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Standards for 3rd Parties in Domestic Relations Cases

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Mandatory Joinder: C.R.C.P. Rule 19

Joinder is mandatory when:

- (1) complete relief cannot be accorded among those already parties; or
- (2) a third person claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may impede or impair the absent person's ability to protect his interest or leave the remaining parties subject to multiple or inconsistent obligations.

Permissive Joinder: C.R.C.P. Rule 20

Standards for Permissive Joinder:

- Persons asserting a right to relief arising out of the same transaction or occurrence may join an action if any questions of law or fact common to all petitioners will arise in the action.
- Persons may be joined as defendants/respondents if there is asserted against them any right to relief arising out of the same transaction or occurrence, and if any question of law or fact common to all respondents will arise in the action.

Permissive Intervention: C.R.C.P. Rule 24

When is intervention appropriate?

- When a statute confers an unconditional right to intervene;
- When the intervenor claims an interest in the subject of the action and disposition of the action may impact his ability to protect that interest.

Procedure:

- Motion to intervene: set forth grounds for intervention and the claim or defense for which intervention is sought.
- The Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties when granting intervention.

3rd Party Scenarios - APR

- Grandparents — visitation or APR
- Stepparent APR
- Psychological parent APR
- Bio parent with limited contact with bio child

Options for Grandparents

CRS § 19-1-117: If there is already a pending case regarding the child, grandparents and great-grand parents may request intervention under CRCP 24(b).

- Pending actions: Dissolution of Marriage, Legal Separation; Invalidity of Marriage; Paternity; D&N (note there are separate standards in D&N cases).
- Death of a parent: in this case no pending case is required.
- Adoption of a child by a non-parent terminates bio grandparents right to intervene.
- Not absolute: the Court may deny or delay intervention based on best interest of the child or judicial economy. *See In re K.L.O.-V.*, 151 P3d 637 (Colo. App. 2016) .

Grandparent standards under C.R.S. § 19-1-117

- Court applies factors set forth in C.R.S. § 14-10-124(1.5) and sets hearing if requested by either side.
- Presumption in favor of the bio parents' determination for grandparent visitation (*Troxel*: parent's have a fundamental interest in the care of their children; a fit parent's determinations regarding their children must be given "special weight").
- **Clear and Convincing:** Grandparents must rebut a parental determination based on *clear and convincing* evidence that a parent is not acting in best interest of the child regarding grandparent time.
- Grandparents have same burden of proof in opposing a parent's later motion to terminate grandparent visitation.

Relevant cases:

- *In re Adoption of C.A.*, 1237 P.3d 318 (Colo. 2006): sets forth standards for grandparent cases).
- *In re Petition of R.A.*, 121 P.3d 295 (Colo. App. 2005): addresses "special weight" for parental determinations.
- *In re A.M.*, 251 P.3d 1119 (Colo. App. 2010) (termination/modification of grandparent visitation).

APR Standards for Non-Parents

Establish standing CRS § 14-10-123(1)(b) or (1)(c)

- Child must have been "physical care" of non-parent for 6 months and APR must be initiated within 6 months of child leaving their care; OR
- Child is not in the physical care of either parent.
- Parental consent for the contact is not required for a nonparent to establish standing.

What is "Physical Care"?

- Consider nature, duration, and frequency of the contact.
- Consider both the amount of time a child spent in the care of a nonparent and the "quality" of the contact—have psychological bonds formed as a result?
- Care does not have to be exclusive of parent's care or uninterrupted. See *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004) (psychological parent).
- Is care at the direction of a parent? Does parent provide supervision of the care? See *In re D.T.*, 292 P.3d 1120 (Colo. App. 2012) (grandparent was parenting "mentor" to mother despite frequent overnights and care of grandchild—no standing).

APR Standards for Non-Parents

- Once standing is established, best interest standard applies.
- Court will consider all relevant factors set forth in C.R.S. § 14-10-124 and then make APR determinations.
- *Troxel* due process requirements for parents are met so long as the court applies "special weight" to parent determination when considering best interest of the child.
- Different standards for custodial and non-custodial parents disputing non-parents seeking APR.
- Custodial parent: preponderance of the evidence standard applies. See *In re D.I.S.*, 249 P.3d 775 (2011).
- Non-Custodial parent: clear and convincing standard applies. See *In re Reese*, 227 P.3d 900 (Colo. App. 2010).

3rd Parties and Marital Property

- Real estate – title or equitable interest held by a 3rd party
- 3rd party business owners
- Discovery issues
- Fraudulent conveyances
- Defrauded 3rd party

Marital property is owned (in whole or in part) by a third party in a pending DR case

Example: Spouses are divorcing and the title to the parties' marital home is jointly held by only one of the divorcing spouses and the parents of that spouse.

Example: Spouses are divorcing. Family farm is jointly owned and operated by both spouses, siblings of one spouse, and parents of one spouse.

Information and/or discovery is needed from a third party to determine issues in the DR case (determination of income, identification of marital property, etc.).

Example: Husband and Wife are divorcing and Husband may be the beneficiary of a trust that was created by Husband's father. In their dissolution proceedings, Husband refuses to produce the trust documents, arguing that he has no authority to obtain these documents because they belong exclusively to his father.

Example: Husband and Wife are divorcing and Wife is the founder and Chief Operating Officer of a large non-profit corporation. In their dissolution proceedings, Wife refuses to produce corporate documents, arguing that she has no authority to obtain these documents because they belong exclusively to the business.

In re the Marriage of Schmedeman, 190 P.3d 788 (Colo. App. 2008).

- District Court enters Permanent Orders finding that a log cabin owned by Husband's parents is marital property. Husband Appeals.
- Husband and Wife, with the help of Husband's father, business partner and friends built cabin on property in Kansas. Husband subsequently gave the cabin to his parents (title was in Husband's parents' names).
- In a separate civil lawsuit, Husband claimed the cabin was his property. Husband also featured the cabin in advertisements for his business, and used the cabin as a model to solicit business.
- Over Wife's objection, Husband gave the cabin to his parents during the marriage.
- The Court of Appeals found that, despite Husband representing that the property was marital for his personal business solicitation, he could dispose of the cabin, owned by Husband and Wife, as he saw fit.
- Wife's disapproval did not affect the validity of Husband's transfer. The cabin was deemed property owned by Husband's parents.

In re Marriage of Gromicko, 387 P.3d 58 (Colo. 2017).

- Wife files a petition for dissolution seeking maintenance and property division. She requests Husband produce documents from his employer, International Association of Certified Home Inspectors (InterNACHI). Wife alleges Husband founded the company, served as Chief Operating Officer, and review corporate documents are necessary to determine Husband's income and whether InterNACHI is marital property (based on an alter ego theory).
- Husband refused to produce the documents. Wife serves a subpoena on InterNACHI. Counsel for Husband (also general counsel for InterNACHI) moved to quash the subpoena on the grounds that many of the documents requested were privileged, confidential, and irrelevant to the dissolution proceedings. Husband also argues that Wife failed to plead a veil-piercing claim at the outset of the dissolution so can't make an "alter ego" claim.
- The District Court denied the Motion to Quash and ordered InterNACHI to produce all requested documents with a "protective order."
- InterNACHI files a CAR 21 Petition on grounds that 1) Wife failed to plead a veil piercing claim with her petition for dissolution pleading; 2) Wife's discovery was outside the scope of CRCP 26.
- The Supreme Court holds: *Wife was not required to make a veil-piercing claim with her dissolution Petition because doing so "would potentially require the joinder of third parties at the outset of the proceeding. Such a procedure seems inconsistent with (a) the Act's (UDMA) repeated focus on the parties to the marriage; (2) the required allegations of the dissolution petition which concerns only those parties; and (3) the underlying purpose of the Act to promote the amicable settlement of disputes that have arisen between the parties to a marriage."* 14-10-102(2)(a) (emphasis added).

Pitfalls and Alternatives

- DR cases are intended to be about the family. The UDMA and C.R.S. § 14-10-107 support resolution of disputes *between the parties*.
- DR cases are equitable proceedings; claims of 3rd parties may be actions at law that DR court can't resolve.
- 3rd parties may be entitled to a jury trial for their claims. Are you prepared to litigate civil issues in a DR case?
- Risk of conflicting orders.
- Consider the particular District.
- Notify the Court of related pending cases.
- What is the purpose or goal when joining a 3rd party? Are there more efficient or appropriate alternatives?
- Appointment of a Special Master to address 3rd party interests or related issues.
- Appointment of a Discovery Master (*IRM Hunt* supports expansive disclosures/discovery in DR cases).

Pitfalls and Alternatives

- Seek early guidance/intervention from the Court: status conference; discovery sanctions; hearing on the specific issue
- Ethical constraints: separate counsel for 3rd parties even if interest appears aligned with one party.
- Is litigation best approach to maintain relationship with child and parent/custodian objecting to APR?
- ENE/ENA - early feedback for all parties.
- Therapeutic intervention.
- Other ADR options - is there way a way to preserve the family without litigation?
- Remember the child.

A grandparent or great grandparent of a minor child seeks visitation in a DR case pursuant to C.R.S. § 19-1-117.

Example: Grandmother wants visitation rights with her grandson who is a minor child. A DR case is presently pending for the dissolution of her grandson's parents' marriage. The grandson's mother is Grandmother's daughter and the grandson's parents will end up sharing equal parenting time.

A third party (not a bio parent) seeks APR for a minor child pursuant to C.R.S. § 14-10-123

Example: Husband and Wife have two minor children together. Wife also has one additional minor child from a prior relationship. No APR Orders have ever been entered for Wife's minor child from a prior relationship. Husband and Wife file for divorce and Husband seeks APR for Wife's minor child from a prior relationship as part of their dissolution of marriage.

Example: Husband and Wife have two minor children together and Wife also has one additional minor child from a prior relationship. 10 years ago, APR Orders were entered with respect to Wife's minor child from a prior relationship in a different county in Colorado. Husband and Wife file for divorce and Husband seeks allocation of parental responsibilities in connection with Wife's minor child from a prior relationship in their dissolution case, pursuant to C.R.S. § 14-10-123.

A third party (not a bio parent) seeks APR for a minor child pursuant to C.R.S. § 14-10-123

Example: A minor child was born during the marriage of divorcing spouses but the child is not biologically related to both spouses (the child is only biologically related to Wife). Husband seeks APR in connection with the child in their dissolution of marriage case, pursuant to C.R.S. § 14-10-123. The child's bio father simultaneously files a Petition to establish his paternity of the child based on the results of genetic testing that show he is the child's biological parent.

**In re the Support of E.K., J.K., and P.K., 2013 COA 99 (Colo. App. June 20, 2013): The district court lacks jurisdiction to resolve matters in a paternity action unless each man presumed to be the children's father and each man alleged to be the children's natural father are made parties to or given notice of the action.*
