SUMMARY
March 13, 2025

2025COA29

No. 24CA1065, *In re Marriage of Dale* — Family Law — Modification of Parenting Time — Restriction of Parenting Time

A division of the court of appeals holds for the first time in a published appellate decision that a purely quantitative reduction in a parent's parenting time cannot constitute a restriction on parenting time pursuant to section 14-10-129(1)(b)(I), C.R.S. 2024, distinguishing — and, to the extent necessary, disagreeing with — the division in *In re Marriage of West*, 94 P.3d 1248 (Colo. App. 2004).

COLORADO COURT OF APPEALS **2025COA29**

Court of Appeals No. 24CA1065
El Paso County District Court No. 21DR32791
Honorable William Moller, Judge

In re the Marriage of,

Nicole Jehlicka Dale,

Appellee,

and

Nicholas Jay Dale,

Appellant.

ORDER AFFIRMED

Division III
Opinion by JUDGE TOW
Dunn and Graham*, JJ., concur

Announced March 13, 2025

KHM Attorneys at Law, PLLC, Alexander Masterson, Colorado Springs, Colorado, for Appellee

Nicholas J. Dale, Colorado Springs, Colorado, for Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2024.

¶ 1 In this post-decree invalidity of marriage case, Nicholas Jay Dale (father) appeals the district court's order modifying his parenting time with the child he shares with Nicole Jehlicka Dale, now known as Nicole Jehlicka Diehl (mother). This appeal requires us to consider whether a substantial reduction in parenting time can amount to a restriction of a parent's parenting time rights, thus requiring the district court to find endangerment rather than simply consider the best interests of the child. Because we conclude that a substantial reduction in parenting time alone is not a restriction of parenting time rights, we affirm.

I. Background

¶ 2 In September 2022, father and mother drafted a memorandum of understanding allocating parental responsibilities for the parties' then-two-year-old child. The district court accepted the agreement and incorporated it into the decree of invalidity of marriage as its final order. The order assigned father parenting time from Sunday afternoons to Wednesday mornings, a one-week vacation, and certain holidays depending on the year. This arrangement allocated father approximately 160 overnights per year with the child, while

mother served as the primary residential parent with approximately 205 overnights per year.

¶ 3 In January 2024, father filed a motion to modify parenting time, seeking to accommodate a change in his work schedule that resulted in him establishing a second residence over 100 miles from the child's primary residence. In his written motion, father sought parenting time from Friday to Monday for the first three weekends of the month. Father also requested an increase in his summer parenting time, which would be determined by the child's enrollment in school. Mother objected to any modification, and particularly to losing every weekend with the child. Mother suggested that if any change was to be made, father should be allocated every other weekend and a mid-week overnight every week during school.

¶ 4 Following a hearing, the district court made oral findings regarding the best interests of the child factors set forth in section 14-10-124(1.5)(a), C.R.S. 2024. The court concluded that a modification was necessary because father's work-from-home schedule had changed, and he was to be in the office in Huerfano County every Monday through Thursday.

¶ 5 The district court followed with a written order in which it modified father's parenting time so that he would have parenting time with the child from Friday to Monday on alternating weekends during the school year (and the fifth weekend in any month that had five), alternating weeks during the summer, and the week of spring break every year. The holiday time remained otherwise unchanged. This new schedule allocates father approximately 115 overnights per year.[1]

II. Restriction Versus Modification of Parenting Time

¶ 6 Father argues that the district court's modification amounted to a restriction of his parenting time, which requires the application of the endangerment standard under section 14-10-129(1)(b)(I), C.R.S. 2024. We disagree.

A. Standard of Review and Applicable Law

¶ 7 We review parenting time modifications for an abuse of discretion. *In re Marriage of Barker*, 251 P.3d 591, 592 (Colo. App.

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[1] In its oral ruling, the district court concluded that this modified schedule would grant father approximately 142 overnights per year. However, when applied to the 2025 calendar, it totals 116 overnights, and we cannot see a scenario in which father would receive more than 120 overnights under this plan.

2010). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or when it misconstrues or misapplies the law. *In re Marriage of Fabos*, 2022 COA 66, ¶ 16.

¶ 8 We review de novo whether the court applied the appropriate legal standard. *In re Parental Responsibilities of Reese*, 227 P.3d 900, 902 (Colo. App. 2010). We also review de novo the district court's application and interpretation of a statute. *In re Marriage of DeZalia*, 151 P.3d 647, 648 (Colo. App. 2006).

¶ 9 The standards for modification of parenting time are codified in section 14-10-129. Generally, "the 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). "[W]hen a [district] court is determining appropriate parenting time, it must balance a host of relevant factors, recognizing that any alternative it chooses may carry with it both advantages and disadvantages." *In re Marriage of Martin*, 42 P.3d 75, 79 (Colo. App. 2002).

¶ 10 However, "[t]he court shall not *restrict* a parent's parenting time rights unless it finds that the parenting time would endanger the child's physical health or significantly impair the child's

emotional development." § 14-10-129(1)(b)(I) (emphasis added). "In addition to a finding that parenting time would endanger the child[] . . . in any order imposing . . . a parenting time restriction, the court shall enumerate the specific factual findings supporting the restriction." *Id.* The statute does not define "restrict."

B. Preservation

¶ 11 First, we must decide whether father preserved his claim that the court applied the wrong legal standard. Mother argues that father did not preserve this argument because he "agreed that the court needed to apply the best interest of the child standard."[2]

¶ 12 Generally, "[a]n issue is preserved for appeal when it is brought to the court's attention and the court ruled on it." *In re Marriage of Turilli*, 2021 COA 151, ¶ 12.

¶ 13 Father filed a motion for modification of parenting time, presented a parenting time plan that allowed him a similar number of overnights, and ultimately ended up with a twenty-eight percent

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[2] Father contends that he preserved his claim because "the district court's written order was final," and he "timely filed his notice of appeal and provided an advisory copy to the lower court." We agree that father's appeal was timely and procedurally correct, but that does not address whether the argument for applying the endangerment standard was, in fact, preserved.

reduction in his overnights. Neither father nor mother requested a reduction of this magnitude. The court also acknowledged that its modification would "likely disappoint both parties," but it feared that the proposed parenting plans "suggested a number of exchanges that . . . would have a negative impact on [the child]."

¶ 14 Based on the presentation of the motion, father did not anticipate that the district court would reduce his overnights by nearly thirty percent until it issued its ruling at the conclusion of the hearing. Thus, there was no reason for father to raise the issue of whether the endangerment standard should apply to a modification that substantially reduces his parenting time. Put another way, while father agreed that the best interests standard applied to the parenting time modification that he requested, we cannot say that he waived or otherwise failed to preserve an argument that a substantial reduction of his parenting time — which no one had requested — could amount to a restriction of his parenting time rights, implicating the need to demonstrate endangerment. *See In re Marriage of Schlundt*, 2021 COA 58, ¶ 21 ("[M]other's statement agreeing that the court's parenting time order must be *in* the child's best interests is not necessarily

inconsistent with applying the endangerment standard and does not reflect a clear intent on her part to waive that standard."); *cf. In re Marriage of Stradtmann*, 2021 COA 145, ¶ 10 (holding a party is not required to object to the district court's oral rulings to preserve an appellate contention). We thus turn to the merits of father's claim.

C. The District Court Did Not Restrict Father's Parenting Time Rights

¶ 15 The gravamen of this dispute is whether a purely quantitative reduction in parenting time can constitute a restriction of parenting time rights under section 14-10-129(1)(b)(I).

¶ 16 Father relies heavily on *In re Marriage of West*, 94 P.3d 1248 (Colo. App. 2004), in which a division of this court opined that "determining whether to apply the best interests standard or the endangerment standard may involve inquiry into both the quantitative and the qualitative aspects of the proposed change to parenting time, as well as the reason or reasons advanced for the change." *Id.* at 1251. Father relies on this language to support his contention that a nearly one-third reduction in his parenting time amounts to a restriction of parenting time rights. We disagree.

¶ 17 To start, *West* did not actually find a purely quantitative reduction in parenting time to be a restriction. Indeed, the division concluded that the reduction of a parent's summer parenting time from eight weeks to six weeks "does not constitute a restriction for the purposes of applying the endangerment test under section 14-10-129(1)(b)(I)." *West*, 94 P.3d at 1251. Thus, the division in *West* held that the court applied the proper standard — i.e., the best interests of the child — to the motion to modify parenting time.

¶ 18 We acknowledge that the reduction in father's parenting time is more substantial than the reduction in *West*. We further acknowledge that *West* contains language suggesting that a purely quantitative change, if substantial enough, could amount to a restriction implicating the endangerment standard. To the extent *West* supports such a conclusion, we disagree for several reasons. *See Chavez v. Chavez*, 2020 COA 70, ¶ 13 ("[W]hile a division may defer to the determination of another division, divisions are not bound by the decisions of other divisions . . . .").

¶ 19 First, to the extent the division in *West* suggested a quantitative reduction alone may amount to a parenting time rights restriction, the language is arguably dicta. As noted, the division

ultimately decided that the reduction in that case was not substantial and thus applied the best interests standard. *West*, 94 P.3d at 1251. Indeed, the division itself stated, "[W]e need decide only which standard applies to a purely quantitative change, *and one of relatively limited magnitude*." *Id.* (emphasis added). In light of this narrow characterization of its decision, it does not appear that the division needed to address the impact of a hypothetical more substantial reduction.

¶ 20 Second, *West* did not address language in section 14-10-129(2) that would be rendered superfluous under *West*'s suggested test. This subsection discusses the court's ability to modify an order concerning parenting time 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*." § 14-10-129(2) (emphasis added).[3] The statute provides that the court shall not make such a modification unless one of four conditions is met: (1) the parties agree to the modification; (2) the

[3] The General Assembly originally adopted this language in 1998. Ch. 310, sec. 15, § 14-10-129(2), 1998 Colo. Sess. Laws 1387. The language was in effect at the time of *In re Marriage of West*, 94 P.3d 1248 (Colo. App. 2004), and remains unchanged today.

nonmoving party has consented to the child's integration into the moving party's family; (3) the primary residential parent is relocating to a residence that substantially changes the geographical ties between the child and the other parent; or (4) "[t]he child's present environment endangers the child's physical health or significantly impairs the child's emotional development." § 14-10-129(2)(a)-(d).

¶ 21 Under subsection (2), absent one of the other preconditions, before a proposed substantial reduction in parenting time is subject to the endangerment standard, the proposed modification must also change the primary residential parent. But father argues, and construes *West* as supporting, that under subsection (1)(b), the endangerment standard applies *even if the primary residential parent is not changing.* If father were correct, and a party whose parenting time was substantially reduced could invoke the endangerment standard in subsection (1) regardless of whether there was also a change in the primary residential parent, there would be no need for the endangerment standard to be included in subsection (2). We do not construe statutes in such a way as to make other language within the same statute superfluous. *In re*

Parental Responsibilities Concerning S.Z.S., 2022 COA 105, ¶ 32; *see also In re Marriage of Ikeler*, 161 P.3d 663, 666-67 (Colo. 2007) ("To reasonably effectuate the General Assembly's intent . . . a statute must be read and considered as a whole. We will interpret a statute to give consistent, harmonious, and sensible effect to all its parts.") (citation omitted).

¶ 22 Next, we observe that father's position provides both trial and appellate courts with no clear answer as to when to apply the endangerment standard and when not to. What is the governing principle? How substantial must a change be? Is it to be determined by percentage of change, the number of overnights lost, or perhaps simply a threshold below which the number of overnights cannot drop? And, most importantly, what is the statutory basis on which this line is to be drawn?

¶ 23 Finally, the *West* division looked to Minnesota and Missouri for guidance in interpreting Colorado's statute. *See West*, 94 P.3d at 1251. And, like the division in *West*, we acknowledge that the General Assembly directs us to construe our statute "as to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact [the

Uniform Dissolution of Marriage Act]." § 14-10-104(1), C.R.S. 2024; *West*, 94 P.3d at 1251. But, notwithstanding the *West* division's characterization of the language in those states' statutes as "similar," we note that the Minnesota statute speaks in terms of restricting "parenting time," not "parenting time rights." Minn. Stat. § 518.175 subdiv. 5(c) (2024).

¶ 24 Moreover, the Minnesota and Missouri statutes are dissimilar in a very significant way: neither of those states has language that parallels Colorado's application of the endangerment standard to a substantial modification of parenting time *that also changes the primary residential parent*.[4] *See* Minn. Stat. § 518.175; Mo. Rev. Stat. § 452.400 (2024). Thus, when considered in conjunction with Colorado's modification of parenting time language, neither of these states provides persuasive guidance as to what constitutes a restriction on parenting time rights under section 14-10-129(1)(b)(I). And we are unaware of any state *other than* Minnesota and Missouri in which an appellate court has concluded that a quantitative reduction alone constitutes a restriction on parenting time rights.

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[4] In fact, we have not identified any other state with similar statutory language.

¶ 25 To the contrary, as the division in *West* observed, "[m]ost of the cases that address 'restrictions' in visitation involve outright denial of visitation or require supervised visitation." *West*, 94 P.3d at 1251. At least one other division of this court has taken the same approach, holding that an order prohibiting a parent from using marijuana while parenting was not a restriction of parenting time rights under section 14-10-129(1)(b)(I) because it did "not present a qualitative change in the nature of [the parent's] parenting time." *In re Marriage of Parr*, 240 P.3d 509, 511 (Colo. App. 2010).

¶ 26 This approach is consistent with that of other states that have limited the concept of restriction to qualitative limitations on the manner or location in which the parent exercises their parenting time.

¶ 27 For example, Arizona has language similar to section 14-10-129(1)(b):

> The court may modify an order granting or denying parenting time rights whenever modification would serve the best interest of the child, but the court shall not restrict a parent's parenting time rights unless it finds that parenting time would endanger seriously

> the child's physical, mental, moral or emotional health.

Ariz. Rev. Stat. Ann. § 25-411(J) (2024). This language has been interpreted not to apply to a reduction in parenting *time*; instead, it refers "to the court's power to place conditions on how a parent may exercise [their] 'parenting time *rights*' . . . , such as by limiting the manner that parenting time is exercised." *Gonzalez-Gunter v. Gunter*, 471 P.3d 1024, 1027 (Ariz. Ct. App. 2020).

¶ 28 Similarly, in Mississippi, the concept of restriction is narrowed to things like requiring parenting time to be supervised, limiting parenting time to a prescribed location, or outright denial of overnight visitation. *Fulton v. Fulton*, 918 So. 2d 877, 881 (Miss. Ct. App. 2006).

¶ 29 There is an important reason to limit the application of the endangerment standard to orders seeking to control or limit the manner, location, or environment in which a parent exercises parenting time as opposed to simply the allocation of parenting time between parents. The allocation of parenting time between parents involves a balancing of myriad factors including, among other things, the age of the child, the schedules of the parents and the

child, the distance between the parents' homes, the needs of the child, the relationship of the child with each parent, and the relationship between the parents. *See* § 14-10-124(1.5)(a). A district court needs flexibility to conduct this balancing to achieve an outcome that is best for the child.

¶ 30 Here, for example, father's change in his employment situation (having to return to in-office work in a county nearly two hours away from the child's primary residence) — along with the fact that the child would soon be starting school — made the existing plan unworkable. It could not stay the same. If, as here, the court determines that, given all the appropriate considerations, a near-equal parenting arrangement is not in the best interests of the child, it must have the flexibility to craft a plan that will serve the child's needs. Otherwise, the court would be prevented from implementing a schedule that is beneficial to the child merely because the need for the change is rooted not in endangerment but, instead, in new life circumstances. That simply cannot be the intent of the General Assembly.

¶ 31 The division of parenting time between the parents is a matter of identifying the best interests of the child. *See* § 14-10-124(1.5).

The imposition of restrictions on how one or both parents engage in their parenting time is another matter altogether. For such restrictions to be imposed, it makes sense to require a higher burden.

¶ 32 For these reasons, we conclude that a purely quantitative reduction in a parent's parenting time is not a restriction on that parent's parenting time rights under section 14-10-129(1)(b)(1).[5] Rather, a restriction on a parent's parenting time rights means an order imposing a qualitative control over the manner, location, or environment in which the parent engages in parenting time, such as a requirement that parenting time be supervised, a prohibition of overnight visits with a particular parent, or a limitation on the location where a parent may exercise parenting time.

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[5] We recognize that, under our reading of the statute, a court could, at least in theory, reduce a parent's parenting time from 180 overnights to a single overnight without being required to find endangerment. We note first that it would be difficult to imagine a scenario in which such a change would be in the best interests of the child absent facts that would demonstrate endangerment. In any event, if the General Assembly wishes to establish some threshold of purely quantitative change that would require more than merely being in the child's best interests, it is of course free to do so.

¶ 33 Because the district court's parenting time plan did not impose any such restrictions, the endangerment standard was inapplicable. Instead, the court was required to consider the best interests of the child, which it did. Father does not challenge the court's resolution of those factors. Accordingly, we discern no error.

III. Appellate Attorney Fees

¶ 34 Mother requests attorney fees under C.A.R. 38. An appellate court may award attorney fees if it finds an appeal is frivolous. C.A.R. 38(b). "A claim is frivolous if 'the proponent can present no rational argument based on the evidence or law in support of that claim.'" *Francis v. Camel Point Ranch, Inc.*, 2019 COA 108M, ¶ 18 (citation omitted). "Standards for determining whether an appeal is frivolous should be directed toward penalizing egregious conduct . . . ." *SG Ints. I, Ltd. v. Kolbenschlag*, 2019 COA 115, ¶ 42 (citation omitted).

¶ 35 Although ultimately unpersuasive, father presented a rational appellate argument when he contended that the court's reduction of his parenting time amounted to a restriction. *See, e.g.*, *West*, 94

P.3d at 1251. Therefore, the appeal was not frivolous, and we deny the request for attorney fees.[6]

IV. Disposition

¶ 36 The district court's order is affirmed.

JUDGE DUNN and JUDGE GRAHAM concur.

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[6] Some of mother's arguments for attorney fees appear more suited to a claim of vexatiousness, rather than frivolousness. We do not address any such claim, however, as it is not specifically asserted.