

## **Survey of Family Law Cases 2004-2013**

### **2009 Family Law Survey**

#### **Attorney Fees**

The wife's attorney appealed from the trial court's award of attorney fees against him stemming from his improper subpoena of a non-party in *In re Marriage of Ensminger*, 209 P.3d 1163 (Colo. App. 2008), cert. denied (2009). For a temporary orders hearing in a dissolution of marriage case, the wife's attorney subpoenaed a non-party to appear, give testimony, and produce records. At the time, the 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. *Id.* at 1165. In a separate order, the magistrate granted the husband's motion to disqualify the wife's attorney due to a personal relationship between the wife and the wife's attorney. In its order to disqualify the 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 the wife's attorney "used the legal process to expand unnecessarily the scope of the dissolution of marriage." *Id.* The wife's attorney filed a petition for review under C.R.M. 7(a). The district court affirmed both the order to disqualify the wife's attorney and the award of attorney fees to a non-party's counsel.

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C.R.S. § 13-17-102(2) 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 if 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 awarded to parties or nonparties.

The 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 the wife's attorney failed to do, waives the right to a hearing.