Survey of Family Law Cases 2004-2013

2013 Family Law Survey

ALTERNATIVE DISPUTE RESOLUTION

In re the Marriage of Rivera, 300 P.3d 994 (Colo. App. 2013) Husband appeals from the trial court's order partially confirming an arbitration award as to property and maintenance provisions and ordering a hearing on the remaining parenting issues. The parties agreed to resolve the terms of their dissolution of marriage through mediation and arbitration. The parties went to mediation, reached an agreement, and agreed that the mediator would be designated as arbitrator to resolve any dispute arising out of the terms of the mediated agreement. The mediated agreement was not filed with the court.

Shortly thereafter, the parties disputed the property distribution provisions in the mediated agreement. The parties and their attorneys engaged in arbitration. The arbitrator entered a final arbitration award reaffirming the parenting time agreement reached at mediation.

Wife filed a forthwith motion requesting trial court confirmation of the arbitration award under C.R.S. § 13-22-222(1) and entering an order that the Parenting Plan was in the best interests of the children. The Court held a non-contested hearing at which both parties requested that the mediated agreement and arbitration award be made the orders of the court. The court took testimony of the parties to ensure they both believed the agreement was fair. Wife answered in the negative, and the court declined to confirm the arbitration award and set a permanent orders hearing. Husband thereafter moved to confirm the arbitration award under C.R.S. § 13-22-222(1). He argued that because neither party had timely sought to vacate, modify, or correct the arbitration award, the court was required to confirm it. Wife agreed that the court should confirm all non-parenting provisions; however, objected to confirmation of any provision concerning parenting issues. The court entered an order confirming all property and maintenance provisions of the arbitration award and ordered that all parenting issues remain set for hearing. Husband appealed.

Husband contends that because he and wife resolved the dissolution through arbitration, and wife did not seek to vacate, modify, or correct the arbitration award in a timely manner, the trial court lacked authority to set a permanent orders hearing. The Court of Appeals held that while a trial court has the authority to set a permanent orders hearing to review parenting issues resolved through arbitration if the statutory prerequisites are met, the trial court exceeded that authority. Courts are charged with the duty of protecting the best interests of children in dissolution proceedings. In dissolution cases, the UDMA takes precedence over other laws, including those applicable to alternative dispute resolution. *In re Marriage of Barker*, 251 P.3d 591, 592 (Colo. App. 2010). Thus, provisions of an arbitration award pertaining to parenting issues are subject to the supervisory power of the trial court. *See Id.*

Under C.R.S. § 14-10-128.5(2), a party may "apply to have the arbitrator's award vacated, modified, or corrected pursuant to [the UAA], or may move the court to modify the arbitrator's award pursuant to a *de novo* hearing concerning such award by filing a motion for hearing no later than thirty-five days after the date of the award." Accordingly, the trial court retains jurisdiction to decide all issues relating to the children *de novo* upon the request of either party. When a C.R.S. § 14-10-128.5(2) request for a de novo hearing is made, the trial court has the discretion to schedule a permanent orders hearing to ascertain whether the arbitration award is in the best interests of the children.A trial court may only hold a de novo hearing under this statute, however, if one is timely requested. *See*, § 14-10-128.5(2). Because neither

party filed a timely request for a *de novo* hearing under C.R.S. § 14-10-128.5(2), the trial court's authority was limited under the UAA to confirming the award as requested. *See*, Colo. Rev. Stat.§ 13-22-222(1).

The U.S. Supreme Court had an active year in family law matters as well.

Chafin v. Chafin, 133 S.Ct. 1017 (U.S. 2013) is a United States Supreme Court case that deals with the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act (ICARA). Mr. Chafin is a U.S. citizen and a member of the armed forces. While stationed in Germany in 2006, he married Ms. Chafin, a citizen of the United Kingdom. Their daughter E.C. was born the following year. In 2007, Mr. Chafin was deployed to Afghanistan; Ms. Chafin took E.C. to Scotland. Mr. Chafin was then transferred Alabama, and in February 2010, Ms. Chafin and E.C. traveled to Alabama. Soon thereafter, Mr. Chafin filed for divorce in Alabama. Ms. Chafin was arrested for domestic violence, and because she had overstayed her visa, she was deported in February 2011. E.C. remained in Mr. Chafin's care.

In May 2011, Ms. Chafin filed petition in the U.S. District Court for the Northern District of Alabama under Hague Convention and ICARA seeking an order for E.C.'s return to Scotland. The court ruled in favor of Ms. Chafin, concluding that E.C.'s country of habitual residence was Scotland and granted the petition for return. Mr. Chafin immediately moved for a stay pending appeal; the court denied his request and Ms. Chafin left the country with E.C. By December 2011, she had initiated custody proceedings in Scotland. The Scottish court granted her interim custody and a preliminary injunction, prohibiting Mr. Chafin from removing E.C. from Scotland. Mr. Chafin appealed the District Court order to the Court of Appeals for the Eleventh Circuit, which dismissed Mr. Chafin's appeal as moot in a one-paragraph order, citing *Bekier v. Bekier,* 248 F.3d 1051 (2001) for the proposition that an appeal of a Convention return order is moot when the child had been returned to the foreign country. On remand, the District Court dismissed the suit as moot, vacated its order, and ordered Mr. Chafin to pay Ms. Chafin over $94,000 costs and fees. Meanwhile, the Alabama state court had dismissed Mr. Chafin's child custody proceeding for lack of jurisdiction. The Alabama Court of Civil Appeals affirmed, relying in part on the U.S. District Court's finding that the child's habitual residence Scotland. The U.S. Supreme Court granted certiorari.

A suit becomes moot, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.,* 568 U.S. ——, ——, 133 S.Ct. 721, 726, 184 L.Ed.2d 553 (2013). But a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees,* 567 U.S. ——, ——, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012).

Mr. Chafin's claim for re-return—under the Convention itself or according to general equitable principles—cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction, *see*, *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and his prospects of success are therefore not pertinent to the mootness inquiry. As to the effectiveness of any relief, Ms. Chafin asserts that even if the habitual residence ruling were reversed and the District Court were to issue a re-return order, that relief would be ineffectual because Scotland would simply ignore it. But even if Scotland were to ignore a U.S. re-return order, this case would not be moot. The U.S. courts continue to have personal jurisdiction over Ms. Chafin, may command her to take action even outside the U.S., and may issue sanctions. No law of physics prevents E.C.'s return from Scotland, and Ms. Chafin might decide to comply with an order against her and return E.C. to the United States.

Mr. Chafin's requested relief is not so implausible that it may be disregarded on the question of jurisdiction; there is authority for the proposition that failure to appeal such judgments separately does not preclude relief. It is thus for lower courts at later stages of the litigation to decide whether Mr. Chafin is in

fact entitled to the relief he seeks. Such relief would of course not be "'fully satisfactory,' " but with respect to the case as whole, "even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot.' " *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (*per curiam*) (quoting *Church of Scientology*, 506 U.S., at 13, 113 S.Ct. 447).

Ms. Chafin is correct to emphasize that both the Hague Convention and ICARA stress the importance of the prompt return of children wrongfully removed or retained. We are also sympathetic to the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children. But courts can achieve the ends of the Convention and ICARA through the familiar judicial tools of expediting proceedings and granting stays where appropriate. There is no need to manipulate constitutional doctrine and hold these cases moot. Indeed, doing so may very well undermine the goals of the treaty and harm the children it is meant to protect. If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal. Such routine stays due to mootness would be likely but would conflict with the Convention's mandate of prompt return to a child's country of habitual residence.

The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties' respective claims.

United States v. Windsor, 133 S. Ct. 2675 (U.S. 2013) is a landmark case in which the United States Supreme Court held that Section 3 of the federal Defense of Marriage Act (hereinafter "DOMA"), is unconstitutional. The State of New York recognized the marriage of Thea Spyer and Edith Windsor, a same-sex couple and residents of New York, who were lawfully wed in Ontario, Canada. Spyer passed in 2009 and left her entire estate to her wife Edith Windsor. Windsor sought to claim the marital federal estate tax exemption for surviving spouses, but was prohibited from doing so by Section Three DOMA which defined the terms "spouse" and "marriage" as excluding same-sex partners as used in federal statutes.

Windsor paid $363,053 in estate taxes to the Internal Revenue Service (hereinafter, "I.R.S") and solicited a refund. The I.R.S. denied Windsor's request since federal law did not confer federal marital benefits to same-sex couples. Soon after, Windsor brought this refund suit, alleging that DOMA violates notions of equal protection embodied in the Fifth Amendment.

The United States District Court ruled against the United States on the merits, finding Section Three of DOMA unconstitutional and ordered the Treasury to refund Windsor's collected estate taxes with interest. The Second Circuit Court of Appeals affirmed. The United States was noncompliant with the judgment and failed to reimburse Windsor. The United States Supreme Court granted certiorari and affirmed the Second Circuit ruling finding DOMA unconstitutional.

The legal issue before the Court was whether Section Three of DOMA, which amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of "spouse" and "marriage," violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

The Court held in the affirmative and declared, "DOMA seeks to injure the very class New York seeks to protect" and by doing so, Section 3 violates quintessential equal protection and due process guarantees applicable to the Federal Government.

According to the Court, DOMA rejects the long established precept that the incidents, obligations, and benefits of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. New York's decision to give gays the right to marry conferred upon them a dignity and "status of immense import." When the State used its authority to define the marital relation in this way, the marital recognition of same-sex couples gained state-wide classification. The Federal Government uses this state-defined class to impose restrictions and disabilities.

That result required the Supreme Court to address whether the resulting injury and indignity is a deprivation of an essential party of the liberty interest protected by the Fifth Amendment. The United States Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Windsor* citing *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973). In determining whether a law is motivated by an improper animus or purpose, discriminations of an unusual character especially require careful consideration. DOMA cannot survive under these principles.

DOMA creates an "unusual deviation from the usual tradition" of lending credence to state definitions of marriage and in essence "operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages." *Windsor* at 20. Such a deviation is "strong evidence" of federal laws "having the purpose and effect of disapproval of that class." *Id*. at 21. The primary purpose of DOMA Section 3 unconstitutionally enforces a separate status, handicaps, and stigmatizes those who enter into same-sex marriages "made lawful by the unquestioned authority of the States." *Id*.

Finally, Federal Tax Court also reached issues of impact to Colorado family law in DeLong v. C.I.R., 105 T.C.M. (CCH) 1446 (U.S. Tax Ct. 2013). A dissolution action was filed in California. The parties to the marriage had two children. Temporary orders provided that Husband was to pay Wife $3,000 per month in combined maintenance and child support, which the court termed "family support." The issue before the tax court was whether Husband was allowed to deduct as alimony any amount of the unallocated "family support" payments as alimony on his taxes.

A deduction from gross income is allowed for alimony payments to the extent such payments are includible in the gross income of the recipient spouse under section 71 Sec. 215(a) and (b) of the tax code. Whether a payment constitutes alimony within the meaning of these sections is determined by reference to section 71(b)(1), which defines an "alimony or separate maintenance payment":

Any payment of cash if –

- such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
- the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,
- in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
- there is no liability to make such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

A payment satisfying this criteria is nevertheless not includible in the recipient spouse's gross income under section 71(a), and is not deductible as alimony, if it qualifies as child support under section 71(c).

The Commissioner of the IRS (C.I.R.) does not dispute that the payments were made under a divorce or separation agreement or that the parties were members of different households when the payments were made. The C.I.R. contends, however, that the payments fail to satisfy the general alimony requirements because they were designated as non-alimony and Husband's liability to make them would have continued past Wife's death.

Courts apply a three step test to determine whether, pursuant to the divorce decree, a party is liable to continue to make support payments after the other party's death, thereby not constituting alimony. First, courts look for an unambiguous termination provision in the decree. If there is no such provision, the court then looks to whether the payments would terminate at the payee's death by operation of state law. If state law is unclear, the court will look solely to the divorce decree to determine whether the payments would terminate at the payee's death.

Here, the support order did not expressly state that Husband's liability for support payments would terminate on Wife's death. Under California law, there is no continuing payment liability past the death of a payee spouse with respect to a family support obligation. Accordingly, here, Husband has no continuing liability for the family support payments past the death of Wife.

A payment will not be treated as alimony if it is designated as nonalimony. C.I.R. argues that the family support payments were designated as nonalimony because they included child support. Child support is defined as any part of a payment that the terms of a divorce or separation instrument specifically fix as a sum that is payable for the support of the payor's children. Sec. 71(c)(1). Child support must be "fixed" and cannot be inferred from intent. Because the support order in this case makes an unallocated award of spousal and child support, it does not fix any portion of the payments as a sum payable for the purposes of support of the children. Therefore, no amount of the family support payments qualifies as child support under section 71(c). The court therefore held that the family support payments constituted alimony, not child support and therefore Husband is entitled to deduct the entire amount of family support payments for 2008.