

## Survey of Family Law Cases 2004-2013

### 2008 Family Law Survey

## DEFINING PROPERTY

Husband's appeals property and child support orders; among other issues, that the court erred in labeling a log cabin owned by Husband's parents as marital property; and by failing to retroactively modify child support in In re the Marriage of Schmedeman, 190 P.3d 788 (Colo. App. 2008); petition for rehearing denied (2008).

With respect to **property**, Husband, Wife, friends and Husband's father built the shell of the cabin. Husband gave the shell to his parents, who installed it on leased land, paid \$65,000 to complete construction, paid the utilities, property taxes and insurance on the cabin. The cabin was used as a vacation home for family members, and used by Husband in brochures to solicit business. The court found that despite Husband representing that the property was marital for his personal business solicitation, he could dispose of the shell, owned by Husband and Wife, as he saw fit; and Wife's disapproval did not affect the validity of Husband's transfer. The cabin was deemed property owned by Husband's parents. Since the court reversed the finding that the cabin was marital property, the court must remand to determine a new division of marital property.

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To qualify as a **gift**, there must be "a simultaneous intention to make a gift, delivery of the gift and acceptance of the gift." *Id.* at 791. Though Husband's father testified that he orally promised to leave the cabin to all of his children, including Husband, the court found that this intent did not actually gift any ownership interest back to Husband and Wife. Moreover, a marital asset may not include any interest in a donative third party instrument that is amendable or revocable, such as a will. Also, pursuant to the statute of frauds, a contract to devise land must be in writing.

As to **child support**, Husband filed a motion to modify child support, retroactive back to the date his eldest child turned nineteen. Under the former C.R.S. §14-10-115(1.6), "child support terminated without either party filing a motion when the child attains nineteen years of age." The court held that there is no authority to enter a retroactive modification without a motion where the child support obligation includes support for other younger children in the family; "only an outright termination of the support obligation affecting all children is permitted without a motion." (emphasis added).

In August 2006, C.R.S. §14-10-115(1.6) was amended and now states "emancipation occurs and child support terminates without either party filing a motion when the last or only child attains nineteen years of age." C.R.S §14-10-115(13)(a). Thus a motion to modify child support is unnecessary if the last or only child reached nineteen; if there is more than one child, a motion to modify child support must be filed when each child reaches the age of emancipation, and modification is effective as of the date of filing the motion. C.R.S. §14-10-115(1)(a)(d).

The Supreme Court considers the proper standard of review for Ex-Wife's claim of unjust enrichment by her ex-in-laws from the sale of the former marital home in Lewis v. Lewis, 189 P.3d 1134 (Colo. 2008), as modified on denial of rehearing and then affirmed (Colo. 2008); petition for rehearing denied (Colo. App. Dec. 18, 2008). The ex-in-laws purchased a home, with \$5000 down, for Husband and Wife as a surprise gift. For the next fourteen years, Husband and Wife paid the mortgage to the ex-in-laws, who paid the mortgage holder; Husband and Wife paid all property taxes, homeowner's insurance, maintenance and improvement costs directly to providers; and held themselves out as owners of the property. Though refinancing or selling the home to Husband and Wife was discussed, it never came to fruition. Wife and children moved out in September 2000, and in November 2000 the ex-in-laws sold the house, netting for themselves alone, \$108,879.86.

Wife sued the ex-in-laws to enforce their discussion of gifting the home to her, and in the alternative, since Wife was unaware of the option to purchase the home herself, Wife seeks to be put in the position of the seller to prevent unjust enrichment by the ex-in-laws. The trial court ordered judgment in favor of Wife for \$17,345.37 (original purchase price less the outstanding mortgage at the time of sale). The Court of Appeals vacated the trial court's order because it did not contain findings of fact or conclusions of law. On remand, the trial court found the close familial relationship between the parties was a "confidential relationship," thus the parties did not commit their agreement to writing. Regardless, the ex-in-laws did have a duty to deal fairly with Husband and Wife. The trial court found that the ex-in-laws violated this duty when they sold the house without informing Wife, thus they unjustly benefited from the sale. The trial court awarded Wife \$103,879.86 (sale price, less the outstanding mortgage and original down payment), based upon the theory of a resulting trust and unjust enrichment. Upon a second appeal, the Court of Appeals denied recovery under a resulting trust because there was not an express trust, stated that unjust enrichment is a mixed question of law and fact, and denied recovery under unjust enrichment.

The Supreme Court held that the proper appellate review standard for unjust enrichment is abuse of discretion. A party alleging unjust enrichment, a judicially created remedy, must prove (1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation. Focusing on the third prong, the court found that in familial settings involving failed gifts or failed contracts between close family members or confidants, if a party deviates significantly from a mutual or common purpose which results in his enrichment at the expense of close family members or confidants, he has been unjustly enriched. Thus it is the deviation from a mutual purpose that governs the third prong of the unjust enrichment standard.

Pursuant to prong one, the court found a confidential relationship between Wife and the ex-in-laws, thus there was a duty to deal fairly with each other. Pursuant to prong two, the ex-in-laws were enriched by the contributions of Husband and Wife. Pursuant to prong three, the court found a mutual purpose in acquiring the home so that Husband and Wife would enjoy the benefits of home ownership.

Justice Eid, dissenting, states there are no cases in this jurisdiction, or any other, recognizing a "mutual purpose" theory of unjust enrichment. He contends that unjust enrichment analysis focuses on the benefit conferred, not upon the intent of the parties. He argues that the court has created a new cause of action, "failed gift or failed contract between close family members of confidants," and the standard they apply is actually a claim for breach of contract, not unjust enrichment. The majority erred by not determining whether Wife actually conferred a net benefit on the ex-in-laws, and to what extent, if any, she conferred a benefit versus Husband conferring a benefit.