

I. Best Interest of the Children

A. Relevant Statutes:

§ 14-10-124. Best interests of child

(1) Legislative declaration. The general assembly finds and declares that 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, 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 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 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;

(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) Whether one of the parties has been a perpetrator of child abuse or neglect under section 18-6-401, C.R.S., or under the law of any state, which factor shall be supported by credible evidence;

(X) Whether one of the parties has been a perpetrator of spouse abuse as defined in subsection (4) of this section, which factor shall be supported by credible evidence;

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

(b) Allocation of decision-making responsibility. The court, upon the motion of either party or its own motion, shall allocate the decision-making responsibilities between the parties based upon the best interests of the child. In determining decision-making responsibility, the court may allocate the decision-making responsibility with respect to each issue affecting the child mutually between both parties or individually to one or the other party or any combination thereof. In determining the best interests of the child for purposes of allocating decision-making responsibilities, the court shall consider, in addition to the factors set forth in paragraph (a) of this subsection (1.5), all relevant factors including:

(I) Credible evidence of the ability of the parties to cooperate and to make decisions jointly;

(II) 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;

(III) 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;

(IV) Whether one of the parties has been a perpetrator of child abuse or neglect under section 18-6-401, C.R.S., or under the law of any state, which factor shall be supported by credible evidence. If the court makes a finding of fact that one of the parties has been a perpetrator of child abuse or neglect, then it shall not be in the best interests of the child to allocate mutual decision-making with respect to any issue over the objection of the other party or the legal representative of the child.

(V) Whether one of the parties has been a perpetrator of spouse abuse as defined in subsection (4) of this section, which factor shall be supported by credible evidence. If the court makes a finding of fact that one of the parties has been a perpetrator of spouse abuse, then it shall not be in the best interests of the child to allocate mutual decision-making responsibility over the objection of the other party or the legal representative of the child, unless the court finds that the

parties are able to make shared decisions about their children without physical confrontation and in a place and manner that is not a danger to the abused party or the child.

(2) The court shall not consider conduct of a party that does not affect that party's relationship to the child.

§ 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.

B. Cases to Consider

***In re Marriage of England*, 997 P.2d 1288, 1290 (Colo.App.1999).** Under § 14-10-124(1.5)(b), C.R.S.2006, the court must consider all of the factors set forth in that subsection and in § 14-10-124(1.5)(a), C.R.S.2006, in determining the best interests of the child for the purpose of allocating decision-making responsibilities. Among these factors is “the ability of the parties to cooperate and to make decisions jointly.” Section 14-10-124(1.5)(b)(I), C.R.S.2006. Specific findings concerning each factor need not be made, but the findings must be sufficient to allow the reviewing court to determine whether the decision is supported by competent evidence.

***In re Marriage of Yates*, 148 P.3d 304, 308, (Colo.App. 2006)**

A finding that a parent has been a perpetrator of child abuse or spousal abuse does not bar an award of parenting time or decision-making responsibility to that parent. Such factors are but two, albeit important, factors in assessing the best interests of the child. See *In re Marriage of Bertsch*, 97 P.3d 219 (Colo.App.2004)(trial court did not abuse its discretion in allocating primary parental responsibility and all decision-making responsibility to husband who had been charged with child abuse after striking eight-year-old son in the face; husband had worked on pertinent issues with a parenting coordinator and his own therapist, and two parenting time evaluators, the guardian ad litem, and the children’s therapist all recommended that husband should be the primary residential parent and that he should have all decision-making authority).

***In re Marriage of Ciesluk*, 113 P.3d 135, (Colo. 2005)**

Amendments to child custody statute eliminated the presumption in favor of the majority time parent seeking to relocate; instead, both parents share equally the burden of demonstrating, under specific statutory analysis, what is in the child’s best interests.

***In re Marriage of Ciesluk*, 100 P.3d 527, (Colo.App. 2004)**

After amendment, statute setting forth factors for consideration of parent’s request for relocation contains no presumption that it is in a child’s best interests to remain with the primary residential parent when that parent moves.

***Spahmer v. Gullette*, 113 P.3d 158, (Colo. 2005)**

In an initial determination to allocate parental responsibilities, a court has no statutory authority to order a parent to live in a specific location; rather, the court must accept the location in which each party intends to live, and allocate parental responsibilities accordingly in the best interests of the child.