

Family Law Update

2009-2010

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1. SEPARATION AND OTHER MARITAL AGREEMENTS

No 2009-2010 Cases to date.

2. DISPOSITION OF PROPERTY

A. VALUATION

In re the Marriage of Thornhill, 200 P.3d 1083 (Colo. App. Aug. 21, 2008); petition for cert. denied, cross petition for cert. granted (Feb. 17, 2009)

*Trial Court: Judge Flynn, Mesa County; Opinion by Judge Terry
(Rothenberg and Hawthorne JJ. concur)*

Wife appeals, arguing that the parties' separation agreement was unconscionable, that the court erred when it applied a marketability discount to the valuation of Husband's closely-held business; Husband cross-appeals, contending the court erred when it ordered temporary maintenance for Wife.

Parties to a marriage may enter into **separation agreements**, and the provisions of separation agreements are binding upon the court unless they are found to be unconscionable. C.R.S. 14-10-112(1) & (2). When reviewing for conscionability, the court must first "review the provisions for fraud, overreaching, concealment of assets, or sharp dealing not consistent with obligations of marital partners to deal fairly with each other." Regardless of the answer to question one, the court must then review the agreement to determine whether it is "fair, just and reasonable" by looking at the economic circumstances of the parties according to the agreement.

In this case, the Court found that the agreement was unconscionable because Wife was not represented when the agreement was negotiated and signed; Wife's father, who aided in the negotiation of the agreement, was also the Chief Financial Officer of Husband's business, thus he was conflicted between assisting Wife and attempting to preserve the business assets; and Wife testified to a lack of mathematical ability, reliance upon her father's advice, and a lack of understanding of the value of the marital assets. Moreover, the intent of the agreement was to divide the marital assets equally, yet Wife was to receive her half of the assets over a period of ten years, without interest, thus the present value of Wife's interest was considerably less than one-half of the marital assets. Though the court did not find fraud, overreaching or sharp dealing, the court held that the property distribution was not "fair, just and reasonable," and must be vacated.

With regard to **temporary maintenance**, the court stated that magistrate's awards of temporary maintenance are appealable under C.R.M. 7(a). As a threshold question

whether maintenance is applicable, the spouse seeking maintenance must (1) lack sufficient property, including marital property, to provide for his/her own needs; and (2) be unable to support himself/herself through appropriate employment. C.R.S. §14-10-114(3). If the spouse meets this test, then the spouse is entitled to maintenance. Only after the threshold determination for entitlement to maintenance has been met does maintenance of the parties' lifestyle become relevant.

With regard to Husband's majority shareholder interest in a **closely-held business**, the court appropriately applied a marketability discount to the value of Husband's interest. Marketability discounts are applied in valuing closely held businesses in dissolution of marriage cases because such stock is less marketable than publicly traded stock, and in dissolution cases, courts act as courts of equity, thus they should have discretion to apply a discount.

Since the property division was vacated, and property division, maintenance and attorney fees are inextricably intertwined, the court must reconsider all three of these issues upon remand.

On February 17, 2009, the Supreme Court denied the petition for writ of certiorari, but granted the cross-petition for writ of certiorari on the following issues: (1) Whether the appellate court erred by refusing to extend the holding of Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353 (Colo. 2003), to divorce proceedings, thereby allowing the application of a marketability discount in valuing a closely held corporation operated as a going concern at the time of the parties' divorce proceeding; and (2) Whether the court of appeals erred by reversing the district court's ruling, which upheld the magistrate's temporary maintenance award to wife, when it failed to consider the particular facts and circumstances of the parties' marriage within section 14-10-113(3)'s threshold requirements of "reasonable needs" and "appropriate employment."

B. DEFINING PROPERTY

In re the Marriage of Powell, 220 P.3d 952 (Colo. App. Feb. 5, 2009) cert. denied (Dec. 14, 2009)

Trial Court: Judge Klein, Boulder County; Opinion by Judge Roy (Taubman and Terry concur)

Husband appeals from permanent orders related to property division, including stock options and an IRA, maintenance, and attorney fees. The parties married on September 23, 2000. Wife was granted stock options on February 27, 2001, for the previous calendar year February 1 through January 31. Wife's 2001 options allowed her to purchase 11,494 shares, with a certain number of shares vesting each February for the four subsequent years.

First, the court had to determine whether the 2001 options, prorated from the start of the fiscal year (Feb. 2000) to the day before the marriage (Sept. 22, 2000), and granted to Wife on February 27, 2001, are marital or separate property. Wife testified that these

options were earned prior to the marriage, thus are separate property, while Husband testified that the 2001 options were granted for future services, thus are marital property. An “employee stock option is a contractual right to purchase stock during a specified period at a predetermined price.” In re the Marriage of Miller, 915 P.2d 1314 (Colo. 1996). But an “employee stock option constitutes property for purposes of dissolution proceedings only when the employee has an enforceable right to the options.” In re the Marriage of Balanson, 25 P.3d 28 (Colo. 2001). The trial court found that most of the 2001 options were awarded for work prior to the marriage, and thus were Wife’s separate property. But the court of appeals found that Wife only had a mere expectancy in the 2001 options, not an enforceable property right, until February 27, 2001. Thus the stock options were marital property in their entirety. Since the stock options all vested and expired, the property division must be vacated and remanded.

With regard to the **valuation of Wife’s IRA**, Husband argues that the court should have determined the marital portion based upon increased values of individual securities within the IRA, instead of a change in the entire gross value of the IRA. According to In re the Marriage of Burford, the amount of increase in *each* asset should be added together, while any asset that decreases in value should be disregarded. 950 P.2d 682, 685 (Colo. App. 1997). Though Husband and Wife each valued the marital portion of Wife’s IRA as the total value of the IRA at the end of the marriage less the total value at the beginning of the marriage, Wife also called an expert who valued each investment within the IRA. Though Wife’s expert’s interpretation would have resulted in an increase in marital property to Husband, the court did not consider it an abuse of discretion not to accept this position.

With regard to the remaining property issues, the court found that while a trial court must consider all relevant factors, pursuant to C.R.S. 14-10-113(1) to achieve an equitable property distribution, the court does not have to make specific findings as to each factor, so long as the findings are supported by competent evidence. The fact that Wife received 60% of the marital home, which belonged solely to Husband prior to his causing title to be placed in both spouses’ names, was still an equitable distribution of property. The court did remand the property distribution regarding two vehicles purchases by Husband, and several World Savings Accounts to review all expenditures and accounts and to treat them all consistently.

Since the property division was vacated, the court must reconsider maintenance and attorney fees upon remand.

In re the Marriage of Obremski and Williamson, 205 P.3d 538
(Colo. App. Feb. 19, 2009)

Trial Court: Judge Warner, Adams County; Opinion by Judge Graham (Bernard and Booras concur)

Wife appeals from an order denying her request to divide Husband's **Temporary Disability Retired List (TDRL) military benefits** under a provision of the permanent orders. Pursuant to the permanent orders in 2001, Husband's "pension/retirement benefits" shall be divided evenly. In March 2007, when Husband had sixteen years of military service, he was put on the TDRL with a 30% disability. Husband's active duty pay of \$5400 per month was replaced with \$1629 per month in TDRL benefits. Husband sought to modify child support, while Wife sought to divide Husband's TDRL benefits pursuant to permanent orders, as she contends they are retirement benefits.

Military retirement benefits are generally distributable as marital property under the Uniformed Services Former Spouses' Protection Act (USFSPA). But retirement benefits exclude disability pay. To be placed on TDRL, a military member has at least a disability rating of at least 30%, and it is determine that the disability may be permanent. A member may remain on TDRL for up to five years, at which point they must (1) return to active duty; (2) permanently retire for longevity (20 years of service, not including time on TDRL); or (3) permanently retire for disability.

Though there is no Colorado law directly on point, the court looked to In re the Marriage of Franz, 831 P.2d 917 (Colo. App. 1992), which found that all of a military member's pay that is "based and computed on" the member's disability is excluded from division as marital property.

In this case, Husband did not have 20 years of service with the military. As such, he was ineligible for any military retirement benefits apart from his disability. Therefore the court found that **all of Husband's TDRL benefits are based on his disability, and not divisible as marital property.**

Husband's request for attorney fees under C.A.R. 38(d) are denied because Wife's appeal was not frivolous, but the court remanded the request for fees under C.R.S. §14-10-119, as the trial court would be better equipped to evaluate current financial resources of the parties.

C. DIVIDING PROPERTY

No 2009-2010 Cases to date.

D. ENFORCEMENT OF ORDERS

No 2009-2010 Cases to date.

3. MAINTENANCE

No 2009-2010 Cases to date.

4. CHILD SUPPORT

A. CHILD SUPPORT DETERMINATION/ MODIFICATION

In re the Marriage of Anthony-Guillar and Guillar,* **207 P.3d 934 (Colo. App. Mar. 19, 2009)*

*Trial Court: Judge Gresh, Douglas County; Opinion by Judge Bernard
(Dailey and Jones JJ. concur)*

Mother appeals from the magistrate's order crediting Father with overpaying of child support, reducing child support arrearages, and sanctioning Mother for failure to disclose income. Mother alleges that Father was in contempt for failure to pay child support. Mother presented evidence that she was disabled; Father presented evidence that Mother received Social Security checks for her disability, which included a benefit on behalf of the child because of Mother's disability. The magistrate found that the **Social Security Disability payment** received for the child should be included in mother's income for child support purposes. After review of the magistrate's order pursuant to C.R.M. 7(a), and on remand, the magistrate found that the disability payments were the child's income, and as such reduced the child's need for support. The magistrate also found that Mother failed to disclose the disability payments, and awarded attorney fees to Father.

The court went through an extensive review of the legislative history of the child support statute to determine whether disability benefits received by the parent, and disability benefits for a child as a result of parent's disability, but actually received by a parent as a representative payee for the child, are includable in the parent's income or the child's income, and what effect the benefits may have on child support. C.R.S. §14-10-115(5)(a)(I)(P) provides that gross income includes social security benefits received by a parent as a result of a disability. Social security benefits received by a minor child as a result of disability or death of a stepparent are not included as income of the child. See C.R.S. §14-10-115(5)(a)(II)(D). The statute does not provide explanation regarding treatment of social security benefits received by a child as a result of a *parent's disability*.

But if a custodial parent receives disability payments on behalf of dependent children due to a disability of the noncustodial parent, the noncustodial parent's child support obligation should be reduced in an amount equal to the benefits.

In this case, Mother received Social Security disability benefits. She also was a representative payee, and received social security benefits on behalf of the child because of Mother's disability. The court determined that **benefits "actually received" refers to a parent's disability benefits, not to benefits that a disabled parent receives on behalf of a child.** Thus the child's disability payments should not be included in Mother's gross income, but are income to the child. The trial court is not bound to deduct the entire amount of the child's disability benefits income from the child support obligation.

The court did err when it determined that Mother's failure to disclose receipt of disability benefits justified a reduction in the child support arrearages. If a court reduces arrearages because of a parent's misconduct, the court must first determine whether the reduction will damage the child's interests. The court here did not consider the best interests of the children before it reduced the arrearages. Also, the court erred when it awarded attorney fees under C.R.S. §14-10-119 for the "mother's deceit," rather than adhere to C.R.S. §14-10-119's purpose of awarding fees to equalize the parties' financial positions.

**People in the Interest of S.E.G., Upon the Petition of the
Denver Dept. of Human Services and Concerning S.R.S.G.,
213 P.3d 1033 (Colo. App. May 14, 2009)**

Trial Court: Judge Schmalberger, Denver County; Opinion by Judge Lichtenstein (Taubman and Ruland, JJ. concur)

The Department of Human Services appeals the juvenile court's order denying its C.R.C.P. 60(b) motion to set aside the dismissal of a child support case based upon the court's finding that since the parties were married and paternity was not contested, the district court, rather than the juvenile court had subject matter jurisdiction over the child support case. Child Support Enforcement initiated this action in juvenile court to establish child support and medical insurance for S.E.G. (child). Mother filed a subsequent motion for emergency custody, but after a hearing, the juvenile court dismissed the action based upon a lack of subject matter jurisdiction. The Department filed a C.R.C.P. 60(b) motion contending that, among other things, neither party had pursued a dissolution of marriage, and the juvenile court had concurrent jurisdiction to enter child support order and allocations of parental responsibilities.

The Court of Appeals agreed with the Department that the **juvenile court has exclusive original jurisdiction over the issuance of orders of support** under Article 6 of the Children's Code. See C.R.S. §19-6-101(1)(a). Further, Article 6 provides that the court has authority to enter orders allocating parental responsibilities in connection with a child support proceeding. Finally the Court reiterated that marital status is irrelevant and not a restriction on jurisdiction. Thus, the juvenile court erred as a matter of law

when it dismissed the child support case for a lack of subject matter jurisdiction. The case is remanded to the juvenile court, if no subsequent dissolution of marriage has been filed.

In re the Parental Responsibilities of M.G.C.-G., Cabello and Gomez, No. 08CA1118, 2010 WL 547629
(Colo. App. Feb. 18, 2010)

Trial Court: Judge Lowry, El Paso County; Opinion by Judge Casebolt (Gabriel and Booras, JJ. concur)

Mother appeals the court's order denying her motion to modify child support. In 2003, Mother filed a motion to relocate with the child. Father objected. Prior to a hearing on this matter, the parties agreed that Father would withdraw his objection and allow Mother to move, and that Mother would accept child support of \$500 per month from Father. This agreement became an order of the court. Four years after the relocation, Mother filed a motion to modify child support. Father objected, stating that the 2003 agreement was entered in exchange for mother's relocation and therefore modification should not be permitted. The trial court calculated and held that child support would have been between \$625-\$640 in 2003, had the parties not reached their own agreement. Pursuant to Mother's current motion to modify child support, child support would have been \$650. Therefore, the trial court denied the motion to modify as there was no evidence of a ten percent change in child support from "what [child support] *would have been* on October 29th, 2003 to today."

Pursuant to C.R.S. §14-10-122(1)(a), modification of an existing child support order may occur only upon a showing of changed circumstances that are substantial and continuing. A change is not substantial if it results in "less than a ten percent change in the amount of [child] support due per month." C.R.S. §14-10-122(1)(b). Both of these provisions apply to orders "currently in effect." At the time the motion to modify child support was considered, the only order currently in effect required Father to pay \$500 in child support. As such, the trial court's denial of Mother's motion to modify is reversed and remanded. Upon remand, the court of appeals reminded the trial court that it may consider the terms of the 2003 agreement between the parties in determining whether any deviation from the guidelines is warranted, even though there is a rebuttable presumption that a modification of child support must be granted when there is more than a ten percent change in the amount due.

B. ENFORCEMENT OF CHILD SUPPORT ORDERS

No 2009-2010 Cases to date.

5. ATTORNEY'S FEES

***In re the Marriage of Ensminger*, 209 P.3d 1163 (Colo. App. Dec. 11, 2008); petition for rehearing denied (Feb. 19, 2009); cert. denied (June 15, 2009)**

Trial Court: Judge Jackson, Jefferson County; Opinion by Judge Richman (Rothenberg and Lichtenstein, JJ. concur)

Wife's attorney appeals from the trial court's award of attorney fees against him stemming from his improper **subpoena of a non-party** in In re the Marriage of Ensminger, No. 07CA2290, 2008 WL 5173681 (Dec. 11, 2008). For a temporary orders hearing in a dissolution of marriage case, Wife's attorney subpoenaed a non-party to appear, give testimony and produce records. At the time, Wife's attorney was representing the same non-party's wife in a separate dissolution of marriage proceeding. The non-party's counsel moved to quash the subpoena and for attorney fees stating that the subpoena was defective and issued for harassment purposes. A hearing was held on the motion to quash and the magistrate quashed the subpoena because he failed to see the "relevancy of the information" sought from the non-party and granted attorney fees. In a separate order, the magistrate granted Husband's motion to disqualify Wife's attorney due to a personal relationship between Wife and Wife's attorney. In its order to disqualify Wife's attorney the court also stated that the subpoena was not issued in good faith, was an abuse of the judicial process, and that Wife's attorney "used the legal process to expand unnecessarily the scope of the dissolution of marriage." *Id.* at *1. Wife's attorney filed a petition for review under C.R.M. 7(a). The district court affirmed both the order to disqualify Wife's attorney and the award of attorney fees to a non-party's counsel.

Section 13-17-102(2), C.R.S., provides the court discretion to award attorney fees against any attorney or party who "brought or defended a civil action" that lacked substantial justification. The court chose not to determine whether the issuance of a subpoena is "part" of an action, but rather found that that the express language of C.R.S. §13-17-102(4) provides that attorney fees are available if an attorney brought or defended an action that lacked substantial justification, or that the action was pursued for delay or harassment, or if the court finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct including abuses of discovery procedures, as was the finding in this case. Attorney fees may be award to parties or non-parties.

Wife's attorney also contended that the court erred by awarding attorney fees without holding a hearing. The Court of Appeals held that a trial court does not need to hold a hearing, and that a party who fails to timely request a hearing, as Wife's Attorney failed to do, waives the right to a hearing.

6. ALLOCATION OF PARENTAL RESPONSIBILITIES

***In re the Marriage of Slowinski and Pagnozzi*, 199 P.3d 48 (Colo. App. Feb. 21, 2008); as modified on denial of rehearing (May 1, 2008); *cert. denied* (Colo. Jan. 20, 2009)**

Trial Court: Judge Wasserman, Adams County; Opinion by Judge Roy (Taubman and Terry concur)

Father appeals from, among other issues, orders restricting his parenting time. Mother filed a Motion to Restrict Father's Parenting Time under C.R.S. §14-10-129(4), alleging that the children were emotionally endangered by Father's disparaging behavior towards Mother. Eleven days later on June 14, 2004, the trial court, without a hearing, ordered that Father's parenting time be supervised under C.R.S. §14-10-129(4) and the matter will be set for a "forthwith" hearing. The court held several hearings from July 1, 2004 through October 11, 2004, during which Father had supervised parenting time only. On October 14, 2004, the Court granted Father unsupervised parenting time every other Saturday.

The court of appeals noted that the trial court had subsequently addressed the issues on appeal, thus making the issues moot, but the court may still consider "moot questions involving great public importance and issues capable of repetition but evading review."

C.R.S. §14-10-129(4) provides that a motion to restrict parenting time that alleges that a child is in imminent physical or emotional danger due to parenting time "shall be heard and ruled upon by the court not later than **seven days** after the day of filing the motion. Any parenting time which occurs during such seven-day period...shall be supervised." The immediate restriction protects the child, while the seven-day time limit protects a parent's constitutional right to the care, custody and control of their children. In sum, the court held that upon the filing of the motion pursuant to C.R.S. §14-10-129(4), supervised parenting time takes immediate effect and continues until the hearing, which is required to occur within seven days. If the hearing does not occur within seven days, supervised parenting time terminates under §14-10-129(4), though the Court may still proceed under C.R.S. §14-10-129(1)(b)(I). A hearing is required unless the allegations within the motion are "facially insufficient," meaning that if all the allegations were true, the circumstances could not give rise to the conclusion that the children are in imminent danger of physical or emotional injury.

A failure to adhere to the requirements of C.R.S. §14-10-129(4), as in this case, is a statutory violation, and the court must use a two-part test to determine whether such violation constitutes reversible error. Specifically, (1) whether the failure is an essential condition of the statute that may implicate due process, and (2) whether the party has been prejudiced. Here the seven-day limitation is an essential condition of the statute and Father's constitutional right to parent his children was restricted without the benefit of a hearing, therefore, due process implications arise. Finally several months of supervised parenting time certainly prejudiced Father.

A C.R.S. §14-10-129(4) motion does not require any third party verification. A party's own verification is sufficient. If a C.R.S. §14-10-129(4) motion is substantially frivolous, groundless or vexatious, the court is required to impose attorney fees pursuant to §14-10-129(5). Before imposing sanctions under C.R.S. §14-10-129(5), the court must hold a hearing and the hearing must be based upon a verified motion.

***In re the Parental Responsibilities of Reese, No. 08CA2428,*
2010 WL 376432 (Colo. App. Feb. 4, 2010)**

Trial Court: Judge Goodbee, Adams County; Opinion by Judge Carparelli (Casebolt and Richman concur)

Adoptive mother appeals from an order awarding sole decision-making authority and majority parenting time to petitioners.

Mother began caring for E.B.H., the biological child of her husband's cousin, soon after the child was born. Petitioners offered to assist her in caring for the child. Petitioners' care gradually increased until the child was living with them full time and had only minimal contact with mother. Nonetheless, mother adopted the child. Petitioners eventually filed a petition for allocation of parental responsibilities pursuant to C.R.S. §14-10-123. The trial court found it was in the child's best interest to grant petitioners sole decision-making responsibility and nearly all parenting time.

C.R.S §14-10-123 permits a non-parent to petition for allocation of parental responsibilities. When a non-parent has standing under C.R.S §14-10-123, the court has statutory authority to allocate parental responsibilities based on the best interests of the child. Nevertheless, the Supreme Court has consistently held that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57 (2000).

The Court found that the "special factors" and "special weight" requirements of Troxel are equally applicable in the context of non-parent petitions under C.R.S. §14-10-123. The Court concluded that when a non-parent seeks an allocation of parental responsibilities contrary to the wishes of a parent, the court may not allocate parental responsibilities to the non-parent unless it complies with the Troxel requirement to accord "special weight" to the parent's determination of the best interests of the child. To do so, a court must consider all relevant factors including those listed in C.R.S. §14-10-124(1.5)(a) and (b). In addition, the court may allocate parental responsibilities to the non-parent only if it enters findings based on clear and convincing proof that the best interests of the child justify such an allocation.

The Court held that explicit application of the clear and convincing standard of proof is necessary to accord special weight to the parent's determination of the child's best interests and therefore, a parent's liberty interest in the care, custody, and control of his

or her child is not infringed when the parent's determination regarding the best interests of the child is overcome by clear and convincing proof of relevant factors and the court's determination of the best interests of the child. Further, the Court rejected mother's contention that in accordance with Ciesluk, "in the absence of demonstrated harm to the child, the best interests of the child standard is insufficient to serve as a compelling state interest overruling the parents' fundamental rights." Ciesluk, 113 P.3d 135 (Colo. 2005).

Although the court found that the petitioners had "more than established by clear and convincing evidence as a matter of fact that they are psychological parents to this child," this finding was not sufficient to gain parental rights. Instead, this finding only determined that the petitioners had standing to seek parental responsibilities under the statute. A court must make its allocation of parental responsibilities based on clear and convincing evidence. The trial court failed to do so. The Court remanded the case for a determination of whether the petitioners met their burden of proving by clear and convincing evidence that allocation of parental responsibilities to them was in the best interests of the child.

7. GUARDIANS, SPECIAL ADVOCATES, AND CHILD REPRESENTATIVES

***Sidman v. Sidman*, No. 08CA2454, 2009 WL 3465724 (Colo. App. Oct. 29, 2009); cert. granted (Nov. 9, 2009)**

Trial Court: Judge Kennedy, El Paso County; Opinion by Judge Rovira (Casebolt and Kapelke, JJ. concur)

The Permanent Guardians appeal from the district court's orders that their income, and capital gains, should be included in the child support calculation owed by the child's parents, and from the order that the Guardians should travel with the child to Massachusetts, at their own expense, to allow parenting time with the parents.

The Court found that C.R.S. §14-10-115, relied upon by the trial court, does not mention a **guardian's duty of support**. According to the plain language of C.R.S. §14-10-115, only the parents' income can be included in the determination of child support. This conclusion is supported by C.R.S. §15-14-209(2), which provides that "A guardian need not use the guardian's personal funds for the ward's expenses," and various case law. See In re the Marriage of Conradson, 604 P.2d 701 (Colo. 1979) (C.R.S. §14-10-115 does not include the financial resources of nonparents with whom the child is living); In re J.C.T., 176 P.3d 726 (Colo. 2007) (the guardian typically does not provide the financial resources to support the child).

With regard to travel, the court found that C.R.S. §14-10-115(11)(a)(II) provides that any expenses for transportation "shall be divided between the parents in proportion to their adjusted gross income." Thus again, according to the plain language of the statute, the

parents, rather than the guardians, shall be responsible for any transportation costs. As such the orders are reversed and the case is remanded.

The Supreme Court granted certiorari as to the following issues:

- (1) Whether a parent relinquishes his or her fundamental liberty interest in the care, custody, and control of his or her child by consenting to guardianship.
- (2) Whether it was error to place the burden upon parents to prove, by a preponderance of the evidence, that termination of non-parents' guardianship would be in the best interests of minor child, where parents originally consented to the guardianship.

8. PROCEDURAL AND EVIDENTIARY MATTERS

In re the Marriage of Roberts, Schelp and Barnett, No. 08SC748, 08SC749, 08SC887, 2010 WL 1006694 (Colo. Mar. 22, 2010)

Opinion by Justice Bender;

IRM Roberts: Trial Court: Judge Sandstead, Boulder County; Opinion by Judge Rothenberg (Carparelli and Bernard, JJ. concur)

IRM Schelp: Trial Court: Judge Metzger, Arapahoe County; Opinion by Judge Rothenberg (Bernard, J. concurs; Rovira, J. concurs and dissents)

In these consolidated cases, the petitions for dissolution or legal separation were all filed before the new effective date of C.R.C.P. 16.2, January 1, 2005. After the trial court entered decrees of dissolution, the Wife in each case filed post-decree motions to set aside the trial court's property divisions, alleging that the Husband's financial disclosures contained misstatements or omissions of value. The Wives all alleged that the trial courts had jurisdiction under C.R.C.P. 16.2(10) because they filed post-decree motions after the effective date of the rule.

In Roberts, Husband filed for dissolution in November 2004, and the Court entered the decree of dissolution in September 2005. According to Husband's financial affidavit, Husband's interest in one of his businesses was valued at \$663,000 and the value of the stock was \$0. In January 2007, Wife filed a post-decree motion to set aside the separation agreement, pursuant to C.R.C.P. 16.2(e)(10), alleging that documents filed with the SEC demonstrated that Husband's stock had a minimum value of \$20 million.

In Schelp, Husband filed for legal separation in April 2003, and the court dissolved the marriage in May 2004. The trial court ordered the parties to share Husband's pension equally. Husband originally represented that the premarital portion of his pension amounted to 23 days, but then subsequently disclosed that his premarital interest was based upon 12.5 years of work before the marriage. In April 2005, Wife filed a motion to reopen the permanent orders pursuant to C.R.C.P. 16.2(e)(10) because of this change in disclosure.

In Barnett, Wife filed for dissolution on October 2002 and their marriage was dissolved in March 2003. The Court ordered that Wife would receive a fixed sum from Husband's pension and Husband would retain his pension. Wife filed a post-decree motion in June 2005 to reopen the property division, alleging that Husband failed to disclose a second pension.

Prior to January 1, 2005, C.R.C.P. 60(b) permitted the trial court to retain jurisdiction for a period of six months after a decree was entered to provide relief due to omissions or misstatements in financial disclosures. C.R.C.P. 16.2 was repealed, amended and then readopted on September 30, 2004, "effective for Domestic Relations Cases ... filed on or after January 1, 2005 and for post-decree motions filed on or after January 1, 2005." Under the new C.R.C.P. 16.2(10), the trial court retains jurisdiction for five years after the decree or judgment has been entered when a party omits or misstates material assets in his or her financial disclosures.

The Supreme Court found that the five-year retention of jurisdiction provision applies to the five years after the entry of any decree or judgment, and only to financial disclosures that fail to comply with the heightened duties established under the new C.R.C.P. 16.2 for resolving new cases or new post-decree motions filed after January 1, 2005. The Court determined that in cases where the new disclosure duties did not apply, the five-year retention provision also does not apply.

The Supreme Court reversed the three Court of Appeals' decisions, and held that "C.R.C.P. 16.2 does not allow the trial court to retain jurisdiction to modify property divisions based upon disclosures made pursuant to petitions for dissolution that were filed before the effective date of the new rule (January 1, 2005)."

***In re the Parental Responsibilities Concerning L.S., and
Concerning McNamara and Spotanski, No. 08CA1872, 2009
WL 3297572 (Colo. App. Oct. 15, 2009);
cert. granted (Mar. 15, 2010)***

*Trial Court: Judge Peterson, La Plata County; Opinion by Judge Connelly
(Russel, and Sternberg, JJ. concur)*

In this case regarding **jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")**, Colorado and Nebraska were exercising simultaneous jurisdiction and issuing contrary orders. The parties resided in Colorado, then separated; Mother stayed in Colorado and Father moved to Nebraska. After a summertime visit with the child in Nebraska, Father refused to return the child. In November 2004, Father filed a legal separation action in Nebraska. Both parties

appeared with counsel. Nebraska found that it had jurisdiction over the matter and granted Mother temporary care of the child because Father violated a previously signed agreement between the parties that all custody matters should be resolved in Colorado since the child resided there. In September 2006, Nebraska issued final orders, which made no reference to the home state of the child, but found that Nebraska had jurisdiction over both parties and the subject matter, and awarded custody of the child to Father. Despite this Order, the child continued to reside with Mother in Colorado.

In late 2006, Mother filed her second dissolution of marriage case in Colorado (the first was dismissed in January 2005 because Nebraska had jurisdiction.) In December 2006, Colorado held that it was the home state of the child under UCCJEA and declined to enforce Nebraska's final orders of September 2006. Mother also filed a motion to dismiss the Nebraska action for lack of jurisdiction pursuant to the UCCJEA. In April 2007, Nebraska held that it did have jurisdiction because Mother voluntarily submitted the issue of custody to the Nebraska court and did not raise the issue of UCCJEA jurisdiction until after the court's final orders.

The UCCJEA prioritizes "home state" jurisdiction, jurisdiction in the state in which the child resides for at least six consecutive months. C.R.S. 14-13-201(1)(a); C.R.S. §14-13-102(7)(a). If home state jurisdiction does not apply, then UCCJEA provides jurisdiction to the state that has significant connections to the child. C.R.S. §14-13-201(1)(b). The Constitution demands that states give full faith and credit to other states' orders.

In reviewing the Nebraska Order of April 2007, first, Colorado found that the mere fact that Wife voluntarily submitted the issue of custody to the court and did not raise the issue of jurisdiction until after the final orders was not a basis for Nebraska to find that it had jurisdiction. The UCCJEA addresses subject matter jurisdiction, which cannot be conferred by consent or waiver, and its questions of its existence can be raised at any time. With regard to the second finding, Colorado found that Nebraska properly exercised UCCJEA jurisdiction because Colorado had declined jurisdiction and Nebraska had significant connections. Colorado held that it must respect this jurisdictional ruling because jurisdiction was based upon a ground recognized by the UCCJEA, even though it was based upon factually inaccuracies.

To prevent injustice, Colorado suggests that the Colorado District Court communicate with the Nebraska District Court to determine if Nebraska is "willing to reconsider its jurisdictional and substantive orders." If Nebraska relinquishes jurisdiction, then Colorado may proceed with exclusive jurisdiction; if not, Colorado must respect Nebraska's rulings.

Certiorari was granted on March 15, 2010, for the following issue: Whether the court of appeals misinterpreted the Parental Kidnapping Protection Act, the statutory embodiment of the full-faith-and-credit clause of the United States Constitution, thereby erring in its determination that a "Colorado court must respect and enforce the prior Nebraska orders."

**People in the Interest of E.D., M.D., and A.D., and
Concerning S.D. and M.D., No. 09CA0576, 2009 WL 3465316
(Colo. App. Oct. 29, 2009)**

*Trial Court: Judge Fasing, Arapahoe County; Opinion by Judge Furman
(Loeb, and Booras, JJ. concur)*

The children in a dependency and neglect case, through the guardian ad litem, appeal the order dismissing the Department of Human Services (“Department”) and keeping the case open under the supervision of the guardian ad litem. At an allocation of parental responsibilities hearing, the Department moved to dismiss the case, as the parents were doing what was requested of them, there were no longer protective issues, and the Department was no longer providing any services. The guardian ad litem wanted testimony from a teacher at school, but the court accepted the guardian ad litem’s statements about the teacher’s concerns as offers of proof. The Court dismissed the case but kept it open under the supervision of the guardian ad litem.

Since the court did not restrict the guardian’s offer of proof, and the guardian did not believe there was additional evidence that the teacher would have provided beyond the offers of proof, the court did not abuse its discretion by proceeding with offers of proof rather than testimony at the allocation of parental responsibilities hearing.

Since the evidence supported the Department’s dismissal of the case, the court did not reverse this decision.

The court did find that keeping the **case open under the supervision of the guardian ad litem** was not proper. Title 19 provides courts with juvenile jurisdiction authority to keep cases open “under protective supervision.” Protective supervision allows children to remain in their homes when supervision and assistance are provided by the court, the department of human services, or other agencies designated by the court. A guardian ad litem cannot provide that supervision in lieu of an “agency.” The guardian ad litem is an attorney at law who gives children a voice in the legal system. Thus leaving a case open under a guardian would have intruded on a parent’s constitutional right to the care, custody and control of their children.

9. PROFESSIONAL NEGLIGENCE

**In the Matter of Fisher, 202 P.3d 1186
(Colo. App. Feb. 9, 2009); rehearing denied (Mar. 2, 2009)**

Opinion by Justice Martinez; Eid, Mullarkey, Rice, JJ., dissents

Attorney appeals from the attorney discipline Hearing Board’s numerous findings of violations of the Rules of Professional Conduct for his representation of Wife in her

dissolution of marriage action. Wife sought representation from Attorney to obtain survivor benefits and a share of Husband's federal retirement plan through the Office of Personnel Management (OPM). Before permanent orders, Attorney asked Wife to sign a promissory note secured by a deed of trust in the marital residence to secure his fees. Attorney never advised the court of his interest in the marital residence nor did he supplement Wife's financial affidavit. In November 2003, the court ordered that Wife receive one-half of Husband's OPM benefits, survivor benefits, ordered sale of marital residence, and ordered each party to pay their own attorney fees. Husband began voluntarily paying Wife one-half of the OPM benefits he received each month, but Attorney never provided an order to OPM, nor did he make any attempts to contact OPM to facilitate transfer of the benefits to Wife. By March 2004, Wife terminated Attorney's services. On May 6, 2004, Attorney filed a notice of attorney lien. At the closing for the sale of the marital home, Attorney's promissory note was paid, and the proceeds from the sale were put into Attorney's trust account. In June 2004, Attorney filed a motion to enforce his attorney's lien, and was paid from the funds in his trust account.

All Colorado attorneys are presumed to know the rules of professional conduct. Colo. R.P.C. 1.1 states "a lawyer shall provide competent representation...." This includes study and investigation of factual and legal elements of a problem. The Hearing Board affirmed its finding that Attorney violated this rule by failing to contact OPM, or mailing the decree to OPM, and taking any steps to secure Wife's share of Husband's OPM benefits.

Colo. R.P.C. 1.3 states that a "lawyer must act with reasonable diligence and promptness in representing a client. A lawyer shall not neglect a legal matter...." The Hearing Board affirmed its finding that Attorney neglected the matter of securing Wife's OPM benefits, failed to forward the order to OPM, failed to contact opposing counsel about the survivor benefits and failed to take any steps to ensure Wife received these benefits.

Colo. R.P.C. 1.8(a) states that an attorney shall not knowingly acquire an ownership interest in a pecuniary interest adverse to a client unless the terms of the transactions are fair, reasonable and fully disclosed in writing, the client is informed to seek independent counsel, and the client consents in writing. Attorney's promissory note and deed of trust against the marital residence provided a method for obtaining his fees but reduced Wife's equity in the home, thus their interests were adverse, and Attorney should have complied with the requirements of 1.8(a).

Colo. R.P.C. 1.8(j) states that an attorney shall not acquire a proprietary interest in the cause of action the attorney is conducting for the client, however an attorney may acquire a lien authorized by law. In Colorado, charging liens are the only liens authorized by law, and excepted from this rule. The promissory note and deed of trust were not authorized by law, and are violation of this rule.

Though C.R.C.P. 251.19 states that the Hearing Board shall prepare its order within sixty days after the hearing, the fact that the Hearing Board issued its opinion 96 days after the hearing did not cause the Board to lose jurisdiction over the matter, and Attorney could not identify any prejudice from the opinion begin delivered late.

Attorney argues that his attorney discipline hearings are quasi-criminal in nature, thus he should be permitted to speak to the Regulation Counsel's expert, who was consulted about OPM benefits, to prevent his due process rights from being violated. The Hearing Board found that attorney discipline hearings are governed by the rules of civil procedure, which allows litigants to consult experts without disclosing the expert or calling them as a witness.

When the Hearing Board found no violation of a rule, the Board did not make factual findings that could be reviewed. Thus the Board's findings could only be overturned "if no reasonable fact finder could be unconvinced of a violation...by clear and convincing evidence." The dissents disagrees with this standard, stating that the court should remand findings of "no violation" if the Hearing Board's rationale is unclear, rather than affirming findings merely because a possible justification could be speculated.

Colo. R.C.P. 1.7(b) provides that a lawyer shall not represent a client if that representation may be materially limited by the attorney's own interests, unless the lawyer believes the representation will not be adversely affected and the client consents to the consultation. Attorney pursued the sale of the marital home to ensure his fees were paid, and Wife pursued the sale to comply with the court's order to sell the home. Thus it could be concluded that the Attorney and Wife's interests were not adverse to each other, and Attorney did not violate this rule.

Colo. R.P.C. 3.3(a)(1) states that a "lawyer shall not knowingly make a false statement of material fact or law to a tribunal." Failure to disclose material information is equivalent to making a false statement. The concept of materiality, the potential that information could influence a determination, is the focus of this rule. Even though Attorney did not update Wife's financial affidavit to reflect his interest, the Board could have been aware of Attorney's interest, whether secured by a deed of trust or attorney's lien, thus the deed of trust was not material information and Attorney did not violate this rule.

Colo. R.P.C. 3.4(c) prohibits attorneys from disobeying rules of a tribunal. C.R.C.P. 26.2 requires attorneys to supplement client's disclosures. Since the Board could have found that Attorney's failure to supplement Wife's affidavit did not materially change the evidence, Attorney did not violate this rule.

Colo. R.C.P. 8.4(c) states that attorneys may not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." To violate this rule, an attorney must demonstrate a mental state of recklessness greater than simple negligence. Since Attorney did not demonstrate recklessness when he failed to amend Wife's financial affidavit, Attorney did not violate this rule.

Sanctions will be affirmed unless they "bears no relation to the conduct", are "materially excessive or insufficient in relation to the needs of the public" or are "unreasonable." Here, suspension for six months after completing two-years of probation, was reasonable and in relation to the needs of the public.

10. TRUSTS AND ESTATES

No 2009-2010 Cases to date.

11. INCOME TAX MATTERS

No 2009-2010 Cases to date.

12. PROTECTION ORDERS

No 2009-2010 Cases to date.

13. COMMON LAW MARRIAGE

No 2009-2010 Cases to date.

14. DOMESTIC VIOLENCE

***People v. Disher*, 224 P.3d 254 (Colo. Feb. 16, 2010)**

Trial Court: Adams County District Court; Opinion by Chief Justice Mullarkey

The Adams County District Attorney appeals the district court's ruling that no domestic violence evaluation could be required of defendant Disher who was convicted of harassing his ex-girlfriend. Under Colorado's domestic violence statute, a finding of domestic violence requires the defendant to complete a treatment evaluation and a treatment program in addition to serving whatever sentence is imposed. Under C.R.S. §18-6-800.3, a perpetrator of a crime and his or her victim must be, or have been, in an "intimate relationship" for the crime to constitute domestic violence.

Disher was arrested and charged with harassment of his ex-girlfriend, M.P. Despite testimony from M.P. that she and Discher had "dated exclusively" for a time, the court held there was no evidence of an intimate relationship between the two because no testimony was offered as to a sexual relationship. Because a domestic violence evaluation is not required unless the parties have had a sexual relationship, the court refused to order an evaluation of Discher.

C.R.S. §18-6-800.3(2) defines domestic violence as, among other things: "an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship." Intimate relationship is defined as: "a relationship between

spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.”

The court stated that evidence of a sexual relationship is not necessary to establish the existence of an intimate relationship. The meaning of the word “intimate” is not synonymous with “sexual.” Intimacy is a broader concept that includes, but is not limited to, sexual intimacy. The word “intimacy” can be modified by the word “sexual” to specifically denote intimacy of a sexual nature, but intimacy itself is more expansive than just sexual intimacy. Yet, the relationship must be more than that of a roommate, friend, or acquaintance; there must be a romantic attachment or shared parental status between the parties. However, whether an intimate relationship is sexual is not in itself determinative. A sexual relationship may be an indicator, but never a necessary condition, of an intimate relationship. Reading a requirement of sexual contact into the definition of intimate relationship would greatly reduce the scope of the statute. Couples that do not have sexual relations would not be covered.

M.P.’s testimony that she had an exclusive dating relationship with Disher evidences the type of interpersonal connection that the statute contemplates as it tries to curb relationship violence.

15. ANNULMENT

***In re the Marriage of Farr*, No. 09CA0238, 2010 WL 376433 (Colo. App. Feb. 4, 2010)**

Trial Court: Judge Russell, Arapahoe County; Opinion Judge Graham (Russel and Lichtenstein concur)

Husband appeals from the judgment declaring his marriage to wife invalid.

The parties’ thirty-year marriage ended in dissolution in 1999. They remarried in 2004, and in 2007, husband again filed for dissolution. Wife cross-petitioned to declare the second marriage invalid pursuant to C.R.S. §14-10-111(1)(d), asserting that she agreed to marry him based upon his representation that he had a terminal illness and would die within a few years. Wife testified that she agreed to remarry husband because husband was dying and she did not want him to die alone.

Standard of proof: Husband contends that the trial court applied the wrong standard of proof in invalidating the parties’ marriage when it applied the clear and convincing evidentiary standard. C.R.S. §13-25-127(1), (4) states that for all civil actions accruing after July 1, 1972, the burden of proof shall be by a preponderance of the evidence, notwithstanding any contrary provision of law. Therefore, the preponderance of the evidence standard applies when a party seeks to avoid a transaction on equitable grounds alleging fraud, undue influence, or mistake. Pursuant to this statute, the Court rejected husband’s contention that the trial court erred by not applying a clear and

convincing standard of proof when determining wife's petition for invalidity of marriage.

Grounds for Invalidity: Pursuant to C.R.S. §14-10-111(d), a court shall enter a decree declaring a marriage invalid if one party entered into the marriage in reliance on a fraudulent act or representation of the other party when the act or representation goes to the essence of the marriage. The trial court found: (1) that wife's testimony was more credible than husband's; (2) that wife believed husband's representation that his death was imminent; (3) that wife did not want husband to die alone; (4) that wife relied on husband's representation that he was dying in deciding to remarry him; and (5) that such representation was fraudulent.

Wife and the parties' son testified that after the parties remarried, husband did not appear to be ill and that they came to believe he had misled them into believing that he would die soon. Wife further testified that she reviewed husband's recent medical records and that they indicated to her that he was not ill. She also submitted an insurance application form, which was signed by husband and which indicated that he had no medical problems.

Here, Husband's misrepresentation went to the essence of the marriage. Misrepresentation about a spouse's prognosis and life expectancy can go to the essence of the marriage. Wife relied on husband's representation in deciding to remarry and did so only because she believed his death was imminent. Therefore, the misrepresentation went to the essence of this marriage.