

Survey of Family Law Cases 2004-2013

2009 Family Law Survey

ALLOCATION OF PARENTAL RESPONSIBILITIES

In *In re the Marriage of Slowinski and Pagnozzi*, 199 P.3d 48 (Colo. App. 2008), as modified on denial of reh'g (May 1, 2008), cert. denied (2009), the father appealed from, among other issues, orders restricting his parenting time. The mother filed a motion to restrict the father's parenting time under C.R.S. § 14-10-129(4), alleging that the children were emotionally endangered by the father's disparaging behavior toward the mother. Eleven days later, on June 14, 2004, the trial court, without a hearing, ordered that the father's parenting time be supervised under C.R.S. § 14-10-129(4) and that the matter would be set for a "forthwith" hearing. The court held several hearings from July 1, 2004, through October 11, 2004, during which the father had supervised parenting time only. On October 14, 2004, the court granted the father unsupervised parenting time every other Saturday.

The court of appeals noted that the trial court had subsequently addressed the issues on appeal, thus making the issues moot, but the court may still consider "moot questions involving great public importance and issues capable of repetition but evading review." *Id.* at 51. C.R.S. § 14-10-129(4) provides that a motion to restrict parenting time that alleges that a child is in imminent physical or emotional danger due to parenting time "shall be heard and ruled upon by the court not later than seven days after the day of filing the motion. Any parenting time which occurs during such seven-day period . . . shall be supervised." *Id.* The immediate restriction protects the child, while the seven-day time limit protects a parent's constitutional right to the care, custody, and control of their children. In sum, the court held that upon the filing of the motion pursuant to C.R.S. § 14-10-129(4), supervised parenting time takes immediate effect and continues until the hearing, which is required to occur within seven days. If the hearing does not occur within seven days, supervised parenting time terminates under § 14-10-129(4), though the court may still proceed under § 14-10-129(1)(b)(I). A hearing is required unless the allegations within the motion are "facially insufficient," meaning that if all the allegations were true, the circumstances could not give rise to the conclusion that the children are in imminent danger of physical or emotional injury.

A failure to adhere to the requirements of C.R.S. § 14-10-129(4), as in this case, is a statutory violation, and the court must use a two-part test to determine whether such violation constitutes reversible error: (1) whether the failure is an essential condition of the statute that may implicate due process, and (2) whether the party has been prejudiced. Here, the seven-day limitation is an essential condition of the statute, and the father's constitutional right to parent his children was restricted without the benefit of a hearing; therefore, due process implications arose. Finally, several months of supervised parenting time certainly prejudiced the father. A C.R.S. § 14-10-129(4) motion does not require any third-party verification. A party's own verification is sufficient. If a C.R.S. § 14-10-129(4) motion is substantially frivolous, groundless, or vexatious, the court is required to impose attorney fees pursuant to § 14-10-129(5). Before imposing sanctions under § 14-10-129(5), the court must hold a hearing and the hearing must be based upon a verified motion.