Family Law Update

2009-2010

by
Barbara Jensen, Esq., and Tina Patierno, Esq.

Materials by Ronald D. Litvak, Esq., & Courtney J. Leathers, Esq.

Litvak Litvak Mehrtens & Epstein P.C.
1900 Grant Street, Suite 500
Denver, CO 80203-4305
(303) 837-0757
www.familyatty.com

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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, 232 P.3d 782 (Colo. June 1, 2010)

Trial Court: Judge Flynn, Mesa County; Court of Appeals Opinion (200 P.3d 1083) by Judge Terry (Rothenberg and Hawthorne JJ. concur); Supreme Court Opinion by Justice Eid

On February 17, 2009, the Supreme Court denied the petition for writ of certiorari, but granted the cross-petition for writ of certiorari regarding: (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."

The trial court held that the separation agreement, which subjected Husband's business interest to a thirty-three percent marketability discount was enforceable, and ordered temporary maintenance for Wife based upon the increased standard of living of the parties late in their marriage. The Court of Appeals found the separation agreement to be unconscionable, but rejected Wife's argument that the holding of Pueblo should be extended to dissolution of marriage cases, thus prohibiting marketability discounts when valuing interests in closely held businesses for property division. The Court of Appeals reversed the award of temporary maintenance, finding that the magistrate erred by considering the parties' standard of living when determining whether Wife was entitled to temporary maintenance under C.R.S. §14-10-114(3), rather than examining the standard of living *after* the threshold for entitlement to temporary maintenance was met.

Under the holding of Pueblo, marketability discounts were prohibited in the context of a corporation buying out a dissenting minority shareholder. The Supreme Court found

that extending this holding to dissolution cases is inappropriate because the limiting statutory language examined in Pueblo, "fair value," is not included in the property division statute applicable in dissolution cases. In fact, C.R.S. §14-10-113(1) provides the trial court with broad discretion to divide property as the court "deems just" after "considering all relevant factors." Thus, the Supreme Court held that there is no per se rule against applying marketability discounts to interests in closely held businesses in dissolution of marriage cases. Trial courts have discretion, on a case-by-case basis, to determine whether to apply a marketability discount.

Where the parties' combined annual gross income is greater than $75,000, a party seeking maintenance must meet a two-pronged test. First, the court must find a spouse lacks sufficient property to provide for his/her reasonable needs and is unable to support oneself through appropriate employment. C.R.S. §14-10-114(3). The Supreme Court found that In re the Marriage of Olar, 747 P.2d 676 (Colo. 1987), established that "reasonable needs" and "appropriate employment" are to be assessed within the broader context of the specific facts and circumstances of the parties and their marriage. In effect, examining the standard of living during the marriage "is in fact an appropriate – and even a necessary – starting point" to determining reasonable needs and appropriate employment. Thus, the Supreme Court held that the threshold determination of whether a party is entitled to temporary maintenance under C.R.S. §14-10-114(3) contemplates that the court will consider the circumstances of the marriage, including the parties' standard of living.

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 martial

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*, 228 P.3d 271 (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.

***In re the Marriage of White and Martin*, No. 09CA0596, 2010 WL 2306113 (Colo. App. June 10, 2010)**

Trial Court: Judge Grohs, El Paso County; Opinion by Judge Carparelli (Bernard, J. concurs and Loeb, J. specially concurs)

In this post-decree case, Father appeals an order modifying child support. At dissolution, the child resided primarily with Mother and Father paid child support. Then in June 2007, the parties agreed that the child would reside primarily with Father, and that neither parent would pay child support, so long as Mother continued to have overnight parenting time. However, in August 2008, Father filed a **motion to modify child support**, asking that Mother pay child support, retroactive back to the date the child began residing with him in accordance with C.R.S. §14-10-122(5), and In re the Marriage of Emerson, 77 P.3d 923 (Colo. App. 2003). The trial court ordered Mother to pay child support, retroactive back to the date of filing the motion (August 2008), not the date the child began residing with Father (July 2007).

C.R.S. §14-10-122(1)(a), (1)(c), and (1)(d) each refer to the general rule, that child support may be modified only as to installments accruing after the filing of a motion for modification. C.R.S. §14-10-122(5) provides that "when a mutually agreed upon change of physical care occurs, "the provisions of child support *of the obligor under the existing child support order…will be modified* as of the date when physical care was changed." The Court of Appeals noted that the statute specifically limited retroactive modification to child support payable *by the obligor*, and that the statute is plain, clear and not ambiguous.

When C.R.S. §14-10-122(5) was first added in 1991, it provided that "[w]hen a voluntary change of physical custody occurs, *the provisions for support*…will be modified as of the date when physical custody was changed. Within months of In re the Marriage of Pickering, 967 P.2d 164 (Colo. App. 1997), the legislature added, "the provisions of child support *of the obligor under the existing child support order*" to C.R.S. §14-10-122(5). Additionally, references of the newly amended C.R.S. §14-10-122(5) were added to C.R.S. §14-10-122(1)(a), (1)(c) and (1)(d), thus further establishing C.R.S. §14-10-122(5) as the exception. Then, five years later, the Court of Appeals held that "the burden of support, along with the identity of the obligor, 'shifted' when the children changed residences," thus child support could be modified with regard to the parent who was not the obligor under the existing order as of the date the physical care changed. Emerson, 77 P.3d at 926.

The Court of Appeals agreed with Father's argument that when the parties mutually agreed to change physical care, Father was the obligor under the existing child support order. Therefore the court could properly modify his child support obligation

retroactive back to the date of the change of physical care under the exception of C.R.S. §14-10-122(5). Thus Mother does not receive a windfall of child support when she no longer had physical care. However, since Mother was not an obligor under that child support order, the general rule under C.R.S. §14-10-122(1) applied, and her child support obligation was modified back to the date of filing the motion. The Court held that Father has the right and choice to file or postpone the filing of his motion to modify child support. The Court of Appeals declined to apply Emerson because it did not find the language of the statute to be ambiguous or unclear.

In his concurrence, Judge Loeb stated that it was a "fair reading" of the record that the trial court concluded that mother became the obligor when the physical care changed. But he also stated that it was within the discretion of the trial court to find that mother's child support obligation would be zero from the date of change of physical care to the date Father filed his motion. Judge Loeb provided that since the two divisions had conflicting conclusions regarding the interpretation of C.R.S. §14-10-122(5), it would be appropriate for the General Assembly or the Supreme Court to resolve the conflict.

***In re the Marriage of Connerton and Nevin*, No. 09CA2290, 2010 WL 3584282 (Colo. App. Sept. 16, 2010)**

Trial Court: Judge Dubois, El Paso County; Opinion by Judge Booras (Webb and Miller, JJ. concurs)

In this post-decree case, Mother appeals the trial court's order modifying child support and imputing income to her based upon a finding that she was voluntarily unemployed. Mother sought to modify the current child support, based upon her receipt of maintenance ending. Father argued that Mother was a licensed real estate agent and emergency medical technician (EMT) who was voluntarily unemployed. The trial court held that Mother had substantial job skills and imputed income to Mother, based upon full time employment as an EMT, held that her educational goal of becoming a nurse did not meet the standards of reasonableness because the program would take 4 ½ years and she did not pursue her degree while receiving maintenance.

Both parents have an obligation to support their children. A court may calculate child support based upon a parties potential income, if that parent is voluntarily unemployed or underemployed. C.R.S. §14-10-115(5)(b)(I). A court may not deem a parent voluntarily unemployed or underemployed if (1) the parent is "enrolled in an educational program that is reasonably intended to result in a degree…within a reasonable period of time and that will result in a higher income," (2) the "educational program is a good faith career choice that is not intended to deprive the child of support," and (3) the "parent's pursuit of the career does not unreasonably

reduce the support available to the child." C.R.S. §14-10-115(5)(b)(III)(C). The trial court must make all of these findings.

In this case, the trial court did not find that Mother's plan was not reasonably intended to result in a degree, was not a good faith career choice, or that the plan was intended to deprive the child of support or unreasonably reduce the support available to the child. The Court of Appeals remanded the case, as the trial court did not make findings as to all parts of the statute.

Since remand may raise other issues, the Court of Appeals reiterated that the trial court may impute income at the annual income that parent previously earned. While the court may consider whether employment is available, there is no burden to prove a particular job exists. The court may consider only childcare expenses that are actually incurred, as it would be "patently unfair" to include child care expenses in the child support calculation that were speculative.

Finally, Mother argued that the court erred in denying her request for attorney fees pursuant to C.R.S. §14-10-119. When seeking fees under C.R.S. §14-10-119, a party must present evidence of the reasonableness of the fees at the time of the hearing on fees, including facts such as the billing rate, the number of hours billed, and the reasonableness and necessity of the hours billed. Since this evidence was not presented, the trial court properly denied Mother's request for fees.

***In re the Marriage of Hein*, No. 09CA2290**
(Colo. App. Sept. 30, 2010)

Trial Court: Judge Dubois, El Paso County; Opinion by Judge Booras (Webb and Miller, JJ. concurs)

In this post-decree case, El Paso County Child Support Enforcement (CSE) appeals an order modifying child support, alleging that the trial court abused its discretion for deviating from the child support guidelines. In the dissolution, Mother was ordered to pay child support of $173 per month. A year later, paternal grandparents intervened and sought parental responsibilities of the children. The children began living with the paternal grandparents, who received public assistance benefits to pay for a portion of the children's daycare. CSE filed to modify child support. At the hearing, the trial court found that Mother's presumptive child support was $399 per month. But, because an order of child support exceeding $245 per month would cause grandparents to lose their public assistance benefits, the court deviated from the guidelines and modified the child support to $240 per month.

The court may deviate from the child support guidelines if the presumptive amount of child support would be inequitable, unjust or inappropriate. C.R.S. §14-10-115(8)(e). The party seeking deviation has the burden to show the deviation is both reasonable and necessary. The court must make findings specifying both the presumptive amount of child support and the reasons for the deviation. C.R.S. §14-10-115(8)(e).

A court does not abuse its discretion by refusing to deviate, even if the presumptive amount would end eligibility for public assistance. Other states have held that child support orders should not be structured to ensure recipients remain eligible for public assistance. Child support is income to the child; therefore any public assistance eligibility must be determined *after* child support income is set.

The Court of Appeals held that the trial court abused its discretion by deviating from the guidelines solely to protect grandparents' eligibility for public assistance benefits, and remanded the case.

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.

***In re the Marriage of Gallegos and Baca-Gallegos*, 09CA2015, 2010 WL 3584283 (Colo. App. Sept. 16, 2010)**

Trial Court: Judge Goodbee, Adams County; Opinion by Judge Davidson (Plank and Ney, JJ. concur)

Mother appealed from the trial court's order denying her request for attorney fees, which she incurred when defending against an unsuccessful petition for grandparent visitation. Whether attorney fees are recoverable against grandparents under C.R.S. §14-10-119 or C.R.S. §19-1-117(3) in grandparent visitation cases is a question of first impression in Colorado.

Grandparents may seek reasonable grandparent visitation, upon a finding that it would be in the best interests of the child, by initiating a new action or intervening in an existing dissolution case. C.R.S. §19-1-117. Only C.R.S. §19-1-117(3) addresses attorney fees:

> "No grandparent may file an affidavit seeking an order granting grandchild visitation rights more than once every two years absent a showing of good cause. If the court finds there is good cause to file

> more than one such affidavit, it shall allow such additional affidavits to be filed and shall consider it. *The court may order reasonable attorney fees to the prevailing party….*

The Court of Appeals found that this provision limits attorney fees to requests made after the initial visitation determination. Had the legislature intended this provision to apply to initial and subsequent requests for grandparent visitation, it would have expressly stated this. Inclusion of the attorney fees provision in this section was meant to protect parents and children from repetitive litigation.

Awards of attorney fees under C.R.S. §14-10-119 are used to apportion fees equitably between spouses based upon their financial positions. This statute does apply in non-parent allocation of parental responsibility cases, and child support proceedings.

The Court of Appeals held that the grandparent's statutory basis for their visitation request was made under C.R.S. §19-1-117 and they did not contemplate an award of parental responsibilities. Therefore Mother did not incur attorney fees under an article 10 of title 14 case and could not be awarded fees under C.R.S. §14-10-119, despite the fact grandparents intervened in a dissolution of marriage case.

6. ALLOCATION OF PARENTAL RESPONSIBLITIES

In re the Parental Responsibilities of Reese, 227 P.3d 900 (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.

***In re the Marriage of Parr and Lyman*, No. 09CA0854, 2010 WL 2105957 (Colo. App. May 27, 2010)**

Trial Court: Judge Bromley, El Paso County; Opinion by Judge Taubman (Hawthorne and Furman, JJ. concur)

Father appeals the trial court's order affirming the magistrate's order and adding additional **restrictions to his parenting time**. The parties entered into a parenting plan that provided Father's parenting time would gradually increase from short supervised visits to unsupervised alternating weekends, and that Father's visits "should be governed by…ongoing UA's [urinalysis tests] and drug screenings to demonstrate that he does not return to marijuana use." The day the parenting plan was incorporated into the decree by the court, Father was approved for listing on the State of Colorado Medical Marijuana Registry. At no time had Father reported that he was seeking this listing. Father filed a motion to waive the urinalysis testing in light of his approved medical marijuana use. The trial court found that Father voluntarily submitted to the terms of the parenting time plan, thus the plan should remain. Father petitioned for review of the magistrate's order on the basis that the testing requirement was contrary to his constitutional right to use medical marijuana (Colorado Constitution, article XVIII, section 14); Father's motion was denied one year later. In affirming the magistrate's Order, the court also added additional provisions, that Father parenting time would be supervised until he demonstrates "by clear and convincing evidence that his use of medical marijuana is not detrimental to the child," and that he may petition for unsupervised time after he provides a clean hair follicle test. Mother filed a Motion to Restrict Father's parenting time for not providing proof of clean tests; no hearing was held.

Husband contends that the court erred by adding additional restrictions to his parenting time. Pursuant to C.R.S. §14-10-129(1)(a)(I), the court may make orders or modifications to parenting time if it would serve the best interests of the child. But the court shall not restrict a parent's parenting time unless the parenting time would endanger the child's physical health or significantly impair the child's emotional development. The Court of Appeals found that the trial court's additional Order prohibiting marijuana use was not a restriction, requiring a finding of endangerment, as it was consistent with the Parenting Plan that Father not use marijuana. But the trial court did err when it returned Father's time to supervised because there was no finding that "absent the restriction, the child would have been physically endangered or her emotional development would have been significantly impaired." The Court of Appeals found that this was a restriction, and that the trial court did not take additional evidence, made no finding of endangerment, or a finding that Father's use of medical marijuana threatened the child's physical or emotional safety. Thus the restriction was

improper and vacated. For the same reasons, the court vacated the requirement for hair follicle testing and petitioning for unsupervised visits.

The Court specifically did not address whether medical marijuana use may constitute endangerment, or Father's argument that he had a constitutional right to use medical marijuana. Concurring, Judge Furman reiterated that the existing parenting plan remains in effect, but was concerned that Mother had filed a motion to restrict parenting time and was not afforded a hearing.

***In re the Parental Responsibilities of A.M. and Concerning Goebel*, No. 09CA1430, 2010 WL 3584398 (Colo. App. Sept. 16, 2010)**

Trial Court: Judge Martinez, El Paso County; Opinion by Judge Casebolt (Furman and Terry, JJ. concur)

In this parental responsibilities action, paternal biological Grandparents appeal the trial court's order in favor of Mother and Adoptive Father, terminating grandparents' visitation. In 2005, Mother was awarded sole residential parental allocation and sole decision-making. Father was not awarded any parenting time, as he was then incarcerated. Mother was voluntarily permitting paternal biological grandparents visitation. In 2008, Grandparents sought and were granted an order for grandparent visitation. In 2009, Mother moved to terminate the grandparent visitation, on grounds that Father's parental rights had been terminated, Mother's Husband had adopted the child, and that termination of grandparent visitation would be in A.M's best interests.

The issue before the court, one of first impression in Colorado, is what is the proper burden of proof and which party bears it when a parent seeks to modify or terminate grandparent visitation previously granted by the court under C.R.S. §19-1-117.

Grandparents argue that preponderance of the evidence is the correct legal standard to use in modification of grandparent visitation cases, similar to modifications of parental responsibilities under C.R.S. §14-10-129 and §14-10-131. Though the court previously applied clear and convincing evidence when they initially sought visitation, this standard is no longer applicable in modification cases. Mother contends, and the court relied on the standard from In re the Adoption of C.A., 137 P.3d 318 (Colo. 2006); specifically that "for orders concerning grandparent visitation under C.R.S. §19-1-117, a presumption must be applied in favor of the parent's decision concerning grandparent visitation, which could be rebutted by grandparents only through clear and convincing evidence that the parent's visitation decision was not in the child's best interests and, conversely, that the visitation they sought was in the child's best interests." The Court reiterated that a dispute between parents and grandparents is not a "contest between

equals." The Court found nothing in a grandparent visitation modification proceeding that suggests parent's constitutional rights to care custody and control of their children are in any way diminished, nor did it find that grandparent's have gained any standing equal to that of parents merely because they have been granted statutory noncustodial visitation rights.

Additionally, grandparents argued that the trial court should not have admitted evidence that predated the original award of grandparent visitation. The Court of Appeals held that when conditions have changed, or previously unknown material facts are discovered, evidence that predated the decree or award may be considered if it is relevant to the issues on which the requested modification is based.

7. GUARDIANS, SPECIAL ADVOCATES, AND CHILD REPRESENTATIVES

In the Matter of Minor Child D.I.S., and 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.

***In the Marriage of Kanefsky and Concerning Fremerman and Fremerman*, No. 09CA0690, 2010 WL 3432208 (Colo. App. Sept. 2, 2010)**

Trial Court: Judge Arkin, Douglas County; Opinion by Judge Hawthorne (Dailey and Carparelli, JJ. concur)

Wife's co-conservators and co-guardians, who are not licensed to practice law, appealed Wife's permanent orders. A case of first impression in Colorado, the issue here is **whether a guardian or conservator**, acting as an incapacitated or protected person's legal representative, **may represent a ward or a ward's estate without an attorney.** After hearings in the dissolution and a related probate case, the probate court issued Letters naming Wife's Mother and Sister as co-conservators and co-guardians for the purpose of assisting Wife in her dissolution. After the permanent orders were entered, Mother's Conservators filed an "entry of appearance" in the dissolution case, and filed a notice of appeal on behalf of Wife seeking to revere certain permanent orders. The Court of Appeals issued an Order to Show Cause for the Conservators to explain how they have standing.

A guardian or conservator is an incapacitated or protected person's legal representative. C.R.S. §15-14-102(6). Guardians may petition the court to initiate or maintain actions for dissolution of marriage. C.R.S. §15-14-315.5(1). Conservators may prosecute or defend actions to protect the protected person's assets. C.R.S. §15-14-425(2)(x). While the Colorado Constitution allows every person to represent their interests in the courts, no one is allowed to prosecute or defend an action in which he is not a party without obtaining a license to practice law. C.R.S. §12-5-101.

The Court of Appeals held that nonlawyer conservators and guardians are statutory legal authorities only, and their legal authority does not create an exception to C.R.S. §12-5-101 requiring a license to practice law on behalf of others. Therefore, since the Conservators were not licensed to practice law, they cannot represent Wife without an

attorney. The Court of Appeals stayed the case 60 days for the Conservators to obtain counsel.

8. PROCEDURAL AND EVIDENTIARY MATTERS

In re the Marriage of Roberts, Schelp and Barnett, 228 P.3d 151 (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 disclosure 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*, 226 P.3d 1227 (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.*, 221 P.3d 65 (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.

***In re the Marriage of Weis*, 232 P.3d 789 (Colo. June 7, 2010)**

Trial Court: Judge DuBois, El Paso County; Opinion by Judge Eid

Pursuant to the parties' Separation Agreement, ex-Wife was to receive $65,000 from the proceeds of the sale of the marital home, from which she was to pay certain joint credit

card debts. Ex-Wife paid one credit card off, but did not pay the others. One of the assignees for one of the unpaid debts named ex-Husband in a collection action, thus ex-Husband filed two contempt citations against ex-Wife related to her failure to pay the debt. Thereafter, ex-Wife filed for Chapter 13 bankruptcy, including the credit card debt, but did not indicate any co-debtors. Ex-Wife argued that she was currently on a five-year payment plan, thus the automatic stay that applies in bankruptcy prevented ex-Husband from filing contempt to pursue payment. The trial court held that ex-Wife was in contempt, the automatic stay did not apply because the contempt actions fell under two exceptions to the automatic stay, that ex-Wife willfully refused to pay the debts, sentenced ex-Wife to 60 days in jail, and subsequently denied the stay of execution of the jail sentence unless ex-Wife posted a supersedeas bond in the amount ex-Wife owed ex-Husband. Ex-Wife then filed a Petition for a Rule to Show Cause pursuant to C.A.R. 21, seeking reversal of contempt finding and alleging that the automatic stay barred to trial court's action.

Filing bankruptcy triggers an automatic stay, which "suspends any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor." Quoting In re Vierkant, 240 B.R. 317, 321 (B.A.P. 8th Cir. 1999). There are two narrowly construed exceptions to the automatic stay: (1) bankruptcy does not stay a criminal action, 11. U.S.C. §362(b)(1), and (2) does not stay "collection of a domestic support obligation from property that is not property of the estate," 11 U.S.C. §362 (b)(2)(B).

The Supreme Court held that the trial court correctly found that the credit card debts were in the nature of a domestic support obligation, as the parties' Separation Agreement indicated that waiver of maintenance was in consideration for undertaking debt obligations. But the trial court had no evidence that the credit card debt obligations could be collected from "property that is not property of the [bankruptcy] estate." In fact, the court found that ex-Wife was unable to pay the debt. Thus the Supreme Court held that though the trial court properly classified the credit card debt as a domestic support obligation, there was no evidence there was property outside of the bankruptcy estate that could pay the obligation, thus the exception to the automatic stay did not apply.

With regard to the criminal exception to the automatic stay, the Supreme Court held that the contempt action was civil, not criminal, in nature. In deciding whether contempt is criminal in nature, the court must look to the "purpose and character of the sanctions imposed against the contemnor." People v. Barron, 677 P.2d 1370, 1372 n.2 (Colo. 1984). Here, the sanctions were remedial, as ex-Wife could purge the jail sentence if she paid the supersedeas bond in the amount of the debt, and the contempt proceedings was designed to force payment to a third party, not to uphold the dignity of the court. Though the trial court found that the punitive sanctions made this case "quasi-criminal," the Supreme Court clarified that creditors cannot turn enforcement actions into criminal matters merely by seeking punitive sanctions, and the Bankruptcy

Code has no exception for "quasi-criminal" actions, thus "quasi-criminal" actions do not create criminal proceedings, thus the exception to the automatic stay does not apply.

***In re the Marriage of Stockman*, No. 10CA0125, 2010 WL 2853758 (Colo. App. July 22, 2010)**

Trial Court: Judge Rubinstein, Mesa County; Opinion by Judge Dailey (Loeb and Hawthorne, JJ. concur)

The magistrate found Husband guilty of two counts of contempt, and ordered Husband to pay attorney fees. The Order stated: "NOTICE: This order is issued in a proceeding in which consent of the parties is necessary. Any appeal of this order must be taken with 45 days pursuant to Rule 7(b), C.R.M." Wife filed an appeal.

Pursuant to C.R.M. 7(b), the Court of Appeals has jurisdiction over any order or judgment entered *with* the consent of the parties, that is, not subject to review under C.R.M. 7(a). Orders entered *without* the consent of the parties requires district court review of a magistrate's order before an appeal may be filed.

The Magistrate's order of attorney fees in this case was an order that could have been made without the consent of the parties. Therefore district court review of the magistrate's order was required before an appeal could be filed. The Court of Appeals has no jurisdiction therefore the appeal is dismissed.

Since a review of the Magistrate's Order by the district court is no longer timely, and Wife relied upon an erroneous or misleading ruling by the court, the Court of Appeals stated that the district court should carefully consider this unique circumstance when it determines whether to accept this untimely appeal.

9. PROFESSIONAL NEGLIGENCE

No 2009-2010 Cases to date.

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 Disher 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 Disher.

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, 228 P.3d 267 (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 did not apply 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 the essence of the marriage. Misrepresentation about a spouse's prognosis and life expectancy can go 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.

16. PATERNITY

In re the Parental Responsibilities of A.D. and Concerning Rueda, No. 09CA0756, 2010 WL 1238841 (Colo. App. Apr. 1, 2010); *cert. denied* (Colo. Aug. 30, 2010)

Trial Court: Judge Goodbee, Adams County; Opinion Judge Rovira (Roy and Richman concur)

Mother appeals from a judgment declaring Petitioner Nicholas Rueda to be the presumed natural father of her child, A.D., and awarding him joint decision-making and parenting time. Mother and Petitioner ended their relationship in 1999, and A.D.

was born on August 18, 2001. Mother and Petitioner reconciled when A.D. was eleven months old, and resided together as a family until January 2007. For the next year, Petitioner spent several overnights a week with A.D. until Mother discontinued contact in February 2008. In April 2008, Petitioner filed an allocation of parental responsibilities case and amended it to include a claim to establish paternity under the Uniform Parentage Act (UPA), C.R.S. 19-4-101 to -130. At the hearing, Petitioner conceded that he was not the biological or adoptive father of A.D. Mother identified the possible biological father, who received notice of the proceedings but failed to appear. Mother conceded that Petitioner received A.D. into his home and held her out to be his natural child. The trial court established Petitioner as a presumed natural father of A.D. under C.R.S. 19-4-105(1)(d), found that Petitioner had standing as a psychological parent to pursue an allocation of parental responsibilities pursuant to C.R.S. 14-10-123(1)(c), ordered joint decision-making and parenting time to Petitioner and ordered Petitioner to pay monthly child support.

Mother contends that the court erred when it failed to notify the alleged biological father of the proceedings as a parent and interested party under C.R.S. 14-10-123(2) and did not join him as an indispensable party under C.R.C.P. 19. The Court of Appeals found that since these issues affect the alleged biological father's rights only, Mother would not have standing to contest these points. Moreover, under C.R.S. 19-4-110, the alleged father could not have been made a party to the action, as he was a California resident and the Colorado court did not have jurisdiction over him, and the alleged father was given notice but chose not to participate.

Mother contends that the court erred by not making A.D. a party to the action and appointing a guardian ad litem. As the court determined for the alleged father, these rights belong to the child, and mother lacks standing to contest them. Additionally, C.R.S. 19-4-110 only provides that a child *may* be made a party and *may* be appointed a guardian ad litem.

Next Mother argues that C.R.S.19-4-102 defines a parent-child relationship as "the legal relationship existing between a child and his natural or adoptive parent incident to which the law confers or imposes rights, privileges, duties and obligations." She contends that since Petitioner is neither the natural or adoptive parent of A.D., no legal parent-child relationship can be established. Pursuant to C.R.S. 19-4-105(1)(d), a man is presumed a natural father "if he received the child, while a minor, into his home and openly held the child out as his natural child." This presumption may be rebutted by clear and convincing evidence, or is rebutted by a court decree establishing paternity (there is no decree in this case). The Court finds that Mother's argument would negate the presumptions identified in C.R.S. 19-4-105(1). The Court finds that the definition cited by Mother in C.R.S. 19-4-102 applies to a parent and child relationship once it is declared.

The Court clarified that the trial court's finding that Petitioner was also a psychological parent pertained to its determination of standing under C.R.S. 14-10-123(1)(c).

Though the Supreme Court denied certiorari, Justice Coats and Justice Eid would have granted certiorari as to the following issues:

(1) Whether the Court of Appeals erred in holding that a parent-child relationship can be established under the Uniform Parentage Act when the party attempting to establish paternity stipulates that he is not the biological father of the child.

(2) Whether the Court of Appeals erred in holding that the presumption of paternity contained in section 19-4-105(1)(d), C.R.S. (2009), was not rebutted in the present case.

(3) Whether the Court of Appeals erred in concluding that, since Respondent was the "declared" parent of A.D., the biological mother's constitutional protections as a natural parent against claims for custody by a non-parent were nullified.