Colorado Supreme Court

2019SC123

Certiorari to the Court of Appeals, 2018CA265
District Court, Mesa County, 2012DR18

In re the Marriage of
Petitioner, Samuel Collin Robinson
and
Respondent, Katherine Lyman Robinson

ORDER OF COURT
Date Filed: May 20, 2019

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 20, 2019

Colorado Court of Appeals

18CA0265

On Appeal From
Mesa County District Court, 12DR18
Honorable Thomas W. Ossola, Judge

In re the Marriage of
Katherine Lyman Robinson, Appellee
and
Samuel Collin Robinson, Appellant

ORDER AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE WELLING
Webb and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced January 3, 2019

Catherine C. Burkey, P.C., Catherine C. Burkey,
Grand Junction, Colorado, for Appellee

Samuel Collin Robinson, Pro Se

¶1 In this post-dissolution of marriage proceeding involving Samuel Collin Robinson (father) and Katherine Lyman Robinson (mother), father appeals the district court's order adopting the magistrate's allocation of holiday parenting time for the parties' children. We affirm.

I. Background

¶2 Mother and father are the parents of two children. The district court dissolved their marriage in 2012, at which time the court entered permanent orders allocating parenting time to father every other weekend, one evening per week, and on certain holidays.

¶3 In 2016, father moved to modify parenting time, asserting that equal parenting time was in the children's best interests. Mother opposed father's request and alerted the court of difficulties surrounding father's weekday evening parenting time.

¶4 Following an evidentiary hearing, the magistrate maintained the regular parenting time schedule but modified the holiday parenting time schedule so that the parties would share holiday parenting time equally. The district court denied father's petition for review and adopted the

magistrate's order as an order of the district court pursuant to C.R.M. 7(a)(10).

II. Holiday Parenting Time

¶5 Father contends that the magistrate abused her discretion by adopting a new holiday parenting schedule that reduced his holiday parenting time and that was not supported by the evidence. We disagree.

A. Standard of Review

¶6 A district court's review of a magistrate's order is like appellate review, and the magistrate's findings of fact cannot be altered unless clearly erroneous. C.R.M. 7(a)(9); *In re Parental Responsibilities Concerning G.E.R.*, 264 P.3d 637, 638-39 (Colo. App. 2011). Our review of the district court's decision is effectively a second level of appellate review, and we apply the same clearly erroneous standard to the magistrate's decision. *In re Marriage of Dean*, 2017 COA 51,¶ 8; G.E.R., 264 P.3d at 639.

¶7 A trial court has broad discretion to establish a parenting time schedule that is in the child's best interests, and we will not disturb its orders absent an abuse of discretion. *In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007). We exercise every presumption in favor of upholding the court's

decisions in parenting matters. Id. As long as there is competent evidence to support the court's orders, we will not disturb the parenting time schedule. Id.

B. Legal Principles

¶8 A trial courts may modify a parenting time order whenever the modification would serve the child's best interests. See§ 14-10-129(1)(a)(I), C.R.S. 2018; *In re Marriage of Parr*, 240 P.3d 509, 511 (Colo. App. 2010). Section 14-10-124(1.5)(a), C.R.S. 2018, lists the best interest factors applicable to parenting time. The court need not make findings concerning each and every factor. *In re Custody of C.J.S.*, 37 P.3d 479, 482 (Colo. App. 2001).

¶9 It is the trial court's responsibility to judge the credibility of witnesses and resolve conflicting evidence as to the child's best interests. See *In re Marriage of McNamara*, 962 P.2d 330, 333-34 (Colo. App. 1998).

C. Analysis

¶10 Both parties proposed new holiday parenting time schedules yet neither party presented evidence specifically in support of their respective holiday parenting time proposals. Father proposed various schedules for eleven holidays or school breaks. The magistrate rejected father's proposal, finding that it was "complicated" and that it had "the potential to

cause more conflict if there was confusion" with the schedule. The record supports the magistrate's findings. For example, with respect to spring break, father suggested alternating years with the following provision:

> If the children would spend more than one fewer day with either parent during the period between the end of the last day school is in session prior to the break and the day school resumes after the break, the parents will coordinate to shift the exchange occurring during the break by one or more days such that the difference is reduced to one day, rounded to the nearest day.

Father's proposal included similarly complicated language for other holidays. And the record contains ample evidence that mother and father 's co-parenting relationship is contentious and readily prone to conflict, and that such conflict is not in the children's best interest.

¶11 The magistrate instead adopted mother's proposed holiday parenting time schedule, finding mother's plan to be in the children's best interests. Mother's proposal provided a schedule for spring break, Thanksgiving, and Christmas, as well as Mother's Day and Father's Day. The magistrate favored mother's proposal because it took into consideration that the children were in school,

because it was consistent with the parties' regular parenting time schedule, and because it was less complicated (and therefore less prone to cause conflict). We also note that mother's proposed schedule divides holiday parenting time equally.

¶12 Because the magistrate's findings are supported by the record, we conclude that the magistrate did not abuse her broad discretion in determining that an equal holiday parenting time schedule was in the children's best interests. See *Hatton*, 160 P.3d at 330-31

III. Opinion Testimony

¶13 Father contends that the magistrate abused her discretion in relying on the version of section 14-10-127, C.R.S. 2018, in effect at the time of the hearing, to preclude his expert, Dr. Warren Farrell, from testifying about what parenting plan was in the children's best interests. In father's view, section 14-10-127 did not apply. We agree that section 14-10-127 did not apply but disagree that the magistrate abused her discretion in precluding that portion Dr. Farrell's testimony.

¶14 Section 14-10-127 governs all aspects of parental responsibilities evaluations (PRE) - who can perform the evaluations, what the evaluation must entail, and who may testify regarding the

evaluations. Here, however, Dr. Farrell was not appointed to complete a PRE. Rather, father retained him to observe father 's parenting time with the children and to recommend and testify to a parenting time schedule that Dr. Farrell determined was in the children's best interests. We therefore agree with father that section 14-10-127 did not apply.

¶15 But the magistrate's erroneous reliance on section 14-10-127 did not prevent Dr. Farrell from testifying as an expert at the hearing. Indeed, the magistrate qualified Dr. Farrell as an expert witness in the area of applying evidence-based research findings to the allocation of parental responsibilities, and his testimony on direct examination spanned nearly sixty-five pages of transcript. And although the magistrate precluded Dr. Farrell from testifying about what specific parenting time schedule was in the children's best interests, he testified extensively about his opinion that it is generally in childrens' best interest to have "equal involvement" of both parents (although, he admitted, certain factors can justify departing from this presumption). He also testified to his observations of father's parenting; but he never interviewed mother or observed her with the children. Simply put, the record does not support father's contention that Dr. Farrell's expert testimony was materially curtailed by the magistrate's erroneous reliance on section 14-10-127.

¶16 The admission of expert testimony is subject to review for an abuse of discretion. See *People in*

Interest of A.E.L., 181 P.3d 1186, 1193 (Colo. App. 2008). Qualification of an expert witness is within the court's discretion. See *People in Interest of S.L.*, 2017 COA 160, ¶68. "The weight to be accorded the testimony of an expert is within the sound discretion of the trier of fact." *People v. Katz*, 58 P.3d 1176, 1194 (Colo. O.P.D.J. 2002). An abuse of discretion occurs only when the trial court's decision is manifestly arbitrary, unreasonable, or unfair. See *People in Interest of S.G.*, 91 P.3d 443, 450 (Colo. App. 2004).

¶17 Here, the record indicates that the magistrate carefully considered Dr. Farrell's testimony, but accorded it very little weight, as is the fact finder's prerogative. See *People in Interest of S.G.*, 91 P.3d 443, 452 (Colo. App. 2004) ("It is the province of the trial court sitting as the fact finder to determine the credibility of a witness and to determine the weight and probative effect of the testimony."). In her written order, the magistrate disregarded Dr. Farrell's testimony because he did not evaluate mother's allegations against father of abuse and bad-mouthing and because he did not interview mother or observe her with the children. Indeed, the magistrate found as follows:

> The Court does not, therefore, find that the specific evidence presented by Dr. Farrell is helpful to the Court to make a determination as to the best interests of the children, since it

> was one sided, and did not consider factors that even Dr. Farrell admits would be exceptions to his findings [in favor of equal involvement].

¶18 The magistrate's conclusions in this regard are well supported by the record. Thus, we conclude the magistrate did not abuse her discretion in limiting and weighing Dr. Farrell's testimony. See S.L.,¶¶ 69-74. Put differently, even if the magistrate had admitted Dr. Farrell's parenting time recommendation, it would likely not have affected the magistrate's parenting time decision. Accordingly, the district court did not err in rejecting this challenge to the magistrate 's order.

IV. Children's Fundamental Rights

¶19 Father contends that the children have fundamental rights to parenting time with each parent. Whether the children have such fundamental rights, however, is not dispositive of father's contention because the magistrate did not deprive the children of parenting time with either of their parents. Under the magistrate's order, the children have parenting time with their father every other weekend, one evening per week, and on certain holidays, and they have parenting time with mother at all other times. Because the children were not deprived of parenting time with either parent, their

fundamental rights, to the extent they have rights under the law, were not violated.

V. Equal Protection

¶20 Father contends that the magistrate deprived the children of their equal protection rights by entering parenting time orders allocating unequal parenting time. We disagree.

¶21 The right to equal protection of the law guarantees that all individuals who are similarly situated are treated similarly. See Colo. Const. art. II, § 25; *In re Marriage of Tonnessen*, 937 P.2d 863, 866 (Colo. App. 1996). If a law does not classify individuals, there can be no equal protection issue presented. See *Tonnessen*, 937 P.2d at 866.

¶22 Section 14-10-124(1.5)(a) sets forth the factors relevant to a child's best interests as related to allocation of parental responsibilities. The statute does not create any groups that would be treated differently in an allocation of parental responsibilities matter. Rather, it requires the court to consider the child's best interests in all cases involving parenting matters. See § 14-10-124(1.5); see also§ 14-10-123.4(1)(a), C.R.S. 2018 (children have the right to have decisions in parental responsibilities proceedings made based on their best interests). Because the applicable statutes do not

create a classification, father has not presented a valid equal protection issue. See *Tonnessen*, 937 P.2d at 867.

VI. Mother's Request for Attorney Fees

¶23 Mother requests her appellate attorney fees under section 14-10-119, C.R.S. 2018, contending that father has substantially greater financial resources than she does to litigate this appeal.

Because the district court is better equipped to resolve the factual issues regarding the parties' current financial circumstances, we remand mother's request to the district court. See *In re Marriage of Kann*, 2017 COA 94, ¶ 84.

VII. Conclusion

¶24 We affirm the district court's order adopting the magistrate's ruling and remand the case for resolution of mother's request for appellate attorney fees under section 14-10-119.

JUDGE WEBB and JUDGE HARRIS concur.

District Court, Mesa County, Colorado

2012DR18

Petitioner, Katherine Lyman Robinson
and
Respondent, Samuel Collin Robinson

ORDER
ON PETITION FOR MAGISTRATE REVIEW
Date Filed: January 25, 2018

THIS MATTER comes before the Court for consideration of multiple petitions for Judicial Review filed by Mr. Robinson and the Court having considered the matters contained in the file and the transcript of the hearing before the Magistrate, finds, concludes and orders the following.

A hearing was held before the Magistrate on Mr. Robinson's motion to modify parenting time. Mrs. Robinson also sought modification of the then existing plan. An extensive hearing was held in which experts testified. The Magistrate issued an order on April 28, 2017. On May 18, 2017, Mr. Robinson filed a motion for review. The Magistrate issued another order on June 6, 2017 followed by

another motion for review filed by Mr. Robinson on June 12, 2017. The Magistrate entered an amended plan on October 30, 2017, correcting clerical errors. Mr. Robinson filed a final motion for review on November 6, 2017.

While Mr. Robinson filed multiple motions for review, the issues remain substantially the same. The Court having considered all of the motions and the orders of the Magistrate, concludes that the orders of the Magistrate are supported by the record and that he [sic] did not abuse his discretion.

WHEREFORE, IT IS ORDERED that all of the motions for review are denied.

Issue Date: 1/25/2018

s/*Thomas W. Ossola*
THOMAS WILLIAM OSSOLA
Senior Judge

District Court, Mesa County, Colorado

2012DR18

Petitioner, Katherine Robinson,
k/n/a Katherine Freeman
and
Respondent, Samuel Collin Robinson

ORDER
Date Filed: April 28, 2017

Re: Motion to Modify Parenting Time and Decision-Making, Verified Motion Regarding Counseling and Parenting Time, Motion for Attorney's Fees and Costs

The Court has reviewed the evidence, and the case file, and applicable statutory and case law, and makes the following orders:

A hearing was held on March 29-30. 2017 on the motions as noted above. Respondent (hereinafter "Father"), filed a Verified Motion to Modify Parenting Time on January 25, 2016. Petitioner. (hereinafter "Mother") filed a response on February 5, 2016, in which she also requested that there be modifications of parenting time, as well as a

modification of parenting time from joint decision-making to her having sole decision-making.[1] In conjunction with her motion, she filed a Motion for a Parental Responsibilities Evaluation, which request was granted.

After the PRE (Dr. Bruce Bishop) filed his report on September 15, 2016, Father filed a request to continue the hearing set for October 6, 2016, as well as a request for a Supplemental PRE to be conducted by Dr. Saul Tompkins. Both requests were granted. Further, on September 23, 2016, Father filed a request to update the requested relief to include his request that he have sole decision-making. Additional motions were filed by Mother on October 26, 2016 and March 13, 2017 respectively for the Court to address counseling for the children, Father's attendance at school, and payment of attorney fees pursuant to C.R.S. §14-10-119.

Final orders in this matter were issued on October 25, 2012. by agreement of the parties. The orders provided that the parties would have joint decision-making for the major decisions regarding the children. Grace (d.o.b. --/--/2007) and Gordon (d.o.b. --/--/2009), and Father would have parenting time on alternating weekends, as well as Wednesday evenings.

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[1] The file contains filing of Sworn Financial Statements and child support worksheets. No motion to modify child support was filed, and the Court did not hear evidence regarding child support modification.

The Court has reviewed the provisions of C.R.S. 14-10-129 to make this determination of modification of parenting time in the child's best interest. Mother is the primary parent under the order. Father requests to change that to equal parenting time between the parents. Both parents are asking to be made sole decision-makers.

C.R.S. 14-10-129 (2) (b) provides:

> 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 the majority of the time unless it finds, upon the basis for 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 or the party with whom the child resides the majority of the time 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:

(emphasis added). The "unless" is followed by four situations in which the primary parent could be

changed. In this circumstance, since neither party is asking to change the primary parent. At most, Father is asking that there not be a designated primary parent. Even though Father's parenting plan would increase his parenting time, necessarily decreasing Mother's parenting time; the determination for a change in parenting time would be what is in the best interest of the children.

Before evaluating the factors regarding best interest of the children, the Court will address the expert testimony which was heard at the hearing. Four separate expert witnesses testified. First, the Court heard from Dr. Warren Farrell. Dr. Farrell was hired by Father to provide support for Father's request for a 50/ 50 or alternating week parenting time schedule. Dr. Farrell testified as an expert in evidence-based research findings to allocation of parental responsibilities. He observed Father with the children, and reported what he observed, as well as testified as to the research he has done regarding children with 50/ 50 parenting time plans. Dr. Farrell's position is that children have the best outcomes, first, in an intact family, but second when parenting time is equal between parents. Dr. Farrell testified to the many ways he found that children react when they have equal time with both parents. He did note that there are exceptions to this: when there is physical or sexual abuse to a parent or children, substance abuse, bad mouthing of the other parent, and denial of access to the other parent.

Of Father's parenting of the children, Dr. Farrell observed that Father uses many opportunities for teaching the children, and that he was very positive toward Mother. The report issued by Dr. Farrell (Respondent,s Exhibit A[2]) recaps what the children did and talked about with Father.

As was noted by Mother, he did not speak to Mother, and did not observe Mother with the children. His reasoning for this was that there would be no need to observe Mother or speak with her, because Father does not want to shut Mother out, but wants Mother to have half of the time as well. However, there is no mention in the report whether or not Dr. Farrell evaluated the issues of abuse, and bad mouthing on the part of Father; both have been alleged by Mother. The fact that Father was positive about Mother when Dr. Farrell was watching him is not significant enough for the Court to find that Mother's concerns are unfounded (and will be addressed further below). If Dr. Warren's premise is rebutted in the instances of the existence or abuse and bad-mouthing, it is not clear how he would ever determine whether these concerns were present without asking the other party. Here, it is not even clear if he asked Father whether those were issues.

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[2] Both parties marked their exhibits with numbers. At the hearing, the Court re-marked the exhibits with Father's exhibits being letters. The transcript reflects in most instances the re-marking of the exhibits. Where this does not occur, the intent of the Court was that for Father's exhibits that the number correspond with the appropriate letter (A=1 and so on), through double letters.

The Court does not, therefore, find that the specific evidence presented by Dr. Farrell is helpful for the Court to make a determination as to the best interest of the children, since it was one-sided, and did not consider factors that even Dr. Farrell admits would be exceptions to his findings.

The Court also heard testimony from Dr. Bruce Bishop, who completed the Parental Responsibilities Evaluation (hereinafter "PRE"). Dr. Bishop ultimately recommended that Mother have sole decision-making and that Father's parenting time be decreased somewhat. This recommendation was due in part to Dr. Bishop's concern that Father's behaviors had traits of being on the Autism Spectrum. Specifically, Dr. Bishop found:

> Stated rather bluntly, it was clearly evident to this evaluator that father struggles with a) a number of issues related to social communications/relationships, especially as related to complex interpersonal and social cues, and b) subtle, yet markedly restricted and/or repetitive patterns of behavior or interests. These are the two primary diagnostic criteria in the DSM-5 for a broad range or heterogeneous conditions under the umbrella label of Autism Spectrum Disorder (American Psychiatric Association. 2013).

(Petitioner's Exhibit 1. pg. 35). Dr. Bishop testified at the hearing that he did not make a diagnosis of Father, as he did not have the expertise, or did the testing to do that. The Court does find, however, the report was a bit ambiguous as to whether a diagnosis had been made. Dr. Bishop's testimony further went on to say that whether or not Father was diagnosed with Autism Spectrum Disorder was not as important to him as a consideration of Father's symptoms and how they impact the children.

After these findings were made by Dr. Bishop, as noted above, Father requested a Supplemental PRE, which was conducted by Dr. Saul Tompkins. Dr. Tompkins worked with Dr. Kent Rosengren, who shares office space with Dr. Tompkins, to conduct testing related to the issue of Autism Spectrum Disorder. Dr. Rosengren concluded that Father did not meet this criteria. Dr. Rosengren used the ADOS Evaluation ("Autism Diagnostic Observation Schedule") and concluded that Father does not meet the criteria for Autism Spectrum Disorder. Dr. Rosengren, in making this determination, interviewed Father, using the ADOS, which included both asking questions of Father, as well as making observations of Father during the interview. One of the challenges that Dr. Rosengren noted was that typically this diagnostic tool is used with young children, and parents are reporting behaviors they have observed. In this case,

Dr. Rosengren was able to interview Father's parents, who did not report any behaviors that would meet these criteria. Dr. Rosengren also reviewed school records of Father, which also did not find behaviors which would meet the criteria (Respondent's Exhibit 9).

Dr. Rosengren's report was a portion of the Supplemental PRE, which was conducted by Dr. Saul Tompkins. Dr. Tompkins also testified at the hearing. Dr. Tompkins ultimate conclusion, along with the determination that Father did not meet the criteria for Autism Spectrum Disorder, was that Father's parenting time should be expanded some, but not to a 50/50 parenting time schedule. Dr. Tompkins felt that the children were doing well under this schedule, and to change it too significantly would not be in their best interest.

Dr. Tompkins noted concern that Mother was trying to shut Father out by requesting a change to parenting time and sole decision-making. What is interesting to the Court was that Father also made this request, when he realized that Mother was asking for sole decision-making. Father's filings and testimony were that he felt that he needed to request sole decision making due to changed circumstances, but there was never a full discussion of what those changes were, other than Mother's request. This appears to be retaliatory, rather than a true consideration of what is in the children's best interest. The question is then, why is Mother

alienating Father by requesting sole decision-making, but Father is not when he makes the same request? The Court finds that if it finds that this is an alienating behavior, it is one in which both parents engaged.

Mother argued that Dr. Tompkins report was not a true supplemental, because the information was very limited. Dr. Tompkins, in his testimony, disputed that argument. However, the Court cannot find that the report is useful (with the exception of the information regarding Father and the Autism Spectrum Disorder), as it is not clear what he relied upon to make his conclusions. For example, Dr. Tompkins concludes:

> The children are doing very well right now. They are doing well intellectually and academically. They are both bright and excelling in school. They are both happy and free from any significant emotional and/or mental problems. (Respondent's Exhibit C. pg. 12).

There is no specific information from which the Court understands that Dr. Tompkins drew this conclusion. Page two of the report refers to the information used in the evaluation process, but there are no references in the report to home visits, what collaterals were interviewed, and what supporting documentation was referenced. Dr. Tompkins confirmed in his testimony that he did not feel that

he needed to speak to any collaterals, despite having listed them in his report. The Court cannot evaluate the conclusion that the children are doing well in school, if, for example. Dr. Tompkins did not talk to school officials or review any school paperwork.

The Court next looks at this information, as well as all of the evidence, in the context of the best interest of the children. C.R.S. 14- 10-124. In making the determination as to the best interest of the child, pursuant to C.R.S. 14-10- 128 (1) (a) (I), the Court first looks to whether there is credible evidence of either domestic violence or child abuse/neglect. No evidence was presented at the hearing that Mother has been the perpetrator of spouse abuse or child abuse or neglect. The Court notes that Mother has alleged since the beginning of this case that Father has been abusive toward her. The Court, at the hearing, took judicial notice of the orders in this case, and notes that Magistrate McNulty, in temporary orders dated May 14, 2012, found that there was credible evidence of spouse abuse perpetrated by Father during the marriage. The parties reached agreement as to final orders, so no hearing or determination on this issue was made at that point.

There was no evidence presented at the hearing that Father has been the perpetrator of spouse abuse since the last order. Mother did testify at this hearing that she is concerned that Father is controlling of her. As part of her evidence, the Court reviewed emails between the parties. The Court's

reading of the emails (Petitioner's Exhibits M. P, Q. and R) notes that a strict reading of the emails shows no harassment or abuse. Petitioner's Exhibit Q shows a list of portions of emails with Mother's notes about her perception regarding the language that father was using. In her mind, Father was being "demanding," in certain instances, which may be based on her experience with the relationship. The Court cannot find by the evidence provided that these emails would be credible evidence of domestic violence, however. Mother did not specifically argue that Father has been the perpetrator of child abuse or neglect, but did argue that Father does not have the ability to recognize the emotional needs of the children which is endangering to them. The Court does not find that there is credible evidence that Father has been the perpetrator of child abuse or neglect, but will address Mother's concerns in the context of mental health issues below.

The Court next looks at the remaining factors related to the best interest of the child. The factors are found in C.R.S. § 14-10-124(1.5)(a), and are as follows:

1. **The wishes of the child's parents as to parenting time.** Mother is requesting parenting time one weekend a month for three overnights and one evening on the weeks he does not have overnights. Father is requesting parenting time for alternating weeks, transitioning on Tuesdays.

2. **The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule.** The children are too young to express reasoned and independent preferences as to parenting time.

3. **The interaction and interrelationship of the child with his or her parents, his or her siblings and any other person who may significantly affect the child's best interests.** The children have been in the primary care of Mother since the last order. Dr. Bishop found in his report that the children are securely attached to her (Respondent's Exhibit 1. pg. 23). She is remarried, and the children appear to have a good relationship with their stepfather. Further, Mother has two children with her new husband, and the children are very pleased to have younger siblings, and have a bond with those children.

As to Father, Dr. Bishop found that the children did have signs of a secure attachment with Father, but also showed signs of "emotional avoidance." (Respondent's Exhibit 1). Dr. Tompkins found that the children were securely attached to both parents. (Petitioner's Exhibit C. pg. 12).

4. **The child's adjustment to his or her home, school and community. Both children appear to be adjusted to their respective homes once they have adjusted to each parent's home.** Both parents have

noted anxiety of the children, particularly Gordon. during transitions. Dr. Tompkins references this briefly in his report, only as a statement that Father made one of Dr. Tompkins' evaluations (Petitioner's Exhibit C. pg. 10), but he found generally that the children are adjusted and doing well in home, school and community. Dr. Bishop spoke with collateral contacts, including people from school. It was reported by Shannon Hoffman, who is a counselor at Nisley Elementary where the children attend school. Ms. Hoffman reported that:

> ...she clearly remembered Grace, and said that the girl changed between second and third grade, shifting from outgoing and extroverted to more withdrawn, anxious and possibly depressed. She recalled that Grace had dark circles under her eyes, and struggles in transitions at school. She was never present when Grace wrote notes to her family, but recalled that intervention. She said she worked with Grace to understand the separation anxiety she felt. They worked together on ways to cope and for Grace to understand that she wasn't responsible for the situation or for fixing things. Ms. Hoffman's assessment was that Grace loves her father, and felt guilty about how things weren't working out ... Ms. Hoffman said that Grace told her that

night times were hard and she had
trouble sleeping.
(Respondent's Exhibit 1. pg. 32).

Helen Doehling, who was the children's first grade teacher, also testified at the hearing to similar concerns that Grace does not act the way she usually does when Father is at school. She testified that Grace "shrinks away a bit," when Father is present at school. Mother noted concerns about Grace in school, but felt that the children were doing "okay." She had concerns about Grace's anxiety, as well as concerns that Grace was not challenged enough at school. Father disputed Mother's concerns, noting that he is at the school observing Grace, and he does not feel that there are concerns about either child in school.

5. **The mental and physical health of all individuals involved, except that a disability alone shall not be a basis to deny or restrict parenting time.** There was no evidence presented as to Mother's mental or physical health. She testified that she had been diagnosed with Post-Traumatic Stress Disorder. but she has not had issues with this. There are no physical health issues of any of the parties.

The Court noted the mental health issues of Father above. The Court notes there is no official diagnosis of Father with Autism Spectrum Disorder. or any other mental health issue. The Court does note the behaviors that Dr. Bishop found in his report that

were of concern to him. Specifically, Dr. Bishop concluded:

> In essence, father's inability to demonstrate sensitive responsivity to the children's emotional communications the mechanism by which attachments are formed and sustained- is a significant deprivation for these children. Father was able to structure his time with the children effectively, but only towards his own agendas, without consideration of the children's emotional needs. Both of these children were consistently focused on satisfying father's requirement for intellectual performance. The evaluator does not believe that this is because of any malicious intent, but is almost certainly purely due to what has been called "mind blindness'— an inability to emotionally experience his children's worlds and needs. In neurotypical parents, this allows a response to the children's basic needs for recognition and validation, but is not something of what father is capable.
> (Respondent's Exhibit 1. pg. 37).

Indeed, Father's responses to concerns noted by Mother and her witnesses, including concerns about what someone was feeling was discounted by Father

as being inaccurate. For example, when Mother noted that Grace is anxious that she will be punished if she is not able to answer the math problems that Father puts to her correctly, Father testified that those feelings are "not true," Further, he is unable to recognize Mother's feelings that Father attempts to control her by making demands on her, simply stating that his intent is not there, and therefore does not give any understanding of Mother's feelings.

As noted above, the children have both displayed anxiety. In addition to the concerns noted above Grace, both parties acknowledged that Gordon can be very distraught around transitions. Mother testified that just prior to the hearing, Gordon returned from Father's house he was in "full panic attack," and was "in the fetal position for an hour while he shook." She was concerned that Father had told the children about what was happening at court, which Father did not dispute.

6. **The ability of the parties to e ncourage the sharing of love, affection and contact between the child and the other party.** Both parents asserted that the other parent is important to the children. The children are very aware of the conflict between the parties which may well be the cause of the children's anxiety.

Father alleges that Mother does not encourage a relationship between him and the children, in part because of the request she has made regarding

parenting time and decision-making. The Court does not find this concern credible, because even if the Court does not grant the request. Mother's concerns regarding emotional availability for the children are not made up. He also alleges that Mother does not provide information regarding the children. There is some support for this concern. Dr. Bishop found that Mother has "at times ignored father's communications and made unilateral decisions." (Respondent's Exhibit 1. pg. 42). The Court has noted above the challenges that Mother has had in communicating with Father, which Dr. Bishop feels explains Mother's behaviors; however, this is still a concern to the Court.

As to Father, the Court finds that there was credible evidence that Father (intentionally or not) does not encourage the relationship between Mother and the children. Mother testified as to the times that she heard Father say, in front of the children, that Mother broke up their family. Further, Mother provided examples in her testimony of times that Father took actions that were clearly belittling of Mother, including a time in which he criticized a strategy that Mother recommended to one of the children. Mother testified that Father has berated her, and made statements to Gordon when Gordon was crying that "I'm sorry Mom took you away, I wish we could be a family, too." Father denied this, but the Court found the testimony of Mother to be credible.

Of greatest concern to the Court was how much information regarding this case has been provided to the children. In Father's testimony, he testified that he had not told Gordon that Mother was going to jail (related to a pre-decree Motion for Abduction Prevention), but that in 2012, he testified that "I told him I had obtained court-ordered abduction prevention measures." The Court could not tell when this happened (if 2012 was related to the time the information was provided, or the time that the orders were obtained), but either way, this was not age-appropriate information and it clearly indicated that Mother had done something wrong. Further, he did admit that the children were aware of the court proceeding, but that he "does not tell them any more than necessary." Based on the above statement, the Court is not certain that Father understands what would be necessary for the children to know.

7. **Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment and mutual support**. The parties appear to have similar values when it comes to the importance of education and family. They both believe that it is important for both parties to put the children's needs first. They both admit that they struggle with communication with one another, and mutual support of the other parent.

8. **The physical proximity of the parties to each other as this relates to the practical considerations of parenting time.** The parties both

live in the Grand Junction area which the Court finds does not impact practical considerations regarding a parenting plan.

9. **The ability of the parties to place the needs of the child ahead of his or her own needs.** Both parties clearly love the children and want what is best for them. The Court is concerned that Father is focused on his needs, rather than the needs of the children. As noted by Dr. Bishop:

> At the same time, it is also quite possible that the children have learned to respond to father's queries in ways that support his being able to take action— i.e., when asked if he wanted to play soccer, Gordon may have replied in a way that he knew would please his father (just as the children did during the interactional session when it came time to take down the tower they had constructed – they chose to carefully dissemble it step-by-step, even though father provided a hint of what appeared to be a choice to know [sic] it down. which is the invariable choice of young children). In short, it is likely that a significant portion of what looks like attentive parenting on father's part constitutes a variety of enmeshment, where the parent's needs are met

through the children's actions.
(Respondent's Exhibit 1, pg. 37 -38).

The incident regarding the tower was one that Dr. Bishop testified about that the children appeared to him to be taking Father's direction regarding the tower construction during the parent/child interaction. Father did not agree with Dr. Bishop's analysis, but felt that he was "coaching them to help them succeed" with the tower building, without recognizing that this was not a win/lose activity. Whether the reasons for Father's behavior are due to Autism Spectrum Disorder as posited by Dr. Bishop is not for the Court to determine, but how these behaviors impact the children.

The greatest concern of the Court is that the anxiety that the children are experiencing. The Court is concerned that this court case and their involvement in it, is a worry for them. The Court does not find sufficient evidence that Mother is attempting to withhold the children from Father, but instead that she is trying to protect them. Regardless of whether there is a diagnosis for Father of any specific mental health issues, the evidence was credible that Father's behaviors and treatment of children, specifically at school, and speaking with them about this case are causing anxiety for the children. The Court did not hear any evidence of anything that Mother has done that would cause anxiety. This position is confirmed by Dr. Bishop's report, which the Court found to be more

comprehensive than Dr. Tompkins' report. The Court finds that Dr. Bishop's report, which notes concerns about Father's behaviors and how it impacts the children to be helpful. The Court, relied on the report to make its determination as to what is in the children's best interest. The Court agrees with Dr. Bishop's concern that Father is not able (without making any findings as to why) to recognize the children's emotional needs and react to them appropriately). The Court does not find that Dr. Bishop's concerns regarding Autism Spectrum, even without a diagnosis to negate the findings of the report as to the observations of the children and the observations regarding Father's behaviors.

The Court denies Father's request for a 50/50 parenting plan. The Court does not find that there is sufficient evidence that these children would benefit from such a plan. The opinions and evidence presented by Dr. Farrell as outlined above were incomplete at best, and did not consider the needs of these specific children.

The Court however, despite agreeing with his findings, does not find that the conclusion that Dr. Bishop made to reduce time to one weekend a month really resolves these issues. It is clear that the children love Father and are bonded to him. The Court found credible the evidence that the children want to spend time with Father. To reduce time to one weekend may cause more stress to the children. who are already aware of these court proceedings

and the animosity between their parents. Further, the evidence was that Father tries to pack so much into the weekends that the Court is concerned that this will accelerate if parenting time is decreased. The Court therefore keeps the current plan as is.

The Court contemplated a number of changes, including removing the Wednesday time. The Court does not find that there was sufficient evidence for the Court to decide that any specific change would be in the children's best interest. The Court does not find that there is any legal justification for removing time, especially because without that Wednesday time, there will be a significant gap between when the children will see Father next, which may also cause stress for them. The Court did not find that there is sufficient evidence that it would be in the children's best interest to make changes to the regular current parenting plan, after consideration of the best interest factors noted above.

There was no evidence as to the holiday plan; however, the Court adopts the parenting plan that was drafted by Mother on this issue, and the remaining standard language. The Court reviewed the language Father proposed for holidays, and found it to be complicated and would have the potential to cause more conflict if there was confusion. The Court finds that the plan for holidays and breaks from school proposed by Mother recognizes that there are changes in the children's ages, as well as being consistent with the findings

the Court made for the regular parenting plan. The Court orders counsel for Mother to draft an amended parenting plan for the Court's signature consistent with this order.

In terms of the issue of modification of decision-making, the Court considered C.R.S. 14-10-124. The Court did not review C.R.S. 14-10-131, as the change each party is requesting is from joint decision-making to sole decision-making. *In re Stewart*, 43 P.3d 740 (Colo. App. 2002). The Court adopts its findings above, related to child abuse/domestic violence. The Court considers the other factors below:

1. **Credible evidence of the ability of the parties to cooperate and to make decisions together.** The evidence is mixed on this issue. There have been disagreements, some of which required court involvement. There was also evidence of decisions they were able to make together. (See Respondent's Exhibit L). Both parties engaged in activities that hindered a real discussion of issues regarding the decisions for the children. As noted above. Mother was not always forthcoming with information about the children, or made decisions on her own. As to Father, his attitude seemed to be that there was not a problem with decision-making, so long as Mother agreed with him. For example, with the issue of Grace switching schools, he testified that while they were not able to make a decision for her, his perspective was it was the "best decision for Grace,"

and as "a result of that decision she is doing so well." This does not show Father's ability to evaluate the other position, or to recognize that sometimes the decisions are not "right" or "wrong," and compromise is necessary.

2. **Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support that would indicate an ability as mutual decision makers to provide a positive and nourishing relationship with the child.** The Court adopts the findings it made above related to this issue and parenting time. Both parents have the same general values when it comes to the children, although they may have different ways of looking at them.

3. **Whether an allocation of mutual decision-making responsibility on any one or a number of issues will promote more frequent or continuing contact between the child and each of the parties.** There are concerns that Mother has not fully involved Father in the decision-making process. Specifically. Mother testified that on the issue of counseling, she had asked Father if he would agree to counseling. Father's response was to ask what Grace had said that made her think that. Mother admitted that she did not respond to this request, and testified that she did not believe "it would help the situation." Whether or not that is true, it is clear that no real discussion about the issue was had. It

concerns the Court that this will continue if Mother were made sole decision-maker.

The Court also notes Mother's concern that Father would not be able to recognize the emotional needs of the children. This concern was noted above in Dr. Bishop's report. The Court agrees with tltis concern. While there are concerns of the Court related to the parties ability to make decisions together, the Court finds that both parties have taken actions which inhibit joint decision-making. The Court finds that both parties have much to contribute to these children's lives. The Court finds that the children will not benefit by a modification of decision-making to sole decision-making to either party. Both requests arc therefore denied.

The next issue is whether the children should be enrolled in counseling. As the Court found above, the children are experiencing anxiety. and the Court finds that counseling would be helpful for them to have a safe place to discuss their feelings. The Court does not believe that Father disagrees with counseling, as much as he disagrees with the discussion, or lack thereof, that the parties had regarding the counseling issue. The Court re-read Father's response to the motion filed on November 14, 2016, and does not see that he states that the children should not have or do not need counseling. The Court finds that counseling would be in the children's best interest. The parties are to jointly choose a counselor. If they are not able to agree on a

counselor, either party may file a motion for the Court to make the final determination. The parties are to split the cost of counseling according to the percentage of income on the most recent child support worksheet.

The Court is concerned that counseling may be used as something other than a safe place for the children to discuss their feelings. The Court has not been able to determine the best "ground rules ... to address these concerns. The Court will therefore at this point simply order that the parents are to respect the children's boundaries for their discussions in counseling. Additionally, the children's counselor may not testify at any court proceeding unless a motion is filed prior to the hearing and good cause shown as to why the testimony would be in the children's best interest.

The more challenging issue is whether the Court should restrict Father's access to school. The testimony was that Father has lunch with the children and/ or volunteers in their classroom about once a week or so. Mother alleges that these visits cause the children anxiety, although it appears to be related more to Grace than Gordon.

In terms of anxiety, there is some support for this. As noted above, Shannon Hoffman and Helen Doehling both testified that they noticed that Grace would change in her demeanor in a negative way when Father was present at the school. Father

testified that he believed that Grace enjoyed when he was there. Father gave an example of how he encouraged Grace to play football with the boys, which Grace did not like at first, but then began to enjoy. The Court is concerned, however, that Father's explanation for any discomfort that Grace may be experiencing is due to "her dad is the only one who cares enough to be there and that gives her notoriety," according to his testimony. The Court also noted concerns of Dr. Bishop that Father does not have the ability to read the children's cues and determine their emotional needs. This response of Father as to the identification of Grace's feelings would be consistent with Dr. Bishop's concern.

However, there is no legal authority that was provided by Mother to give the Court the authority to restrict Father's access to the children's school in this manner. The Court is hopeful that the parties will act in the children's best interest, rather than their own, however, absent something specifically harmful; the Court does not find that it can make such an order. The request to restrict Father from the children's school is denied.

The last issue is related to attorney fees. Mother has requested that her attorney fees be paid by Father, pursuant to C.R.S. 14-10-119, which provides:

> [F]rom time to time, after considering the financial resources of both parties,

> may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees ...

According to Mother's Sworn Financial Statement (Petitioner's Exhibit 3), other than child support, she has no other income. Her testimony was that she is a full-time caregiver for the children in her home. Her husband works, but the Court cannot consider his income for this purpose. *In re Erickson*, 602 P.2d 909 (1979). Her expenses show that she has a shortfall of over $3.000.00. While the Court does not find it can consider her husband's resources, the Court does find that it can consider the fact that the expenses listed are half the responsibility of another person. Therefore, it appears that she may not have such a shortfall at the end of the month. There are no other assets that are listed that can be used for the costs of attorney fees.

As to Father's income, his Sworn Financial Statement (Respondent's Exhibit GG), provides that he earns $7,382.00 per month. His expenses show he has approximately $100.00 left at the end of the month. He also shows that this includes an expenditure for $1.000.00 in savings. While savings are important, it is also not a necessary expense. He also shows assets in the form of savings. The Court finds that he has the ability to assist with Wife's attorney fees. While he argued that he could not afford an attorney, it was clear that this was a

choice he made, rather than based on true financial ability. He was able to pay the high costs of an out-of-state witness (according to the testimony $28.000.00 since the last proceedings in 2012 to present). While his Sworn Financial Statement shows $300.00 a month in legal/ accounting costs, it is not clear what this is for. He did not have a lawyer, and if he owes money for the expert witness, the total cost is not included on his Sworn Financial Statement. Further, there was no evidence about accounting fees that would be a monthly cost for Father.

The Court does not have an attorney fee affidavit and finds in order to make a determination as to what Father can afford to pay, the total costs must be provided. The Court orders counsel for Mother to provide her attorney fee affidavit within 21 days. Father will then have 21 days after that date to argue the reasonableness of the fees and/or request a hearing on the reasonableness of the fees. After that, the Court will make a final determination as to the attorney fee issue.

IT IS ORDERED this 28th day of April, 2017.

s/ Stephanie Rubinstein
MAGISTRATE STEPHANIE RUBINSTEIN

NOTICE: This order is issued in a proceeding in which consent of the parties is unnecessary. Any appeal of this order must be taken within 21 days pursuant to Rule 7(a), C.R.M.

Colorado Revised Statutes § 14-10-124

The statute is lengthy. Pertinent portions are quoted here. The text was given by a compilation updated through 2016.

14-10-124. Best interests of child.

(1) Legislative declaration.

While co-parenting is not appropriate in all circumstances following dissolution of marriage or legal separation, the general assembly finds and declares that, in most circumstances, it is in the best interest of all parties to encourage frequent and continuing contact between each parent and the minor children of the marriage after the parents have separated or dissolved their marriage. In order to effectuate this goal when appropriate, the general assembly urges parents to share the rights and responsibilities of child-rearing and to encourage the love, affection, and contact between the children and the parents.

(1.5) Allocation of parental responsibilities.

The court shall determine the allocation of parental responsibilities, including parenting time and decision-making responsibilities, in accordance with the best interests of the child giving paramount consideration to the child's safety and the physical, mental, and emotional conditions and needs of the child as follows:

(a) Determination of parenting time.

The court, upon the motion of either party or upon its own motion, may make provisions for parenting time that the court finds are in the child's best interests unless the court finds, after a hearing, that parenting time by the party would endanger the child's physical health or significantly impair the child's emotional development. In addition to a finding that parenting time would endanger the child's physical health or significantly impair the child's emotional development, in any order imposing or continuing a parenting time restriction, the court shall enumerate the specific factual findings supporting the restriction and may enumerate the conditions that the restricted party could fulfill in order to seek modification in the parenting plan. ... In determining the best interests of the child for purposes of parenting time, the court shall consider all relevant factors, including:

(I) The wishes of the child's parents as to parenting time;

(II) The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule;

(III) The interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child's best interests;

(IV) The child's adjustment to his or her home, school, and community;

(V) The mental and physical health of all individuals involved, except that a disability

alone shall not be a basis to deny or restrict parenting time;

(VI) The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party; except that, if the court determines that a party is acting to protect the child from witnessing domestic violence or from being a victim of child abuse or neglect or domestic violence, the party's protective actions shall not be considered with respect to this factor;

(VII) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support;

(VIII) The physical proximity of the parties to each other as this relates to the practical considerations of parenting time;

(IX) and (X) Repealed.

(XI) The ability of each party to place the needs of the child ahead of his or her own needs.

(1.7) Pursuant to section 14-10-123.4, children have the right to have the determination of matters relating to parental responsibilities based upon the best interests of the child. In contested hearings on final orders regarding the allocation of parental responsibilities, the court shall make findings on the record concerning the factors the court considered and the reasons why the allocation of parental responsibilities is in the best interests of the child.