Survey of Family Law Cases 2004-2013

2010 Family Law Survey

PROCEDURAL AND EVIDENTIARY MATTERS

In these consolidated cases, In re the Marriage of Roberts, Schelp, and Barnett, 228 P.3d 151 (Colo. 2010), the petitions for dissolution or legal separation were all filed before the new effective date of **C.R.C.P. 16.2**, January 1, 2005. After the trial court entered decrees of dissolution, the Wife in each case filed post-decree motions to set aside the trial court's property divisions, alleging that the Husband's financial disclosures contained misstatements or omissions of value. The Wives all alleged that the trial courts had jurisdiction under C.R.C.P. 16.2(10) because they filed post-decree motions after the effective date of the rule.

In Roberts, Husband filed for dissolution in November 2004, and the Court entered the decree of dissolution in September 2005. According to Husband's financial affidavit, Husband's interest in one of his businesses was valued at $663,000 and the value of the stock was $0. In January 2007, Wife filed a post-decree motion to set aside the separation agreement, pursuant to C.R.C.P. 16.2(e)(10), alleging that documents filed with the SEC demonstrated that Husband's stock had a minimum value of $20 million.

In Schelp, Husband filed for legal separation in April 2003, and the court dissolved the marriage in May 2004. The trial court ordered the parties to share Husband's pension equally. Husband originally represented that the premarital portion of his pension amounted to 23 days, but then subsequently disclosed that his premarital interest was based upon 12.5 years of work before the marriage. In April 2005, Wife filed a motion to reopen the permanent orders pursuant to C.R.C.P. 16.2(e)(10) because of this change in disclosure.

In Barnett, Wife filed for dissolution on October 2002 and their marriage was dissolved in March 2003. The Court ordered that Wife would receive a fixed sum from Husband's pension and Husband would retain his pension. Wife filed a post-decree motion in June 2005 to reopen the property division, alleging that Husband failed to disclosure a second pension.

Prior to January 1, 2005, C.R.C.P. 60(b) permitted the trial court to retain jurisdiction for a period of six months after a decree was entered to provide relief due to omissions or misstatements in financial disclosures. C.R.C.P. 16.2 was repealed, amended and then readopted on September 30, 2004, "effective for Domestic Relations Cases … filed on or after January 1, 2005 and for post-decree motions filed on or after January 1, 2005." Under the new C.R.C.P. 16.2(10), the trial court retains jurisdiction for five years after the decree or judgment has been entered when a party omits or misstates material assets in his or her financial disclosures.

The Supreme Court found that the five-year retention of jurisdiction provision applies to the five years after the entry of any decree or judgment, and only to financial disclosures that fail to comply with the heightened duties established under the new C.R.C.P. 16.2 for resolving new cases or new post-decree motions filed after January 1, 2005. The Court determined that in cases where the new disclosure duties did not apply, the five-year retention provision also does not apply.

The Supreme Court reversed the three Court of Appeals' decisions, and held that "C.R.C.P. 16.2 does not allow the trial court to retain jurisdiction to modify property divisions based upon disclosures made pursuant to petitions for dissolution that were filed before the effective date of the new rule (January 1, 2005)."

In this case regarding **jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")**, Colorado and Nebraska were exercising simultaneous jurisdiction and issuing contrary orders in In re the Parental Responsibilities Concerning L.S., and Concerning McNamara and Spotanski, 226 P.3d 1227 (Colo. App. 2009); *cert. granted* March 15, 2010). The parties resided in Colorado, then separated; Mother stayed in Colorado and Father moved to Nebraska. After a summertime visit with the child in Nebraska, Father refused to return the child. In November 2004, Father filed a legal separation action in Nebraska. Both parties appeared with counsel. Nebraska found that it had jurisdiction over the matter and granted Mother temporary care of the child because Father 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 Father. Despite this Order, the child continued to reside with Mother in Colorado.

In late 2006, 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. 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 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 UCCJEA provides jurisdiction to the state that has significant connections to the child. C.R.S. §14-13-201(1)(b). The Constitution demands that states give full faith and credit to other states' orders.

In reviewing the Nebraska Order of April 2007, first, Colorado found that the mere fact that 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 its 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. Colorado 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 factually inaccuracies.

To prevent injustice, Colorado suggests that the Colorado District Court communicate with the Nebraska District Court to determine if Nebraska is "willing to reconsider its jurisdictional and substantive orders." If Nebraska relinquishes jurisdiction, then Colorado may proceed with exclusive jurisdiction; if not, Colorado must respect Nebraska's rulings.

Certiorari was granted on March 15, 2010, for the following issue: Whether the court of appeals misinterpreted the Parental Kidnapping Protection Act, the statutory embodiment of the full-faith-and-

credit clause of the United States Constitution, thereby erring in its determination that a "Colorado court must respect and enforce the prior Nebraska orders."

In In re the Marriage of Weis, 232 P.3d 789 (Colo. 2010), pursuant to the parties' Separation Agreement, ex-Wife was to receive $65,000 from the proceeds of the sale of the marital home, from which she was to pay certain joint credit card debts. Ex-Wife paid one credit card off, but did not pay the others. One of the assignees for one of the unpaid debts named ex-Husband in a collection action, thus ex-Husband filed two contempt citations against ex-Wife related to her failure to pay the debt. Thereafter, ex-Wife filed for **Chapter 13 bankruptcy**, including the credit card debt, but did not indicate any co-debtors. Ex-Wife argued that she was currently on a five-year payment plan, thus the automatic stay that applies in bankruptcy prevented ex-Husband from filing contempt to pursue payment. The trial court held that ex-Wife was in contempt, the automatic stay did not apply because the contempt actions fell under two exceptions to the automatic stay, that ex-Wife willfully refused to pay the debts, sentenced ex-Wife to 60 days in jail, and subsequently denied the stay of execution of the jail sentence unless ex-Wife posted a supersedeas bond in the amount ex-Wife owed ex-Husband. Ex-Wife then filed a Petition for a Rule to Show Cause pursuant to C.A.R. 21, seeking reversal of contempt finding and alleging that the automatic stay barred to trial court's action.

Filing bankruptcy triggers an automatic stay, which "suspends any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor." Quoting In re Vierkant, 240 B.R. 317, 321 (B.A.P. 8th Cir. 1999). There are two narrowly construed exceptions to the automatic stay: (1) bankruptcy does not stay a criminal action, 11. U.S.C. §362(b)(1), and (2) does not stay "collection of a domestic support obligation from property that is not property of the estate," 11 U.S.C. §362 (b)(2)(B).

The Supreme Court held that the trial court correctly found that the credit card debts were in the nature of a domestic support obligation, as the parties' Separation Agreement indicated that waiver of maintenance was in consideration for undertaking debt obligations. But the trial court had no evidence that the credit card debt obligations could be collected from "property that is not property of the [bankruptcy] estate." In fact, the court found that ex-Wife was unable to pay the debt. Thus the Supreme Court held that though the trial court properly classified the credit card debt as a domestic support obligation, there was no evidence there was property outside of the bankruptcy estate that could pay the obligation, thus the exception to the automatic stay did not apply.

With regard to the criminal exception to the automatic stay, the Supreme Court held that the contempt action was civil, not criminal, in nature. In deciding whether contempt is criminal in nature, the court must look to the "purpose and character of the sanctions imposed against the contemnor." People v. Barron, 677 P.2d 1370, 1372 n.2 (Colo. 1984). Here, the sanctions were remedial, as ex-Wife could purge the jail sentence if she paid the supersedeas bond in the amount of the debt, and the contempt proceedings was designed to force payment to a third party, not to uphold the dignity of the court. Though the trial court found that the punitive sanctions made this case "quasi-criminal," the Supreme Court clarified that creditors cannot turn enforcement actions into criminal matters merely by seeking punitive sanctions, and the Bankruptcy Code has no exception for "quasi-criminal" actions, thus "quasi-criminal" actions do not create criminal proceedings, thus the exception to the automatic stay does not apply.

The magistrate found Husband guilty of two counts of contempt, and ordered Husband to pay attorney fees in In re the Marriage of Stockman, 2010 WL 2853758 (Colo. App. 2010). The Order stated: "NOTICE: This order is issued in a proceeding in which consent of the parties is necessary. Any appeal of this order must be taken with 45 days pursuant to Rule 7(b), C.R.M." Wife filed an appeal.

Pursuant to C.R.M. 7(b), the Court of Appeals has jurisdiction over any order or judgment entered *with* the consent of the parties, that is, not subject to review under C.R.M. 7(a). **Orders entered *without* the consent of the parties requires district court review of a magistrate's order before an appeal may be filed**.

The Magistrate's order of attorney fees in this case was an order that could have been made without the consent of the parties. Therefore district court review of the magistrate's order was required before an appeal could be filed. The Court of Appeals has no jurisdiction therefore the appeal is dismissed.

Since a review of the Magistrate's Order by the district court is no longer timely, and Wife relied upon an erroneous or misleading ruling by the court, the Court of Appeals stated that the district court should carefully consider this unique circumstance when it determines whether to accept this untimely appeal.

In the post-dissolution case of In re the Marriage of Jilek and Barker, 2010 WL 4791951 (Colo. App. Nov. 24, 2010), Mother appeals from the trial court order denying her motion to set aside the parties' mediated parenting time agreement. The parties' original parenting plan provided that if either party relocated, the parties agreed to modify parenting time, and if they could not agree, they would attend mediation. Though the parties agreed to a new parenting plan in mediation, the agreement was never reduced to writing, nor signed by the parties. The agreement was read onto the record and both parties confirmed it was in the best interests of the child. The court adopted the agreement as an order, and neither party objected. Mother then filed a motion to set aside the agreement, in accordance with **C.R.S. 13-22-308**, which requires a mediated settlement agreement to be reduced to writing and signed by the parties before it may be enforced as a court order.

The Uniform Dissolution of Marriage Act (UDMA) takes precedence over other laws, including those applicable to alternative dispute resolution generally. The court may modify parenting time orders when modification serves the best interests of the child, and when the parties agree to the modification, if doing so is in the best interests of the child. C.R.S. 14-10-129(1)(a)(I) and C.R.S. 14-10-129(2)(a). These statutes do not require a writing signed by the parties. The underlying purpose of the UDMA is to promote amicable resolution of disputes. C.R.S. 14-10-102(2)(a).

Under the UDMA, the court may modify parenting time whenever doing so is in the best interests of the child. As Mother did not dispute that the mediated agreement was not in the best interests of the child, the court did not abuse its discretion in adopting it as an order.