SUMMARY
May 3, 2018

2018COA63

No. 16CA0428, *Parental Responsibilities Concerning W.C.* — Family Law — Parental Responsibilities — Appeals — Continuing District Court Jurisdiction

A division of the court of appeals considers whether a district court retains jurisdiction over allocation of parental responsibilities while a prior order allocating responsibilities is on appeal. The division concludes that a district court retains continuing jurisdiction to consider motions to modify parental responsibilities while prior orders are on appeal so long as those motions are based on a material change in circumstances that has occurred after the prior order was entered.

COLORADO COURT OF APPEALS **2018COA63**

Court of Appeals No. 16CA0428
City and County of Denver District Court No. 15DR30554
Honorable Karen L. Brody, Judge

In re the Parental Responsibilities Concerning W.C., a Child,

and Concerning Kimberly Ann Nanke,

Appellee,

and

Winston Harold Conkling,

Appellant.

ORDER OF CLARIFICATION

Division A
Taubman, Hawthorne, and Ashby, JJ.
PER CURIAM

Announced May 3, 2018

Robinson Waters & O'Dorisio, P.C., Langdon J. Jorgensen, Denver, Colorado, for Appellee

Gill & Ledbetter, LLP, Ann Whalen Gill, Castle Rock, Colorado, for Appellant

¶ 1 In this allocation of parental responsibilities case, Winston Harold Conklin (father) appeals the district court's permanent orders granting Kimberly Ann Nanke (mother) sole decision-making authority and majority parenting time. Though his appeal is pending with this court, father has filed verified motions to modify parenting time and decision-making in the district court. The district court has concluded it lacks jurisdiction to consider those motions because this court enjoys exclusive jurisdiction over those matters while the appeal is pending. We conclude that the district court retains continuing jurisdiction to consider motions to modify parenting time and decision-making while permanent orders are on appeal, but *only* when such motions are based solely on a material change in circumstances that occurred since the court entered permanent orders.[1]

I. Background

¶ 2 In June 2015, mother filed an allocation of parental responsibilities action concerning W.C., the biological child of mother and father. Following hotly contested temporary and

[1] This order only addresses continuing jurisdiction in the context of the court's obligation to consider the best interests of the child. *See, e.g.*, §§ 14-10-129, 14-10-131, C.R.S. 2017.

permanent order hearings, the district court entered permanent orders granting mother majority parenting time and sole decision-making authority. Father has appealed those orders to this court, arguing in pertinent part that the district court misapplied the best interests of the child standard in reaching its determinations on parenting time and decision-making.[2]

¶ 3 After filing his opening brief in this appeal, father filed a motion with this court titled "Motion to Determine Whether Remand is Necessary, and if so For a Limited Remand." In the motion, he argued that after the court entered permanent orders, there have been "significant, substantial, and continuing changes in circumstances" affecting parenting time and decision-making and, therefore, he wished to file motions to modify in the district court. While father conceded that the appeal "divested the district court of jurisdiction over the matters decided in the orders that are the subject of the appeal," citing *Molitor v. Anderson*, 795 P.2d 266 (Colo. 1990), he also argued that "[i]t is unclear . . . whether a

[2] Mother has cross-appealed the district court's determination that she is not entitled to child support retroactive to the child's birth. For purposes of this order, we only address whether the district court retains jurisdiction to hear father's pending motions to modify.

remand is necessary for the district court to have jurisdiction" over his proposed motions. After receiving a response from mother, a court of appeals judge denied the motion without explanation.

¶ 4 Father then filed motions to modify parenting time and decision-making in the district court, arguing that mother has demonstrated "a pattern of poor judgment," "questionable judgment," and "vindictive" behavior constituting a change in circumstances justifying modification of parenting time and decision-making. Mother responded with a motion to dismiss, and, in a detailed written order,[3] the district court concluded that under *Molitor* it lacked jurisdiction to consider the motions because those motions "absolutely affect the substance of the judgment entered in this case." *See id.* at 269 ("[I]n this jurisdiction a trial court may not determine matters affecting the substance of a judgment once an appeal of that judgment has been perfected unless the appellate

[3] This court may take judicial notice of records under CRE 201, including "contents of court records in a related proceeding," *People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004), whether or not the parties request judicial notice. *Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 64. Here, we take judicial notice of the district court's January 3, 2018, order determining it lacked jurisdiction.

court issues an order remanding the judgment to the trial court for that purpose.").

¶ 5 The district court noted that father's position "promotes a waste of judicial resources" and that while father argued changed circumstances, his request "is, essentially, the same issue before the Court of Appeals — whether the trial court's order for allocation of parental responsibilities is in error." However, the district court acknowledged the "dearth of clear case law in the area of domestic relations on a court's jurisdiction to manage ongoing parenting time and decision-making issues when permanent orders have been appealed" and declined to dismiss father's motions. Instead, the district court decided to take no further action on the motions "unless and until the Court of Appeals finds that the Court has jurisdiction or remands and gives this Court authority to consider the motions."

¶ 6 We now grant father's motion to clarify or reconsider this court's earlier order denying the motion for limited remand, and issue this order to clarify that no limited remand is necessary because, under our statutory scheme, a district court retains continuing jurisdiction to consider motions to modify parenting

time and decision-making based on allegedly changed circumstances while permanent orders are on appeal.

II. Jurisdiction in District Court or Court of Appeals

¶ 7 "Courts universally recognize the general principle that once an appeal is perfected jurisdiction over the case is transferred from the trial court to the appellate court for all essential purposes with regard to the substantive issues that are the subject of the appeal." *Id.* "Such divestiture or transfer principle is essential to the efficient administration of appellate processes and is an important adjunct to the concept of finality of judgments."[4] *Id.* at 269.

¶ 8 At the same time, under Colorado's Uniform Dissolution of Marriage Act (UDMA), the General Assembly has declared that children have the right to have parental responsibilities determined based on their best interests, § 14-10-123.4(1)(a), C.R.S. 2017, and

[4] There is a split of authority in other states on whether a court retains jurisdiction to modify parenting time and decision-making during the pendency of an appeal. *Compare In re E.J.M.*, 259 S.W.3d 124, 135 (Tenn. Ct. App. 2007) (a district court retains jurisdiction to modify custody even while an appeal concerning custody is pending), *with Mack-Manley v. Manley*, 138 P.3d 525, 530 (Nev. 2006) (a district court does not retain jurisdiction to enter post-decree orders changing custody while custody is on appeal). As discussed below, we agree with those courts that have concluded a trial court retains jurisdiction to consider allegedly changed circumstances when an underlying order is pending on appeal.

a district court "may make or modify an order granting or denying parenting time rights *whenever* such order or modification would serve the best interests of the child." § 14-10-129(1)(a)(I), C.R.S. 2017 (emphasis added); *see* § 14-10-131(2), C.R.S. 2017 (setting forth circumstances under which a district court may modify a "custody decree or decree allocating decision-making responsibility").

¶ 9 Before the enactment of the UDMA, the supreme court acknowledged a district court's continuing jurisdiction over proceedings involving children based on the express language of the statute then in effect. § 46-1-5(4), C.R.S. 1963 (the district court "shall retain jurisdiction" over child custody matters "as changing circumstances may require"); *see Aylor v. Aylor*, 173 Colo. 294, 297, 478 P.2d 302, 303 (1970) ("An award of custody is a final order and appealable, but the court retains jurisdiction of the children for the very purposes of being able to make such custody orders as will best serve the interests of the children."); *Michaelson v. Michaelson*, 167 Colo. 58, 60, 445 P.2d 211, 211-12 (1968) ("In matters of [child support] the court had jurisdiction, notwithstanding the fact that

prior to the modification order a writ of error had been issued by this court.").

¶ 10 Additionally, since the UDMA was enacted, at least two divisions of this court have recognized a district court's continuing jurisdiction over parental responsibilities while an appeal is pending. *See In re Marriage of Slowinski*, 199 P.3d 48, 51 (Colo. App. 2008) (The appellate court was "advised at oral argument that the orders on appeal have been superseded by subsequent orders entered under the trial court's continuing jurisdiction over parenting time issues and, therefore, the orders at issue are moot."); *Dockum v. Dockum*, 34 Colo. App. 98, 101, 522 P.2d 744, 746 (1974) ("The Uniform Act does not expressly grant [continuing] jurisdiction, but, since it contains a section permitting modification of child custody orders, it does give continuing jurisdiction by implication."), cited with approval in *Darner v. Dist. Court*, 680 P.2d 235, 238 (Colo. 1984).

¶ 11 Nevertheless, we are faced with apparently contradictory precedent in *Molitor*, 795 P.2d at 268-69, where the supreme court held that "a trial court may not determine matters affecting the substance of a judgment once an appeal of that judgment has been

perfected" because "[t]he appellate process would indeed become a quagmire of uncertainty if parties could obtain trial court alteration of rulings subject to an appeal during the pendency of that appeal."

¶ 12 In *Molitor*, the plaintiff filed a civil action against the defendants seeking damages for wrongful termination of employment, slander, and outrageous conduct. *Id.* at 266. The jury returned a verdict in favor of the plaintiff and, after filing an unsuccessful C.R.C.P. 59 motion, the defendants filed a notice of appeal. *Id.* While the appeal was pending, defendants filed a C.R.C.P. 60(b) motion in the district court asserting that the trial judge had misled them regarding the timeliness of their appeal and asking the court to enter a new judgment, "thus initiating a new period within which to file an appeal." *Id.* at 267. While that motion was pending, a division of this court dismissed the appeal as untimely. *Id.* Then, after dismissal by the division, but before the mandate issued, the district court denied the defendant's C.R.C.P. 60(b) motion on the merits. In a separate appeal of that ruling, a division of this court held that the district court had jurisdiction to deny the defendants' C.R.C.P. 60(b) motion despite

the defendants' perfected appeal. *Id.* The supreme court granted certiorari and reversed. *Id.*

¶ 13 In concluding that a district court does not retain jurisdiction to consider and deny a C.R.C.P. 60(b) motion to vacate a judgment while that judgment is on appeal, the supreme court considered the different positions taken by the federal and state courts, the "universally recognize[d] . . . principle that once an appeal is perfected jurisdiction over the case is transferred from the trial court to the appellate court," *id.* at 268, and the "previously recognized . . . principle that the filing of a notice of appeal divests a trial court of *authority* to consider *matters of substance affecting directly the judgment* appealed from," *id.* at 269 (emphasis added).

¶ 14 We conclude that no conflict exists between *Molitor* and our determination that the district court retains continuing jurisdiction to decide motions to modify parental responsibilities while an appeal of an underlying order is pending, to the extent that circumstances have changed since the order was entered. This is so because when a district court considers a motion to modify based on changed circumstances, it is in reality considering whether to enter a *new order* based on circumstances occurring

after the prior order was entered. *See In re Marriage of Spangler*, 464 N.E.2d 1120, 1122 (Ill. App. Ct. 1984) ("Although the granting of such relief is said to 'modify' the judgment of custody, actually, a new judgment is entered based on new facts and circumstances.").

¶ 15 Therefore, while sections 14-10-129 and -131 are titled "modification" of parenting time and decision-making responsibility, those sections require a district court to enter a new order based either on changed circumstances or endangerment of the child. Because the court is entering a new order based on changed circumstances, it is not "affecting directly the judgment appealed from." *Molitor*, 795 P.2d at 269. Thus, we do not read *Molitor* to conflict with the supreme court's prior precedent and the mandates of the UDMA.

¶ 16 Of course, we acknowledge that simultaneous litigation of a modification motion and an appeal of parental responsibilities orders could lead to the inefficient administration of appellate processes warned of by the *Molitor* court. When a party attempts to ride two horses at once by "obtain[ing] trial court alteration of rulings subject to an appeal during the pendency of that appeal," *id.* at 268, the order on appeal may become moot and the party will

have wasted judicial resources. However, when weighing this possibility against the legislative mandate to consider the best interests of the child, we are convinced that our resolution is the appropriate outcome.

III. Conclusion

¶ 17 We conclude that under the UDMA a district court retains continuing jurisdiction to modify parental responsibilities while the current allocation order is on appeal, but only when the modification sought is based on a change in circumstances arising after the original order was issued.

¶ 18 While father has filed verified motions to modify parenting time and allocation of decision-making authority in the district court, we cannot tell from the motions whether father is alleging new incidents which constitute changed circumstances or simply providing additional examples of behavior by mother that father already raised during the permanent orders hearing when arguing for full decision-making authority and additional parenting time. It appears that the district court considered the motions to only rehash arguments already made to the court. However, because

the district court did not have the benefit of this opinion, the court may, in its discretion, reconsider the motions if it so chooses.

¶ 19 We grant father's motion to clarify and determine no limited remand is necessary.

BY THE COURT:

Taubman, J.
Hawthorne, J.
Ashby, J.