Survey of Family Law Cases 2004-2013

2011 Family Law Survey

PROCEDURAL AND EVIDENTIARY MATTERS

In re the Parental Responsibilities of M. B.-M., and McBlair and Concerning Berndt, 252 P.3d 506 (Colo. App. 2011) addressed **whether a district court magistrate can reconsider, sua sponte, his or her own written and signed order for contempt and sanctions**, other than to correct clerical errors. Here, Berndt file a motion for contempt against McBlair for violations of temporary orders. After the contempt hearing, the magistrate made oral findings that, among other things, McBlair was in contempt and was ordered to pay attorney fees of $1,500 to Berndt. The order was never reduced to writing. After a sentencing hearing on July 7, 2009, the magistrate issued a signed minute order that the contempt had been purged, and awarding attorney fees of $1,500 again McBlair in favor of Berndt. On July 13, 2009, the magistrate issued a new written and signed order, making "additional, different findings" that Berndt had not met her burden to establish contempt, the McBlair was not in contempt and vacating the attorney fees award. Berndt filed a petition for review of the magistrate's order, but it was denied because the July 13 order was the "only final order in the proceeding." Berndt's motion for reconsideration of this district court's order was also denied. Upon reconsideration the district court acknowledged the July 7 order, but stated that until the July 13 order, the issue before the court was not fully resolved. On appeal, the court found that the July 7 order was an adoption of the court's oral ruling, and did fully resolve the issue. Therefore it was a final appealable order.

Magistrates' authority arises from statute or court rule. C.R.S. 13-5-201(3). Magistrates are supervised by district court judges. C.R.M. 1. Pursuant to C.R.M. 5, "except for correction of clerical errors pursuant to C.R.C.P. 60(a), a magistrate has not authority to consider a petition for rehearing." Magistrates do not have powers that district courts have to reconsider their judgments under C.R.C.P. 59 and 60.

The Court of Appeals held that district court magistrates do not have discretion to reconsider the substance of their own written rulings sua sponte. A magistrate may only correct clerical errors, upon application of a party, or sua sponte. Thus the July 13 order, which amended the July 7 order, is void, and the case is remanded. As an aside, the court notes that magistrates should not make rulings on contempt and sanctions without issuing a written and signed order.

The United States Supreme court addressed the issue of whether the Due Process Clause of the Fourteenth Amendment grants an indigent defendant potentially faced with incarceration a right to s**tate-appointed counsel in a civil contempt proceeding** in Turner v. Rogers, 131 S. Ct. 2507 (2011).

NOTE ON DENVER CHILD SUPPORT PAYMENTS

Here, Father was under an order to pay child support in the amount of $51.73 per week to Mother. Father repeatedly failed to pay the amount due and was held in contempt on five occasions. The fifth time this occurred, Father completed a 6–month jail sentence. After his release, Father remained $5,728.76 in arrears and was again held in contempt. At his civil contempt hearing, neither Father nor Mother was represented by counsel. Despite making no express finding concerning Father's ability to pay the arrearage, the judge found Father in contempt and sentenced him to one year in jail.

Father appealed claiming that the U.S. Constitution entitled him to counsel at his contempt hearing. The South Carolina Supreme Court rejected Father's claim stating that civil contempt differs significantly

from criminal contempt in that constitutional safeguards applicable in criminal proceedings, including the right to counsel, are not required at a civil contempt hearing. The Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a criminal case, including a criminal contempt. Gideon v. Wainwright, 372 U.S. 335 (1963). However, in a civil contempt, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections.

The Court used the factors outlined in Matthews v. Eldridge to decide what specific safeguards the Due Process Clause requires in order to make a civil proceeding fundamentally fair. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Relevant factors include (1) the nature of the private interest that will be affected, (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements.

The critical question at issue in civil contempt cases concerns the defendant's ability to pay, often closely related to indigence. There is available a set of "substitute procedural safeguards," which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.

A categorical right to counsel in a civil contempt proceeding would carry with it disadvantages including unfairness and delay. Thus, the Court held that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual, even if that individual faces incarceration (for up to a year). When the custodial parent receiving child support is unrepresented by counsel, the State need not provide counsel to the noncustodial parent paying child support provided that the State provides alternative procedural safeguards. Because Father received neither counsel nor the benefit of alternative procedures, his incarceration violated the Due Process Clause.

Colorado and Nebraska were exercising **simultaneous jurisdiction** and issuing contrary orders in In re the Parental Responsibilities of L.S. and Concerning McNamara, 257 P.3d 201 (Colo. 2011). The child resided with Mother in Colorado.

Parallel federal and state statutes, the PKPA (Parental Kidnapping Protection Act) and the UCCJEA, adopted by both Colorado and Nebraska, govern whether Nebraska had jurisdiction to enter an initial child custody determination and whether Colorado must enforce that determination. The PKPA was enacted by Congress as an addendum to the full faith and credit statute of the U.S. Constitution in order to establish a national standard for the resolution of interstate child custody jurisdictional disputes. The PKPA mandates that when a state enters an initial custody determination, a second state must enforce that determination provided that the first state made the determination in compliance with the PKPA. Once a State exercises jurisdiction consistently with the provisions of the PKPA, no other State may exercise concurrent jurisdiction over the custody dispute and all States must accord full faith and credit to the first State's custody decree. Conversely, if a state court's custody determination fails to conform to the PKPA's requirements, then the custody determination is not entitled to full faith and credit.

Colorado statutes mandate that a Colorado court is obligated to enforce the child custody determination of another state when it determines that the sister state made the determination in "substantial conformity" with or under factual circumstances satisfying the jurisdictional requirements of the UCCJEA which is substantively identical to the PKPA.

The PKPA provides that a state's custody determination is made consistently with the PKPA when: (1) the court of the state has jurisdiction under its own law, and (2) the exercise of jurisdiction meets one of the conditions set out in 28 U.S.C. §1738A(c)(2). Nebraska Revised Statutes section 43–1238(a), which sets out the requirements for Nebraska to exercise jurisdiction to make an initial child custody determination, provides four independent bases for jurisdiction to make an initial child custody determination. Only the first two are relevant here: (1) home state and (2) significant connection.

In order for a Nebraska court to have jurisdiction to make an initial custody determination, the Nebraska court must either be the home state of the child or there must be significant contacts between the child and the state. The home state of the child is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding" including "a period of temporary absence." If Nebraska is not the home state of the child, then it may exercise significant connection jurisdiction "only if": (1) another state does not have jurisdiction as the child's home state; or (2) the home state "has declined to exercise jurisdiction on the ground that Nebraska is the more appropriate forum. Here, the Nebraska district court did not have jurisdiction over this custody determination under its own law. The child lived in Colorado with at least one parent for more than six consecutive months. Mother brought the child to Nebraska on vacation, and Father refused to return the child to Colorado. Thus, Colorado, not Nebraska, was the child's home state. Further, Colorado, as the child's home, state did not decline jurisdiction on the ground that Nebraska was the more appropriate forum. Because Nebraska did not have jurisdiction under its own law, the PKPA does not require Colorado to accord the Nebraska custody determination full faith and credit.

A similar jurisdictional issue arose in In re the Marriage of Dedie and Springston, 255 P.3d 1142 (Colo. 2011). In that case the parties divorced in 2004. A New York court issued an initial custody determination awarding primary physical custody of the parties' two children to Mother. In 2006, the mother and the children moved to Massachusetts. In March 2010, Father filed an action to enforce visitation in New York. Mother filed a motion to dismiss the action for lack of jurisdiction. The New York family court granted the motion because the children had not lived in New York State in the past six months and because all the information concerning the children was located in another state.

Mother and children moved to Colorado in July 2010. Six months later, Father filed a motion seeking to hold Mother in contempt for failure to comply with the **initial custody determination** and to modify the initial determination to give the father custody of the children in New York. Mother filed a motion to dismiss based on New York's previous finding that it lacked jurisdiction. The New York court held that it had exclusive continuing jurisdiction to enforce and to modify the initial custody determination and gave Father temporary custody and primary physical residence of the children.

Father then petitioned the Denver District Court to enforce the New York custody modification order. The Denver District Court determined that New York had continuing, exclusive jurisdiction over the initial custody determination and that in its modification, the New York court exercised jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Mother filed an original action under C.A.R. 21, arguing that the New York Supreme Court lacked jurisdiction to modify the initial custody determination.

An interstate child custody dispute requires the court to determine whether Colorado is obligated to enforce a prior child custody determination rendered by a court in a sister state. The court must follow the Parental Kidnapping Prevention Act (PKPA), which extends the requirements of the Full Faith and Credit Clause to custody determinations. The PKPA mandates that, when a state enters a custody determination, a second state must enforce that determination so long as the first state made the determination consistent

with the provisions of the PKPA. In order to exercise jurisdiction consistently with the PKPA, a state court must have jurisdiction under its own law.

New York Domestic Relations Law section 76-a(1) mandates that to relinquish exclusive, continuing jurisdiction, a New York court must find both that: (1) neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with New York; and (2) substantial evidence is no longer available in New York concerning the child's care, protection, training, and personal relationships.

Because the New York family court referee relinquished jurisdiction, the New York Supreme Court did not have jurisdiction under New York law and therefore did not exercise jurisdiction consistent with the PKPA. Consequently, the PKPA does not require Colorado to give full faith and credit to the New York Supreme Court custody modification determination.

The issue of **therapist-client privilege** was addressed in People in the Interest of L.A.N. and Concerning L.M.B.,10CA2408 (Colo. App., July 7, 2011), a dependency and neglect proceeding in which Mother appealed from the judgment terminating her parent-child legal relationship with L.A.N. and the Court's denial of her request for production of the L.A.N.'s therapist's file.

In 2008, Denver Department of Human Services (DDHS) received a referral regarding the then seven year old L.A.N. due to reports that L.A.N. had been brought to Children's Hospital because of out-of-control behavior and suicidal statements; mother had refused their treatment recommendations; and that Mother had attempted to flee with L.A.N. when told that transfer of the child to a mental health facility was being considered.

DDHS filed a D&N petition. Upon release from the hospital, the child was placed in the custody of her maternal aunt who hired a therapist for the child. Two years later, the court terminated Mother's parental rights because she had not successfully met the objectives of her treatment plan, and the child was adjudicated dependent and neglected as to Mother.

On appeal, Mother argued that the juvenile court erred in failing to ensure that the notice requirements of the Indian Child Welfare Act (ICWA) were met because the there was no record to show that notice was sent to the Cherokee Nation of Oklahoma, or that any determination was made as to whether the child's biological father had Indian heritage. The Court agreed and vacated the judgment due to these deficiencies.

Mother also argued that the juvenile court erred when it denied her request for production of the child's therapist's file. The Court found that Mother was entitled to at least a portion of the file and remanded for further proceedings.

During the course of treatment with the child, the therapist submitted a letter to the GAL to share some of her observations regarding the case. Although she did not explicitly recommend against reuniting the child with Mother, she described a number of "concerns" that she had about the child's welfare were that to occur. Without attempting to reserve the privilege between the therapist and the child, the GAL provided the therapist's letter to the court and each of the other parties.

In June 2010, mother's attorney subpoenaed the therapist for a deposition and to produce her entire case file. The therapist moved to quash the subpoena arguing that it sought information and documents that were privileged under C.R.S. §13-90-107(1)(g). Mother responded that any privilege was implicitly waived because the mental condition of the privilege holder (the child) was at issue, the child's progress

in therapy was "outcome-determinative" of Mother's parental rights, and access to the therapist's records was necessary to determine the basis for the information, opinions, and conclusions set forth in the therapist's letter to the GAL.

The court found that the child was not competent to waive her own privilege; Mother could not waive it because in opposing termination of her parental rights, her interests could be adverse to those of the child; and neither the DDHS caseworker nor the GAL was in a position to waive it, even if so inclined. The court ordered the therapist to participate in a deposition or a "chat" with Mother's attorney, but not to produce any records. The Court concluded that DDHS and the GAL expressly waived the privilege because both of them obtained privileged information from the therapist and then disclosed that information to the court. Because privileged information from the therapist portrayed mother negatively, and this information was used by DDHS and the GAL in seeking to terminate her parental rights, the Court of Appeals concluded that Mother was deprived of a fundamentally fair opportunity to protect her rights. The case was remanded to the trial court to conduct an in-camera interview of the therapist's file and to identify the discoverable portions of the file.

In In re the Marriage of Rubio, No. 10CA0912 (Colo. App. 2011), Wife gave the Marrison Law Firm a retainer to secure its services in a case against Husband. A few weeks later, Husband served a **writ of garnishment** on the firm seeking the unearned portion of the retainer to satisfy a judgment he had obtained against Wife. The firm opposed Husband's effort, arguing that it had a possessory attorneys' lien against the unearned portion of the retainer.

Husband then asked the court to disqualify the firm arguing that the firm had an unwaivable conflict of interest because it had asserted its own interest in the retainer. Wife responded that the situation created only a potential conflict of interest, which she waived. The magistrate ordered the firm to surrender the unearned retainer, found an unwaivable conflict of interest, and ordered the firm to withdraw from the case. Wife filed a petition for review of the magistrate's order under C.R.M. 7(a)(11).

The firm argued that garnishment was improper because it had a lien on the unearned portion of wife's retainer under section 12-5-119, C.R.S. 2010. The money was received, not on Wife's behalf as a result of the firm's efforts, but directly from Wife. Attorney liens under C.R.S. §12-5-119 attach only to property that an attorney has obtained or has assisted in obtaining on the client's behalf. See In re Fisher, 202 P.3d 1186, 1197 (Colo. 2009). There is nothing in the governing statutes or rule that would prevent a judgment creditor from garnishing funds held in a lawyer's trust account. See §§ 13-54.5-101 to -111, C.R.S. 2010; C.R.C.P. 103. Because unearned retainers belong to the client, not the lawyer, they fall within the broad category of property that is subject to garnishment. Therefore, husband properly garnished Wife's retainer.

Both the firm and Wife expressed an interest in the unearned portion of wife's retainer. This situation created a potential conflict of interest. But here, the potential conflict did not ripen into an actual conflict. Instead, both the firm and Wife were aligned in resisting husband's attempt to garnish the unearned retainer. Moreover, wife waived any conflict.

The firm's interest in the unearned retainer does not constitute an "assertion of a claim by one client against another client" within the meaning of Colo. RPC 1.7(b)(2). Therefore, the conflict was waivable. Thus, the magistrate erroneously required the firm to withdraw from the case.

Wife contended that the trial court erred by denying her C.R.C.P. 59 motion in In re the Marriage of Walker, No. 09CA0510 (Colo. App. 2011). The Court dismissed Wife's appeal as untimely under C.A.R. 4(a), which provides that an appeal must be filed within 45 days of the entry of final judgment. After a

final judgment enters, if a timely C.R.C.P. 59 motion is filed, the 45 day period for filing a notice of appeal is tolled and begins running from the date the post-trial motion is denied or is deemed denied under C.R.C.P. 59(j). An untimely C.R.C.P. 59 motion does not toll the time for filing an appeal. In such a situation, an appeal filed more than 45 days after the final judgment enters must be dismissed.

A motion for post-trial relief under C.R.C.P. 59 must be filed "within 15 days of entry of judgment…or such greater time as the court may allow." C.R.C.P. 59(a). A request for an extension of time to file a C.R.C.P. 59 motion must be filed before the 15-day period from entry of judgment expires. Wife moved for additional time to file her C.R.C.P. 59 motion 14 days after the maintenance order entered. Wife requested additional time for the specific purpose of obtaining a transcript of the hearing so that her newly-hired attorney could prepare a post-trial motion. The court granted wife's request and ordered "the motion shall be due 15 days after the transcript is delivered to [Wife's] counsel."

Nearly four years later, Wife filed her C.R.C.P. 59 motion, contending she had been unable to obtain a transcript. The record did not reflect that Wife ever informed the trial court of her inability to obtain a transcript, of her continued efforts to do so, or of her continued intent to seek C.R.C.P. 59 relief. Even after wife learned no transcript was available she inexplicably delayed another four months before she filed her C.R.C.P. 59 motion. Under these circumstances, the Court concluded that wife effectively abandoned her C.R.C.P. 59 motion.

Because wife did not sufficiently establish diligent efforts to obtain a transcript, and because her delay in filing her C.R.C.P. 59 was unreasonable, her appeal is untimely as well, under the provisions of C.A.R. 4(a), and therefore is dismissed.

The issue of a **judge's responsibility to recuse himself**, as well as the issue of ineffective assistance of counsel were addressed in In re the Interest of A.G. and Concerning C.M., 262 P.3d 646 (Colo. October 17, 2011).

In this termination of parental rights case, Mother alleged that the judge should have been disqualified because his clerk was the mother of a material witness in the case, creating an appearance of impropriety. In October of 2007, the child of Mother's live-in boyfriend died in Mother's home as a result of the boyfriend's chronic abuse and neglect. As a result, the Department of Human Services filed a dependency and neglect petition on behalf of Mother's four biological children. Mother's rights were eventually terminated in 2009.

At Mother's termination hearing, a caseworker, who was the daughter of the judge's clerk, testified on behalf of DHS as the primary witness regarding Mother's compliance with the treatment plan. In its order terminating Mother's rights, the court relied heavily on the caseworker's testimony. Two weeks after the order entered, Mother filed a motion to disqualify the judge and for a new trial, reasoning that the judge's impartiality could reasonably be questioned. Mother alleged she had received ineffective assistance of counsel when her lawyer did not timely file a motion to recuse. Both motions were denied.

A judge's recusal may result from either allegations of actual bias or allegations of a mere appearance of impropriety. An appearance of impropriety exists "in any proceeding in which the judge's impartiality might reasonably be questioned." C.J.C. 2.11(A). Actual bias is one "that in all probability will prevent [a judge] from dealing fairly with a party." People v. Julien, 47 P.3d 1194, 1197 (Colo. 2002).

Whether an ineffective assistance claim can be raised in a termination hearing is an issue of first impression with the Supreme Court. The court of appeals has applied the Strickland v. Washington analysis to a termination hearing, concluding that the parent must prove two elements to

prevail on a claim of ineffective assistance of counsel: "(1) counsel's performance was outside the wide range of professionally competent assistance; and (2) the parent was prejudiced by counsel's errors." 466 U.S. 668, 686 (1984). Although the Supreme Court declined to decide whether Strickland applies to an ineffective assistance claim in a termination hearing, it found that prejudice to the litigant is required.

Here, Mother has failed to allege facts that would prove prejudice. At most, she has alleged that there may have been an appearance of impropriety, but she has not alleged that the proceeding was fundamentally unfair or that the judge was not impartial. The prejudice element of an ineffective assistance claim premised on counsel's failure to file a motion for disqualification cannot be satisfied without an allegation that the judge was actually biased. Because Mother's motion for disqualification was entirely based on an appearance of impropriety, rather than a claim of actual bias, it failed to satisfy the prejudice element necessary to prevail on an ineffective assistance claim.

C.R.C.P. 97 does not specify the time when a motion for disqualification should be filed. Yet, "good faith and orderly process dictate that if grounds for disqualification are known at the time the suit is filed and a party desires to proceed thereon, a motion to disqualify should be filed prior to taking any other steps in the case." Aaberg v. Dist. Court, 319 P.2d 491, 494 (1957). A motion for disqualification must be timely filed so that a judge has the opportunity to ensure that a trial proceeds without any appearance of impropriety. When the motion for disqualification is not made until a ruling has been issued, the motion does not give the judge an opportunity to disqualify himself. Instead, the motion serves as a challenge to the judgment of the court. Were the Court to require a new termination hearing in these circumstances, we might encourage an untimely motion to recuse as a means to a second chance with a different judge. Such an outcome would waste judicial resources and further damage the reputation to the judiciary.