SUMMARY
September 16, 2021

2021COA123

No. 20CA1726, *Marriage of Thomas* — Family Law — Modification of Custody or Decision-making Responsibility — Appointment of Decision-maker

In this post-decree parenting dispute over the child's school enrollment, a division of the court of appeals concludes, apparently as a matter of first impression, that a provision of the parties' parenting plan designating one parent's residence as the child's residence "for purposes of school attendance" does not give that parent final say over where the child will attend school when the parenting plan requires the parents to make educational decisions jointly. The division also concludes that where parents with joint decision-making cannot agree on a particular decision, the district court has the authority to break the impasse and make the decision for the parents.

COLORADO COURT OF APPEALS **2021COA123**

Court of Appeals No. 20CA1726
Adams County District Court No. 05DR1328
Honorable Kyle Seedorf, Judge

In re the Marriage of

Sergei B. Thomas,

Appellant,

and

Lydia M. Thomas,

Appellee.

APPEAL DISMISSED IN PART
AND ORDER AFFIRMED IN PART

Division III
Opinion by JUDGE TOW
Furman and Rothenberg*, JJ., concur

Announced September 16, 2021

Thomas Law Group, P.C., Sergei B. Thomas, Denver, Colorado, for Appellant

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 In this post-dissolution of marriage case, Sergei B. Thomas (father) appeals two district court orders entered after a hearing on a motion filed by Lydia M. Thomas (mother) regarding where the parties' child would attend high school. This appeal requires us to explore, apparently as a matter of first impression, the interplay between the allocation of joint educational decision-making and the designation of one parent's residence as the child's residence "for purposes of school attendance." In so doing, we reject father's argument that the mere fact that his residence is the child's residence for school attendance purposes gives him a de facto veto over mother's desires when selecting a school for the child.

¶ 2 We also conclude that part of father's appeal is moot because it is directed at an order that the district court already vacated.

¶ 3 We thus dismiss the appeal of the vacated order and affirm the order resolving the parties' impasse regarding school enrollment.

I. Relevant Facts

¶ 4 The district court dissolved the parties' marriage in 2006. The parties' separation agreement, which included a parenting plan for their only child, was incorporated into the decree.

¶ 5 The parties prepared their parenting plan using a now-discontinued model form from the judicial branch, JDF 1421 (revised Sept. 2003).[1] The JDF 1421 form the parties used instructed them to check one of three boxes under the heading of paragraph "4. Decision-Making": (1) Major Decision-Making by One Party Only; (2) All Major Decision-Making by Both Parties; or (3) Major Decision-Making Divided Between the Parties. The parties marked box 2, agreeing that "[b]oth parties will make ALL major decisions regarding the child(ren) together." The form then directed the parties to proceed "directly to paragraphs 5, 6, 7, 8, and 9 below." Despite this instruction, the parties also checked the boxes under part 3 of the form, which were supposed to be used by parties who were not agreeing to a blanket allocation of either joint decision-making or sole decision-making to one parent for all matters but instead were dividing amongst themselves the

[1] The standard form for a parenting plan is now JDF 1113. Although the new form differs substantially in many respects, it still provides for the parents to check a box indicating which parent's home will be the child's residence "for purposes of school attendance only," and a separate section in which the parents indicate whether major decisions for education (and, separately, other matters) will be made jointly or by one parent.

allocation of decision-making authority on education, health care, religion, and extracurricular activities.[2] Nevertheless, for each of these categories, the parties marked the respective box indicating they would exercise joint decision-making. Within this portion of the form, the parties also marked a box providing that "[f]or purposes of school attendance only, the child(ren)'s residence will be with [father]."

¶ 6 Later in the same form, under a section titled "compliance with state and federal statutes," the parties agreed that mother would be the "custodian of the child(ren) solely for the purposes of all federal and state statutes which require a designation or determination of custody." That section also provided that the custodial designation "shall not affect either party's rights and responsibilities under this parenting plan, or under Colorado law."

¶ 7 Finally, the parties agreed that future disputes related to the parenting plan or to child support would be submitted to mediation,

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[2] For example, part 3 was designed for situations in which the parties agree that one parent would exercise sole decision-making for health care, the other parent would exercise sole decision-making for religion, and the parents would share joint decision-making for education and extracurricular activities.

and that if mediation was unsuccessful, "the final decision will be made by the Court."

¶ 8 Four years later, the parties filed a document titled "Stipulation and Order for Modification of Child Support Pursuant to § 14-10-115(14) and Modification of the Primary Residential Custodian Designation." In this stipulation, which was approved by the court, the parties agreed "that the provisions of the Separation Agreement will be modified by designating [father] the primary residential custodian for the minor child."[3]

¶ 9 In August 2020, a dispute arose because mother wanted the child to attend a high school in Jefferson County while father wanted the child to attend the neighborhood school based on father's residence in Adams County. This impasse prompted mother to file a motion seeking to become the sole decision-maker with respect to the child's high school enrollment. Alternatively, mother requested the district court either authorize her to

[3] The record does not contain any stipulation or order altering the parties' original agreement regarding the child's primary residence for educational purposes. However, several months after the dissolution, the parties had stipulated to a modification of child support based on mother having 183 overnights.

determine enrollment pursuant to *In re Marriage of Dauwe*, 148 P.3d 282 (Colo. App. 2006), or resolve the dispute itself pursuant to section 14-10-130, C.R.S. 2020.[4] In her motion, mother asserted that both parties agreed that mediation would not be fruitful; father did not dispute this assertion in his response or at the hearing on mother's motion.

¶ 10 At the hearing, the parties agreed that the facts were not in dispute. Thus, the parties presented no testimony, only their legal arguments. Mother asserted that the child was performing well and was socially adjusted, that he had attended schools in Jefferson County since kindergarten, that the high school she wanted him to attend was the school into which his middle school fed, that attending that high school would permit the child to maintain his friendships, and that changing schools would present emotional harm to the child.

¶ 11 Father responded that, based on his residence, the proper school for the child was in Adams County. He argued that mother

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[4] As we will discuss more fully, in *In re Marriage of Dauwe*, 148 P.3d 282 (Colo. App. 2006), the district court resolved a decision-making impasse over the children's therapy by authorizing the mother to enroll the children in therapy.

could not establish any emotional harm to the child, particularly because the child was transitioning from middle school to high school regardless of which school he attended so his friends would likely change at either school. Father pointed out that the Jefferson County schools were not going to be providing any bus service due to the COVID-19 pandemic, thus affecting his ability to pick the child up after school. (In prior years, the child would take a bus to the YMCA after school, where father would pick him up.) He also argued that under *Griffin v. Griffin*, 699 P.2d 407 (Colo. 1985), he was the child's "primary residential custodian" and thus had the ultimate authority to decide the child's school.

¶ 12 The district court entered an order (the August 21 order) denying mother's motion on three grounds. Citing section 14-10-131, C.R.S. 2020, the court determined that there had been no change in circumstances justifying a modification of educational decision-making responsibility, and that mother had not demonstrated that the current allocation endangered the child's physical health or emotional development.

¶ 13 The court also denied mother's request for relief under section 14-10-130(1), noting that "[t]he [c]ourt's role is not to exercise

parental decision-making, but to allocate it." However, the court also rejected father's interpretation of *Griffin*, noting that the statutory language had been amended, and thus the case was "outdated and inapplicable."

¶ 14 The district court was not persuaded by mother's reliance on *Dauwe*, in part because it considered the case factually distinguishable and, in part, because in that case the court "allocated decision-making authority where there was no other mechanism to do so." In the end, the court appointed a decision-maker, under section 14-10-128.3(1), C.R.S. 2020, to resolve the school choice issue.

¶ 15 Father moved for relief under C.R.C.P. 60(b), arguing that the court lacked the authority to appoint a decision-maker without his consent. *See* § 14-10-128.3(1) (providing that, "upon written consent of both parties," the district court may appoint a decision-maker with binding authority to resolve disputes between the parties).

¶ 16 On August 26, 2020, the court entered an order (the August 26 order) modifying its earlier ruling. It concluded that father's unwillingness to consent to a decision-maker left the parties at a

"total impasse" in resolving the school issue. Noting that it had previously distinguished *Dauwe* because in that case there had been no other mechanism available to resolve the dispute, the court explained that the intent of the August 21 order appointing the decision-maker was to provide such a mechanism. Because the court lacked the parties' consent, however, that effort failed as a matter of law. Thus, the district court concluded, *Dauwe* was no longer distinguishable, and the court would make the decision for the parties.

¶ 17 The court found that it was in the child's best interests to attend the Jefferson County high school for the 2020-2021 school year and so ordered.

¶ 18 Father appeals both orders.

II. The August 21 Order

¶ 19 As a threshold issue, mother argues that the appeal of the August 21 order is moot. Reviewing the question de novo, *see Colo. Mining Ass'n v. Urbina*, 2013 COA 155, ¶ 23, we agree.

¶ 20 The district court acknowledged that its August 21 order appointing a decision-maker was erroneous and that "by operation of C.R.C.P. 60(b)(3) or (5), the parties [were] entitled to relief from

the judgment." The context of the August 26 order makes clear that it superseded the August 21 order.

¶ 21 Because the August 21 order is no longer in effect, there is no order to reverse. Thus, any action we may take with respect to the now-vacated order "would have no practical effect on an existing controversy." *See In re Marriage of Balanson*, 25 P.3d 28, 38 (Colo. 2001). Accordingly, we dismiss the appeal to the extent it seeks reversal of the August 21 order.

III. The August 26 Order

A. Though Moot, We Elect to Address Father's Challenge to the August 26 Order

¶ 22 Because the August 26 order, by its terms, applies only to the 2020-2021 school year — which has come to an end — the appeal of that order also implicates mootness concerns. As a jurisdictional prerequisite, mootness can be addressed at any stage of a proceeding. *Diehl v. Weiser*, 2019 CO 70, ¶ 9. "Because we must always satisfy ourselves that we have jurisdiction to hear an appeal, we may raise jurisdictional defects sua sponte, regardless of whether the parties have raised the issue." *People v. S.X.G.*, 2012 CO 5, ¶ 9. Thus, although neither party raised the issue here, we

must "address the mootness problem because it may affect the existence of a justiciable controversy." *Nowak v. Suthers*, 2014 CO 14, ¶ 12.

¶ 23 Even if an issue is moot, we may review it if it is capable of repetition yet evades review. *In re Marriage of Tibbetts*, 2018 COA 117, ¶ 23. The parties' impasse regarding the child's school enrollment is unlikely to end absent our resolution of this issue. The parties will be left to litigate where the child goes to school each year, and it is highly unlikely that a given appeal can be resolved within the span of a single school year. *Cf. Nowak*, ¶ 15 (concluding that a challenge to a parole decision may continue to evade review "given the short time frame associated with habeas petitions"). Consequently, we conclude that this matter is capable of repetition yet evading review, and thus choose to exercise jurisdiction.

B. The Parenting Plan

¶ 24 Citing section 14-10-112(1), C.R.S. 2020, father asserts that the district court erred by refusing to enforce the educational decision-making provisions of the parties' 2006 parenting plan. He relies on the following language of the plan: "For purposes of school

attendance only, the [child's] residence will be with the [father]." He contends that this language acts as a tiebreaker, giving him the unilateral authority to enroll the minor child in school based on where he resides. We are not persuaded.

¶ 25 Father's argument is inconsistent with the concept of joint decision-making. If parents have joint decision-making responsibility, but one parent has the final say, the grant of joint decision-making is illusory. Were father's interpretation correct, it would vitiate the clear expression of the parties' intent — and the court's order — that decisions about the child's education are to be made jointly.

¶ 26 As the district court correctly noted, the language regarding residency of the child for school enrollment purposes is related to the statutory provision governing how a school district may determine which children live within its boundaries. *See* § 22-1-102(2)(a), C.R.S. 2020 ("A child shall be deemed to reside in a school district if . . . [the parent] with whom such child resides a majority of the time pursuant to an order of any court of competent

jurisdiction resides in the school district.").[5] In other words, a *school district* must permit a child to attend the neighborhood school defined by the child's residence. But that does not mean the child's parents (or, if applicable, the parent with sole decision-making) cannot elect to homeschool the child or to enroll the child in a private school, a charter school, or a different public school through an applicable out-of-boundary school choice protocol. Nor does it mean that the decision to forgo any of these alternatives and enroll the child in a neighborhood school is not a major educational decision subject to the allocation of joint decision-making.

¶ 27 Nothing prevents parties from agreeing — or a court from ordering — that a particular school, as defined by a given parent's residence, is the default school if the parties are unable to agree. But no such agreement or order will be inferred merely from standard language regarding the child's residence "for school

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[5] Here, the parties had equal parenting time, though at the time of this dispute, child support was calculated with father having 183 overnights and mother having 182. Thus, the language was needed to make clear which parent would be considered to have the majority of the parenting time under the parenting plan.

enrollment purposes" where, as here, contrary language requires the parties to jointly decide the issue.

C. *Griffin v. Griffin*

¶ 28 Next, father argues that the district court's order violates *Griffin*'s "prohibition" against breaking a deadlock between parents. We disagree.

¶ 29 In *Griffin*, the parents' dissolution decree awarded custody of their child to the mother. 699 P.2d at 408. The parents' separation agreement stated that the child's schools would be "selected jointly" but did not specify a school or provide a means of resolving deadlocks over school selection. *Id.* at 409. When the parents were unable to agree on a choice of school for their child, the father moved to enforce the education provision of the separation agreement. *Id.* The Colorado Supreme Court held that the agreement was unenforceable because "the parties merely 'agreed to agree'" on the child's school and "the court has no power to force the parties to reach agreement." *Id.* at 409. The court added that "any attempt to enforce the agreement by requiring the parents to negotiate and reach a future agreement would be not only futile, but adverse to the interests of the child as well." *Id.* at 410.

¶ 30 The supreme court noted that courts are ill-equipped to regulate the details of a child's upbringing. *Id.* In the absence of an enforceable agreement, the court left the decision to the mother as the child's primary custodial parent under the version of section 14-10-130(1) in effect at the time. *Id.* at 409-10.

¶ 31 Initially, we note that *Griffin* is factually distinguishable because the parties' agreement there provided no mechanism for the resolution of disputes when joint decision-making failed. *Id.* at 409. Here, in contrast, the parties explicitly agreed that future conflicts would be submitted to mediation and that, "[i]f mediation fails, the final decision will be made by the Court."

¶ 32 Notably, this provision would seem to resolve the entire controversy. Nevertheless, because mother does not rely on this language, we will not rest our decision on it. *See Compos v. People*, 2021 CO 19, ¶ 35 (noting that under the party presentation principle, parties "are responsible for advancing the facts and arguments entitling them to relief" (quoting *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008))). *But see Laleh v. Johnson*, 2017 CO 93, ¶ 24 (stating the oft-invoked rule that an appellate court may affirm a trial court's judgment "on any ground supported

by the record, whether relied upon or even considered by the trial court" (quoting *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006))).[6]

¶ 33 In any event, father ignores the current language of section 14-10-130(1). When the supreme court decided *Griffin*, the statute provided that "the *custodian* may determine the child's upbringing, including his education . . . ." § 14-10-130(1), C.R.S. 1973 (emphasis added). In 1998, however, sweeping amendments made by the General Assembly changed the statutory terminology from "custody" to "parental responsibilities," and the statute was amended to provide that "*the person or persons with responsibility for decision-making* may determine the child's upbringing, including his or her education . . . ." Ch. 310, sec. 17, § 14-10-130(1), 1998 Colo. Sess. Laws 1388 (emphasis added). That language remains in the current version of the statute. *See* § 14-10-130(1).

¶ 34 Thus, the statute no longer leads to the same outcome it did in *Griffin*. Under the old statute, even where there was an agreement for joint decision-making, there was only one custodian, who had

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[6] Whether these two revered maxims are in conflict with each other is a question we leave for another day.

the final say when joint decision-making failed. But under the current statute, where there is an allocation of joint decision-making, both parents are "persons with responsibility for decision-making [who] may determine the child's . . . education." *See id.* In these circumstances, there is no longer a single statutory default decision-maker.

¶ 35 Father also relies on section 14-10-103(4), C.R.S. 2020, which clarifies that, in making the change from "custody" to "parental responsibilities," the General Assembly did not intend "to modify or change the meaning of the term 'custody' [or] alter the legal rights of any custodial parent with respect to the child as a result of changing the term 'custody' to 'parental responsibilities.'" According to father, this language means that because he is the parent designated as the "primary residential custodian" pursuant to the 2010 stipulation, he is entitled to be treated as the "custodian" for purposes of section 14-10-130. But, again, the statute no longer limits the default to a single custodian. It provides that these decisions are to be made by the "persons with responsibility for decision-making," and the parties' agreement — and the court's order — in this case clearly establishes that both

father and mother are "the persons with responsibility for decision-making." *See id.*

¶ 36 Finally, we do not read *Griffin* as *prohibiting* a district court from breaking a parental deadlock between joint decision-makers. While co-parents would do well to heed the supreme court's warning that district courts are "stranger[s] to both child and parents, [and] ill-equipped to understand and act upon the needs of the child," *Griffin*, 699 P.2d at 410, when one or both of those parents are unable to responsibly discharge their duty to make a particular decision, a court is sometimes left with no alternative but to do so.

¶ 37 For example, in *Dauwe*, parents who shared joint decision-making responsibility had a long-standing dispute over the children's therapy. 148 P.3d at 285. A division of this court upheld the district court's order granting the mother the authority to obtain therapy for the children but leaving undisturbed the existing allocation of joint decision-making. *Id.* The division explained:

> The [district court's] order resolved a long-standing dispute between the parties about therapy. The record shows that whether the children should be in therapy has been an issue throughout the proceedings. Because

> the joint decision[-]makers could not resolve the issue, the [district] court did so.

Id. The division specifically noted that it knew of "no authority that prohibits the court from resolving a dispute between joint decision[-]makers." *Id.*

¶ 38 Similar to the parents in *Dauwe*, mother and father reached an impasse in making a major decision they were obligated to make together. Because they could not resolve the dispute, the district court appropriately exercised its authority to do so.[7] We therefore discern no error.

IV. Conclusion

¶ 39 The appeal of the August 21 order is dismissed. The August 26 order is affirmed.

JUDGE FURMAN and JUDGE ROTHENBERG concur.

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[7] Father does not challenge the district court's determination that attending the Jefferson County school is in the child's best interest.