Parental Responsibilities K.A.B. v. C.T.

Decided Aug 20, 2015

Court of Appeals No. 14CA0692

08-20-2015

In re the Parental Responsibilities Concerning K.A.B., a Child, and Concerning R.M., Petitioner-Appellant, and C.T., n/k/a C.M., Respondent-Appellee, and S.B. and J.B., Intervenors-Appellees.

Cox Baker & Page, LLC, Anne Whalen Gill, Nathan M.J. Dowell, Castle Rock, Colorado; The Hutchins Law Firm, P.C., Wesley D. Hutchins, West Jordan, Utah, for Petitioner-Appellant Aitken Law, LLC, Sharlene J. Aiken, Denver, Colorado; Hulen & Leutwyler, LLC, Mike Hulen, Littleton, Colorado, for Respondent-Appellee and Intervenors-Appellees

Opinion by JUDGE WEBB

City and County of Denver Juvenile Court No. 08JV141
Honorable D. Brett Woods, Judge ORDER AFFIRMED IN PART, VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS Division IV
Opinion by JUDGE WEBB
Graham and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Cox Baker & Page, LLC, Anne Whalen Gill, Nathan M.J. Dowell, Castle Rock, Colorado; The
2 Hutchins Law Firm, P.C., Wesley D. Hutchins, West Jordan, Utah, for Petitioner-Appellant Aitken Law, LLC, Sharlene J. Aiken, Denver, Colorado; Hulen & Leutwyler, LLC, Mike Hulen, Littleton, Colorado, for Respondent-Appellee and Intervenors-Appellees *1

1 ¶ 1 R.M. (father), the biological father of K.A.B. (child), appeals the order allocating parental responsibilities. We affirm the order as to standing, vacate the order as to parental responsibilities, and remand for further proceedings.

I. Background

¶ 2 This case comes to us after lengthy litigation concerning the child in both Colorado and Utah. Yet, as one court faced with a similarly difficult child custody dispute arising from a failed adoption observed,

> [t]here are no winners in some cases, and this is one of them. Ruling in favor of the Adoptive Parents would violate the Natural Mother's constitutional rights, while the opposite ruling would risk pulling the Twins away from the family they have lived with for most of their lives, and the only stable family they have ever known.

In re Adoption of C.B.M., 992 N.E.2d 687, 696 (Ind. 2013). ¶ 3 In January 2008, before the child was born, father petitioned the trial court in Colorado for a paternity determination and to enjoin any adoption proceeding. He alleged "serious and founded concerns that [the child's mother] will flee to Utah, where she has family, to proceed with an adoption." He also sought an order *2 allocating parental responsibilities to him when the child was born. ¶ 4 Mother responded, acknowledging that father, whom she had never married, was a biological parent but asking the

trial court to allow adoption proceedings and to deny parental responsibilities to father, based on the child's best interests. She also moved to continue the paternity hearing, stating that she had previous travel plans to visit her sick father in Utah. She did not inform father or the court of any other reason for her presence in Utah. ¶ 5 Shortly thereafter, before the paternity hearing, and unknown to father, mother gave birth to the child in Utah. The child was born about six weeks premature. The next day, mother — without notifying father or the trial court — consented to adoption of the child by her brother and sister-in-law (Intervenors). A district court in Utah (Utah court) granted temporary custody of the child to the Intervenors. ¶ 6 After learning of the child's birth, father moved the trial court for a hearing and allocation of parental responsibilities (APR). He asserted that mother had given birth to the child and placed the child with an adoptive family in Utah. Following several hearings, the trial court entered a judgment of paternity, finding that father *3 was the child's biological parent. The court declined to enter an order allocating parental responsibilities. Still, it allowed the case to remain open. ¶ 7 Over the next four years, the parties litigated the child's adoption and custody in Utah. The background appears in *In re Adoption of Baby B.*, 308 P.3d 382 (Utah 2012). As relevant here, the Utah Supreme Court reversed the Utah court's order terminating father's parental rights and remanded for further findings about whether father had complied with Colorado's requirements to establish his parental rights and to preserve his right to notice of a Colorado adoption proceeding, and had otherwise shown a full commitment to his parental responsibilities. *Id.* at 405. ¶ 8 In February 2012, Intervenors moved to intervene in the Colorado case, seeking an allocation of parental responsibilities under section 14-10-123(1)(c), C.R.S. 2014. Father did not object to their intervention. The trial court granted the motion. ¶ 9 The Utah court dismissed the adoption and custody case. One year later, it entered an order declining further subject matter jurisdiction, concluding that Colorado was the more appropriate *4 forum to resolve the parties' claims concerning the child. As a result, the trial court entered an order finding that it had subject matter jurisdiction to allocate parental responsibilities. ¶ 10 In December 2013, the trial court held a three-day hearing. Father, Intervenors, and the guardian ad litem submitted proposed parenting plans. As relevant here, those plans differ primarily in whether father or Intervenors would be the primary residential parents, who would have decision-making responsibility, and eventual transition of the child to father. ¶ 11 Mother did not submit a separate parenting plan. At the APR hearing, she testified that she was the child's aunt; that Intervenors had not told the child who the birth mother was; and that she wanted to remain an "integral part of [the child's] life as her aunt." She also testified that if the child could not be placed with Intervenors, she wanted the child to go to grandparents or brothers, and if that was not an option, then the child could be placed with her. When asked, she testified that she did not want the court to terminate her parental rights. ¶ 12 The court found that Intervenors had standing to seek an allocation of parental responsibilities for the child under section *5 14-10-123(1)(c), by virtue of their physical custody of the child. Then it entered an order allocating parental rights, naming Intervenors as the primary residential parents, and granting father — who now lived in New Mexico — significant parenting time, but not providing for the child to be integrated with him. It also ordered joint decision-making responsibility between father and Intervenors. ¶ 13 Father appeals.

II. Standing

¶ 14 Father first contends that because Intervenors fraudulently obtained physical custody of the child, the trial court erred by finding that they had standing to seek an allocation of parental responsibilities. We discern no error. ¶ 15 Nonparent standing to seek an allocation of parental responsibilities is governed by section 14-

10-123. A nonparent may seek an allocation of parental responsibilities if the nonparent has had physical care of the child for at least six months and commences the action within six months of the termination of that care. § 14-10-123(1)(c). ¶ 16 We review de novo the trial court's construction of section 14-10-123(1)(c) and its legal determination that Intervenors have *6 standing. *In Interest of B.B.O.*, 2012 CO 40, ¶ 6. However, we defer to the court's factual findings, if they are supported by the record. *Id.* ¶ 17 To begin, we disagree with Intervenors' assertion that father waived the standing issue and cannot raise it on appeal. At least in a bench trial, some issues may be preserved for appeal by raising them in closing argument. *Bachelor Gulch Operating Co. v. Bd. of Cnty. Comm'rs*, 2013 COA 46, ¶ 11. Father's written closing argument raised the estoppel component of the standing argument that he now asserts on appeal. Further, the trial court addressed this argument in its order, which serves the purpose of the preservation requirement. *See Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010) ("[T]o preserve the issue for appeal all that was needed was that the issue be brought to the attention of the trial court and that the court be given an opportunity to rule on it."). ¶ 18 For these reasons, we will also consider father's standing argument to the extent that it rests on estoppel. However, because at oral argument father conceded that he had not raised unclean hands below, we will not consider that doctrine. *See Nielson v. *7 Scott*, 53 P.3d 777, 781 (Colo. App. 2002) ("Generally, a party may not raise an issue for the first time on appeal."). ¶ 19 Father does not dispute that the child was in the physical care of Intervenors for approximately four years before they sought an allocation of parental responsibilities. Because the child was in their physical care and was not in the physical care of either parent when Intervenors sought an allocation of parental responsibilities, they satisfied the standing requirements of section 14-10-123(1)(c). ¶ 20 Undaunted, father asserts that equitable estoppel deprives Intervenors of standing because Intervenors separated the child from him when "they had absolutely no legal right to do so, without his knowledge, consent, [or] permission, and in direct contradiction to the paternity action" and that allowing them to have standing would "reward" them for "their wrongful acts." The record supports father's position. For example, the Utah court found that mother had "hatched the plan to give the baby up for adoption to her brother and sister-in-law in Utah as early as October or November of 2007," but "neither [Intervenors] [n]or [mother] told [father] specifically what her adoption plans were." *Adoption of Baby B.*, 308 P.3d at 388. *8 ¶ 21 According to father, allowing a nonparent to have standing to seek an allocation of parental responsibilities without considering the circumstances under which the child came to be in the care of the nonparent could lead to grave injustice. *See B.B.O.*, ¶ 21 (Eid, J., concurring in the judgment) (section 14-10-123(1)(c) should not be construed so broadly as to bestow standing on a kidnapper). But father relies solely on *In Interest of C.R.C.*, 148 P.3d 458 (Colo. App. 2006), for the proposition that "courts should consider the manner in which a child came into the possession of a nonparent in determining the threshold issue whether the nonparent has standing under § 14-10-123." *Id.* at 462. Our supreme court expressly disagreed with *C.R.C. B.B.O.*, ¶¶ 10, 15-16. In doing so, the court found that it was "not necessary to read a parental consent requirement into either section 14-10-123(1)(b) or (1)(c) in order to protect the fundamental liberty interests of parents in the care, custody, and control of their children." *Id.* at ¶ 17. ¶ 22 Father does not cite other authority, nor have we found any in Colorado or elsewhere, recognizing that a party on whom a statute has conferred standing may be denied standing based on estoppel or similar equitable considerations. Relevant cases are few, but *9 they favor standing. *See, e.g., Bruno v. Bruno*, 76 A.3d 725, 733 (Conn. App. Ct. 2013) ("A party's lack of clean hands can defeat an equitable action on the merits, but does not

prevent a party from invoking the jurisdiction of the court.").[1] ¶ 23 Based on *B.B.O.*, we conclude that the trial court was not required to consider the circumstances under which the child came to be in Intervenors' care before it determined that they had standing under section 14-10-123(1)(c). While some might find this result troubling, we are bound by *B.B.O.* and the statute's plain language. *See Common Sense Alliance v. Davidson*, 995 P.2d 748, 755 (Colo. 2000) (court of appeals bound by statutory language); *see Bernal v. Lumbermens Mut. Cas. Co.*, 97 P.3d 197, 203 (Colo. App. 2003) (court of appeals bound by supreme court precedent). ¶ 24 For these reasons, we discern no error by the trial court in finding that Intervenors had standing to seek an allocation of parental rights under section 14-10-123(1)(c), regardless of how *10 they came to have physical custody of the child. As to standing, "[t]his is another of those hard cases" that may "make bad law." *Hodges v. Ladd*, 143 Colo. 143, 161, 352 P.2d 660, 669 (Colo. 1960) (Knauss, J., dissenting). But "if there is any public policy requiring a rule different from that applicable to other subjects, it is for the Legislatures, and not for the courts, to declare it." *Modern Woodmen of Am. v. Int'l Trust Co.*, 25 Colo. App. 26, 43, 136 P. 806, 812 (1913).

[1] Given the broad language in *B.B.O.*, we decline father's invitation to distinguish between the lack of consent at issue there and Intervenors' conduct here. While he evokes "strong policy arguments," as other intermediate appellate courts have recognized, such arguments "are best made to the . . . Supreme Court." *State v. Fish*, 213 P.3d 258, 270 (Ariz. Ct. App. 2009).

III. Allocation of Parental Responsibilities

¶ 25 Father next contends the trial court violated his presumptive constitutional rights by finding that Intervenors were the child's "psychological parents," providing them with both primary residential custody and joint decision-making responsibility, and not establishing a procedure for transition of the child from them to him. He also contends the court erred in failing to consider that the fraudulent circumstances under which Intervenors came to have custody of the child estopped them from being awarded parental rights. We agree that this portion of the order must be vacated and conclude that a remand is required.

A. Allocation of Parental Responsibilities Statute

*11 ¶ 26 Once a nonparent establishes standing under section 14-10-123 to pursue an allocation of parental responsibilities, a trial court must consider whether to allow parenting time to the nonparent. § 14-10-124(1.5)(a), C.R.S. 2014; *In re B.J.*, 242 P.3d 1128, 1132 (Colo. 2010). But the statute does not address the constitutional presumption afforded a natural parent who opposes any allocation of parental rights to a nonparent, as discussed in the following subsection of this opinion. Once the trial court has addressed all constitutional considerations, it allocates parental responsibilities according to the best interests standard under section 14-10-123.4, C.R.S. 2014. *People in Interest of A.M.K.*, 68 P.3d 563, 565 (Colo. App. 2003). In determining the child's best interests, the court must consider the factors set forth in section 14-10-124(1.5), as well as any other relevant factors. *Id.*

B. *Troxel* Presumption

¶ 27 A nonparent who has standing under section 14-10-123 must still overcome the presumption that as between a parent and a nonparent, parents have a first and prior right of custody of their children. *B.J.*, 242 P.3d at 1133; *see McDermott v. Dougherty*, 869 A.2d 751, 770 (Md. 2005) (Unlike the parent, "[a] private third party *12 has no fundamental constitutional right to raise the children of others."). Thus, when a trial court considers whether to allocate parenting time to a nonparent over the objection of a parent, it must proceed in accordance with the standards set forth in *Troxel v. Granville*, 530 U.S. 57 (2000), and *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006).

B.J., 242 P.3d at 1133. ¶ 28 In *Troxel*, the Supreme Court held that parents have a fundamental liberty interest in the care, custody, and control of their children. 530 U.S. at 65 (finding this liberty interest is "perhaps the oldest of the fundamental liberty interests recognized by [the Court]"); *see also In re D.I.S.*, 249 P.3d 775, 780 (Colo. 2011). And fit parents are presumed to act in the best interests of their children. Stated differently, so long as the parent is fit, normally the state may not second-guess that parent's ability to make the best decisions concerning the rearing of his or her children. *B.J.*, 242 P.3d at 1134; *see Troxel*, 530 U.S. at 72-73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."); *see also M.C. v. Adoption Choices of Colo., Inc.*, 2014 COA *13 161, ¶ 80 ("We are aware of no Colorado authority for the proposition that parental rights may be terminated simply because the child might be better off in a different home.") (*cert. granted in part sub nom. In Interest of Baby A*, Apr. 13, 2015). ¶ 29 As a result, "[s]pecial weight" must be given to a parent's determination whether to allow a nonparent parenting time. *B.J.*, 242 P.3d at 1134; *see Troxel*, 530 U.S. at 72. And for a trial court to interfere with a parent's fundamental right to make decisions concerning his or her children, the court's order must be founded on "special factors" that justify the state's interference. *B.J.*, 242 P.3d at 1134; *see Troxel*, 530 U.S. at 68.[2] ¶ 30 In *C.A.*, 137 P.3d at 319, our supreme court announced a three-part test for ordering grandparent parenting time to accommodate the "best interest of the child" test as well as the "special weight" and
14 "special factors" requirements of *Troxel*. This *14 three-part test applies to all nonparent requests for allocation of parental responsibilities, at least where, as here, the parent has not been found unfit. *B.J.*, 242 P.3d at 1134; *In re Parental Responsibilities of Reese*, 227 P.3d 900, 903 (Colo. App. 2010). It includes: (1) a presumption in favor of the parental determination; (2) an opportunity to rebut that presumption by showing that the parental determination is not in the child's best interests; and (3) placement of the ultimate burden on the nonparent to establish by clear and convincing evidence that allocation of parenting time to him or her is in the child's best interests. *B.J.*, 242 P.3d at 1132. And before awarding any parenting time to the nonparent, the trial court must make factual findings identifying those "special factors" on which it relies. *Id.* at 1130.

[2] We decline Intervenors' invitation to limit the *Troxel* presumption to biological parents who have had physical custody of a child. *See In Interest of C.C.R.S.*, 892 P.2d 246, 254-56 (Colo. 1995) (mother was entitled to *Troxel* presumption even though the child was removed from her custody one day after birth); *see also In re D.I.S.*, 249 P.3d 775, 781-82 (Colo. 2011) (a fit parent does not lose his or her *Troxel* presumption even when the child is not in the parent's custody).

C. Standard of Review

¶ 31 We review the trial court's allocation of parental responsibilities for an abuse of discretion. *Reese*, 227 P.3d at 903; *see B.J.*, 242 P.3d at 1132. We review the legal standard applied by the trial court de novo. *B.J.*, 242 P.3d at 1132. "A trial court necessarily abuses its discretion if its ruling is based on an incorrect legal standard." *Wal-Mart*
15 *Stores, Inc. v. Crossgrove*, 2012 *15 CO 31, ¶ 7.

D. Application

¶ 32 The trial court entered a lengthy and well-written order detailing the parties' positions, the applicable law, and the evidence presented. The court acknowledged father's *Troxel* presumption, noted the three-part test of *B.J.*, and applied the statutory factors. Then it entered its order regarding parenting time and decision-making responsibility, emphasizing the child's best interests. ¶ 33 However, the trial court's order misapplied the law in four significant ways.

• The order does not explain how the court considered father's argument that Intervenors were equitably estopped from obtaining parental rights, even if they had standing, as he raised in closing argument separate from his challenge to Intervenors' standing on this basis. Yet, the court found that mother and Intervenors had "prevented" father from having a relationship with the child; they were "doing everything they could to terminate Father's parental rights"; and the Utah Supreme Court had described "in great detail" their "deceitful, fraudulent and outrageous conduct."

16 *16

• The order does not indicate that in allocating parental responsibilities, the court accorded any "special weight" to father's constitutional interest in the care, custody, and control of his child. Instead, the court focused on the child's attachment to Intervenors and her adjustment to home, school, and community in Utah, without any reference to "special weight."

• The order noted "that father has not established by a preponderance of the evidence that he should have sole decision-making." By finding that father had not established by a preponderance of the evidence that he should have sole decision-making responsibility, the court improperly shifted the burden onto father to prove that his decision was in the child's best interests, in violation of his *Troxel* presumption.

• The order does not identify any "special factors" that led the court to rejecting father's plans for the child — primarily being the residential parent, with Intervenors having some parenting time. Instead, the court "considered the enumerated factors *in the statute* and gave paramount consideration to the Child's best interests." (Emphasis added.)

17 *17 ¶ 34 Given the trial court's express recognition that the circumstances under which the child came into Intervenors' physical care were at best deceitful, if not fraudulent, it should have considered father's equitable estoppel argument *before* it allocated any parental responsibilities to Intervenors. *See Rossi v. Colo. Pulp & Paper Co.*, 88 Colo. 461, 500, 299 P. 19, 32 (1931) ("[F]raud taints everything it touches."); *In re Marriage of Joel & Roohi*, 2012 COA 128, ¶ 20 ("[W]e do not perceive that the General Assembly intended that a party could benefit from his or her fraud . . . ."). Instead, the court chose "not to dwell on the past"

and turned to the statutory factors concerning allocation of parental responsibilities. But estoppel may have been relevant to the statutory factors. *See In re Marriage of McCaulley-Elfert*, 70 P.3d 590, 592 (Colo. App. 2003) (evidence of father's sexual misconduct was relevant to the factors under section 14-10-124(1.5) in determining the child's best interests); *see* § 14-10-124(1.5)(a)(III), (VI), (VII), (b)(I), (II). ¶ 35 In sum, we conclude that the trial court misapplied the law by not considering father's equitable estoppel argument before it allocated parental responsibilities to Intervenors; by not expressly giving "special
18 weight" to father's decision that the child's best *18 interests would be served by placing her in his custody; by improperly shifting the burden onto father to prove that his decision was in the child's best interests; and by not identifying any "special factors" justifying rejection of father's decision. *See In re A.L.*, 781 N.W.2d 482, 488 (S.D. 2010) ("When a court goes no further than to conclude that visitation is in the best interests of the child, the court has neither given special weight to the parent's decision nor applied the presumption that the fit parent's choice, as opposed to the court's choice, is in the best interests of the child."). Therefore, this portion of the order must be vacated.

IV. Remand Instructions

¶ 36 On remand, the trial court may, in its discretion, take additional evidence of the circumstances under which the child came into Intervenors' physical care. Regardless, the court shall make specific findings whether Intervenors were complicit in what the court described as "findings of deception" that were part of "the unique factual history of this case." If so, the court shall make further findings whether their complicity establishes equitable estoppel. *See Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, L.L.C.*, 176 P.3d 737, 741 (Colo. 2007)
19 (Equitable estoppel "is *19 more precisely characterized as an equitable doctrine that suggests a tort-related theory in that it attempts to allocate loss resulting from the misrepresentation of facts to the most culpable party and to ameliorate an innocent party's losses."). And if the court finds that equitable estoppel has been established, the court shall reconsider the APR order on that basis, especially as it concerns whether father or Intervenors will be the primary residential parents and eventual transition of the child to father. ¶ 37 If the court again allocates any parental responsibilities to Intervenors that are contrary to father's decision, the court must also make findings showing that it gave father's parenting plan "special weight," as required by the *Troxel* presumption that a fit parent's decision is in the child's best interests, particularly as to his decision to be the residential custodian and for the child to be transitioned to him. And finally, if the court finds that this presumption regarding the child's best interests has been overcome by clear and convincing evidence that allocation of parental responsibilities to Intervenors but contrary to father's decision is in the child's best interests, the court must make further specific findings identifying all of the "special factors" on
20 which it relied. *20 ¶ 38 Although the appellate record shows that Intervenors' counsel also entered their appearance on behalf of mother, the Answer Brief does not make any separate argument on her behalf. And it concludes, "Wherefore, [Intervenors] respectfully request[] this Honorable Court to affirm the juvenile court's February 25, 2014 Opinion and Order." Thus, we cannot predict what position, if any, mother may take on remand. And for that reason, we express no opinion on the outcome if mother argues that she has rights under *Troxel* that are coequal to those of father. ¶ 39 To be sure, our decision will further protract this litigation. Although unfortunate, the consequences of that delay can be mitigated by leaving the existing parenting plan in effect until the trial court conducts further proceedings consistent with this opinion. But in any event, the objectives of expedition and closure in cases involving young children are not license to ignore error that may have diminished father's

fundamental rights. *See People v. D.F.*, 933 P.2d 9, 22 (Colo. 1997) (Scott, J., specially concurring) (Fundamental rights "are to remain inviolate — certainly not to be cast aside for judicial economy
21 or expediency."). *21

V. Appellate Attorney Fees

¶ 40 We decline Intervenors' request for an award of appellate attorney fees under C.A.R. 39(a), C.A.R. 39.5, and section 13-17-102, C.R.S. 2014. Father's arguments on appeal were not frivolous nor did they lack substantial justification, as Intervenors assert. *See Schoonver v. Hedlund Abstract Co.*, 727 P.2d 408, 410 (Colo. App. 1986). We decline father's request for an award of appellate attorney fees under C.A.R. 39.5 because he states no legal basis for the recovery of such fees. *See People in Interest of B.S.M.*, 251 P.3d 511, 515 (Colo. App. 2010).

VI. Conclusion

¶ 41 The order is affirmed as to standing and vacated as to parental responsibilities. The case is remanded for further proceedings consistent with this opinion.

JUDGE GRAHAM and JUDGE TERRY concur.