Colorado Statutes

Title 14. DOMESTIC MATTERS

DISSOLUTION OF MARRIAGE - PARENTAL RESPONSIBILITIES

Article 10. Uniform Dissolution of Marriage Act

Current through Chapter 189, Second Regular Session 2010

§ 14-10-131.Modification of custody or decision-making responsibility

(1) If a motion for modification of a custody decree or a decree allocating decision-making responsibility has been filed, whether or not it was granted, no subsequent motion may be filed within two years after disposition of the prior motion unless the court decides, on the basis of affidavits, that there is reason to believe that a continuation of the prior decree of custody or order allocating decision-making responsibility may endanger the child's physical health or significantly impair the child's emotional development.

(2) The court shall not modify a custody decree or a decree allocating decision-making responsibility unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or the child's custodian or party to whom decision-making responsibility was allocated and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the allocation of decision-making responsibility established by the prior decree unless:

(a) The parties agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other party and such situation warrants a modification of the allocation of decision-making responsibilities;

(b.5) There has been a modification in the parenting time order pursuant to section 14-10-129, that warrants a modification of the allocation of decision-making responsibilities;

(b.7) A party has consistently consented to the other party making individual decisions for the child which decisions the party was to make individually or the parties were to make mutually; or

(c) The retention of the allocation of decision-making responsibility would endanger the child's physical health or significantly impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

History. L. 71: R&RE, p. 532, § 1. C.R.S. 1963: § 46-1-31. L. 83: (1) and IP(2) amended, p. 648, § 5, effective June 10. L. 98: Entire section amended, p. 1389, § 18, effective February 1, 1999.

Case Notes:

ANNOTATION

I. GENERAL CONSIDERATION.

Am. Jur.2d. See 24 Am. Jur.2d, Divorce and Separation, §§ 981-991, 994-1000.

C.J.S. See 27C C.J.S., Divorce, §§ 1050-1076.

Law reviews. For article, "The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75). For article, "Legislative Update", see 12 Colo. Law. 1257 (1983). For article, "Moving the Children Out of State", see 12 Colo. Law. 1450 (1983). For article, "Custody Evaluations in Colorado", see 18 Colo. Law. 1523 (1989). For article, "Removal Issues and Standards for Modification of Custody", see 24 Colo. Law. 1045 (1995). For article, "Addressing New Standards for Modification Under the Parental Responsibility Act", see 28 Colo. Law. 67 (June 1999).

Annotator's note. Cases relevant to § 14-10-131 decided prior to its earliest source, L. 71, p. 532, § 1, have been included in the annotations to this section.

This section applies only where there is motion filed by noncustodial parent seeking a change of permanent custody. In re Lawson, 44 Colo. App. 105, 608 P.2d 378 (1980).

This section does not apply to modification of child support. In re Jones, 703 P.2d 1328 (Colo. App. 1985).

This section applies only in cases where a noncustodial parent is seeking a change of custody. In re Dickman, 670 P.2d 20 (Colo. App. 1983).

Where the parties share custody of the child, and both seek sole custody, the statutory criteria for modification in this section are inapplicable. In re Dickman, 670 P.2d 20 (Colo. App. 1983).

The "best interests" standard is governing standard for modification of parental responsibilities where the parents equally share joint legal and physical custody under the original decree and where the permanent orders

did not designate a residential parent. In re Stewart, 43 P.3d 740 (Colo. App. 2002).

This section is limited to those cases where a parent has been awarded sole custody and the non-custodial parent is seeking sole custody. Where a parent seeks a change in custody from sole custody to joint custody, § 14-10-131.5 (4) provides the correct standards for determining whether joint custody shall be granted. In re Wall, 868 P.2d 387 (Colo. 1994) (disapproving In re Murphy, 834 P.2d 1287 (Colo. App. 1992), to the extent it holds that § 14-10-131 applies to a motion for a change in the prior order of sole custody to that of joint custody).

When modifying sole custody from one parent to another would result in a residential change in custody, then the "endangerment" standard should apply. In re Francis, 919 P.2d 776 (Colo. 1996).

When the court is considering a removal motion that involves a change in the residential custody of the children, it must similarly apply the "endangerment" standard of this section. In re Francis, 919 P.2d 776 (Colo. 1996).

In a modification of sole to joint custody, the "best interest of the child" standard of § 14-10-131.5 should apply only to those situations where only modification of legal custody and not residential custody is at stake. In re Francis, 919 P.2d 776 (Colo. 1996).

In amending § 14-10-129 in 2001, the general assembly intended to eliminate the three-part test set forth in In re Francis in relocation cases, including the presumption in favor of the majority-time parent seeking to relocate. In re Ciesluk, 113 P.3d 135 (Colo. 2005).

Both prongs of subsection (2)(c) must be established to warrant a change in custody or relocation. In re Steving, 980 P.2d 540 (Colo. App. 1999) (decided under law in effect prior to 1998 amendment).

The endangerment standard applies when removal is sought by a party who shares joint legal custody. In re Garst, 955 P.2d 1056 (Colo. App. 1998).

Where the separation agreement addressed the consequences of mother's continued alienation of the children from father, the father's motion was in the nature of enforcement rather than modification. Given that there was no modification, the court correctly ruled that the endangerment or removal standard was inapplicable and that the parenting plan in the decree had already been reviewed under the best interests standard. In re Kniskern, 80 P.3d 939 (Colo. App. 2003).

Two-year rule in this section does not apply to motions for modification of visitation rights under § 14-10-129. Manson v. Manson, 35 Colo. App. 144, 529 P.2d 1345 (1974).

Application where original custody order entered before article enacted. This article does not apply to proceedings between parents to change custody of children when the original order relative to custody was entered pursuant to Colorado statutes in effect prior to this article. Spurling v. Spurling, 34 Colo. App. 341, 526 P.2d 671 (1974).

Subsection (2) is constitutional. Ford v. Ford, 194 Colo. 134, 571 P.2d 717 (1977).

Change in physical custody is tantamount to modification of custody. McGraw v. District Court, 198 Colo. 489, 601 P.2d 1383 (1979); Darner v. District Court, 680 P.2d 235 (Colo. 1984).

Parties may not alter requirements of this section through an agreement incorporated into the decree of dissolution. In re Johnson, 42 Colo. App. 198, 591 P.2d 1043 (1979).

"Joint selection of schools" provision in separation agreement is unenforceable and the custodial parent retains the ultimate authority to select the child's school. Griffin v. Griffin, 699 P.2d 407 (Colo. 1985).

There was nothing irrevocable about a custody order. Wiederspahn v. Wiederspahn, 146 Colo. 214, 361 P.2d 125 (1961).

Section does not apply since request was not for decree to place sole custody with a different parent but for change from sole to joint custody. Section 14-10-131.5 applies. In re Wall, 851 P.2d 224 (Colo. App. 1992).

Trial court should have applied the standard for an original determination of visitation, which is based on the best interests of the child, where the order awarding parenting time to stepfather was a temporary order. Although paternity decree operated as a final order and permanent allocation as to paternity and custody, its award of parenting time to stepfather was a temporary order because the parties had not reached an agreement on a permanent parenting time schedule but had agreed to maintain the interim schedule and work toward a permanent one. The fact that the parties adhered to the schedule for nearly three years did not change the nature of the order. In re C.T.G., 179 P.3d 213 (Colo. App. 2007).

Applied in In re Rinow, 624 P.2d 365 (Colo. App. 1981); In re Eckman, 645 P.2d 866 (Colo. App. 1982); In re Davis, 656 P.2d 42 (Colo. App. 1982).

II. PROCEDURE.

An ex parte order of court changing the custody of children was void because a parent cannot be deprived of the custody of his or her children without the notice required by due process of law. Parker v. Parker, 142 Colo. 416, 350 P.2d 1067 (1960); Ashlock v.

District Court, 717 P.2d 483 (Colo. 1986).

Section limits scope of inquiry. For the sake of continuity and stability, this section limits the scope of inquiry to the change in circumstances of the child or the custodial parent, and dictates that "the court shall retain the custodian established by the prior decree" absent the showing required by subsection (2)(c). In re Larington, 38 Colo. App. 408, 561 P.2d 17 (1976).

III. CHANGE OF CIRCUMSTANCES.

A. In General.

Repeated decisions of the supreme court authorized a modification of a custodial order where there was a change in circumstances and conditions, and the modification would have been beneficial to the minor. Bird v. Bird, 132 Colo. 116, 285 P.2d 816 (1955); Coulter v. Coulter, 141 Colo. 237, 347 P.2d 492 (1959); Wiederspahn v. Wiederspahn, 146 Colo. 214, 361 P.2d 125 (1961); Deines v. Deines, 157 Colo. 363, 402 P.2d 602 (1965).

A change in circumstances alone does not compel award of custody. Coulter v. Coulter, 141 Colo. 237, 347 P.2d 492 (1959).

The mere fact that the mother's circumstances may have changed for the better does not constitute a sufficient basis for changing the original custody order. In re Larington, 38 Colo. App. 408, 561 P.2d 17 (1976).

A mere change of circumstances alone is insufficient to justify a change of custody. Christian v. Randall, 33 Colo. App. 129, 516 P.2d 132 (1973).

The interest and welfare of the children was the primary and controlling consideration of the court in ordering the change of custody. Aylor v. Aylor, 173 Colo. 294, 478 P.2d 302 (1970).

Subsection (2)(c) recognizes that a modification of custody is likely to result in some harm to the child involved. Christian v. Randall, 33 Colo. App. 129, 516 P.2d 132 (1973).

In determining the issue of integration, the trial court should consider the totality of the circumstances, including: (1) The frequency, duration, and quality of the child's contacts with the custodial parent and the proposed custodial parent; (2) the identity of the person making the primary decisions with respect to health care, education, religious training, and the child's general welfare; and (3) the views of the child as to which environment constitutes his or her "home". In re Chatten, 967 P.2d 206 (Colo. App. 1998).

The consent requirement is satisfied when the custodian has voluntarily placed the child with the non-custodial parent and willingly permitted the child to become integrated into the new family. In re Chatten, 967 P.2d 206 (Colo. App. 1998).

Consent of the custodial parent may be implied from a voluntary transfer of custody that results in the child's integration into the family of the non-custodial parent. In re Chatten, 967 P.2d 206 (Colo. App. 1998).

B. Evidence.

Strong showing needed to justify modification of custody. The public policy of this state as expressed in this section favors retention of the child in a stable atmosphere, thus requiring a strong showing, including a change in circumstances, to justify modification of custody. The protection for children created by this statute would be defeated by allowing parents to determine independently that a lesser showing is sufficient grounds for changing custody arrangements. In re Johnson, 42 Colo. App. 198, 591 P.2d 1043 (1979).

To support the trial court's finding of a sufficient change in circumstances to justify changing the custody of the children, it was necessary to show a change of circumstances or new facts which were not in existence at the time of the prior order. Aylor v. Aylor, 173 Colo. 294, 478 P.2d 302 (1970).

Noncustodial parent must demonstrate change of circumstances necessitating change of custody, and change of custody may not be based solely on custodial parent's misconduct. Ashlock v. District Court, 717 P.2d 483 (Colo. 1986).

When the power of the court is invoked to place an infant into the custody of its parents and to withdraw such child from other persons, the court will scrutinize all the circumstances and ascertain if a change of custody would be disadvantageous to the infant; if so, the change will not be made, and it matters not whether it is through the fault or the mere misfortune of the legal guardian that the infant has come to be out of his custody. Root v. Allen, 151 Colo. 311, 377 P.2d 117 (1962).

Party seeking modification of prior custody decree has burden of proving that the statutory standards justifying the change are present. In re Davis, 43 Colo. App. 302, 602 P.2d 904 (1979).

Evidence of events which occurred prior to the original custody order, unless such were unknown to the trial court at the time the original order was entered, or unless the trial court was in some fashion imposed upon through fraud and concealment, may not be basis for a modification of the earlier custody order, because there must be proof of a change of circumstances in order to justify any modification of the order and decree awarding custody. Deines v. Deines, 157 Colo. 363, 402 P.2d 602 (1965).

In the hearing of a petition for the modification of a

decree awarding custody of a minor child in a divorce proceeding, the contention that the court erred in considering evidence of matters that occurred prior to the entry of the original decree, overruled. Ross v. Ross, 89 Colo. 536, 5 P.2d 246 (1931).

Where the custody of a child was awarded in a divorce proceeding, the child became the ward of the court, and it was against the policy of the law to permit its removal to another jurisdiction unless its well-being and future welfare could have been better served thereby. Holland v. Holland, 150 Colo. 442, 373 P.2d 523 (1962).

Fact that mother who had been awarded custody was undergoing a transsexual change from female to male was not sufficient for changing custody in view of uncontradicted evidence of the high quality of the environment and home life between mother and children and in absence of a showing that the mother's relationship with the children had been adversely affected or that their emotional development had been impaired. Christian v. Randall, 33 Colo. App. 129, 516 P.2d 132 (1973).

Evidence of ex-wife's inability to properly supervise older children is relevant to the determination of a motion to modify custody of the youngest child. In re Pilcher, 628 P.2d 126 (Colo. App. 1980).

Evidence of sexual abuse in record is sufficient to justify change of custody. In re Utzinger, 721 P.2d 703 (Colo. App. 1986).

Even though a court could modify an earlier decree to insure the carrying out of provisions for the best interests of the child, and violation of a decree was a good ground to file a motion to modify, nevertheless, a change of custody should not have been awarded as punishment for a parent's unwarranted acts, for the best interest of the child was paramount. Holland v. Holland, 150 Colo. 442, 373 P.2d 523 (1962); Heckel v. Heckel, 156 Colo. 20, 396 P.2d 602 (1964).

Although the mother sought to prevent the father from visiting the children by hiding them, this alone, unaccompanied by other evidence, did not constitute sufficient grounds for a change in custody of the children because the father did not produce evidence of changed circumstances and produced nothing to show that the change would have been in the best interests of his two children, and the evidence, therefore, was legally insufficient to support the change of custody. Deines v. Deines, 157 Colo. 363, 402 P.2d 602 (1965).

When a parent showed little or no regard for the legitimate order of a court relating to custody, that fact was certainly one factor for the court to weigh in considering suitability of who should have custody of a child along with other facts such as the consequences of removal to a foreign jurisdiction, and this was true no matter how laudable the desire of the offending parent. Holland v. Holland, 150 Colo. 442, 373 P.2d 523 (1962).

While it was true that custody of children of tender years was ordinarily given to the mother, and that custody of several children would normally not be split between the parents, it was also clear that the overriding concern of the court should have been for the welfare of the children. Kelley v. Kelley, 161 Colo. 486, 423 P.2d 315 (1967).

A new family situation of the mother was sufficient to justify a change of custody from the father to the mother providing always that the interest and welfare of the children was the primary and controlling consideration of the trial court in ordering such change of custody. Aylor v. Aylor, 173 Colo. 294, 478 P.2d 302 (1970).

In the absence of a clear showing to the contrary, decisions of custodial parent reasonably made in a good faith attempt to fulfill the responsibility imposed by award of custody should be presumed to have been made in the best interests of children. Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14 (1972).

The authority that must be exercised and the decisions that must be made by a custodial parent, both on a daily and long term basis, in carrying out the responsibility of custody of minor children, are entitled to the support of the court which initially awarded custody to the parent. Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14 (1972).

Custodial parent has great latitude in carrying out custodial responsibilities. Absent some restrictive conditions in the applicable dissolution decree or separation agreement, a custodial parent is permitted great latitude in carrying out the custodial responsibilities of providing a primary home for the minor children of the parties. In re Casida, 659 P.2d 56 (Colo. App. 1982).

Custodial discretion may include the removal of the child from the jurisdiction of the court which entered the permanent orders. In re Casida, 659 P.2d 56 (Colo. App. 1982).

C. Discretion of Court.

In sound exercise of its discretion, a trial court has authority to modify its previous orders relative to custody and visitation upon a showing of circumstances warranting a change in the best interests of the children. Bird v. Bird, 132 Colo. 116, 285 P.2d 816 (1955); Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14 (1972).

In awarding custody, the trial court has the advantage of personal contact with the parties, to appraise the worth of their testimony, and consider the circumstances involved, and if desirable to interview the subject child. Coulter v. Coulter, 141 Colo. 237, 347 P.2d 492 (1959);

Schlabach v. Schlabach, 155 Colo. 377, 394 P.2d 844 (1964).

Where the one parent acts in disregard of the decree so as to deny the other parent the rights he had under it, the court was not limited to mere punitive measures, but could modify the decree in such a way as to insure the carrying out of those provisions which it conceived to be for the best interests of the child. Holland v. Holland, 150 Colo. 442, 373 P.2d 523 (1962).

The trial court erred in using a custodial change to punish the mother for her unjustified actions in secreting the children to prevent visitation. Pearson v. Pearson, 141 Colo. 336, 347 P.2d 779 (1959).

IV. JURISDICTION OF COURT.

Trial court has continuing jurisdiction by implication. Under former § 46-1-5(4), C.R.S. 1963, the trial court was specifically granted continuing jurisdiction "of the action" for the purpose of revising orders determining child custody. This article does not expressly grant such jurisdiction, but, since it contains a section permitting modification of child custody orders, it does give continuing jurisdiction by implication. Dockum v. Dockum, 34 Colo. App. 98, 522 P.2d 744 (1974).

Although juvenile court has exclusive jurisdiction to make custody determinations with respect to a child who is the subject of a valid petition in dependency and neglect, juvenile court cannot retain jurisdiction of a motion for modification of custody filed pursuant to this section once it has been determined that the child is not dependent and neglected. People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988).

A court had continuing authority to modify existing orders or enter additional orders to minimize any detrimental effect of a move upon the relationship between a noncustodial parent and his children. Johnson v. Black, 137 Colo. 119, 322 P.2d 99 (1958); Aylor v. Aylor, 173 Colo. 294, 478 P.2d 302 (1970); Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14 (1972); Wood v. District Court, 181 Colo. 95, 508 P.2d 134 (1973).

Where the original custody award of a child and a subsequent habeas corpus proceeding were in the same state, but in different courts, although the habeas corpus court would not have jurisdiction to test the wisdom of or to modify the custody decree, it could and should have made the writ permanent to enforce the decree, and should have ordered the child returned to the one lawfully entitled to custody. Wood v. District Court, 181 Colo. 95, 508 P.2d 134 (1973).

The trial court which acquired personal jurisdiction over party in divorce proceedings had continuing in personam jurisdiction to modify child support orders and to enforce original custody orders through the exercise power of contempt, therefore, personal service on a party out of state was sufficient and party's failure to appear did not deprive court of jurisdiction or power to punish for contempt. Brown v. Brown, 31 Colo. App. 557, 506 P.2d 386 (1972).

Well established was the rule that when a child from another state became domiciled in Colorado, and there was a material change in the circumstances of the divorced parents which would have justified modification of the rights to custody of the child, the Colorado courts could have and did take jurisdiction of the custody proceedings and enter appropriate orders based on conditions as they then appeared, and in such a case the supreme court held that the custody provisions of a decree rendered by the court of former domicile was subject to modification in Colorado if there was a change in conditions arising after the decree in the foreign state, which could not have been considered by that court in making the award. Petition of Kraudel v. Benner, 148 Colo. 525, 366 P.2d 667 (1961).

Factors listed in this section are not relevant in determining custody in a dependency proceeding under the Children's Code. People in Interest of R.E., 721 P.2d 1233 (Colo. App. 1986).

Applied in In re Murphy, 834 P.2d 1287 (Colo. App. 1992).

V. APPELLATE REVIEW.

Any final order in a custody proceeding regardless of the label placed upon it by the trial court was appealable as a matter of law. Aylor v. Aylor, 173 Colo. 294, 478 P.2d 302 (1970).

On appellate review of such an order modifying a previous order relative to custody and visitation, every presumption will be made in favor of the validity of the trial court's decision and only where a clear abuse of discretion can be shown will an appellate court interfere with orders of a trial court delineating visitation rights and awarding custody. Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14 (1972).

In reviewing an order affecting the custody of a child, appellate courts will make every reasonable presumption in favor of the action of the trial court. Christian v. Randall, 33 Colo. App. 129, 516 P.2d 132 (1973).

Questions of custody must of necessity rest upon the judgment of the trier of fact, and its determination will not be disturbed if there is evidence to support its conclusion. In re Trouth, 631 P.2d 1183 (Colo. App. 1981); In re Agner, 659 P.2d 53 (Colo. App. 1982); In re Utzinger, 721 P.2d 703 (Colo. App. 1986).

Appellate courts are reluctant to disturb rulings of the trial court in custody matters, absent circumstances clearly disclosing an abuse of discretion. Christian v.

Randall, 33 Colo. App. 129, 516 P.2d 132 (1973).

The modification of a divorce decree with respect to custody of minor children lies within the sound discretion of the trial court and will be disturbed on review only if clear abuse of discretion is shown. Dockum v. Dockum, 34 Colo. App. 98, 522 P.2d 744 (1974); In re Utzinger, 721 P.2d 703 (Colo. App. 1986).

Change of custody in violation of subsection (2) cannot stand. Although appellate courts are reluctant to disturb the trial court's ruling in a custody matter, subsection (2) is clear and the trial court must comply with its provisions. If the trial court's findings show no indication of endangered physical health or impairment of emotional development, an order changing custody cannot stand. In re Harris, 670 P.2d 446 (Colo. App. 1983).

Trial court must comply with section. Although appellate courts are reluctant to disturb rulings of the trial court in custody matters, this section is clear, and the trial court must comply with its provisions. In re Larington, 38 Colo. App. 408, 561 P.2d 17 (1976).

Cross References:

For the "Uniform Child-custody Jurisdiction and Enforcement Act", see article 13 of this title.