Survey of Family Law Cases 2004-2013

2008 Family Law Survey

PROCEDURAL AND EVIDENTIARY MATTERS

In In re the Marriage of Cyr and Kay, 186 P.3d 88 (Colo. App. 2008), Husband (Cyr) appeals from the district court's order finding him in contempt for violating the parties' separation agreement, arguing he did not willfully violate a court order. The parties' partial separation agreement stated that Husband "shall be solely responsible for all 1997, 1998, or 1999 income tax not yet paid and penalties and interest now known or that may be assessed in the future as a result of an audit or review by taxing authorities." When the IRS audited Wife's 1998 taxes, she sought and was granted innocent spouse relief. Husband successfully appealed the relief and Wife was required to pay one-half of the tax debt to the IRS, totaling $16,245. Subsequently, Wife filed a motion for a contempt citation against Husband for violating the tax provision in their separation agreement. The trial court found remedial contempt because Husband had the present ability to comply, and awarded Wife attorney fees.

First, though Husband purged the contempt by reimbursing Wife for her half of the tax debt, the case is not moot because the court's order also included an award of attorney fees. Under C.R.C.P. 107, amended and effective in 1995, there are two types of contempt. Punitive contempt is criminal in nature and meant to punish "by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court." C.R.C.P. 107(a)(4). To prove punitive contempt, the findings of fact must establish beyond a reasonable doubt (1) existence of a lawful court order; (2) the contemnor knew of the order; (3) the contemnor had the ability to comply with the order; and (4) the contemnor willfully refused to comply with the order. An act is willful if it is performed "voluntarily, knowingly, and with conscious regard for the consequences of [one's] conduct." Id. at 92.

Remedial contempt is civil in nature, and meant "to force compliance" with a lawful order "within the person's power or present ability to perform." C.R.C.P. 107(a)(5). To prove remedial contempt, the findings of fact must establish the contemnor (1) did not comply with a lawful court order; (2) knew of the order; and (3) has the present ability to comply with the order. A finding of remedial contempt must include the means by which the contemnor may purge the contempt. Willfulness is not required for remedial contempt sanctions; this was the main focus of this case.

The court found that the trial court acted within its discretion by finding remedial contempt and awarding attorney fees because Husband had the present ability to comply with the agreement due this is annual earnings and other assets available to pay Wife's half of the tax shortage.

Orders for In re the Marriage of Roberts, and In re the Marriage of Schelp, both related to C.R.C.P. 16.2 and both were issued on the same day, August 7, 2008. In In re the Marriage of Roberts, 194 P.3d 443 (Colo. App. 2008), Wife appeals from an order dismissing her motion to set aside the parties' separation agreement for lack of jurisdiction. The parties' decree of legal separation from March 2005 was converted into a dissolution of marriage six months later. Pursuant to the parties' separation agreement, husband retained his separate property interest in a limited liability company that owned certain stock, and he retained any increases in value of the company's assets. According to Husband's financial affidavit, Husband's interest in the limited liability company was valued at $663,000 and the value of the stock was zero. In January 2007, Wife filed a motion to set aside the separation agreement, pursuant to C.R.C.P. 16.2(e)(10). Wife alleged that Husband did not fully disclose his assets because prior to the parties' separation, documents filed with the SEC demonstrated that Husband's stock had a minimum

value of $20 million. Husband argued that the change in stock value occurred after the dissolution, that the court lacked jurisdiction to rule on Wife's motion because the case was filed before the effective date of C.R.C.P. 16.2, and that Wife's motion was barred under C.R.C.P. 60(b)'s six-month time frame to allege fraud, misrepresentation or other misconduct. The trial court found that it lacked jurisdiction because the case began before C.R.C.P. 16.2 came into effect.

C.R.C.P. 16.2 was adopted in 1995, but repealed and replaced in September 30, 2004, and became effective for cases filed on or after January 1, 2005, and for post-decree motions filed on or after January 1, 2005. C.R.C.P. 16.2(e)(10) provides that the court retains jurisdiction for 5 years after the entry of a final decree or judgment to allocate material assets and liabilities if a party's disclosures contain misstatements or omissions. Though the parties' legal separation was filed prior to Jan. 1, 2005, the Wife's post-decree motion was filed after that date, thus C.R.C.P. 16.2 does apply.

Husband argues that C.R.C.P. 16.2(e)(10) gives Wife a greater remedy since she has up to five years to file. C.R.C.P. 16.2 is not "unconstitutionally retrospective simply because it expands the remedy afforded to a party." The expanded remedy to Wife does not remove Husband's affirmative defenses. Since C.R.C.P. 16.2 applies, and the trial court has jurisdiction, the case is remanded for proceedings on Wife's motion.

In May 2004, in their permanent orders, the parties agreed to share Husband's pension equally and to cooperate in preparing the necessary documents in In re the Marriage of Schelp, 194 P.3d 450(Colo. App. 2008). In April 2005, Wife filed a motion to adopt a Qualified Domestic Relations Order (QDRO) to divide Husband's pension equally, based upon Husband only working 23 days before the marriage. Alternatively, Wife also asked the court to reconsider the property division, as Husband disclosed after the permanent orders that his premarital interest in the pension was based upon over ten years of work before the marriage. In September 2005, the court appointed a special master to investigate the QDRO issue. In October 2005, Wife filed a motion to reopen the permanent orders pursuant to C.R.C.P. 16.2(e)(10). In December 2005, the special master filed a report and in January 2006, the court found that Husband failed to fully disclose the value of his pension, awarded Wife the entire marital portion of the pension, and ordered each party pay one-half of the special master fees.

Husband's appeal of the part of the order appointing the special master to investigate is premature. Since the appointment of a special master will not resolve Wife's motion to reopen permanent orders and allocate undisclosed assets, the order is not final for the purposes of an appeal. Likewise, Husband's appeal of the court's order requiring parties to equally share in the costs of the special master is also an order that is not final for the purposes of appeal because it does not end the particular action in which it was entered. Finally, Husband did not object to the initial appointment of the special master, thus he did not preserve this issue for appeal.

Since Wife filed a motion to reopen permanent orders after January 1, 2005, C.R.C.P. 16.2 applies, permitting the court to retain jurisdiction for five years if a party misrepresents or omits disclosures.

Finally, the court did not err in accepting the special master's report, as the court is required to do so unless the report is clearly erroneous. C.R.C.P. 53(e)(2).

The Dissent finds that C.R.C.P. 16.2 (e)(10) applies to domestic relations cases filed after January 1, 2005 and to post-decree motions filed after January 1, 2005. C.R.C.P. 16.2(e)(10) should not apply retroactively to permanent orders enters prior to January 1, 2005.

These two consolidated cases involve statutory interpretation of provisions of the Dispute Resolution Act, C.R.S. §13-22-301 to -313, and whether C.R.S. §13-22-308 is the exclusive means by which parties can create a binding agreement after mediation. Yaekle v. Andrews, 195 P.3d 1101 (Colo. App. 2008).

In Yaekle, the parties attended mediation in a civil suit, and signed a document entitled "Basic Terms of Settlement," which included language that it was "a binding enforceable agreement." Thereafter, counsel for the parties attempted to prepare more formal documents setting forth the agreement, but disagreed about some of the terms. Yaekle never signed the formal documents, but did file a Notice of Pending Settlement in which he stated that the parties reached an agreement concerning the content and terminology of the agreement. Yaekle argued that the only means by which parties may form a binding agreement after mediation is found in C.R.S. §13-22-308, which provides that a mediated settlement agreement, if reduced to writing and signed by the parties, may be submitted to the court and if approved, shall be enforceable as an order of court. Thus, Yaekle contends the original "Basic Terms of Settlement" was binding, but the future, unsigned, formal agreement was not enforceable.

In Chotvacs v. Lish, the parties attended mediation in a property dispute, the mediator handwrote the terms of the agreement, but neither the parties nor their counsel signed the agreement. While Chotvacs later sought specific performance based upon the mediator's handwritten notes, the Lishes argued that the agreement was not binding because it was unsigned.

The Supreme Court held that C.R.S. §13-22-308 is not the exclusive way for parties to reach a binding agreement in mediation. If C.R.S. §13-22-308 were the exclusive means for settling disputes after attending mediation, the common law principles of contract formation would be suspended. Moreover, the Dispute Resolution Act does not demonstrate any "intent to abrogate the common law of contract during mediation proceedings." Id. at 1107. Nor does the plain language of C.R.S. §13-22-308 provide the exclusive means for settlement after mediation, as it states, "*if* reduced to writing, …agreement *may* be presented…and *if* approved." Id. at 1108. C.R.S. §13-22-308 does not address or limit other ways in which a binding agreement may be formed.

C.R.S. §13-22-307 provides that all "mediation communications" are confidential, which includes "any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding." C.R.S. §13-22-302(2.5). Mediation communications "are limited to those made in the presence or at the behest of the mediator." Id. at 1109. But "[c]ommunications or negotiations that concern the dispute but are not connected to specific mediation services proceedings are not contemplated by the definition of 'mediation communication' and therefore are not protected as confidential under section 307." Id. While some communications are protected, the court found that the principles of common law contracts are not abrogated entirely.

In Yaekle, the "Basic Terms of Settlement," which was drafted during mediation, stated that it was a binding enforceable agreement, and was signed by the parties and their counsel. At the behest of the mediator, formal documents were drafted setting forth the settlement reached at mediation. Since this first formal document draft was made pursuant to mediation, it was confidential mediation communications. But the Court found that the final agreement, negotiated over the next few months by the parties, would not constitute confidential mediation communications under C.R.S. §13-22-307. Since Yaekle's counsel explicitly represented to the court that the final version submitted was a final agreement

of "content and terminology," this final agreement constituted a contract between the parties that the court could enforce.

In Chotvacs, the agreement was handwritten by the mediator, but remained unsigned by the parties and their counsel, and was never filed with the court. Thus pursuant to C.R.S. §13-22-308, the agreement was not enforceable as an order of court. Since the agreement was derived during the course of mediation services, it is protected as confidential mediation communications. Since there is no other information to suggest the terms of the agreement, a contract cannot be found under the common law principles of contracts.

Justice Eid and Chief Justice Mullakey concur in the result of both cases, but disagree with the court's finding that an "oral agreement reached in mediation may be enforceable by court order." They contend that this conclusion goes against C.R.S. §13-22-308, which requires agreements to be reduced to writing and signed by the parties, and "chills the candid and informal character of mediation discussion." Id. at 1113. Additionally, the concurrence contends that C.R.S. §13-22-308 is only the exclusive method for *obtaining court enforcement* of an agreement reached at mediation. (emphasis added).

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 (Colo. App. 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.