# Family Law Update
# 2011-2012

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# 1. SEPARATION AND OTHER MARITAL AGREEMENTS

***No 2011-2012 Cases to date.***

# 2. DISPOSITION OF PROPERTY

## A. VALUATION

***No 2011-2012 Cases to date.***

## B. DEFINING PROPERTY

***No 2011-2012 Cases to date.***

## C. DIVIDING PROPERTY

### *In re the Marriage of Poland*, No. 10CA1158 (Colo. App., September 29, 2011)

*Trial Court: Judge Cisneros, El Paso County; Opinion by Judge Webb (Roy and Fox, J.J. concur)*

In this post-dissolution action, Husband appeals from an order awarding Wife a portion of the pay he received from the military after he was placed on the temporary disability retired list (TDRL).

The parties' separation agreement provided that husband's "gross military retirement" benefits were marital property and would be divided, upon his retirement, under the *Hunt-Gallo* formula. *See In re Marriage of Hunt*, 909 P.2d 525, 532 (Colo. 1995). After 21 years of service, Husband was placed on TDRL. Wife moved to establish her share of the TDRL pay. The trial court ordered husband to pay wife her share of his TDRL pay as determined under the decree. Husband appealed.

A military service member is placed on TDRL under 10 U.S.C. § 1202 if the member has a disability rating of at least thirty percent but the disability has not yet been determined to be permanent. *In re Marriage of Williamson*, 205 P.3d 538, 540 (Colo. App. 2009). The member may remain on TDRL for 5 years, during which the member submits to a medical evaluation every 18 months to determine whether the disability has stabilized to a degree that permanent disability retirement is appropriate, or whether the disability has improved to the point where the member is fit to return to active duty. 10 U.S.C. § 1210. After 5 years, the member must be returned to active duty, be permanently retired for longevity (if the member has at least 21 of service), or be

permanently retired for disability.

While a service member is on the TDRL, the member is entitled to pay, calculated under 10 U.S.C. § 1401(a), using one of two formulas. Under the first formula, the member receives 2.5 percent of his or her monthly base pay for each year of service; under the second formula, the member's pay is calculated by multiplying the base pay by the member's disability percentage.

A spouse's military retirement benefits may be distributed as marital property in dissolution cases under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. However, only "disposable retired pay" may be distributed. Thus, the trial court's determination that it could, based on the parties' agreement to divide husband's "gross military retirement," divide more than husband's "disposable retired pay" was rejected by the Court of Appeals. The Court concluded that an amount equal to the amount of TDRL pay, as calculated based on husband's percentage of disability when he was placed on the TDRL, must be excluded from the marital property, but that any amounts in excess of that amount may be divided under the decree.

Because the trial court divided all of husband's TDRL pay under the time rule formula without considering the extent to which the pay was computed on husband's disability, the order cannot stand. 10 U.S.C. §1408(a)(4)(C) of the USFSPA suggests that for service members who are eligible to retire based on longevity, their disability retirement benefits may include elements of *both* disability *and* regular retirement benefits. Here, the record does not indicate either how husband's TDRL pay was calculated or the percentage of his disability when he was placed on the TDRL. Thus, the Court vacated the order and remanded the case to the trial court to determine the amount of husband's TDRL pay, as computed based on his percentage of disability, and then exclude that amount from the TDRL pay that is divided under the decree.

## D. ENFORCEMENT OF ORDERS

***No 2011-2012 Cases to date.***

# 3. MAINTENANCE

***No 2011-2012 Cases to date.***

# 4. CHILD SUPPORT

## A. CHILD SUPPORT DETERMINATION/ MODIFICATION

## ***In re the Marriage Beatty and Turner*, No. 10CA0205; 2012 COA 71 (Colo. App., April 26, 2012)**

*Trial Court: Judge Sierra, Boulder County; Opinion by Judge Hawthorne (Casebolt and Jones, J.J. concur)*

The parties' marriage was dissolved in 2001, and Father was ordered to pay $1,155 in monthly child support. In 2009, Father objected to a garnishment of his wages to recover both child support and arrearages, and also requested a modification of child support.

Following an evidentiary hearing on arrearages and child support the Magistrate found that the parties had reached "out-of-court agreements modifying child support and that [Mother was] equitably estopped from collecting the difference between the court-ordered support and the lower amount of support agreed to by the parties."

Mother sought review in the district court which affirmed the magistrate's findings and held that the magistrate correctly applied the equitable estoppel doctrine. On appeal, Mother argued that the magistrate erred by applying the equitable estoppel doctrine to enforce the parties' oral agreements to reduce child support. The Court of Appeals agreed, and remanded the case to the district court to vacate the magistrate's order and recalculate the arrearages.

"The parties cannot, by contract, escape their responsibilities to provide adequate child support." *Combs v. Tibbitts*, 148 P.3d 430, 434 (Colo. App. 2006). Thus, any stipulation regarding the amount of child support is not effective unless the court reviews and approves it to ensure the amount's adequacy under statutory guidelines. Nonetheless, the doctrine of equitable estoppel may provide an exception to the rule to allow relief from accrued arrearages. However, the party claiming estoppel must demonstrate both reasonable and detrimental reliance on the other party's acts or representations and a lack of knowledge or convenient means of knowing the facts.

Because Father does not allege, and the record contains no evidence showing, that he either was unaware of his continuing obligation under the original support order, or lacked the knowledge and means to seek modification of it, and, because he does not allege that he took any action in reliance on the reduced support agreement, Father does not meet the requirements for relief based on equitable estoppel. For these reasons, the Court concluded that the magistrate erroneously abated the arrearages Father owed under the original support order. The Court also ruled on procedural issues, income, and attorney fees.

## ***In re the Marriage of Paige*, No. 11CA0893; 2012 COA 83 (Colo. App., May 10, 2012)**

*Trial Court: Judge Cisneros, El Paso County; Opinion by Judge Webb (Roy and Fox, J.J. concur)*

In this post-dissolution matter, father appeals from the denial of his motion to retroactively modify a child support order based on a change in physical care of the parties' child.

In 2000, during permanent orders, Father was ordered to pay child support to Mother, who was designated as the primary residential parent. In 2008, Mother filed a motion seeking contempt sanctions for Father's failure to pay child support from July 2000 to April 2005. Father argued that, pursuant to an unwritten agreement between the parties, the child had actually lived with him from July of 2000 until March of 2003, and again from September of 2003 through her emancipation in April 2005. Citing this change in physical care, father asserted that there should be a corresponding retroactive modification of child support during those times, and that this should also be reflected in the court's consideration of the contempt sanctions.

The trial court found, without a hearing, even though father had repeatedly requested one, that without a mutual agreement reduced to writing evidencing the change of physical custody, the court cannot determine whether any such agreement existed. Father contends that the court erred in failing to hold a hearing when it acknowledged there was an issue of fact, and failed in requiring a written agreement. The Court of Appeals agreed.

Under section 14-10-122(1)(a), a modification of child support is generally effective as of the date of filing of a motion to modify. However, pursuant to section 14-10-122(5), "when a mutually agreed upon change of physical care occurs, the provisions for child support of the obligor under the existing child support order, if modified pursuant to this section, will be modified as of the date when physical care was changed."

Neither section 14-10-122(5) nor its counterparts, section 14-10-122(1)(c)-(d), specify that the agreement must be in writing. Thus, it is clear that, because only a mutual agreement is specified in section 14-10-122(5), it is unnecessary for that agreement to be reduced to writing.

Because no written agreement is required under section 14-10-122(5), the trial court erred in requiring one here. Because the court erred in requiring a written agreement, and acknowledged that there was a factual issue as to the existence of a "mutually agreed upon change of physical care" under section 14-10-122(5), it must hold an evidentiary hearing on remand.

# B. ENFORCEMENT OF CHILD SUPPORT ORDERS

## *In re the Marriage of Tognoni*, No. 10CA1138 (Colo. App. November 11, 2011)

*Trial Court: Judge Hoskins, Weld County; Opinion by Judge Hawthorne (Lichtenstein and Booras, J.J. concur)*

In this post-dissolution matter, husband appeals the judgment awarding wife child support arrearages, interest, and attorney fees. Wife cross-appeals the attorney fees amount. The arrearages and interest judgment were affirmed, the attorney fees award

was vacated, and the case was remanded for further proceedings.

Wife moved for summary judgment claiming that husband owed her $399,414.24 in arrearages and interest on unpaid child support. Husband objected and requested a hearing. In reply, wife requested attorney fees under C.R.S. §13-17-102(4), contending that husband's position lacked substantial justification. Without conducting a hearing, the trial court entered judgment against husband for $399,400, and awarded wife one half her attorney fees. After the court denied husband relief under C.R.C.P. 59, husband appealed. Wife cross-appealed.

Husband first contended that the trial court erred by entering summary judgment on the arrearages and interest. The arrearages amounts determined by the parties differed by $14.24, assuming a 12% interest rate compounded monthly as provided under C.R.S. §14-14-106. The trial court used husband's expert's calculation in entering judgment. Husband cannot raise on appeal an error which he himself invited. Thus, the Court of Appeals found that there was no dispute of material facts, and summary judgment was appropriate.

Husband also contended that the trial court erred in finding that it lacked discretion under C.R.S. §14-14-106 to determine the appropriate interest rate and compounding period to apply to the child support arrearages. The Court of Appeals disagreed and held that the right to interest, absent an agreement to pay it, is determined by statute. A court has no discretion to modify the interest rate or determine the compounding period, although such interest may be waived by the judgment creditor.

Husband further contended that the trial court abused its discretion by awarding wife one half her attorney fees without providing him an opportunity to respond to the allegation that his position lacked substantial justification. When deciding whether to award fees under the statute, a court must consider the relevant factors in C.R.S. §13-17-103(1) and make findings explaining how those factors support concluding that the offending party engaged in improper conduct justifying a fee award. Properly considering these factors requires that the trial court hold an evidentiary hearing when one is requested by the party against whom fees are sought. Because the trial court granted summary judgment without a hearing, husband had no opportunity to respond to wife's allegation that his position lacked substantial justification. Thus, the court vacated Wife's award of attorney's fees.

Wife also sought attorney's fees incurred on appeal under C.R.S.§13-17-102, contending that the appeal is substantially frivolous. Because husband raised a plausible interpretation of the interest statute and because the Court concluded that the attorney fees award must be vacated, the appeal was not frivolous, and therefore Wife's request was denied.

# 5. ATTORNEY'S FEES

## *In re the Marriage of Webb and Christiansen*, No. 10CA2333 (Colo. App., August 18, 2011)

*Trial Court: Judge Hoskins, Weld County; Opinion by Judge Webb (Casebolt and Dailey, J.J. concur)*

In this post-decree matter, Mother appeals the finding of contempt and award of attorney fees in favor of Father. The court's 2007 order provided for shared decision-making on all major health decisions including non-routine health issues. It also required the parties to notify and consult each other, if possible, in medical emergencies.

Father moved to hold Mother in contempt, and sought remedial and punitive sanctions, including attorney's fees, alleging that Mother made a unilateral decision to have the child seen at the emergency room and be given a CAT scan without contacting Father in advance. The parties disputed whether the child's condition constituted a medical emergency.

The trial court found that the child's condition "was not an emergency situation," that Father "was not advised about the CAT scan until after it happened," and that Mother's consultation with him was inadequate. The court therefore held Mother in contempt and required her to pay Father's attorney fees. The court was unable to find punitive contempt.

To find a party in contempt the fact finder must find that the contemnor did not comply with a lawful order of the court. Because the record supports the trial court's findings of no emergency and inadequate contact, the Court of Appeals refused to disturb the trial court's findings of fact and held that the trial court did not err in holding Mother in contempt.

Under Rule 107(d)(2), attorney fees may be awarded *only* as a component of remedial sanctions. A remedial sanction must include a purge clause. Such a sanction is "imposed to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform." Thus, when the court imposes a remedial contempt sanction, it must do so in writing or on the record describing the means by which the person may purge the contempt.

Where the contemnor commits a one-time violation, incapable of being purged, attorney fees may not be assessed as a remedial sanction. Thus, a punitive sanction, such as a fine or imprisonment, is the only avenue for punishment.

Here, no remedial sanction was imposed, nor could one have been. The CAT scan contempt constituted a one-time violation of the 2007 order committed over a year before father even raised the issue with the court. By that time, mother could not undo what she had done. Hence, an attorney fees award was not appropriate.

# 6. ALLOCATION OF PARENTAL RESPONSIBLITIES

## *In re the Parental Responsibilities of B.R.D.,* No. 10CA2386; 2012 COA 63 (Colo. App., April 12, 2012)

*Trial Court: Judge Crockenberg, Pueblo County; Opinion by Judge Ernard (Russel and Hawthorne, J.J. concur)*

This appeal concerns a dispute between the biological parents of a child and a couple with whom the child was living. In 2005, when the child was born, the biological mother gave the child up for adoption, and he was placed with the couple shortly after his birth. Father was unaware of the existence of the child until after the adoption, but thereafter wished to have parenting time. In June 2007, the custodial couple, Mother and Father entered into a stipulation allocating parental responsibilities. Mother and Father explicitly reserved the right to ask the court to modify the allocation of parental responsibilities in the permanent orders.

In December 2008, Mother moved to increase her parenting time and decision-making authority; and, in 2009, Father also moved to modify parenting time and parental responsibility a change in circumstances. In October 2010, the court held a 3-day evidentiary hearing on both Mother and Father's requests for modification of parenting time and decision-making authority. In employing the standard from *In re Parental Responsibilities of M.J.K.*, 200 P.3d 1106 (Colo. App. 2008), the trial court found that the environment the couple provided did not endanger the child or impair his emotional development, and that changing this environment was not in the child's best interests.

The court ordered that the couple should be the child's primary residential custodians, granted them sole decision-making authority, and gave Mother and Father parenting time on alternate weekends. The Court of Appeals held that, because the Supreme Court has recently rejected the opinion of *M.J.K.* in it's ruling in *In re D.I.S.*, 249 P.3d 775 (Colo. 2011), the trial court's holding based on the application of the standard in *M.J.K.* should be vacated and remanded.

The Court stated as the child's biological parent, Father has a constitutionally protected interest in the child's care, custody, and control, and he is presumed to act in the child's best interest. This presumption is not extended to the child's non-biological caretakers.

Ordinarily, the party seeking a modification of parenting time has the burden of proving that the statutory factors justifying the change are present. However, pursuant to *D.I.S.*, that burden shifts from a parent to a non-parent to protect the parent's due process rights. The Court concluded that *D.I.S.* and several other cases alter the analysis in four distinct ways:

1. First, rather than presuming that the existing order remains in effect, the court must give "special weight" to Father's request to modify them; there is a presumption in favor of modifying the orders at Father's request.

2. Second, the Court must give the couple an opportunity (1) to rebut this presumption by showing that the proposed modification is not in the child's best interests and that the present allocation of parental responsibilities does not endanger him; and (2) to prove that the present order is in the child's best interests. Father is entitled to present evidence in support of the proposed modification.

3. Third, the couple must satisfy their evidentiary burdens by a preponderance of the evidence.

4. Fourth, if the court denies father's request and continues the present allocation of parental responsibilities to the couple, it must make findings of fact identifying the special factors on which it relies. These special factors are found in sections 14-10-124(1.5), 14-10-129(2), and 14-10-131(2).

In relying on *D.I.S*, there is no practical difference between a parent transferring custody to a non-parent by way of a guardianship and a parent transferring custody to a non-parent through an order allocating parental rights. Thus, the rationale of *D.I.S.* extends to requests to modify allocations of parental responsibilities in situations involving parents and non-parents.

## ***In re the Interest of B.B.O.: Olds v. Berry*, 2012 CO 40. No. 10SC623 (Colo. May 29, 2012)**

*Trial Court: Judge Arp, Jefferson County; Court of Appeals Opinion: Judge Graham; Supreme Court Opinion: Justice Boatright, Justice Eid concurs*

In this appeal, the Supreme Court reviews a decision by the Court of Appeals reversing the trial court's allocation of primary parental responsibilities to the half-sister of a minor child on grounds that the half-sister lacked standing to petition for APR. The Court held that C.R.S. §§14-10-123(1)(b) and (1)(c) do not require parental consent for a non-parent to establish standing to petition for APR.

The minor child resided with her father and half-sister six years, until her father's death in 2008, at which time she continued to reside with her half-sister. The child's mother had given consent for the child to live with her father and half-sister and visited the child on a regular basis for the first two years of the child's life. However, the mother had no direct physical contact with the child during the last several years (although she maintained telephone contact, and sent letters and cards).

Two months after Father's death, the half-sister petitioned for APR. Mother moved to dismiss on the ground that the half-sister lacked standing. The trial court disagreed, and determined that it was in the child's best interest to reside primarily with her half-sister and schedule liberal parenting time with Mother, as recommended by the CFI.

Mother appealed both the standing and best interest determinations of the trial court arguing that a nonparent does not have standing under C.R.S. §§14-10-123(1)(b) or (1)(c) unless the child's parents have consented to the nonparent providing care for the child. Mother argued she had never consented to the child being cared for by the half-sister in Father's absence. The Court of Appeals agreed and held that in order to

establish standing under C.R.S. §§14-10-123(1)(b) or (1)(c), a "nonparent must show that the child's parents voluntarily permitted the nonparent to share in or assume the parents' responsibility for the child's care."

The Supreme Court reversed the Court of Appeals and held that there is no statutory basis for reading a consent requirement into the concept of care for standing purposes in C.R.S. §§14-10-123(1)(b) and (1)(c). In relying on In re Custody of C.C.R.S., the Court of Appeals conflated standing requirements with best interest considerations when it gave undue weight to the mother's voluntary relinquishment of custody. In re Custody of C.C.R.S. does not, therefore, stand for the proposition that parental consent to a nonparent caring for a child is necessary for a nonparent to establish standing to seek an allocation of parental responsibilities, and it is not necessary to read a parental consent requirement into either section 14-10-123(1)(b) or (1)(c) in order to protect the fundamental liberty interests of parents in the care, custody, and control of their children.

# 7. GUARDIANS, SPECIAL ADVOCATES, AND CHILD REPRESENTATIVES

## *People v. Gabriesheski*, No. 08SC945 (Colo. October 24, 2011)

*Trial Court: Judge Kelly, El Paso County; Court of Appeals Opinion by Judge Vogt (Terry and Lichtenstein, J.J. concur); Opinion by Justice Coats (Martinez and Bender Fox, J.J. dissent)*

In this dependency and neglect (D and N) case, the Supreme Court held that because a child in a D and N proceeding is not the client of a court-appointed guardian ad litem (GAL), the attorney-client privilege and confidentiality do not strictly apply. In reaching its decision, the Court noted that the role of the GAL is to represent the best interests of the child, not the child himself or herself.

Mark Gabriesheski was charged with two counts of sexual assault on a child by one in a position of trust. A Petition in D and N was filed in the juvenile court and a GAL was appointed as required by the juvenile court. Prior to trial, the child recanted her accusations, and the prosecution gave notice of its intention to call the GAL as a crucial witness who allegedly had knowledge of attempts by the mother to pressure her daughter to recant. The defense objected on the grounds that all communications between the child and GAL were confidential and inadmissible in the absence of appropriate consent or waiver pursuant to the statutory attorney-client privilege and duty of confidentiality imposed on attorneys by rule 1.6(a) of the Colorado Rules of Professional Conduct.

The trial court ruled that the GAL would not be permitted to testify at trial. It concluded that Colo. R.P.C. 1.6, in conjunction with Chief Justice Directive 04-06, imposed a duty of confidentiality on the GAL, which could only be waived by the child. The appellate court upheld the trial court's ruling.

The statutes are silent as to the existence of an attorney-client relationship between a statutorily appointed GAL and the child in a D and N proceeding. While all GALs appointed to serve in D and N proceedings must be credentialed as attorneys licensed to practice in the jurisdiction, they are ultimately tasked with acting on behalf of the child's health, safety, and welfare. See C.R.S. §19-3-203. Rather than representing the interests of either the petitioner or respondent in the litigation, or even the demands or wishes of the child, the GAL is statutorily tasked with assessing and making recommendations to the court concerning the best interests of the child.

The Chief Justice Directives do not purport to designate an attorney-client relationship between a GAL and the child who is the subject of a D and N proceeding. Nothing in the term "guardian ad litem," which on its face indicates merely a guardian for purposes of specific proceedings or litigation, suggests an *advocate* to serve as counsel for the child as distinguished from a *guardian*, charged with representing the child's best interests.

# 8. PROCEDURAL AND EVIDENTIARY MATTERS

## *Turner v. Rogers*, 131 S.Ct. 2507, 79 U.S.L.W. 4553 (U.S. June 20, 2011)

*South Carolina Supreme Court: Opinion by Justice Toal; Opinion Justice Breyer (Justice Thomas joined by Justice Scalia filed dissenting opinion, Chief Justice Roberts and Justice Alito joined in part)*

The issue presented was whether the Due Process Clause of the Fourteenth Amendment grants an indigent defendant potentially faced with incarceration a right to state-appointed counsel in a civil contempt proceeding. Father was under an order to pay child support in the amount of $51.73 per week to Mother. Father repeatedly failed to pay the amount due and was held in contempt on five occasions. The fifth time Father completed a 6–month jail sentence. After his release, Father remained $5,728.76 in arrears and was again held in contempt. At his civil contempt hearing, neither Father nor Mother was represented by counsel. Despite making no express finding concerning Father's ability to pay the arrearage, the judge found Father in contempt and sentenced him to one year.

Father appealed claiming that the U.S. Constitution entitled him to counsel at his contempt hearing. The South Carolina Supreme Court rejected Father's claim stating that civil contempt differs significantly from criminal contempt in that constitutional safeguards applicable in criminal proceedings, including the right to counsel, are not required at a civil contempt hearing. The Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a *criminal* case, including a criminal contempt. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). However, in a civil contempt, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections.

The Court used the factors outlined in *Matthews v. Eldridge* to decide what specific safeguards the Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Relevant factors

include (1) the nature of the private interest that will be affected, (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements.

The critical question at issue in civil contempt cases concerns the defendant's ability to pay, often closely related to indigence. There is available a set of "substitute procedural safeguards," which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.

A categorical right to counsel in a civil contempt proceeding would carry with it disadvantages including unfairness and delay. Thus, the Court held that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual, even if that individual faces incarceration (for up to a year). When the custodial parent receiving child support is unrepresented by counsel, the State need not provide counsel to the noncustodial parent paying child support provided that the State provides alternative procedural safeguards. Because Father received neither counsel nor the benefit of alternative procedures, his incarceration violated the Due Process Clause.

## ***In re the Parental Responsibilities of L.S. and Concerning McNamara*, 257 P.3d 201 (Colo. June 27, 2011)**

*Trial Court: Judge Peterson, La Plata County; Court of Appeals: Opinion by Judge Connelly; Opinion Justice Bender (Coats, Martinez and Marquez dissent)*

In this case regarding jurisdiction, Colorado and Nebraska were exercising simultaneous jurisdiction and issuing contrary orders. The child resided with Mother in Colorado.

Parallel federal and state statutes, the PKPA (Parental Kidnapping Protection Act) and the UCCJEA, adopted by both Colorado and Nebraska, govern whether Nebraska had jurisdiction to enter an initial child custody determination and whether Colorado must enforce that determination. The PKPA was enacted by Congress as an addendum to the full faith and credit statute of the U.S. Constitution in order to establish a national standard for the resolution of interstate child custody jurisdictional disputes. The PKPA mandates that when a state enters an initial custody determination, a second state must enforce that determination provided that the first state made the determination in compliance with the PKPA. Once a State exercises jurisdiction consistently with the provisions of the PKPA, no other State may exercise concurrent jurisdiction over the custody dispute and all States must accord full faith and credit to the first State's custody decree. Conversely, if a state court's custody determination fails to conform to

the PKPA's requirements, then the custody determination is not entitled to full faith and credit.

Colorado statutes mandate that a Colorado court is obligated to enforce the child custody determination of another state when it determines that the sister state made the determination in "substantial conformity" with or under factual circumstances satisfying the jurisdictional requirements of the UCCJEA which is substantively identical to the PKPA.

The PKPA provides that a state's custody determination is made consistently with the PKPA when: (1) the court of the state has jurisdiction under its own law, and (2) the exercise of jurisdiction meets one of the conditions set out in 28 U.S.C. §1738A(c)(2).

Nebraska Revised Statutes section 43–1238(a), which sets out the requirements for Nebraska to exercise jurisdiction to make an initial child custody determination, provides four independent bases for jurisdiction to make an initial child custody determination. Only the first two are relevant here: (1) home state and (2) significant connection.

In order for a Nebraska court to have jurisdiction to make an initial custody determination, the Nebraska court must either be the home state of the child or there must be significant contacts between the child and the state. The home state of the child is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding" including "a period of temporary absence." If Nebraska is not the home state of the child, then it may exercise significant connection jurisdiction "only if": (1) another state does not have jurisdiction as the child's home state; or (2) the home state "has declined to exercise jurisdiction on the ground that Nebraska is the more appropriate forum. Here, the Nebraska district court did not have jurisdiction over this custody determination under its own law. The child lived in Colorado with at least one parent for more than six consecutive months. Mother brought the child to Nebraska on vacation, and Father refused to return the child to Colorado. Thus, Colorado, not Nebraska, was the child's home state. Further, Colorado, as the child's home, state did not decline jurisdiction on the ground that Nebraska was the more appropriate forum. Because Nebraska did not have jurisdiction under its own law, the PKPA does not require Colorado to accord the Nebraska custody determination full faith and credit.

## ***In re the Marriage of Dedie and Springston*, 255 P.3d 1142 (Colo. June 27, 2011)**

*Trial Court: Judge Stern, Denver County; Opinion Chief Justice Bender (Justice Coats and Marquez dissent)*

Mother and Father divorced in 2004. A New York court issued an initial custody determination awarding primary physical custody of the parties' two children to Mother. In 2006, the mother and the children moved to Massachusetts. In March 2010, Father filed an action to enforce visitation in New York. Mother filed a motion to dismiss the action for lack of jurisdiction. The New York family court granted the

motion because the children had not lived in New York State in the past six months and because all the information concerning the children was located in another state. Mother and children moved to Colorado in July 2010. Six months later, Father filed a motion seeking to hold Mother in contempt for failure to comply with the initial custody determination and to modify the initial determination to give the father custody of the children in New York. Mother filed a motion to dismiss based on New York's previous finding that it lacked jurisdiction. The New York court held that it had exclusive continuing jurisdiction to enforce and to modify the initial custody determination and gave Father temporary custody and primary physical residence of the children. Father then petitioned the Denver District Court to enforce the New York custody modification order. The Denver District Court determined that New York had continuing, exclusive jurisdiction over the initial custody determination and that in its modification, the New York court exercised jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Mother then filed an original action under C.A.R. 21, arguing that the New York Supreme Court lacked jurisdiction to modify the initial custody determination.

An interstate child custody dispute requires the court to determine whether Colorado is obligated to enforce a prior child custody determination rendered by a court in a sister state. The court must follow the Parental Kidnapping Prevention Act (PKPA), which extends the requirements of the Full Faith and Credit Clause to custody determinations. The PKPA mandates that, when a state enters a custody determination, a second state must enforce that determination so long as the first state made the determination consistent with the provisions of the PKPA. In order to exercise jurisdiction consistently with the PKPA, a state court must have jurisdiction under its own law.

New York Domestic Relations Law section 76-a(1) mandates that to relinquish exclusive, continuing jurisdiction, a New York court must find both that: (1) neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with New York; and (2) substantial evidence is no longer available in New York concerning the child's care, protection, training, and personal relationships.

Because the New York family court referee relinquished jurisdiction, the New York Supreme Court did not have jurisdiction under New York law and therefore did not exercise jurisdiction consistent with the PKPA. Consequently, the PKPA does not require Colorado to give full faith and credit to the New York Supreme Court custody modification determination.

## ***People in the Interest of L.A.N. and Concerning L.M.B.,***
## **10CA2408 (Colo. App., July 7, 2011)**

*Trial Court: Judge Schmalberger, City and County of Denver Juvenile Court; Opinion by Judge Webb (Casebolt and Dailey, J.J. concur)*

In this dependency and neglect proceeding, Mother appealed from the judgment terminating her parent-child legal relationship with L.A.N. and the Court's denial of her request for production of the L.A.N.'s therapist's file.

In 2008, Denver Department of Human Services (DDHS) received a referral regarding

the then seven year old L.A.N. due to reports that L.A.N. had been brought to Children's Hospital because of out-of-control behavior and suicidal statements; mother had refused their treatment recommendations; and that Mother had attempted to flee with L.A.N. when told that transfer of the child to a mental health facility was being considered.

DDHS filed a D&N petition. Upon release from the hospital, the child was placed in the custody of her maternal aunt who hired a therapist for the child. Two years later, the court terminated Mother's parental rights because she had not successfully met the objectives of her treatment plan, and the child was adjudicated dependent and neglected as to Mother.

On appeal, Mother argued that the juvenile court erred in failing to ensure that the notice requirements of the Indian Child Welfare Act (ICWA) were met because the there was no record to show that notice was sent to the Cherokee Nation of Oklahoma, or that any determination was made as to whether the child's biological father had Indian heritage. The Court agreed and vacated the judgment due to these deficiencies.

Mother also argued that the juvenile court erred when it denied her request for production of the child's therapist's file. The Court found that Mother was entitled to at least a portion of the file and remanded for further proceedings.

During the course of treatment with the child, the therapist submitted a letter to the GAL to share some of her observations regarding the case. Although she did not explicitly recommend against reuniting the child with Mother, she described a number of "concerns" that she had about the child's welfare were that to occur. Without attempting to reserve the privilege between the therapist and the child, the GAL provided the therapist's letter to the court and each of the other parties.

In June 2010, mother's attorney subpoenaed the therapist for a deposition and to produce her entire case file. The therapist moved to quash the subpoena arguing that it sought information and documents that were privileged under C.R.S. §13-90-107(1)(g). Mother responded that any privilege was implicitly waived because the mental condition of the privilege holder (the child) was at issue, the child's progress in therapy was "outcome-determinative" of Mother's parental rights, and access to the therapist's records was necessary to determine the basis for the information, opinions, and conclusions set forth in the therapist's letter to the GAL.

The court found that the child was not competent to waive her own privilege; Mother could not waive it because in opposing termination of her parental rights, her interests could be adverse to those of the child; and neither the DDHS caseworker nor the GAL was in a position to waive it, even if so inclined. The court ordered the therapist to participate in a deposition or a "chat" with Mother's attorney, but not to produce any records.

The Court concluded that DDHS and the GAL expressly waived the privilege because both of them obtained privileged information from the therapist and then disclosed that information to the court. Because privileged information from the therapist portrayed mother negatively, and this information was used by DDHS and the GAL in seeking to terminate her parental rights, the Court of Appeals concluded that Mother was

deprived of a fundamentally fair opportunity to protect her rights. The case was remanded to the trial court to conduct an in-camera interview of the therapist's file and to identify the discoverable portions of the file.

## ***In re the Marriage of Rubio*, No. 10CA0912 (Colo. App., August 18, 2011)**

*Trial Court: Judge DuBois, El Paso County; Opinion by Judge Russel (Dailey and Miller, J.J. concur)*

Wife gave the Marrison Law Firm a retainer to secure its services in a case against Husband. A few weeks later, Husband served a writ of garnishment on the firm seeking the unearned portion of the retainer to satisfy a judgment he had obtained against Wife. The firm opposed Husband's effort, arguing that it had a possessory attorneys' lien against the unearned portion of the retainer.

Husband then asked the court to disqualify the firm arguing that the firm had an unwaivable conflict of interest because it had asserted its own interest in the retainer. Wife responded that the situation created only a potential conflict of interest, which she waived. The magistrate ordered the firm to surrender the unearned retainer, found an unwaivable conflict of interest, and ordered the firm to withdraw from the case. Wife filed a petition for review of the magistrate's order under C.R.M. 7(a)(11).

Garnishment

The firm argued that garnishment was improper because it had a lien on the unearned portion of wife's retainer under section 12-5-119, C.R.S. 2010. It is undisputed that the money was received, not on Wife's behalf as a result of the firm's efforts, but directly from Wife. Attorney liens under C.R.S. §12-5-119 attach only to property that an attorney has obtained or has assisted in obtaining on the client's behalf. *See In re Fisher*, 202 P.3d 1186, 1197 (Colo. 2009).

There is nothing in the governing statutes or rule that would prevent a judgment creditor from garnishing funds held in a lawyer's trust account. *See* §§ 13-54.5-101 to -111, C.R.S. 2010; C.R.C.P. 103. Because unearned retainers belong to the client, not the lawyer, they fall within the broad category of property that is subject to garnishment. Therefore, husband properly garnished Wife's retainer.

Conflict of Interest

Both the firm and Wife expressed an interest in the unearned portion of wife's retainer. This situation created a potential conflict of interest. But here, the potential conflict did not ripen into an actual conflict. Instead, both the firm and Wife were aligned in resisting husband's attempt to garnish the unearned retainer. Moreover, wife waived any conflict.

The firm's interest in the unearned retainer does not constitute an "assertion of a claim by one client against another client" within the meaning of Colo. RPC 1.7(b)(2). Therefore, the conflict was waivable. Thus, the magistrate erroneously required the firm

to withdraw from the case.

## ***In re the Marriage of Walker*, No. 09CA0510 (Colo. App., September 15, 2011)**

*Trial Court: Judge Kane, El Paso County; Opinion by Judge Furman (Gabriel and Richman, J.J. concur)*

Wife contends the trial court erred by denying her C.R.C.P. 59 motion. The Court dismissed Wife's appeal as untimely under C.A.R. 4(a), which provides that an appeal must be filed within 45 days of the entry of final judgment. After a final judgment enters, if a timely C.R.C.P. 59 motion is filed, the 45 day period for filing a notice of appeal is tolled and begins running from the date the post-trial motion is denied or is deemed denied under C.R.C.P. 59(j). An untimely C.R.C.P. 59 motion does not toll the time for filing an appeal. In such a situation, an appeal filed more than 45 days after the final judgment enters must be dismissed.

A motion for post-trial relief under C.R.C.P. 59 must be filed "within 15 days of entry of judgment…or such greater time as the court may allow." C.R.C.P. 59(a). A request for an extension of time to file a C.R.C.P. 59 motion must be filed before the 15-day period from entry of judgment expires.

Wife moved for additional time to file her C.R.C.P. 59 motion 14 days after the maintenance order entered. Wife requested additional time for the specific purpose of obtaining a transcript of the hearing so that her newly-hired attorney could prepare a post-trial motion. The court granted wife's request and ordered "the motion shall be due 15 days after the transcript is delivered to [Wife's] counsel."

Nearly four years later, Wife filed her C.R.C.P. 59 motion, contending she had been unable to obtain a transcript. The record did not reflect that Wife ever informed the trial court of her inability to obtain a transcript, of her continued efforts to do so, or of her continued intent to seek C.R.C.P. 59 relief. Even after wife learned no transcript was available she inexplicably delayed another four months before she filed her C.R.C.P. 59 motion. Under these circumstances, the Court concluded that wife effectively abandoned her C.R.C.P. 59 motion.

Because wife did not sufficiently establish diligent efforts to obtain a transcript, and because her delay in filing her C.R.C.P. 59 was unreasonable, her appeal is untimely as well, under the provisions of C.A.R. 4(a), and therefore is dismissed.

## ***In re Parental Responsibilities Concerning T.L.B. and M.A.B.*, 2012 COA 8 No. 10CA2157 (January 19, 2012)**

*Trial Court: Judge Laff, Denver County; Opinion by Judge Taubman (Román and Booras concur)*

In this international custody dispute, mother appeals the trial court's order that Canada, rather than Colorado, has jurisdiction to determine parental responsibilities. After the parties had been living together in Canada for 6 years, Mother took the children to Colorado without informing Father. Father filed a Hague Convention petition in Colorado requesting that the children be returned to Canada. The trial court found that although Father had made a prima facie case to return the children, returning the children to Canada would risk subjecting them to sexual abuse and denied the return pursuant to article 13(b) of the Hague Convention.

Mother subsequently initiated a hearing in Denver County regarding parental responsibilities. The Court found that pursuant to the UCCJEA, Canada had jurisdiction over parental responsibilities, yet it ordered that the children remain with Mother in Colorado pursuant to C.R.S. §14-13-204, until the Canadian courts could enter an order, or for a maximum of one year. Mother appealed this order. However, during the pendency of her appeal, the Canadian Court, pursuant to the UCCJEA, rejected Mother's allegations regarding any sexual abuse by Father, and awarded Father sole custody and guardianship of the children.

For UCCJEA purposes, a court in another country is treated as though it were a court in another state. Pursuant to statute C.R.S. §14-13-206(1), a Colorado court may not exercise jurisdiction, except on a temporary emergency basis, if proceedings have been commenced in a court of another state having jurisdiction substantially in conformity with the UCCJEA, unless those proceedings have been terminated or stayed because Colorado is a more convenient forum. Here, because an action in Canada had already been initiated by Father, the trial court communicated with the Canadian court and found Canada's jurisdiction was substantially in conformity with the UCCJEA, and Canada had not determined that Colorado was a more convenient forum. Thus, the trial court did not err when it determined that Colorado could only exercise temporary jurisdiction under C.R.S. §14-13-204.

Mother argued that the Hague Convention proceeding in Adams County preempted the Denver trial court's UCCJEA analysis, and thus a decision not to return a child under the grave risk exception means that the country to which the child was taken *must* always make the final parental responsibilities decision concerning the child. The Court of Appeals disagreed. Hague Convention return procedures are separate from the determination of jurisdiction, and because the two laws address different objectives, proceedings under the UCCJEA are not preempted by, and do not conflict with, proceedings under the Hague Convention. Under the Hague Convention, a country to which a child has been removed has jurisdiction to decide the merits of the return claim, but not necessarily the underlying custody dispute. Thus, parental responsibilities decisions can be made in the child's place of habitual residence even when the child is not immediately returned there because of an exception to the Hague Convention return requirement.

In addition, the Convention provides that a place to which a child has been removed to may take only such urgent measures as necessary to protect the child, and that such protective measures lapse as soon as the place of habitual residence takes action concerning the child. Because the Hague Convention does not *require* a state to which a child has been taken to decide final parental responsibilities in all cases in which the

child is not returned, the trial court did not err in finding that Colorado can only exercise temporary emergency jurisdiction and that Canada, the children's place of habitual residence, has jurisdiction over parental responsibilities.

## ***In re the Marriage of Brandt*, 2012 CO 2. No. 11SA248 (January 23, 2012)**

*Trial Court: Judge Russell, Arapahoe County; Opinion by Hobbs (en banc)*

Pursuant to C.A.R. 21, the Supreme Court addressed whether the district court erred in assuming jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), sections 14- 13-101-403, C.R.S. (2011), to modify a child custody order that the State of Maryland had issued.

The parties were divorced in Maryland in 2006. In 2010, after Father retired and Mother returned from Iraq, Father settled in Littleton, Colorado and Mother settled in Texas. The parties' minor child resided in Colorado with Father in Colorado while Mother was in Iraq.

In April 2011, while Mother was living in Texas, she received military orders to return to Maryland. The minor child moved back to Texas to live with her prior to her return to Maryland. Shortly before child returned to Texas, Father filed a petition in Colorado to register the Maryland custody order pursuant to C.R.S. § 14-13-305, and to modify the custody order pursuant to C.R.S. § 14-13-203. The district court entered an order registering the Maryland decree and assuming jurisdiction to modify the order based on the fact that the minor child had resided in Colorado for more than one year, and neither party, nor the child "currently resided" in Maryland. Mother then filed a motion to dismiss the Father's petition, and returned to Maryland with the child.

Pursuant to Mother's motions filed in Colorado, Maryland held three teleconferences with Judge Russell in Arapahoe County who concluded that: (1) Maryland had lost exclusive continuing jurisdiction due to Mother's presence in Texas; (2) under the UCCJEA, the preferred forum is where the child has lived for the past six months; and (3) Colorado was the most convenient forum to hear the case. The Maryland judge explicitly disagreed and reiterated its contention that Maryland maintained exclusive continuing jurisdiction over the custody order.

For purposes of modification, only the state that originally entered the custody order may decide that another forum would be more convenient. While the UCCJEA prioritizes the child's "home state" for some purposes, this preference pertains only to jurisdiction to enter an initial child custody order, not to modify an order that has already been entered by another state. Thus, absent action by Maryland disclaiming or declining to exercise exclusive continuing jurisdiction, the only basis for Colorado to divest Maryland of jurisdiction is to determine that "the child, the child's parents, and any person acting as a parent do not presently reside" there.

The phrase "presently reside" necessitates a broader inquiry into the totality of the circumstances that make up the domicile. Residency provisions contained in other

Colorado statutes, such as sections 1-2-103, 13-71-105(1) & (2)(e), and 14-10-131.3, provide guidance for what factors should be considered in making the totality of the circumstances determination. However, because none of those statutes address the term "presently reside", the Court concludes that the factors to be weighed in making the residency determination under section 14-13-202(1)(b) and 203(1)(b), a mixed question of fact and law, include but are not limited to the length and reasons for the parents' and the child's absence from the issuing state; their intent in departing from the state and returning to it; reserve and active military assignments affecting one or both parents; where they maintain a home, car, driver's license, job, professional licensure, and voting registration; where they pay state taxes; the issuing state's determination of residency based on the facts and the issuing state's law; and any other circumstances demonstrated by evidence in the case.

The court declined to adopt an interpretation of the statutory term "presently reside" which is confined only to "physical presence within the borders of the state whose jurisdiction is at issue." The Court also discussed the issues of initial jurisdiction, exclusive continuing jurisdiction, modification, and the appropriate procedure for determining where the parents and the child "presently reside."

## ***In re the Marriage of Wiggins*, 2012 CO 44; No. 12SA63 (Colo. June 18, 2012)**

*Trial Court: Judge Arkin, Douglas County; Opinion by Justice Bender*

This proceeding was brought by Mother under C.A.R. 21 challenging the district court's summary denial of Mother's motion for a protective order and sanctions concerning the acquisition of Mother's entire employment file from Mother's former employer by Father's attorney via subpoena.

In this post-decree parenting time and child support matter, both parties sought discovery prior to hearing. Three days prior to the hearing, Father's attorney served a subpoena on Mother's former employer, a school, commanding that it produce Mother's entire employment file. Father's attorney told the school's business manager that if he produced the entire file, he would not have to testify in court. Mother's file was produced and Father's attorney forwarded it to Mother's attorney asking that she stipulate to its authenticity for trial purposes. Father's attorney had not yet provided Mother with any notice of the subpoena. As such, neither Mother nor her attorney had knowledge of the subpoena prior to Father's attorney's email, and accordingly could not object to its production. Mother moved for a protective order and sanctions against Father's attorney concerning the subpoenaed documents. The district court denied Mother's motion without explanation.

C.R.C.P. 45 sets out the formal process by which an attorney may invoke the subpoena power to require the attendance of a witness at a deposition, hearing, or trial and to acquire documents from that witness. Whether Father's attorney violated Rule 45 when she accepted delivery of subpoenaed documents in advance of the time and place specified in the subpoena depends on whether the rule governs where and when the

production of subpoenaed documents was to occur. Mother argued that the rule requires production only at the designated deposition, hearing or trial. Father argues Rule 45 is silent as to whether a subpoenaed witness may produce subpoenaed documents in advance of the time and place specified in the subpoena and therefore that no violation occurred.

The authority of an attorney to subpoena documents under Rule 45 comes from the phrase "with or without documentary evidence," which is couched within the Rule's principal power to require a witness to attend and testify at a deposition, hearing or Trial. The Rule's use of the adverb "only" constrains the purpose and operation of the subpoena power, restricting its application only "to compel attendance of witnesses" and only "at a deposition, hearing or trial." Therefore, the time and place for the production of subpoenaed documents are restricted to the deposition, hearing, or trial where the witness must attend and testify. Thus, Rule 45 unambiguously prohibits an attorney from accepting subpoenaed documents from a subpoenaed witness in advance of the specified deposition, hearing, or trial, therefore affording sufficient opportunity for objection. If an attorney desires to receive subpoenaed documents from a subpoenaed witness in advance of the time and place specified in the subpoena, the attorney must confer with and obtain the consent from all parties to the case as well as the subpoenaed witness. If a party does not consent, production must wait until the time and place of the event specified in the subpoena.

In sum, unless the subpoenaed witness and other parties consent to an alternate agreement or by other court order, subpoenaed documents are to be produced only at the deposition, hearing, or trial specified in the subpoena. Accordingly, Father's attorney violated Rule 45 and frustrated the purpose of Rule 45 by depriving Mother of the opportunity to object to the subpoena before the documents were produced.

# 9. PROFESSIONAL NEGLIGENCE

## *In re the Interest of A.G. and Concerning C.M.*, No. 10SC332 (Colo. October 17, 2011)

*Trial Court: Judge Schiferl, Otero County; Court of Appeals: Judge Roman (Jones and Miller, J.J. concur); Supreme Court Opinion: Justice Martinez*

In this termination of parental rights case, Mother alleged that the judge should have been disqualified because his clerk was the mother of a material witness in the case, creating an appearance of impropriety. In October of 2007, the child of Mother's live-in boyfriend died in Mother's home as a result of the boyfriend's chronic abuse and neglect. As a result, the Department of Human Services filed a dependency and neglect petition on behalf of Mother's four biological children. Mother's rights were eventually terminated in 2009.

At Mother's termination hearing, a caseworker, who was the daughter of the judge's clerk, testified on behalf of DHS as the primary witness regarding Mother's compliance with the treatment plan. In its order terminating Mother's rights, the court relied

heavily on the caseworker's testimony. Two weeks after the order entered, Mother filed a motion to disqualify the judge and for a new trial, reasoning that the judge's impartiality could reasonably be questioned. Mother alleged she had received ineffective assistance of counsel when her lawyer did not timely file a motion to recuse. Both motions were denied.

A judge's recusal may result from either allegations of actual bias or allegations of a mere appearance of impropriety. An appearance of impropriety exists "in any proceeding in which the judge's impartiality might reasonably be questioned." C.J.C. 2.11(A). Actual bias is one "that in all probability will prevent [a judge] from dealing fairly with a party." People v. Julien, 47 P.3d 1194, 1197 (Colo. 2002).

Whether an ineffective assistance claim can be raised in a termination hearing is an issue of first impression with the Supreme Court. The court of appeals has applied the Strickland v. Washington analysis to a termination hearing, concluding that the parent must prove two elements to prevail on a claim of ineffective assistance of counsel: "(1) counsel's performance was outside the wide range of professionally competent assistance; and (2) the parent was prejudiced by counsel's errors." 466 U.S. 668, 686 (1984). Although the Supreme Court declined to decide whether Strickland applies to an ineffective assistance claim in a termination hearing, it found that prejudice to the litigant is required.

Here, Mother has failed to allege facts that would prove prejudice. At most, she has alleged that there may have been an appearance of impropriety, but she has not alleged that the proceeding was fundamentally unfair or that the judge was not impartial. The prejudice element of an ineffective assistance claim premised on counsel's failure to file a motion for disqualification cannot be satisfied without an allegation that the judge was actually biased. Because Mother's motion for disqualification was entirely based on an appearance of impropriety, rather than a claim of *actual* bias, it failed to satisfy the prejudice element necessary to prevail on an ineffective assistance claim.

C.R.C.P. 97 does not specify the time when a motion for disqualification should be filed. Yet, "good faith and orderly process dictate that if grounds for disqualification are known at the time the suit is filed and a party desires to proceed thereon, a motion to disqualify should be filed prior to taking any other steps in the case." Aaberg v. Dist. Court, 136 Colo. 525, 529, 319 P.2d 491, 494 (1957). A motion for disqualification must be timely filed so that a judge has the opportunity to ensure that a trial proceeds without any appearance of impropriety. When the motion for disqualification is not made until a ruling has been issued, the motion does not give the judge an opportunity to disqualify himself. Instead, the motion serves as a challenge to the judgment of the court. Were the Court to require a new termination hearing in these circumstances, we might encourage an untimely motion to recuse as a means to a second chance with a different judge. Such an outcome would waste judicial resources and further damage the reputation to the judiciary.

# 10. TRUSTS AND ESTATES

***No 2011-2012 Cases to date.***

# 11. INCOME TAX MATTERS

***No 2011-2012 Cases to date.***

# 12. PROTECTION ORDERS

***No 2011-2012 Cases to date.***

# 13. COMMON LAW MARRIAGE

***No 2011-2012 Cases to date.***

# 14. DOMESTIC VIOLENCE

***No 2011-2012 Cases to date.***

# 15. ANNULMENT

***No 2011-2012 Cases to date.***

# 16. PARENTAGE

## *In re the Parental Responsibilities Concerning G.E.R.*, No. 11CA0032 (Colo. App., September 15, 2011)

*Trial Court: Judge Deister, Mesa County; Opinion by Chief Judge Davidson (Nieto, J. concurs, Rovira, J., dissents)*

Mother alleged that she and Father were the natural parents of G.E.R., born out of wedlock. In November 2009, Mother petitioned for allocation of parental responsibilities (APR) and child support under the Uniform Dissolution of Marriage Act (UDMA). The magistrate entered a child support order and determined the allocation of parental responsibilities.

In June 2010, Mother moved for modification of child support and also filed a petition for paternity under the Uniform Parentage Act (UPA), seeking birth-related costs, court costs, and attorney fees, yet she contended that paternity was not an issue and that Father was, in fact, the biological parent to G.E.R. At a hearing on the petition for

paternity, the magistrate found that there was no question of paternity, and that although the UDMA and UPA provided different remedies, the remedies were mutually exclusive and Mother had to elect between pursuing an action under the UDMA or an action under the UPA. Thus, the magistrate dismissed Mother's petition for paternity.

Mother petitioned for district court review of the magistrate's order under C.R.M. 7(a) alleging that the magistrate could consider a request for birth-related costs under C.R.S. §19-4-116 after it had entered orders under the UDMA. The district court adopted the magistrate's order on the basis that the paternity issue had already been resolved.

The Court of Appeals agreed with Mother's contention that the magistrate erred by concluding that she had to elect between pursuing an action under the UDMA or the UPA and remanded the issue to the district court. The Court found that birth-related costs incurred by Mother could not be awarded as a debt of the marriage under C.R.S. §14-10-113 because the parties were never married. Thus, to recover birth-related costs, Mother was required to file a petition for paternity under the UPA.

C.R.S. §19-4-109(1) provides that an action under the UPA may be joined with an action in another court of competent jurisdiction for child support. Here, Mother had a motion for modification of child support pending when she filed her UPA action. Although the better practice would have been to bring both actions simultaneously, and then to consolidate them pursuant to C.R.S. §19-4-109(1), nevertheless, both actions could have been joined under C.R.S. §19-4-109(1). Because the UPA provides that a parent may bring an action in paternity "at any time", Mother was not precluded from seeking birth-related costs under the UPA despite the fact that the father-child relationship was uncontested.

## ***People in the Interest of C.L.S.*, No. 10CA1980 (Colo. App., November 23, 2011)**

*Trial Court: Judge Shakes, El Paso County; Opinion by Judge Bernard (Fox, J. concurs, Graham, J. dissents)*

Mother and Husband were married a short time when son, C.L.S., was conceived. Mother simultaneously had a short, intimate relationship with Boyfriend. Mother filed for dissolution of marriage prior to son's birth. The dissolution decree, issued after son was born, does not refer to any children. The son's birth certificate did not list a father.

Mother and Boyfriend began dating again three months after son was born. Genetic testing was performed excluding Boyfriend as son's biological father. Nonetheless, boyfriend acted as son's father, signed an acknowledgement of paternity, and added his name to the birth certificate.

Upon ending his relationship with Mother, Boyfriend asked a court to grant him parental responsibilities for the son. The court awarded him parenting time and he paid mother child support. Mother applied to child support enforcement (CSE), which sought an order establishing Husband as the son's legal father and requiring him to pay

regular child support. Genetic testing established a 99.99% probability that husband was son's biological father. When CSE learned that Boyfriend had signed an acknowledgement that he was the son's father and that his name was on the birth certificate, it filed an action to determine son's legal father.

The first step in establishing a father-child relationship is determining whether a man is presumed to be a child's father. C.R.S. §19-4-105(1). There are six statutory presumptions.

Two applied to husband:

- § 19-4-105(1)(a) (the man and the child's mother were married and the child was born during the marriage); and
- § 19-4-105(1)(f) (genetic tests establish that the probability of a man's parentage of the child is 97% or higher).

Two applied to boyfriend:

- § 19-4-105(1)(d) (the man received the child into his home and openly held the child out as his natural child); and
- § 19-4-105(1)(e) (the man acknowledges his paternity in writing, but, if another man is also presumed to be the father, the other man has given written consent to the acknowledgement).

No statutory presumption of paternity is conclusive. Once a presumption is established, it may be rebutted by clear and convincing evidence. C.R.S. §19-4-105(2)(a). Although Colorado has recognized that evidence must be clear and convincing to rebut any established presumptions of paternity, it has not addressed what burden of proof should be applied to resolve *competing presumptions.*

Normally, the burden of proof in civil cases is a preponderance of the evidence. C.R.S. §13-25-127(1). The plain meaning of the language used in C.R.S. §19-4-105(2)(a), "the weightier considerations of policy and logic," is consistent with the preponderance standard. By determining which considerations are weightier, a trial court essentially determines which ones are "more probable" to be in the child's best interests, as opposed to those that are "highly probable."

The court here held that trial courts should resolve competing presumptions by using the preponderance standard rather than the clear and convincing standard. The legislature has stated generally that the preponderance standard is the burden of proof in civil cases, C.R.S. §13-25- 127(1), and paternity cases are civil cases. By using the word "weightier," the plain language of section 19-4-105(2)(a) indicates that the preponderance standard applies. Our supreme court and two divisions of this court have stated that the preponderance standard applies to paternity cases. Employing the clear and convincing standard at this point of the decision-making process would make it harder to promote the child's best interests because this elevated standard of proof would (a) put greater weight on the rights of the presumed fathers than those of the child, when it is the child who has the most at stake in a paternity proceeding; (b) change the focus of the analysis to the interests of the presumed fathers, even though in some cases, the child's best interests may not match the best interests of any of the

adults involved; and (c) make it more difficult to determine which presumed father should become the legal one, lessening the prospect of a workable result.

## ***In re the Interest of S.N.V. and Concerning C.A.T.C.*, No. 10CA1302 (Colo. App. December 22, 2011)**

*Trial Court: Judge Straus, Adams County; Opinion: Judge Russell*
*(Carparelli and Roman, J.J. concur)*

Two women dispute motherhood; one as the biological mother, while the other claims legal motherhood under presumptions set forth in the Colorado Uniform Parentage Act (UPA).

S.N.V. was born in 2007. He was conceived through sexual intercourse between Birth Mother and Husband. Husband and Wife assert that they arranged with Birth Mother to act as a surrogate, paid for all birth-related expenses, and have been S.N.V's sole caregivers since his birth. Birth Mother asserts that S.N.V.'s conception was the result of her intimate relationship with Husband, denies the existence of a surrogacy agreement, and states that she participated in S.N.V.'s care for the first two years of his life.

In 2009, Birth Mother sought allocation of parental responsibilities under C.R.S. §14-10-123. Wife filed an action under the UPA to establish that she is S.N.V.'s legal mother under C.R.S. §19-4-105. Birth mother moved to dismiss Wife's petition, arguing that Wife lacks the capacity to bring an action under the UPA. Alternatively, Birth Mother requested summary judgment in her favor because she undisputedly is S.N.V.'s biological mother.

The magistrate ruled in favor of Birth Mother and concluded that Birth Mother must prevail as a matter of law because she is the biological mother. The district court affirmed the magistrate's decision. The Court of Appeals reversed and held that an action to determine legal maternity may be brought by any woman who is presumed to be the child's mother under C.R.S. §19-4-105.

Here, the question is whether the Supreme Court's interpretation of the UPA as it applies to paternity actions - also applies to maternity actions. The Court of Appeals held that it does.

The UPA governs any dispute about the existence of a parent-child relationship. Although, on its face, section 19-4-105 applies only to paternity determinations, the Court of Appeals held that it is extended to maternity determinations by sections 19-4-122 and 19-4-125. *See* § 19-4-122 ("Insofar as practicable, the provisions of [the UPA] applicable to the father and child relationship apply."); § 19-4-125 ("In case of a maternity suit against a purported mother, where appropriate in the context, the word 'father' shall mean 'mother.'").

Thus, under section 19-4-105, a woman may gain the status of a child's natural mother even if she has no biological tie to the child. A woman's proof of marriage to the child's father, or her proof of receiving the child into her home and holding the child out as her own, also may establish the mother-child relationship.

# 17. ALTERNATIVE DISPUTE RESOLUTION

## *In re the Marriage of Leverett*, No. 10CA1338, 2012 COA 69 (Colo. App., April 26, 2012)

*Trial Court: Judge Sells, El Paso County; Opinion by Judge Furman (Carparelli, J. concurs; Jones, J. dissents)*

This post-dissolution contempt action presents an issue of first impression in Colorado: whether the award of an arbitrator appointed under C.R.S. §14-10-128.5, which has not been confirmed by the district court, is enforceable as a "court order" under Colorado's contempt rule. The Court of Appeals held that the answer to this question is no.

At the time of dissolution, the parties entered into an arbitration agreement stating, "the parties understand that this process is an alternative to having their case heard in court by a judge," and the court appointed an arbitrator pursuant to C.R.S. §14-10-128.5. The arbitrator issued two final awards, one of which ordered husband to take two of the children to a particular therapist for family therapy. The arbitrator's award was emailed to the parties in an email asking the parties to file the awards with the court. Neither spouse petitioned the district court to confirm the awards.

Husband took the children to a therapist other than the one selected by the arbitrator. Wife filed a motion for contempt citation with a district court magistrate citing the arbitrator's awards. Husband was found guilty of contempt for violating the arbitrator's awards and was sentenced to two weeks in jail and a $2,000 fine. Husband petitioned the district court for review of the magistrate's decision stating that he could not be held in contempt for alleged violations of unconfirmed arbitration awards, which was denied.

To find a party in contempt under C.R.C.P. 107, the fact finder must find that the contemnor did not comply with a lawful order of the "court," defined by C.R.C.P. 107(a)(6) as "any judge, magistrate, commissioner, referee, or a master while performing official duties." Because an arbitrator is not included in this definition, and an arbitrator's award is not an order of the court, a person cannot be held in contempt of court for violating an unconfirmed award of an arbitrator.

C.R.S. §14-10-128.5 states the conditions for using an arbitrator in domestic relations cases to resolve disputes between the parties concerning their minor or dependent children. However, it does not mention how to *enforce* an arbitrator's award that has

become effective if one party should fail to follow that award. Because it does not, and courts are to construe C.R.S. §14-10-128.5 in *pari materia* with the Uniform Arbitration Act (UAA) if possible, the Court of Appeals turned to the provisions of the UAA for guidance.

Under C.R.S. §13-22-222(1), an arbitrator's award does not constitute an enforceable "order" of the district court unless and until a party makes a motion to the court for an order confirming the award and the court issues an order confirming the arbitration award pursuant to that section. Here, the arbitrator appeared to recognize this requirement when she directed the parties to file the award with the court.

Where one party fails to comply with an arbitration award under C.R.S. §14-10-128.5, the other party may make a motion to the district court for an order confirming that award under C.R.S. §13-22-222(1). Only once the court issues a confirming order is the order enforceable through a contempt action. Because neither party made a motion to the court for an order confirming the arbitrator's awards, those awards were not enforceable as an "order of the court," and husband may not be held in contempt on that basis.