

Survey of Family Law Cases 2004-2013

2007 Family Law Survey

PROCEDURAL AND EVIDENTIARY MATTERS IN A DIVORCE

Husband appeals from the property division in this annulment proceeding in In re the Marriage of Amich, f/k/a Adiutori, and Adiutori, No. 06CA2493, 2007 WL 3378336 (Colo. App. 2007). After three months of marriage, Wife filed for an annulment based upon her mental incapacity due to heavy doses of pain and depression medicine following major surgery. The court granted the annulment and found that Wife did not gift \$30,000 and a Lexus to Husband, and that since Husband was last in possession of Wife's jewelry, that he should be responsible for its loss.

To be a gift between spouses, a transfer of property must involve a "simultaneous intention to make a gift, delivery of a gift, and acceptance of the gift." Though the court did not find that Husband had forced Wife to act, as Wife argued, the Court did not find that Wife intended to make these gifts.

While on a police-assisted fifteen-minute access visit, Wife found a note underneath a phone in Husband's home, where Wife no longer lived. The note was in Husband's handwriting and referred to a conversation he had with his criminal attorney in which Husband stated that he was keeping Wife's jewelry. The trial court admitted the note, despite Husband's objection that the note was privileged attorney-client communication. Colorado courts follow the "ad hoc" approach; it is within the court's discretion to determine "whether an inadvertent disclosure of privileged documents by an attorney or client constitutes a waiver of privilege." The court found that Husband's efforts to protect the confidentiality of the note were reasonable, therefore the trial court abused its discretion by admitting the note containing privileged attorney-client communication.

With regard to Wife's lost jewelry, the Court of Appeals stated that C.R.S. §14-10-113(1) does not prohibit the Court from "assigning liability to one spouse for the loss of separate property belonging to the other spouse." The Court of Appeals found no error in applying the law of bailments, rather than C.R.S. §14-10-113, to determine that Husband was responsible for the lost jewelry. A bailment is a "delivery of personal property by one person to another with an express or implied contract that the property will be returned or accounted for when the bailor reclaims the property," otherwise a presumption of negligence arises on the part of the bailee. Husband was last in possession of the jewelry, his possession was in the nature of a bailment, and as bailee he was responsible for the loss. But this only created the *presumption* of negligence, not proof of negligence. Therefore the case is remanded to make findings whether Husband was in fact negligent, and then whether Husband should be liable.

In re the Marriage of Lipson v. Roberts went up on appeal and certiorari was denied, en banc. 07CA903, 2007 WL 4374264 (Colo. 2007). But Chief Justice Mullarkey would have granted certiorari as to the following issue: Whether the five year "reachback" provision of C.R.C.P. 16.2(e)(10) confers jurisdiction to consider post-decree motions filed on or after January 1, 2005 seeking reallocation of marital assets based on spousal misrepresentation and/or fraud for cases filed prior to January 1, 2005; or whether the district court was correct in ruling that Rule 16.2's five-year period for seeking such relief only applies to cases originally filed after January 1, 2005.