The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
July 14, 2022

2022COA74

No. 20CA1669, *In re Marriage of Wenciker* — Family Law — Post-dissolution — Modification of Parenting Time — Modification of Custody or Decision-making Responsibility

In this post-dissolution of marriage parental responsibilities action, mother appeals the trial court's order modifying parenting time and decision-making authority for the parties' two children. Because one of the children is now over the age of eighteen, a division of the court of appeals dismisses the appeal as moot as to him; because the younger child is still a minor, the division reaches the merits of mother's appeal as to her.

In his motion to modify, father sought to substantially change parenting time and to modify decision-making from joint decision-making to sole decision-making by him. His motion rested in large part on the same allegations of endangerment that he had asserted

and failed to prove in connection with an emergency motion to restrict parenting time that the court had recently denied. Notwithstanding having previously denied father's emergency motion to restrict, the court granted his motion to modify.

Mother argues that because the Uniform Dissolution of Marriage Act requires motions to modify such as father's be based on "facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree," §§ 14-10-129(2), -131(2), C.R.S. 2021, the court's denial of his emergency motion to restrict barred the court from relying on the same facts to grant the motion to modify. The division rejects mother's argument and concludes that allegations of endangerment from a failed emergency motion to restrict parenting time can, if ultimately proved, be the basis for a subsequent motion to substantially change parenting time or modify decision-making.

Because the division rejects mother's construction of the statute and because it concludes that the court's findings are supported by the record, the division affirms the trial court's order as to the younger child.

COLORADO COURT OF APPEALS **2022COA74**

Court of Appeals No. 20CA1669
Moffat County District Court No. 19DR30018
Honorable Michael A. O'Hara III, Judge

In re the Marriage of

Jeffrey Wenciker,

Appellee,

and

Kinsey Bolen,

Appellant.

APPEAL DISMISSED IN PART
AND ORDER AFFIRMED IN PART

Division VI
Opinion by JUDGE WELLING
Fox and Johnson, JJ., concur

Announced July 14, 2022

Griffiths Law PC, Jennifer Schaffner, Lone Tree, Colorado, for Appellee

Leslie A. Goldstein Attorney at Law, LLC, Leslie A. Goldstein, Steamboat Springs, Colorado, for Appellant

¶ 1 In this post-dissolution of marriage parental responsibilities action between Kinsey Bolen (mother) and Jeffrey Wenciker (father), mother appeals the trial court's order modifying parenting time and decision-making authority for the parties' two children. Because one of the children is now over the age of eighteen, we dismiss the appeal as to him as moot; because the younger child is still a minor, we reach the merits of mother's appeal as to her.

¶ 2 In his motion to modify, father sought to substantially change parenting time and to modify decision-making from joint decision-making to sole decision-making by him. His motion rested in large part on the same allegations of endangerment that he had asserted and failed to prove in connection with an emergency motion to restrict parenting time that the court had recently denied. Notwithstanding having previously denied father's emergency motion to restrict, the court granted his motion to modify.

¶ 3 Mother argues that because the Uniform Dissolution of Marriage Act (UDMA) requires motions to modify such as father's be based on "facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree," §§ 14-10-129(2), -131(2), C.R.S. 2021, the court's denial of his emergency

motion to restrict barred the court from relying on the same facts to grant the motion to modify. We reject mother's argument and conclude that allegations of endangerment from a failed emergency motion to restrict parenting time can, if ultimately proved, be the basis for a subsequent motion to substantially change parenting time or modify decision-making.

¶ 4 Because we reject mother's construction of the statute and because the court's findings are supported by the record, we affirm the order as to the younger child.

I. Background

¶ 5 The parties were divorced in Kansas in 2009. Under their 2011 modified parenting plan, mother was designated the primary residential parent for their two children, father had parenting time during school breaks and over the summer, and the parties shared joint decision-making authority.

¶ 6 In 2019, after father relocated to Virginia, he registered the Kansas order in Colorado, where mother and her husband (stepfather) lived with the children. At the same time that he registered the Kansas order in Colorado, father also filed an emergency motion to restrict mother's parenting time pursuant to

section 14-10-129(4). Less than two weeks later, and after a hearing, the trial court denied that motion, finding that father had failed to carry his burden of proof. Shortly after the court's denial of his emergency motion to restrict parenting time, father moved to appoint a child and family investigator (CFI) and to modify parenting time and decision-making authority. The court granted the motion for a CFI and set a hearing on the motion to modify.

¶ 7 After a two-day hearing on father's motion to modify, the court entered a lengthy order finding that the children were endangered in mother's care and that any potential harm caused by transitioning them to father's care in Virginia was "substantially outweighed" by the harm caused by remaining with mother. The court further found that the decision-making allocation in place endangered the children because mother was incapable of engaging in joint decision-making and her unilateral decisions "endanger[ed] the children's physical, educational, and emotional well-being." Accordingly, the court designated father the children's primary residential parent and allocated sole decision-making authority to him.

II. The Appeal Is Moot as to the Parties' Older Child

¶ 8 The record reflects that the parties' older child turned eighteen while this appeal was pending. As an adult, he has the right to make his own decisions, including whether and how often to visit his parents, rendering any parenting time and decision-making orders unenforceable as to him. *See In re Marriage of Tibbetts*, 2018 COA 117, ¶¶ 12-13; *see also* § 13-22-101(1)(d), C.R.S. 2021 (deeming a person eighteen years or older as of full age to "make decisions in regard to his own body . . . to the full extent allowed to any other adult person").

¶ 9 Therefore, mother's appeal as to the older child is moot, and we dismiss the appeal as it relates to him. *See Tibbetts*, ¶¶ 7-8, 21, 28; *see also Fullerton v. Cnty. Ct.*, 124 P.3d 866, 867 (Colo. App. 2005) (addressing mootness issue nostra sponte because it is an issue of subject matter jurisdiction).

¶ 10 We next address mother's contentions as they relate to the parties' younger child.

III. Modification of Parenting Time and Decision-Making Authority as to the Parties' Younger Child

¶ 11 Mother contends that the trial court erred in two respects when it granted father's motion to modify and designated him the child's primary residential parent and sole decision-maker. First, she contends that the court erred by relying on the same claims of endangerment that father had previously asserted in an emergency motion to restrict parenting time filed pursuant to section 14-10-129(4), which the court rejected in ruling on that motion. Second, she contends that even if father could rely on allegations predating the denial of his emergency motion to restrict parenting time, the court's findings aren't supported by the record. We address, and reject, both contentions below.

A. Previously Asserted Allegations of Endangerment

1. Statutory Scheme

¶ 12 Section 14-10-129 governs the modification of parenting time orders. When, as here, a parent seeks to modify a prior parenting time order in a way that "substantially changes the parenting time as well as changes the party with whom the child resides a majority of the time,"

> [t]he court shall not modify [the] prior order . . . 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 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.

§ 14-10-129(2) (emphasis added).

¶ 13 That subsection goes on to provide that the court shall retain the parenting time schedule from the prior order unless, as relevant here,[1] "[t]he child's present environment endangers the child's physical health or significantly impairs the child's emotional development and the harm likely to be caused by a change of

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[1] There are three other grounds for granting a modification under section 14-10-129(2), C.R.S. 2021: (1) agreement of the parties; (2) integration of the child into the family of the moving party with the consent of the other party; or (3) a proposed relocation by the parent "with whom the child resides a majority of the time . . . to a residence that substantially changes the geographical ties between the child and the other party." § 14-10-129(2)(a)-(c). Although father sought to change the children's primary residence from mother's home in Colorado to his home in Virginia, he wasn't the majority time parent at the time he filed the motion to modify (and, in any event, he didn't invoke the relocation provision). Instead, he alleged that the children's present environment with mother endangered them. Therefore, the trial court applied section 14-10-129(2)(d) in determining whether to modify parenting time. Because father didn't invoke subsection 129(2)(c), this isn't a relocation case.

environment is outweighed by the advantage of a change to the child." § 14-10-129(2)(d).

¶ 14 Similarly, when resolving a motion to modify decision-making authority,

> [t]he 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.

§ 14-10-131(2) (emphasis added).

¶ 15 And the court must retain the allocation of decision-making responsibility established by the prior decree unless, as relevant here, "[t]he 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." § 14-10-131(2)(c); *see also In re Parental Responsibilities Concerning B.R.D.*, 2012 COA 63, ¶¶ 17-18.

2. Standard of Review

¶ 16 Mother argues that the court erred because it had previously denied father's emergency motion to restrict her parenting time and father alleged no new facts or circumstances in his motion to modify. We aren't persuaded.

¶ 17 Mother's argument requires us to interpret the phrase "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," as used in sections 14-10-129(2) and 14-10-131(2). This presents an issue of statutory interpretation, which we review de novo. *In re Marriage of Mack*, 2022 CO 17, ¶ 13. In construing a statute, our goal "is to give effect to legislative intent." *Johnson v. Sch. Dist. No. 1*, 2018 CO 17, ¶ 11. Therefore, we examine "the entire statutory scheme to give consistent, harmonious, and sensible effect to all parts," and we apply "words and phrases according to their plain and ordinary meaning." *Vallagio at Inverness Residential Condo. Ass'n v. Metro. Homes, Inc.*, 2017 CO 69, ¶ 16 (quoting *Pulte Home Corp. v. Countryside Cmty. Ass'n*, 2016 CO 64, ¶ 24).

¶ 18 When the statutory language is clear, we must enforce it as written. *Mack*, ¶ 14. Only if the language is ambiguous may we

resort to other tools of statutory construction. *Id.* (citing *Munoz v. Am. Fam. Mut. Ins. Co.*, 2018 CO 68, ¶ 9).

3. Analysis

¶ 19 To begin, the plain language of the statutes — specifically their reference to "prior decree" — doesn't bar a court from considering allegations contained in a previously denied emergency motion to restrict parenting time. The "prior decree" in this case wasn't the order denying father's motion to modify; it was the parenting time and decision-making orders that were in place when father filed his emergency motion. Mother offers no basis for concluding otherwise, and we can discern none.

¶ 20 Moreover, even if the term "prior decree" were to include an order denying an emergency motion to modify, mother's contention that father's subsequent motions can't rely on the same allegations of endangerment fails for two additional reasons.

¶ 21 First, mother's proposed construction of the statutory scheme is discordant with its purpose of protecting the best interests of the child. The interpretation proposed by mother would have the perverse result of discouraging a parent from filing a meritorious, but difficult to prove, emergency motion to restrict. This is because,

under mother's interpretation of the statutory scheme, a parent's failure to prove endangerment at an emergency motion hearing — a hearing that is required to be held within fourteen days of the filing of the motion — would render those allegations off limits in a subsequently filed motion to modify under sections 14-10-129(2) or 14-10-131(2). This couldn't have been the result intended by the legislature.

¶ 22 Put another way, mother's proposed interpretation would present the decision to file an emergency motion to restrict as a fork in the road — either file an emergency motion to restrict or pursue a motion to modify. That's not how the statute is structured. An emergency motion to restrict isn't an alternative to a motion to modify; instead, it's a port in the storm along a continuum of remedies intended to protect the best interests of children in a wide array of circumstances. There's nothing about the emergency motion to restrict statute indicating that the disposition of such a motion should serve as a barrier to a motion to modify.[2]

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[2] The legislature did, however, enact a deterrent to a parent filing a spurious emergency motion to restrict parenting time — namely, section 14-10-129(5), which requires the court to award attorney

¶ 23 Second, the court had substantially more information when it ruled on father's motion to modify than it had when assessing his initial emergency motion. Most notably, after denying the emergency motion, the court appointed a CFI, who investigated father's allegations, reported her findings, and testified at the hearing. Further, the CFI and the court considered information from the children's therapist, which was also not available at the hearing on father's emergency motion.

¶ 24 Simply put, although the specific incidents father alleged in his motion to modify — i.e., a physical altercation between the older child and stepfather, the older child's incident of self-harm, and the younger child being slapped and physically dragged outside by stepfather — might have been substantially the same as those alleged in his previously denied emergency motion to restrict parenting time, the court didn't err by considering those allegations when modifying parenting and decision-making authority under sections 14-10-129(2)(d) and 14-10-131(2)(c).

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fees and costs against a party whom the court finds filed an emergency motion to restrict that "was substantially frivolous, substantially groundless, or substantially vexatious."

B. The Record Supports the Court's Endangerment Findings

¶ 25 We are also unpersuaded by mother's arguments that the record doesn't support the court's endangerment findings and that the court improperly discounted her evidence.

¶ 26 The trial court has broad discretion when modifying parental responsibilities, and we exercise every presumption in favor of upholding its decisions in this area. *In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007). What constitutes endangerment is a highly individualized determination, *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo. App. 2010), and we won't disturb the trial court's findings on the issue if they are supported by the record, *see In re Marriage of Newell*, 192 P.3d 529, 534-35 (Colo. App. 2008). When, as here, the parties present conflicting evidence, the trial court's findings resolving such conflicts are binding on review if they have record support. *Hatton*, 160 P.3d at 335. The trial court isn't required to believe witness testimony even if uncontroverted. *In re Marriage of Amich*, 192 P.3d 422, 424 (Colo. App. 2007); *see also In re Marriage of Lewis*, 66 P.3d 204, 207 (Colo. App. 2003) ("[C]redibility determinations and the weight, probative force, and sufficiency of the evidence, as well as the inferences and

conclusions to be drawn therefrom, are matters within the sole discretion of the trial court.").

¶ 27 The trial court found that mother and stepfather physically and emotionally abused the children and that the children were endangered in their care. This finding and the specific incidents detailed in the court's order are supported by the record. The CFI testified that the environment in mother's home was "not a good place" for the children, they were isolated and didn't feel safe because of mother's rigid parenting and their conflicts with stepfather, mother's parenting style wasn't supportive because she "continuously" isolated and degraded the children, and their "emotional well-being [wa]s at risk" if they remained with her. The CFI further testified that both children told her that stepfather hit them with an open hand, had physical altercations with the older child, and dragged the younger child outside by her hair. The CFI found the children credible, in part, because their accounts had remained consistent over time.

¶ 28 The CFI also testified that mother made decisions without involving father and that this endangered the children. Specifically, mother pulled the children out of school to home school them but

then didn't follow through with the planned home schooling curriculum and didn't give them the materials they needed to succeed. The CFI believed that mother took the children out of school to punish them. The children told the CFI that they were concerned they had fallen behind academically and that they wanted to participate in extracurricular activities, but mother didn't support that. Although mother re-enrolled the children in school after the emergency hearing, the court noted that it took a court order for her to do so despite the children's desire to return to school.

¶ 29 Mother and stepfather testified to the contrary regarding some of these issues. Although stepfather professed not to believe in corporal punishment, he admitted to slapping the younger child and that he "lost his cool one to two times." He further testified that he had shoved the children and picked the younger child up under her arms to take her outside to calm down.

¶ 30 Mother admitted that she had pulled the children out of school without involving father in the decision and had told the children to inform him (as opposed to informing him of this decision herself). She said that the older child was acting out, so she told him he had

used up his last chance and would have to be home schooled, and that the younger child wanted to be home schooled. She also testified that the children refused the extracurricular activities she suggested but participated in 4-H. Also, the older child was in band and the younger child volunteered.

¶ 31 Mother testified that there was one physical altercation between stepfather and the older child, that mother once threw a board that hit the older child on the leg causing a deep scratch, and that stepfather had once picked up the younger child to take her outside to calm down. Mother further testified that, after an incident where the younger child took marijuana edibles to school, the edibles were kept in a locked cabinet, but she also acknowledged that the cabinet was unlocked when the CFI visited the home.

¶ 32 In sum, the record amply supports the trial court's endangerment findings and its order modifying parenting time and decision-making authority. Therefore, we won't disturb the order. *See Newell*, 192 P.3d at 534-35; *Hatton*, 160 P.3d at 330-31.

IV. Conclusion

¶ 33 For the reasons set forth above, the appeal is dismissed as to the parties' older child, and the order is affirmed as it relates to the younger child.

JUDGE FOX and JUDGE JOHNSON concur.