

Survey of Family Law Cases 2004-2013

2009 Family Law Survey

Procedural and Evidentiary Matters in Family Law

Orders for *In re Marriage of Roberts*, 194 P.3d 443 (Colo. App. 2008), cert. granted 2009 Colo. LEXIS 266 (March 16, 2009), and *In re the Marriage of Schelp*, 194 P.3d 450 (Colo. App. 2008), cert. granted 2009 Colo. LEXIS 250 (March 16, 2009), both related to C.R.C.P. 16.2 and were issued on the same day, August 7, 2008.

An attorney experienced in complex family and divorce cases

In *Roberts*, the wife appealed 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, the 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 the husband's financial affidavit, the husband's interest in the limited liability company was valued at \$663,000 and the value of the stock was zero. In January 2007, the wife filed a motion to set aside the separation agreement, pursuant to C.R.C.P. 16.2(e)(10). The wife alleged that the husband did not fully disclose his assets because prior to the parties' separation, documents filed with the SEC demonstrated that the husband's stock had a minimum value of \$20 million. The husband argued that the change in stock value occurred after the dissolution, that the court lacked jurisdiction to rule on the wife's motion because the case was filed before the effective date of C.R.C.P. 16.2, and that the 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C.R.C.P. 16.2 was adopted in 1995, but was repealed and replaced in September 30, 2004, and became effective for cases filed on or after January 1, 2005, and for post-decree motions filed on or after January 1,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 five 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. Although 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 did apply.

The husband argued that C.R.C.P. 16.2(e)(10) gave the wife a greater remedy since she had up to five years to file. However, the court stated that C.R.C.P. 16.2 is not "unconstitutionally retrospective simply because it expands the remedy afforded to a party." *Id.* at 447. The expanded remedy to the wife did not remove the husband's affirmative defenses. Since C.R.C.P. 16.2 applied, and the trial court had jurisdiction, the case was remanded for proceedings on the wife's motion.

The agreement reached during the divorce case

In *Schelp*, in their May 2004 permanent orders, the parties agreed to share the husband's pension equally and to cooperate in preparing the necessary documents. In April 2005, the wife filed a motion to adopt a qualified domestic relations order (QDRO) to divide the husband's pension equally, based upon the husband's only working 23 days before the marriage. Alternatively, the wife also asked the court to reconsider the property division, as the husband disclosed after the permanent orders that his premarital interest in the pension was based upon more than 10 years of work before the marriage. In September

2005, the court appointed a special master to investigate the QDRO issue. In October 2005, the 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 (1) found that the husband had failed to fully disclose the value of his pension, (2) awarded the wife the entire marital portion of the pension, and (3) ordered that each party pay one-half of the special master fees.

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

Since the wife filed a motion to reopen permanent orders after January 1, 2005, C.R.C.P. 16.2 applied, 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).

Retroactive to Permanent Orders in a Divorce or Legal Separation

The dissent in *Schelp* argued 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 entered prior to January 1, 2005. In *In re Parental Responsibilities Concerning L.S., and Concerning McNamara and Spotanski*, 2009 Colo. App. LEXIS 1782 (Oct. 15, 2009), Colorado and Nebraska were exercising simultaneous jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and were issuing contrary orders. The parties resided in Colorado, then separated; the mother stayed in Colorado, and the father moved to Nebraska. After a summertime visit with the child in Nebraska, the father refused to return the child. In November 2004, the father filed a legal separation action in Nebraska. Both parties appeared with counsel. Nebraska found that it had jurisdiction over the matter and granted the mother temporary care of the child because the father had violated a previously signed agreement between the parties that all custody matters should be resolved in Colorado since the child resided there. In September 2006, Nebraska issued final orders, which made no reference to the home state of the child but found that Nebraska had jurisdiction over both parties and the subject matter, and awarded custody of the child to the father. Despite this order, the child continued to reside with the mother in Colorado. In late 2006, the mother filed her second dissolution of marriage case in Colorado (the first was dismissed in January 2005 because Nebraska had jurisdiction). In December 2006, Colorado held that it was the home state of the child under UCCJEA and declined to enforce Nebraska's final orders of September 2006. The mother also filed a motion to dismiss the Nebraska action for lack of jurisdiction pursuant to the UCCJEA. In April 2007, Nebraska held that it did have jurisdiction because the mother voluntarily submitted the issue of custody to the Nebraska court and did not raise the issue of UCCJEA jurisdiction until after the court's final orders. The UCCJEA prioritizes "home state" jurisdiction, jurisdiction in the state in which the child resides for at least six consecutive months. C.R.S. § 14-13-201(1)(a); C.R.S. § 14-13-102(7)(a). If home state jurisdiction does not apply, then the UCCJEA provides jurisdiction to the state that has significant connections to the child. C.R.S. § 14-13-201(1)(b). The U.S. Constitution demands that states give full faith and credit to other states' orders. In reviewing the Nebraska Order of April 2007, first, the Colorado Court of Appeals found that the mere fact that the wife voluntarily submitted the issue of custody to the court and did not raise the issue of jurisdiction until after the final orders was not a basis for Nebraska to find that it had jurisdiction.

The UCCJEA addresses subject matter jurisdiction, which cannot be conferred by consent or waiver, and questions of its existence can be raised at any time. With regard to the second finding, Colorado found that Nebraska properly exercised UCCJEA jurisdiction because Colorado had declined jurisdiction and Nebraska had significant connections. The court of appeals held that it must respect this jurisdictional ruling because jurisdiction was based upon a ground recognized by the UCCJEA, even though it was based upon factual inaccuracies.

To prevent injustice, court of appeals suggested that the Colorado district court communicate with the Nebraska district court to determine if Nebraska is “willing to reconsider its jurisdictional and substantive orders.” *Id.* at *20. If Nebraska relinquishes jurisdiction, then Colorado may proceed with exclusive jurisdiction; if not, Colorado must respect Nebraska’s rulings.

The children in a dependency and neglect case, *People in the Interest of E.D., M.D., and A.D., and Concerning S.D. and M.D.*, 221 P.3d 65 (Colo. App. 2009), through their guardian ad litem (GAL), appealed the order dismissing the Department of Human Services (Department) and keeping the case open under the supervision of the GAL. At an allocation of parental responsibilities hearing, the Department moved to dismiss the case, as the parents were doing what was requested of them, there were no longer protective issues, and the Department was no longer providing any services. The GAL wanted testimony from a teacher at school, but the court accepted the GAL’s statements about the teacher’s concerns as offers of proof. The court dismissed the case but kept it open under the supervision of the GAL.

The court of appeals held that since the trial court did not restrict the GAL’s offer of proof, and the GAL did not believe there was additional evidence that the teacher would have provided beyond the offers of proof, the court did not abuse its discretion by proceeding with offers of proof rather than testimony at the allocation of parental responsibilities hearing. Since the evidence supported the Department’s dismissal of the case, the appellate court did not reverse this decision.

The court of appeals did find that keeping the case open under the supervision of the GAL was not proper. Title 19 provides courts with juvenile jurisdiction authority to keep cases open “under protective supervision.” Protective supervision allows children to remain in their homes when supervision and assistance are provided by the court, the department of human services, or other agencies designated by the court. A GAL cannot provide that supervision in lieu of an “agency.” The GAL is an attorney at law who gives children a voice in the legal system. Thus, leaving a case open under a GAL would have intruded on a parent’s constitutional right to the care, custody, and control of his or her children.