with professionals;
- the children had developed a stable routine after experiencing a lot of upheavals, and J.G. viewed the case as creating the possibility of another upheaval; and
- an APR to the paternal grandmother was in the children’s best interests.

¶ 37 The record supports these findings. Evidence presented at the APR hearing established that even before the altercation that initiated this case, the children had been exposed to domestic violence, arguments, and substance use in the family home. Indeed, the paternal grandmother stated that the fighting between mother and father was so frequent that it was “like breathing” to everyone else.

¶ 38 During earlier periods in the case, the children appeared comfortable and excited to see mother. However, the children later exhibited animosity toward mother. For example, during a visit at a restaurant in May 2019, the children climbed on a wall, J.G. cursed at mother, and C.G. ignored mother and threw paper in her drink.

¶ 39 The children also began exhibiting loyalty conflicts between mother and the paternal family, especially the aunt and uncle who had previously been their caregivers. At certain times, J.G. believed that mother had shot father even though multiple people (including father) had assured her that it was not true.

¶ 40 Although J.G. did not ultimately view mother as “unsafe,” she identified mother and maternal family members as individuals whom she did not trust. In contrast, J.G. identified paternal family members, including father, as individuals whom she did trust. When a skills provider worked with J.G. on increasing her trust in mother, J.G. responded with avoidance, decreased engagement, and the setting of strict boundaries.

¶ 41 A psychologist, who had evaluated the family and continued to serve in an advisory role to the Department, observed that it “seemed backwards” that the children had no anxiety about visiting father but lots of anxiety about seeing mother. He explained that the case presented a hybrid issue: the children had a history of trauma involving mother before the case began, and the aunt and uncle took actions that alienated the children from mother. The psychologist further explained that this was “one of the most

confusing, complex, and difficult cases” that he had “worked on in [his] 30 years.”

¶ 42 Additionally, a therapeutic visitation provider who began working with the family in late 2019 believed that the level of services — therapeutic visits plus family therapy plus individual therapy — could be overwhelming for the children. J.G. wanted to have “a normal life” and was resistant to continue working with treatment providers.

¶ 43 The reintegration therapist who was working with the family around the same time observed that J.G. had a lot of anxiety about “the case” and was fearful of “opening up or getting close with [mother] because she feels that that will impact where she’s living.” Specifically, J.G. believed that if she was too nice to mother, then she would have to go live with her. The therapist also relayed that J.G. knew the dates of the court hearing and viewed the proceeding as creating uncertainty as to where she would be living.

¶ 44 Be that as it may, the record does not show that the court applied *Troxel*’s protections to mother. First, it did not apply a presumption in favor of mother’s determinations that a transition plan should be developed to return the children to her care and that

she should have joint decision-making authority. Second, while the court found that it was in the children’s best interest to award primary parenting time and sole decision-making authority to the paternal grandmother, it did not determine whether this showing had been made by clear and convincing evidence. Third, while the court identified special factors — the prevalent dynamics in the case, the children’s resistance to the case and treatment professionals, and the upheaval that the children had experienced — it did not explain how these factors justified interfering with mother’s determinations.

¶ 45 For these reasons, we reverse the judgment and remand the case to the juvenile court to reconsider the provisions of the APR judgment.

IV. Constitutionality of Sole APR

¶ 46 Last, mother contends that granting sole parenting time and decision-making authority to a nonparent over a fit parent’s objection infringes on the parent’s constitutional rights. We reject this argument.

¶ 47 To start, we note that mother did not raise this constitutional argument in the juvenile court. Although mother repeatedly

asserted that she was a fit parent who was entitled to the *Troxel* presumption, neither her position statement nor her arguments during the APR hearing alerted the juvenile court that granting parenting time and decision-making authority to the paternal grandmother would otherwise violate her constitutional rights.

¶ 48 We generally do not consider issues that have not been presented to the juvenile court. *See People in Interest of C.E.*, 923 P.2d 383, 385 (Colo. App. 1996); *see also In re E.R.S.*, 2019 COA 40, ¶¶ 30-31. Here, however, the issues concern alleged fundamental constitutional rights and will likely arise on remand when the court reconsiders the provisions of the APR order. As a result, we elect to address mother's contention. *See C.E.*, 923 P.2d at 385; *see also Roberts v. Am. Fam. Mut. Ins. Co.*, 144 P.3d 546, 550 (Colo. 2006) (recognizing an appellate court's discretion to notice any error appearing of record, whether or not a party preserved its right to raise or discuss the error on appeal).

¶ 49 We also note that, contrary to mother's assertion, the court did not allocate sole parenting time to the paternal grandmother. Rather, the court determined that mother should have consistent, albeit relatively minimal, weekly parenting time with the children.

¶ 50 Having said that, we turn to mother's constitutional argument.

As previously discussed, the Children's Code authorizes a court to allocate parental responsibilities to a nonparent in accordance with the child's best interests. *L.B.*, 254 P.3d at 1208. The court may do so, even over the objection of a parent, without requiring the demonstration of parental unfitness or significant harm to the child. *See People in Interest of M.D.*, 2014 COA 121, ¶¶ 43-44; *see also C.M.*, 116 P.3d at 1283.

¶ 51 This does not infringe on a parent's liberty interest in the care, custody, and control of his or her child so long as the court applies a presumption in favor of a fit parent's determination and makes findings that are legally sufficient to overcome the presumption. *In re Reese*, 227 P.3d 900, 903 (Colo. App. 2010); *see also Baby A*, ¶ 19 (holding that a trial court sufficiently protected a parent's fundamental liberty interest in his children when it applied a presumption in favor of preserving parental rights and made findings, required under the applicable statute, to overcome this presumption by clear and convincing evidence).

¶ 52 Accordingly, the award of primary parenting time to the paternal grandmother will not infringe on mother's constitutional

rights so long as the court applies *Troxel's* safeguards. *See Baby A*, ¶ 25.

¶ 53 Finally, we note that mother challenges the factual sufficiency of the record and the juvenile court's findings. Specifically, she asserts that (1) the children's best interests cannot be served by failing to address their trauma and alienation issues and leaving them in the care of the paternal family; (2) a de novo review of the record establishes that the paternal grandmother contributed to undermining efforts to reunify the children with her; (3) the court's decision went against the specific advice of expert psychologists; and (4) the court erred by considering the children's discomfort that arose as the result of alienation. However, because we have already concluded that the APR judgment must be reversed so that the juvenile court may apply *Troxel's* safeguards, we do not address these issues.

V. Conclusion

¶ 54 The judgment is reversed, and the case is remanded to the juvenile court. On remand, the court must (1) apply the *Troxel* presumption in favor of mother's decisions regarding an allocation of parental responsibilities; (2) determine whether the presumption

has been rebutted by clear and convincing evidence showing that mother's decisions are not in the children's best interests; and (3) place the ultimate burden on the paternal grandmother and the GAL to show that the allocation of parental responsibilities is in the children's best interests. In doing so, the court must identify special factors that justify interfering with mother's decisions.

N.G.G., ¶ 23.

¶ 55 The court may make these determinations based on the existing record or may, in its discretion, take additional evidence. *See D.P.H. v. J.L.B.*, 260 P.3d 320, 326 (Colo. 2011). The existing parental responsibilities allocation shall remain in effect pending further proceedings on remand. *See B.R.D.*, ¶ 47.

JUDGE DAILEY and JUDGE TOW concur.