



# JUNE 2004

## CBA FAMILY LAW SECTION NEWSLETTER

### LETTER FROM THE CHAIR

*STEVEN LASS*

*Sign Up Now to Attend the Family Law Institute Set for August 6-8, 2004*

The Fourth Annual Family Law Institute will take place from August 6 to 8 in Steamboat Springs. The planning committee, co-chaired by Richard Zuber and Bonnie Schriener, has prepared an outstanding program covering all areas of domestic relations practice. We will also have a significant “judicial education” component to the program, and we are anticipating the attendance of a large number of judges and magistrates who handle family law matters. The Institute has established itself as one of the premier CLE programs in our field of practice. I hope you will attend. You will not be disappointed.

#### *The Continuing Evolution of Rules 16.2 and 26.2*

As you know, there has been a great deal of effort over the past year (and more) regarding proposed changes to family law discovery and pretrial procedures, as currently embodied in Rules 16.2 and 26.2 and various Court orders regarding “simplified divorce.” In December, 2003, the Family Law Section created a “task force” to analyze and comment upon the draft version of a revised Rule 16.2 that was being circulated for comment at that time. The result of the work of the task force was a letter approved by the Executive Council and sent by me on behalf of the Section to Justice Kourlis and the Standing Committee on Family Issues. The letter highlighted some of the governing principles that the Section believed were most important to keep in mind in the on-going dialogue over how best to manage these cases. I will set forth below an edited (shortened) version of the Section’s letter.

Please understand that the rules have been redrafted a number of times since this letter was written. The “final” new Rules have not yet been approved. However, I am pleased that a number of the concepts proposed in the Section’s letter have been incorporated into the most recent revision to the draft Rules. In particular, I believe that the Standing Committee has “heard” and at least partially addressed our concerns regarding expert witnesses, attorney certification of disclosures, temporary orders, notice and due process, and Rule 60. Keep your eyes out for the next version of the new Rules.

*Continued On Page 3*

## *In this Issue...*

Letter from the Chair	Pg 1
Legislative Update	Pg 5
Mediation Advocacy in Domestic Cases	Pg 9
Ten Suggestions for Messing Up Your Child	Pg 11
The Mechanics of a <i>Martinez</i> Modification	Pg 12
Family Law News Items From El Paso County	Pg 15
Executive Council Minutes	Pg 16

### FAMILY LAW SECTION OFFICERS

**Chair:** Bonnie Schriener

303-458-5100 or bonnie@bonnieschriener.com

**Chair-Elect:** Fran Fontana

303-987-1127 or ffontana@qbfamily.com

**Secretary:** David Johnson

719-471-1663 or johnson@kdjpc.com

**Treasurer:** Kathryn Beck

303-278-3078 barristerbeck@steinerbeck.com

**Immediate Past President:**

Steve Lass

303-296-9412 or slass@khgk.com

### NEWSLETTER

**Editors:**

Helen C. Shreves and Ellen Weston Squires

The editors will happily accept submission of articles for publication, letters to the Editor, or other items of interest. The editors retain the right to edit any and all submissions. E-mail articles to jpetersen@codla.org.

## COLORADO BAR ASSOCIATION FAMILY LAW SECTION EXECUTIVE COUNCIL 2004-2005

### Terms ending 7/1/05:

Terry Bernuth  
Martin Brown  
Megan Combs  
Steven B. Epstein  
Robert T. Hinds III  
Michael L. Luchetta  
Robert L. Malman  
Marie Avery Moses  
Richard J. Rotole  
Jacqueline St. Joan

### Terms ending 7/1/06:

Deborah Anderson  
Gretchen Aultman  
Jordan Fox  
Katie Hays  
Beth Henson  
David Littman  
Joan McWilliams  
Robert Smith  
Brenda Storey  
Richard Zuber

Thank you to all who ran for office. For those who were elected and those who were not, your strong participation in this Section is essential. If you would like to become more active in this Section's work, please contact one of the officers or an Executive Council member. We have a job with your name on it..

## FAMILY LAW SECTION LUNCHEON SCHEDULE AND EXECUTIVE COUNCIL MEETINGS 2004-2005

Please set your plans to attend our luncheons. Teleconferencing is available for members outside of the Denver metropolitan area. Call Terry Bernuth or Bob Malman for more information.

### DATE

\*September 17, 2004

\*October 15, 2004

November 19, 2

\*January 21

\*February 18

\*March 18

\*April 15

May 19

### TOPIC

TBA

TBA

Judges' Luncheon

Annual Caselaw Update

TBA

TBA

TBA

Annual Legislative Update

\*Executive Council Meetings will be held on these "\*" dates.

*Letter from the Chair*  
Standing Committee on Family Issues  
c/o Honorable Rebecca Love Kourlis  
Colorado Supreme Court  
State Judicial Building  
2 E. 14th Avenue, 4th Floor  
Denver, Colorado 80203

Re: Draft Rule 16.2 Amended

Dear Justice Kourlis:

I am writing this letter on behalf of the Family Law Section of the Colorado Bar Association. The purpose of this letter is to relay the comments of our Section to the current version of draft Rule 16.2.

## **INTRODUCTION**

The Family Law Section currently has more than 800 members with a wide variety of practices. The Section is governed by its Executive Council, consisting of: (a) the five current officers; (b) twenty Council members elected by the membership; and (c) the past chairs of the Section. The comments set forth in this letter relay the opinions of the Section as approved at the January 16 meeting of the Executive Council.

This letter will begin with some general observations about the draft Rule as a whole. It will then identify seven specific areas of concern, and set forth some suggestions for addressing those areas.

## **GENERAL COMMENTS ABOUT DRAFT RULE 16.2**

The Section has serious concerns about whether the draft Rule will accomplish its stated objective of providing “a timely, less expensive, quality process for parties and counsel.” There are currently insufficient judicial resources for many judicial districts to effectively implement the draft Rule. Attempts to implement the draft Rule without the availability of sufficient judicial resources will actually worsen the current, serious docket problems. The draft Rule is not likely to reduce the cost to clients or result in a more timely resolution of these disputes. The number of *pro se* filings may actually increase under the draft Rule, which will increase the burden on the courts.

## **COMMENTS ON SPECIFIC PROVISIONS OF THE DRAFT RULE**

### **Expert Witnesses**

The use of a “joint” expert is appropriate for some issues in some cases. However, the parties are better served in other instances, and settlement is made more likely, if the parties are permitted to retain their own expert witnesses at the outset of a case. The Section strongly believes that the decision about whether to retain a joint or separate expert on any given issue should be made by the parties and their counsel, not left to the discretion of the trial court.

### **Attorney Certification of Disclosures**

The Section does not oppose the attorney signature provisions contained in subparagraph (h)(2) of the draft Rule. However, the Section opposes the Statement by Attorney set forth in Appendix D to the draft Rule. Despite the disclaimer to the effect that the attorney “do[es] not make any personal affirmation as to its accuracy or completeness,” we believe that this attorney certification may, in fact, greatly expand the scope of the attorney’s obligations, increase the cost of cases to the clients, and create immediate and irreconcilable conflicts between clients and their attorneys.

### **Trial Judges Performing Alternative Dispute Resolution Services**

The Section strongly believes that the trier of fact should never serve as a settlement judge or mediator in the same case. The principles enunciated in C.R.Civ.P. 121, § 1-17 and *Tripp v. Borchard*, 29 P.3d 345 (Colo.App. 2001) are sound and serve to promote settlement. Those principles prevail over the superficial expediency of permitting the trial judge to also serve as a settlement judge or mediator. Our concern is particularly with protecting *pro se* parties, who may find it very difficult to oppose a trial judge’s well-intentioned offer to serve as a settlement judge or mediator.

### **Temporary Orders**

The Section is concerned about the ability of a

party to obtain a relatively prompt, evidentiary temporary orders hearing following sufficient disclosure and adequate notice to both parties. We appreciate the fact that paragraph (d) provides that temporary orders hearing will be held “as soon as possible,” and subparagraph (c)(12) permits each jurisdiction to “establish procedures for access to the court for...interim matters that may arise...prior to the initial status conference.” However, the draft Rule does not contemplate the filing of a motion for temporary orders. Fiscal realities and past experience lead us to be concerned that temporary orders issues might not be addressed until the initial status conference (fifty days after commencement of the case), and an actual hearing will not take place until significantly after the status conference. In some cases, this is simply too long for a party to wait for entry of temporary orders. In addition, the parties should have reasonable advance notice of when and whether an evidentiary hearing will actually take place.

### **Other Issues of Notice and Due Process**

The Section is pleased that subparagraph (c)(9) is included in the draft Rule because it satisfies many previous due process concerns by requiring the court to conduct an evidentiary hearing upon the request of a party. The Rule should provide that, if an evidentiary hearing is to be held, the parties must be given adequate advance notice of the hearing. If there is a possibility that an “impromptu” evidentiary hearing might be held at each status conference, attorneys will need to be prepared to conduct such a hearing on any contested issue whenever there is a status conference, and the cost to clients will be greatly increased. The Section is also concerned that the draft Rule appears to provide for the disclosure of lay witness testimony and exhibits only ten days before trial. There is general satisfaction with the existing deadlines for witness and exhibit disclosures already set forth in the current Rules.

### **Disclosures**

The mandatory disclosures outlined in Appendix B to the draft Rule are far more extensive than the disclosures actually needed in the majority of cases. With respect to the Court Authorization for Financial Disclosure Form set forth in Appendix C to the draft Rule, we believe that: (a) both parties should

know, in advance, the identity of every person or entity to whom the Authorization is sent; and (b) verbal conversations with third parties pursuant to the Authorization should be held only after the Authorized Person has attempted to schedule the discussion at a time mutually agreeable to the other party.

### **Modifications to C.R.Civ.P. 60**

Subparagraph (m)(3) of the draft Rule provides that the court will retain jurisdiction for ten (10) years over any property, liability or income that was not disclosed at the time of the divorce. The legitimate concern of providing an adequate remedy in the event of a material non-disclosure must be balanced against the need for an end to the litigation, particularly in divorce cases. The ten (10) year time frame is simply too long. Because this provision of the draft Rule represents such a dramatic change in existing law, and is not central to the draft Rule’s core concept of “active case management,” we recommend that this provision be omitted at this time for further specific scrutiny and, if appropriate, that changes such as this be separately implemented (by Rule and/or statutory change) at a later date.

### **CONCLUSION**

Thank you for giving our Section, and its individual members, an opportunity to comment on the draft Rule. We hope you find our comments helpful. The Section would welcome any opportunity to assist the Standing Committee in addressing our shared goal of improving the quality of services provided to families experiencing divorce.

Very truly yours,  
Steven C. Lass, Chair  
Family Law Section  
Colorado Bar Association

**CBA FAMILY LAW SECTION LEGISLATIVE UPDATE**  
**SIXTY-FOURTH COLORADO GENERAL ASSEMBLY**  
**SUMMARY OF BILLS PASSED JANUARY 7, 2004 THROUGH MAY 5, 2004**  
**&**  
**SUMMARY OF HB 1297**  
*PREPARED BY MARIE AVERY MOSES, ESQ. & DICK ROTOLE, ESQ.*

*Internet Link for All House and Senate Bills:*  
<http://www.leg.state.co.us>

**Bill Number:** House Bill 1153

**Title:** Concerning Housing Issues for Victims of Domestic Violence.

**Status:** This bill was signed into law on April 21, 2004 and shall become effective on August 4, 2004.

**Bill Summary:** A lease cannot contain any provisions that allow the landlord to terminate the lease or to impose a penalty if a tenant calls the police or other emergency services as a result of a domestic abuse situation.

**Legislative Information:** The Family Law Section did not take a position on this bill.

---

**Bill Number:** House Bill 1297

**Title:** Concerning the Allocation of Parenting Time in a Domestic Relations Case

**Status:** This bill was not passed.

**Bill Summary:** At the temporary orders hearing, requires the court to provide substantially equal parenting time for a minor child of the marriage with both parents, regardless of age or gender, unless the court finds that there is clear and convincing evidence that such parenting time is not in the best interests of the child. Gives a parent who objects to substantially equal parenting time the burden of proving, by clear and convincing evidence, that substantially equal parenting time is not in the best interests of the child at the temporary orders hearing. If the court determines that substantially equal parenting time is not in the best interests of the child, requires the court to document the reasons for such determination in the court record.

**Legislative Information:** The Family Law Section actively opposed this bill and testified against it at the House Committee Hearing. The bill passed out of the House State, Veterans & Military Affairs Committee by a vote of 9-2. The bill was referred to the House Appropriations Committee, where it was laid over indefinitely as a result of the significant fiscal note that State Judicial attached to the bill. Although there was tremendous political pressure, State Judicial was not willing to reduce the fiscal note.

---

**Bill Number:** House Bill 1305

**Title:** Concerning Protective Orders

**Status:** This bill was signed into law by the governor on April 21, 2004. Effective date July 1, 2004 for all motions for protective orders or motions to modify protective orders filed on or after that date.

**Bill Summary:** The bill relocates and makes uniform provisions concerning civil protection orders from titles 14, 16, and 19 into title 13, specifically §13-14-101, et. seq. Authorizes district courts and juvenile courts to issue emergency protection orders to prevent domestic abuse of a minor child. Clarifies that, if there are conflicting protection orders, the court shall consider issues of public safety first. Specifies that if a protection order is modified, the modification is only effective if it is served upon the respondent or the respondent has actual notice of the changed provisions. For dissolution of marriage cases, separates protection orders from temporary orders. Repeals sections relocated to title 13. Makes conforming amendments.

For a protection order filed in a proceeding commenced under the "Uniform Dissolution of Marriage act", article 10 of title 14, CRS, the court may, on the motion of either party if both parties agree to the continuance, continue

*Continued on Page 6*

*Legislative Update Continued*

the temporary protection order until the time of the final decree or final disposition of the action.

The court may award interim decision-making responsibility of a child to a person entitled to bring an action for the allocation of parental responsibilities under §14-10-123, when such award is reasonably related to preventing domestic abuse as defined in §14-10-101 (2), or preventing the child from witnessing domestic abuse. The standard for the award of temporary care and control shall be in accordance with §14-10-124

Any county or district court has the authority to enter written or verbal emergency protection orders pursuant to §13-14-103(1)(a) which may include: a) restraining a party from threatening, molesting, injuring, or contacting any other party, a minor child of either of the parties, or a minor child who is in danger in the reasonably foreseeable future of being a victim of an unlawful sexual offense or domestic abuse; b) excluding a party from the family home or from the home of another party upon a showing that physical or emotional harm would otherwise result; c) awarding temporary care and control of any minor child of a party involved; or d) enjoining an individual from contacting a minor child at school, at work, or wherever he or she may be found.

In cases involving a minor child, the juvenile and district courts have authority to issue emergency protection orders to prevent an unlawful sexual offense, as defined in § 18-3-411 (1), C.R.S., or to prevent domestic abuse, as defined in § 13-14-101 (2), when requested by the local law enforcement agency, the county department of social services, or a responsible person who asserts, in a verified petition supported by affidavit, that there are reasonable grounds to believe that a minor child is in danger in the reasonably foreseeable future of being the victim of an unlawful sexual offense or domestic abuse, based upon an allegation of a recent actual unlawful sexual offense or domestic abuse or threat of the same. Any emergency protection order issued pursuant to this subsection must be on a standardized form prescribed by the judicial department and a copy must be provided to the protected person. The order may be entered ex parte.

An emergency protection order issued pursuant to this § 13-14-103(1) shall expire not later than the close of judicial business on the next day of judicial business following the day of issue, unless otherwise continued by the court. The court may continue an emergency protection order filed to prevent domestic abuse pursuant to this subsection only if the judge is unable to set a hearing on

plaintiff's request for a temporary protection order on the day the complaint was filed pursuant to § 13-14-102; except this limitation on a court's power to continue an emergency protection order shall not apply to an emergency protection order filed to protect a minor child from an unlawful sexual offense or domestic abuse. For any emergency protection order continued pursuant to the provisions of § 13-14-103(1)(f), following two days' notice to the party who obtained the emergency protection order or on such shorter notice to said party as the court may prescribe, the adverse party may appear and move its dissolution or modification. The motion to dissolve or modify the emergency protection order shall be set down for hearing at the earliest possible time and shall take precedence over all matters except older matters of the same character, and the court shall determine such motions as expeditiously as the ends of justice require.

A verbal emergency protection order may be issued pursuant to § 13-14-103(1) only if the issuing judge finds that an imminent danger in close proximity exists to the life or health of one or more persons or that a danger exists to the life or health of the minor child in the reasonably foreseeable future. Any verbal emergency protection order shall be reduced to writing and signed by person asserting the grounds for the order and shall include a statement of the grounds for the order. The officer or person shall not be subject to civil liability for any statement made or act performed in good faith. The emergency protection order shall be served upon the respondent with a copy given to the protected party and filed with the county or district court as soon as practicable after issuance. The written emergency protection order shall be on a standardized form prescribed by the judicial department with a copy provided to the protected person.

The availability of an emergency protection order is not affected by the subject of domestic abuse leaving his or her residence to avoid abuse. The issuance of an emergency protection order shall not be considered evidence of any wrongdoing. If three emergency protection orders are issued within a one-year period involving the same parties within the same jurisdiction, the court shall summon the parties to appear before the court at a hearing to review the circumstances giving rise to such emergency protection orders.

The bill provides for recognition, Full Faith and Credit and enforcement of a foreign protection order issued by a

*Continued on Page 7*

*Legislative Update Continued*

civil or criminal court of another state, an Indian tribe, or a U.S. territory or commonwealth, so long as a) the foreign protection order was obtained after providing the person against whom the protection order was sought reasonable notice and an opportunity to be heard sufficient to protect his or her due process rights; b) If the foreign protection order is an ex parte injunction or order, the person against whom it was obtained shall have been given notice and an opportunity to be heard within a reasonable time after the order was issued sufficient to protect his or her due process rights c) The court that issued the order had jurisdiction over the parties and over the subject matter and d) The order complies with section §13-14-102 (18).

The bill modifies §14-10-108 (2) regarding temporary orders in a dissolution case to delete the current references to the temporary injunction and to provide that a party to a dissolution of marriage action may seek a protective order pursuant to the provisions of §13-14-102.

Retains language regarding prior notice of protective orders pursuant to petitions for dissolution of marriage and under the Uniform Parentage Act, and retains language that violation of a protective order is a crime pursuant to §18-6-803.5.

This act takes effect July 1, 2004, and applies to motions for protective orders or motions to modify protective orders filed on or after that date.

---

**Bill Number:** Senate Bill 64

**Title:** Child Support Obligations

**Status:** This bill was signed into law by the governor on April 8, 2004, effective July 1, 2004.

**Bill Summary:** Minor statutory changes to CRS §14-10-115. Places responsibility of designing and updating guideline forms, schedules and instructions with the judicial department instead of the supreme court. With respect to basic child support obligations, for combined gross income amounts falling between amounts shown in the schedule, basic child support amounts shall be interpolated and not extrapolated. Modifies the definition of extraordinary medical expenses to uninsured expenses, including copayments and deductible amounts, in excess

of two hundred fifty dollars per child per calendar year.

Modifies CRS 14-10-122 provisions regarding liens on real and personal properties to be effective for the earlier of twelve years or until all past-due amounts are paid, including any accrued interest and costs, without the necessity of renewal; and allows such liens to be extended or renewed indefinitely beyond twelve years by rerecording the lien every twelve years.

Modifies CRS 14-14-102 regarding the Family support registry to include maintenance.

Modifies CRS 26-2-111. Eligibility for public assistance to include an assignment of unpaid support up to the amount of the cost of assistance provided.

Adds a new section to CRS 26-13-102.8 regarding nondisclosure of information in exceptional circumstances where a party alleges in a sworn affidavit or pleading that the health, safety, or liberty of a party or child would be jeopardized by disclosure of specific identifying information, that information shall be sealed and may not be disclosed to the other party or the public. The party seeking disclosure of all or part of such identifying information may request a hearing before the court. After a hearing in which the court takes into consideration the health, safety, or liberty of the party or child, the court shall make findings based upon the considerations specified in this section and may order disclosure of all or part of the information if the court determines the disclosure to be in the interest of justice.

Amends CRS 26-13-113 regarding placement in foster care automatic assignment of rights such that the assignment of rights to accrued child support shall remain in effect until foster care maintenance costs have been reimbursed in full in those cases in which the children were not eligible for assistance under Title IV-E of the federal Social Security Act. For cases in which children were eligible for assistance under Title IV-E of the federal "Social Security Act", as amended, the criteria for assignment of rights set forth in § 26-2-111 (3) (a), shall apply.

Amends the provisions of CRS 26-13-122 and other statutes under the administrative act regarding administrative liens and attachments

*Continued on Page 8*

**Bill Number:** Senate Bill 117

**Title:** Newborn Removal

**Status:** This bill was signed into law by the governor on April 13, 2004, effective July 1, 2004.

**Bill Summary:** Prohibits a law enforcement officer from removing a newborn child from the custody of his or her parents without a court order with findings that an emergency situation exists and the newborn child is seriously endangered, unless the child is identified as being affected by illegal substance abuse or demonstrating withdrawal symptoms resulting from prenatal drug exposure or the child has no available birth parent due to mental illness of the child's only identifiable birth parent or both birth parents. Requires a law enforcement officer who removes a newborn child from the custody of his or her parents to provide certain verbal and written notices directly to the newborn child's identifiable birth parent or parents at the time of the newborn child's removal. Strongly encourages these notices to be given in a language that the birth parent or parents understand, and authorizes the law enforcement officer to designate another person to assist him or her in providing these written and verbal notices to fulfill this requirement, if necessary.

---

**Bill Number:** Senate Bill 122

**Title:** Concerning the Repeal of Family Law Magistrates.

**Status:** This bill was signed into law by the governor on April 1, 2004, effective July 1, 2004.

**Bill Summary:** This bill repeals C.R.S. §13-5-301 to §13-5-305 concerning family law magistrates. C.R.S. §13-5-301 has previously designated the matters over which a magistrate could preside. With the repeal of this statute, magistrates will no longer be appointed as "family law magistrates" and all magistrates will be "district court magistrates."

**Legislative Information:** This bill was passed after the Supreme Court Rules Committee amended the portions of C.R.M. 6 addressing the role of magistrates in family law cases as follows: (Effective November 6, 2003).

Rule 6. Functions of District Court Magistrates.

(b) Functions in Family Law Cases:

(1) A district court magistrate shall have the power to preside over all proceedings arising under Titles 14 and 26, except that a district court magistrate may not hear contested permanent orders without the consent of the parties.

(2) A family law magistrate, as defined in 13-5-301(1) and so designated by the chief judge of the district may perform any or all of the duties specified in C.R.S. sections 13-5-301, to -305.

*Troubled by Rude &  
Unprofessional Attorneys?*

*The Denver Bar Association Metro Conciliation Panel will list, monthly, one or two family law lawyers as contacts to help you deal with rude or unprofessional attorneys. These lawyers are willing to take calls on a confidential basis for guidance, tips and strategies for dealing with opposing counsel.*

*The list of conciliation panel attorneys is in the Denver Bar Association's monthly publication, The Docket.*

*Thanks to Judge Tina Habas, John Baker, and Diane Hartman for helping to make this happen.*

# MEDIATION ADVOCACY IN DOMESTIC CASES

BY JACK HARDING

FAMILY LAW ATTORNEY & MEDIATOR

THE HARRIS LAW FIRM, P.C.

As Colorado domestic courts increasingly order cases to mediation, and as practitioners increasingly request it, many domestic attorneys are confronted with a process they do not really understand or use very effectively. Many see mediation as a waste of time because they fail to see the opportunities mediation provides. Even for the litigation-hardened veteran, however, mediation can be a useful tool in winning cases.

"Winning" in the domestic case is, of course, different from winning other types of cases. If there are children, winning usually requires doing what is in their best interest. If one spouse has relatively more earning power, winning may be obtaining as much for one's client, or more, than he or she would likely get from a judge. However winning is defined, mediation, properly handled, may provide as much opportunity to "win" as does a courtroom. Considering the parties often have an ongoing relationship because of their children, the opportunities for winning in the truest sense are probably greater in mediation than in litigation.

## The Importance of Negotiation Skills

Critical to effective mediation advocacy is an understanding of negotiation. Mediation is "facilitated" negotiation. While a neutral may be present, the primary process is still negotiation. The effective advocate should either have a basic understanding of negotiation theory or have a strong intuitive understanding of how people cut deals. Even for the seasoned practitioner, an understand-

ing of negotiation theory can be helpful in explaining to the client the strategies the attorney is using.

Next to understanding negotiation, the advocate should understand mediation. The nature of a particular mediation depends, in large part, on the mediator. Some mediators are very directive, rendering opinions about the possible litigated outcome. Some mediators are very skilled. Some mediators know the law. Some mediators are very good at hiding their biases and opinions. Other mediators have only some or none of these characteristics. In the end, a good advocate who understands mediation can be successful regardless of how good the mediator is.

## Understanding Mediation

The primary characteristic of mediation is flexibility. Mediators usually start a mediation by explaining the "rules," but actually, there are no rules. There is only a goal: get an agreement that is good enough to keep the parties out of court for the foreseeable future. Anything the advocate can do to keep the parties (and the mediator) moving in that direction is acceptable. Because of the variety of strategies, the advocate should be thinking as hard about the mediation process as is the mediator. The advocate must be creative as possible, both about potential solutions, and about the communication strategies needed to get there. Questions in the back of the advocate's mind should include, "What issues would best be discussed next? Who should be talking with whom? What or who is getting in the way of

this deal?"

The advocate must coach the client about what happens in mediation as thoroughly as he or she would prepare the client for court. Because mediation is more freewheeling than litigation, the client must understand the dangers of freelancing, much as the client should understand the dangers of answering more than yes or no during cross-examination. The advocate will want to be as confident in mediation as he or she would be in court. The client may very well be gauging the advocate's courtroom skills by his or her performance in mediation. An advocate who has difficulty in mediation may send the client the message he or she may also have difficulty in court.

The advocate should recognize that the mediator may use information strategically. A mediator will often claim, for example, to keep caucus information confidential. Don't count on it. A mediator might not convey exactly what was said in the other room, but a mediator who cannot give both sides a good idea of what the other is thinking is not likely to succeed in getting an agreement. Mediation, like negotiation, is a game of nuance, of understanding what is *not* said as much as what *is* said.

Preparing well for a mediation is important in other aspects. Discovery should be complete prior to mediation, at least if the parties intend to settle the entire case. A failed mediation may increase the likelihood a case will end up in court, even more than had there been no mediation at all. The advocate needs

*Continued on page 9*

### *Mediation Continued*

a very good idea of exactly what his or her client wants. This often means the advocate must help the client *decide* what he or she wants. The toughest negotiation, with or without mediation, is often not with the other side, but between members of the same side. *This* negotiation *must* be completed before negotiation with the other party can begin.

#### **Knowing the Law**

The law is very important to mediation. If one is not likely to win in court, one is not likely to negotiate successfully in mediation. The advocate must know the case and know the law to make the case.

The client also needs to understand the law of the case. The client does not want to hear the weaknesses of his or her case for the first time sitting across the table from the other side. In mediation, the advocate is on trial with the client serving as the jury. When there are weaknesses in the advocate's case, as there always are, it is better that they come from the advocate's mouth than the mouth of opposing counsel or the mediator. Client preparation is particularly important when advocates will not be participating.

#### **Choosing a Mediator**

The Denver metropolitan area has scores, probably hundreds of people willing to attempt to help settle domestic litigation. A good way to get an idea of a mediator's style and skill, of course, is the Colorado Divorce Lawyers listserv. Knowledge of the law is very helpful to a mediator; thus, in this writer's opinion, most of the best mediators are attorneys-but not all. Even more important than legal knowledge is interpersonal skill-something not taught heavily in law school.

Knowing how the mediator mediates

is also helpful. Some mediators treat mediation much as a Freudian psychiatrist treats patients-offering mostly active listening, empathy, and an occasional insight. At the other end of the spectrum are mediators who treat mediation more as a settlement conference, actively challenging the parties on their positions and freely offering opinion as to how the case will be treated by a judge. Some mediators are willing to accept guidance from an advocate as to the type of mediation that may be most effective in a particular case. The advocate should not hesitate, especially if he or she has a good understanding of the mediation process, to make suggestions to the mediator as to how a particular mediation should be conducted.

#### **Using the Process**

For the advocate, mediation is an opportunity to triangulate, if necessary, his or her client with both the other side and with the advocate. The mediator, particularly one who knows the law, can provide a reality check for the client. If the other side believes the advocate's client is wrong, and the advocate, after examining the law, has tried to convince the client he or she may be mistaken, hopefully the opinion of a nominally neutral party in the form of the mediator will convince the client he or she needs to consider other options. Because of this, the working relationship between the advocate and the mediator can be important.

A primary reason most cases settle is that a negotiated resolution is almost always superior to a litigated one. Parties have time to fashion solutions a judge would never have time to create. Moreover, parties and their advocates can address non-legal but important issues the court will not address. The advocate in mediation, especially family law practitioners,

should be prepared to deal with issues that never came up in law school. Why a particular parenting plan, for example, is better than another may have little basis in statute or case law. Every family, every child, every parent is different. Every homemaker headed for the workforce has different needs. The advocate in mediation needs to be able to ferret out the underlying issues that will bring an agreement together, without the obsessive reliance on the form many litigators are so fond of. Mediation is outside the box of litigation-the advocate needs to be comfortable operating there.

The opportunity to vent is an important aspect of mediation. Such venting may help diffuse the issues of the divorce and allow the parties to see not just the hurt and devastation, but also the business decisions that must be made. However, the advocate must be able to deal with that emotionality. The reason there are metal detectors at courthouses is divorce cases.

#### **Conclusion**

Mediation provides significant opportunity to achieve resolutions clients are seeking, particularly in domestic cases. However, the task of reaching that resolution should not be left solely to the mediator. The advocates know the case. Hopefully the advocates know what their clients really want. The only question may be whether the advocates know negotiation and mediation well enough to assist or even direct the mediator in obtaining an agreement. Mediation advocacy skills are different from litigation skills; but as the use of mediation increases, they should become part of the skills of all advocates who seek to give their clients what they want.

# TEN SUGGESTIONS FOR MESSING UP YOUR CHILD

BY DAVID KIRSH

*After 24 years of domestic relations practice, I am still amazed and impressed by how many ways clients can find to damage their children. I am not speaking of abuse or other overtly injurious behavior. Nor am I speaking of such things as not communicating at all with an ex-spouse. I am speaking of more subtle, simple ways of ensuring that a child grows up with little sense of family and no idea of how to handle conflict in a relationship. If your client will follow these simple suggestions, I am confident that he or she can enjoy long and fruitful relationships with a series of child therapists.*

1. Let your child decide whether he will go to his other parent's home. A ten year old is perfectly capable of deciding what is best for him in major areas of his life. While you're at it, let him decide if he will go to school, to the dentist, etc. Next, decline to discipline your child in the name of developing "self-esteem". If you doubt the wisdom of this, read "Lord of the Flies" to see what happens when children are in charge.
2. Let your child know you do not want her to enjoy her time with her other parent. There are many ways to send this message covertly. Use your imagination.
3. Let your child call your new spouse "Mom", "Dad", or other parental name.
4. Make your hostility toward your ex-spouse clear to the child. Demonize your ex at every turn. A helpful hint, when you get angry at your child, tell him/her he is acting just like his father/mother.
5. Fight about holidays. Few things will be longer remembered than a fractious Christmas. Have separate birthday parties.
6. Don't let your child see you mutually enjoying his happiness. Sit far apart at dance recitals, sporting events, etc. Refuse to jointly attend a parent/teacher conference with your ex and child. Or, simply forget to advise your ex about such events.
7. Let your child know he can't have/do something because Daddy was late with his check. On the flip side, tell your child he can't go to some event because Mom won't be flexible with the schedule (this works best if you tell the child about the event before clearing it with your ex).
8. Don't cooperate in modifying the schedule to allow your child to visit with your ex's family, attend a birthday party, or take part in an activity. A corollary to this is to schedule an activity during your ex's scheduled parenting time.
9. Use your child to spy on your ex. Interrogate her when she comes back to you about your ex's new purchases, activities, etc.
10. Do not have the same rules at both homes for discipline, chores, allowance, homework, bed time, permissible movies, etc. This way you can compete for your child's affections by making yours the "fun house".

# THE MECHANICS OF A *MARTINEZ*<sup>1</sup> MODIFICATION<sup>2</sup>

BY MAGISTRATE ROBERT R. LUNG

WITH CONTRIBUTIONS BY MICHELLE KLINE AND ANNE MARIE TURNER

Before the Colorado Supreme Court issued *In re the Marriage of Martinez*, 70 P.3d 474 (Colo. 2003), a modification of child support basically focused on whether a ten percent change in the monthly child support obligation occurred after application of child support guidelines pursuant to C.R.S. § 14-10-115 and § 14-10-122(1)(b). In those cases in which a party was allegedly voluntarily unemployed or underemployed, determination generally focused on whether the parent was to blame for their current employment status.<sup>3</sup> Occasionally cases included a change in career paths or a parent returning to school under C.R.S. § 14-10-115(7)(b)(III), but a modification of child support never mandated a multifaceted analysis.

Before *Martinez*, it could be said with little doubt that if a brain surgeon was fired from his or her practice and began working at a local fast food restaurant, the Court would impute the surgeon income to the new fry cook.<sup>4</sup> However, *Martinez* introduces a multifaceted approach and sets forth a list of factors for the trial court to consider when determining whether a parent<sup>5</sup> is "shirking their responsibility."<sup>6</sup> While the Supreme Court recognizes the list is not exhaustive, the list provides excellent guidance on what circumstances and factors should be considered when attempting to determine whether a parent is shirking their child support obligation.

Briefly, the facts of *Martinez*<sup>7</sup> involved a Father-Obligor who at the time of his divorce was earning \$1,866 per month. Approximately three years later, Mr. Martinez was promoted to a store manager and began earning \$4,510 per month. Mr. Martinez was later fired from this position after violating company policy. Mr. Martinez became re-employed as an assistant store manager with a different company earning \$2,648 per month. However, he was fired from that position as well. Subsequently, he moved from Denver to Pueblo where he found employment earning only \$2,167 per month in retail. In both cases of being fired, Mr. Martinez signed letters acknowledging his terminations were based on his own wrongdoing.

The trial court found Mr. Martinez was voluntarily underemployed and imputed an income of \$4,510 per month to him. However, the Colorado Court of Appeals

concluded that the trial court erred in determining that Mr. Martinez was voluntarily underemployed simply because he was fired as a result of his own misconduct. The Colorado Supreme Court affirmed the judgments of the Court of Appeals and ordered the trial court to examine all relevant factors bearing on whether Mr. Martinez was shirking his child support obligations.

The Martinez factors are as follows:

[the parent's] firing and post-firing conduct; the amount of time the parent spent looking for a job of equal caliber before accepting a lower paying job; whether the parent refused an offer of employment at a higher salary; whether the parent sought a job in the field in which he or she has experience and training; the availability of jobs for a person with the parent's level of education, training and skills; the prevailing wage rates in the region; the parent's employment experience and history; and the parent's history of child support payment.<sup>8</sup>

This article is written with the hope that additional analysis of the *Martinez* factors may lend family law attorneys and judicial officers an insight into case preparation or case analysis, respectively, for specific facts that will more clearly establish whether a parent is shirking their support obligation.

Therefore, beginning with the first listed factor, firing and post firing conduct, one of the most critical elements of this factor is the timeliness and reasonableness of the actions of the parent under scrutiny. How quickly after they were fired or lost their position did they seek unemployment benefits or begin their job search? It may be that the parent does not qualify for unemployment benefits, but that does not excuse a parent from being lax about their job search. If anything, a parent without unemployment benefits should be more motivated in their reemployment efforts and begin their search through as many avenues as possible. It is noteworthy that within this factor, the Supreme Court includes consideration of firing conduct. But if you learn only one thing from *Martinez*, it should be that analysis must be of all relevant factors, not just one fact.

The second and fourth listed factors, how long the parent

*Continued on page 13*

*Martinez Continued*

looked for a job of equal caliber before taking a lower paying position and whether the parent looked for a job in the same industry, are probably two of the most important and difficult factors. In this analysis, it is helpful to blend these factors. In most cases, it is preferred that the parent remain in their industry as it increases their chance of maintaining their former earning capacity and it reduces the risk of losing their industry-specific skills. However, if a parent remains unemployed for an extended period of time, while searching for a position of equal caliber, their perseverance may become proof of their persistent failure to pay child support or provide for the child. While there isn't a determinate amount of time<sup>9</sup>, testimony that a parent has not considered an interim job in retail or in fast food during their job search, may invoke a question of whether the parent understands "the needs of the children are of paramount importance."<sup>10</sup> On the other hand, a parent that leaves a specialized industry with little or no effort to become reemployed in their field of expertise will face the difficult task of explaining the reasonableness of their decision. There are exceptions, however, such as involuntary limitations on reemployment by unions that prohibit reemployment within their industry without approval or at the loss of employment benefits.

It may seem the third listed factor would be very unlikely, namely whether the parent refused a higher paying job offer, but there are many ways this factor may be at issue. In *Martinez* the Obligor moved from Denver to Pueblo after being fired consecutively from two management positions in the retail industry.<sup>12</sup> Obviously, with a move from a major metropolitan area to a remote or smaller city, a court might consider this supportive of a finding that a parent is shirking their responsibility. However, as in the *Martinez* case, consideration must be given to any reasons supporting the move to the smaller city. As it turned out, the children of the support actions and Obligor's current wife's family all resided in Pueblo, thus providing the Obligor a support base. Other considerations may include whether the higher salary requires the parent to move further from the children or move the children further away from the other parent, whether the higher salary is offset by other incurred expenses or whether the higher paying position is sustainable.

One may also blend the fifth, six and seventh factors listed in *Martinez* by considering the parent's level of education, training, skills, employment experience, employment history and prevailing wage rates in the

region. There are many ways these factors might offset each other such as in the case of a parent that never completed high school, but has ten years experience in construction or sales. A parent's employment history is critical in those cases in which the parent has been searching for their ideal job for the last decade as is exemplified by a parent who switches jobs every six to eighteen months into unrelated fields. Additionally, a parent who has transitional skills should also be able to find comparable employment quickly. Transitional skills would be skills that might be useful in more than one field or industry, such as sales experience, word processing, office management or transferable manual labor skills.

While the last listed *Martinez* factor presumes the parent under scrutiny is the Obligor, the application of *Martinez* is absolutely applicable to both parents when considering whether a parent is shirking their obligation to provide for a child. In the case of the Obligor, a copy of the record of payments from the Family Support Registry showing a consistent payment history with minimal interruptions would be significant but other provisions for support might also be considered relevant.

If it is determined that a parent is voluntarily unemployed or underemployed, the trial court shall impute to that parent their potential income for purposes of calculating child support. The determination of potential income should be relatively evident after considering the above factors.

If it is determined that a parent is not voluntarily unemployed or underemployed, and thus is not shirking their responsibility to provide for a child, then the trial court shall only use that parent's actual income.<sup>13</sup> In this instance, a modification may result in a dramatic reduction of child support and a review of the case may be appropriate. However, it is critical that a final order enter at the modification hearing to provide finality of the support order and to prevent the creation of child support arrears resulting from extended retroactive modifications.

In cases where the use of the parent's actual income results in a minimum support order,<sup>14</sup> courts might consider whether the result is inequitable, unjust or inappropriate.<sup>15</sup> However, caution should be used to ensure that consideration of a deviation does not effectuate an "end-around" of *Martinez* and essentially impute income to a parent that has been determined not to be shirking their responsibility to provide for their child.

*Continued on page 13*

### *Martinez Continued*

In either instance, a court-ordered exchange of financial affidavits on a quarterly, biannual or annual basis may ensure an appropriate review of child support. Courts should also suggest that the parent seek vocational training, contact county employment services or maintain job search records.<sup>16</sup>

The advent of *Martinez*, though not involving a parent employed in the "tech" or telecommunications industry, coincides well with the "tech bubble burst," the recent national and state recession and employment losses associated with the "9/11" tragedy of 2001. *Martinez* is an exceptionally well-written case that provides a summary of a court's review of statutory terms, in particular C.R.S. § 14-10-115, and a full analysis of income imputation including both legislative history and case law.

### NOTES

<sup>1</sup> *In re the Marriage of Martinez*, 70 P.3d 474 (Colo. 2003).

<sup>2</sup> I had originally intended on titling this article the "Machinations of Modifications" but apparently The American Heritage College Dictionary (2000) defines machinations not just as plotting but as evil plotting and we can't have family law articles providing tools for evil plots.

<sup>3</sup> *In re the Marriage of Atencio*, 47 P.3d 718 (Colo. App. 2002) effectively eliminated the "blame game" analysis in child support modification hearings as the Court of Appeals found that a father who was fired for drug use was not voluntarily underemployed solely because he was fired. No party filed a certiorari petition in *Atencio*. Character assassination is not an integral part of child support modification hearings.

<sup>4</sup> *See In re the Marriage of Bregar*, 952 P.2d 783 (Colo. App. 1997) (finding an attorney unreasonably discontinued his law practice to start a cattle ranch).

<sup>5</sup> Technically *Martinez* involved a "noncustodial" parent, also referred to as the Obligor, but courts should apply the

*Martinez* factors to either parent with a change in employment status or earnings as C.R.S. § 14-10-115 recognizes the obligation to provide child support is a mutual obligation of the parties.

<sup>6</sup> Again, technically, *Martinez* addresses whether a parent is voluntarily underemployed but the guidance of *Martinez* to conduct multifaceted analysis in modification cases should be utilized in cases in which a party is allegedly voluntarily unemployed as well.

<sup>7</sup> *Martinez* was the consolidation of two cases involving Mr. *Martinez*, *In re the Interests of J.A.*, 2002 WL 1822995 and *In re the Interests of J.R.T.*, 55 P.3d 217 (Colo. App. 2002).

<sup>8</sup> *Martinez* at 480.

<sup>9</sup> In the *Martinez* case the Obligor searched for a new job in Denver for one or two weeks before moving to Pueblo. However, longer time periods may be more reasonable depending on the particular industry, skills, training, education and experience of the parent.

<sup>10</sup> *Wright v. Wright*, 514 P.2d 73, 75 (Colo. 1973).

<sup>11</sup> *See Bregar* supra n.3.

<sup>12</sup> *Martinez* at 475.

<sup>13</sup> While *Martinez* expands the definition and means of determining whether a parent is voluntarily unemployed or underemployed, if a parent is physically or mentally incapacitated or is caring for a joint child under the age of thirty months, pursuant to C.R.S. § 14-10-115(7)(b)(I), potential income shall not be imputed to that parent.

<sup>14</sup> *See* C.R.S. § 14-10-115(10)(a)(II).

<sup>15</sup> *See* C.R.S. § 14-10-115(3)(a).

<sup>16</sup> C.R.S. § 14-10-115(7)(b)(I.5) provides authority to order unemployed, noncustodial parents with child support arrears to participate in a number of work activities.

### **Donation Desperately Needed:**

Northeast Colorado Legal Services, a 501 (c) (3) charity, needs a laptop computer and a printer to accomplish their pro bono work. NECLS covers 7 counties in the 13th Judicial District (about the size of Massachusetts), helping pro se domestic relations clients get through the system. NECLS amazingly operates on a \$20,000 per year budget. Maggie Atkinson, their coordinator, is a dedicated volunteer who keeps their ship running. If you've ever volunteered for our "Flying Squad," you've met Maggie at the Ft. Morgan or Sterling courthouses. She coordinates our efforts up there and helps many people. Please help if you can.

The laptop and printer will go to NECLS and will assist the Flying Squad on location. Contact Maggie at 1.970.265.3491 email mea@kci.net, or contact Bonnie Schriener bmjs@ix.netcom.com.

# FAMILY LAW NEWS ITEMS FROM EL PASO COUNTY

*Compiled by Lisa M. Dailey, Esq.*

## **From the Bench**

With the retirement of Judge Booth, the Division 12 docket was divided between Division 3 and Division 13. This resulted in several significant changes in the way we do business. Beginning January 1, 2004, the Divorce With Dignity program will be opt in by those represented by counsel only. At the time of filing, counsel can notify the filing clerk of the election to opt in and the case will be assigned to Division 13. Although pro se litigants will not have an opt in option, there are some changes that will assist those parties. At time of filing, the pro se litigants will be given an appointment with Michael Vigil or Nicolle Rugh, Facilitators, within 30 days. This is our effort to explore the best way to comply with the proposed rule changes that will probably become effective mid year. Irrespective of the proposed rule changes, we anticipate early management of the pro se cases will result in a more efficient use of the resources in the numbered and lettered divisions, which should benefit everyone. We are still exploring the best way to manage early meetings in represented cases and expect to implement a program for early access in those cases in the first quarter of 2004.

Effective January 1, 2004, Magistrate Denise Peacock will be handling child support cases for the local CSE Unit in addition to her Protection Orders docket. Starting in February of 2004, she will be presiding over most of the CSE cases previously assigned to Divisions X, R and V and will also handle new filings assigned to her division.

Magistrate Sells and Magistrate Sullivan will still be covering their respective CSE dockets.

Please designate the issue to be addressed in all Status Conference Notices. Division 15 specifically encourages attorneys to schedule telephone status conferences to save time and money.

Due to the high volume of cases, staffing constraints, and some logistical problems with e-filing, motions are not always ruled upon in a timely manner. In order to address this problem, the domestic bench would like to encourage you to contact the assigned division if the Court has not ruled upon a motion within thirty (30) days. A simple phone call to the division will serve this purpose. If the motion is an emergency motion that requires a more immediate decision by the Court, e.g. ex parte, and no ruling has been forthcoming, you may certainly contact that division with a reasonable time period.

## **Courthouse Meetings**

The April meeting provided an opportunity to talk with many of the judges currently serving in the family law rotation. Judge Simmons and Dave Johnson updated the attorneys in attendance regarding the current status of Rule 16.2. Public hearings are anticipated in September with implementation of the Rule in January of 2005. Judge Simmons indicated that the Divorce with Dignity program will continue as an "opt in" program in his division and stressed the importance of making sure that your case is an appropriate

fit for the model. Judge Simmons provided an update regarding pro se procedures including a review of his standing order that these cases will be scheduled for a conference with the Court Facilitators about 30 days from the date of filing. Attorneys who enter their appearance after a case is filed need to notify Mike Vigil or Nicolle Rugh so that this meeting can be canceled. Judge Simmons stressed that attorneys should include all upcoming deadlines, for pleadings and court appearances, in a motion to withdraw. Judge Kane indicated that he's noticed an increase in the number of ex parte filings and stressed that only those matters that are true emergencies will be handled on an ex parte basis. Magistrate DuBois and all of the judges stressed the importance of pre-hearing settlement meetings.

Judge Kane announced that the noon meetings will continue on a quarterly basis and be held in Judge Pelican's courtroom, Division 6 on the 4th floor of the courthouse. The following meeting dates were announced: August 3rd and October 5th. Please let Judges Kane and/or Pelican know of topics of interest to you.

## **For Kids Workshop**

"For the Kids" is a co-parenting workshop that provides parents engaged in a contested family action an opportunity to learn how to put their children first. This is a Level 2 parenting class for follow-up to the Parenting through Divorce class offered at the Courthouse. For an approved providers list, please con-

*Continued on page 16*

tact the Children's Advocacy Center (CAC) at (719) 636-2460.

### **Multidisciplinary Professionals (MDP)**

The next MDP meeting will be held on Tuesday, July 20th from 11:45 - 1:15 p.m. at City Council Chambers located on the northeast corner of Kiowa and Nevada. A legislative update is planned.

### **El Paso County Family Law Section**

Starting in July, meetings will be held on the second Tuesday of each month. This is an opportunity to meet and discuss updates in the law, local procedure, and your cases with fellow practitioners. Contact Lisa M. Dailey for location information, (719) 473-0884 or e-mail, lisamdailey@pcisys.net.

### **Pikes Peak Collaborative Law Association**

A local organization has formed to promote the collaborative law model in our region. Membership is open to attorneys, mental health and financial professionals who have 5 years experience in family law, are licensed, and have attended basic collaborative law training (8 hours or as approved). Annual dues are \$50.00. Quarterly meetings are planned. Contact Lisa Dailey for additional information and/or a membership application at 526 S. Nevada Avenue, (719) 473-0884 or email, lisamdailey@pcisys.net

## **COLORADO BAR ASSOCIATION MINUTES OF MEETING OF THE FAMILY LAW SECTION EXECUTIVE COUNCIL MEETING FEBRUARY 13 2004**

Sheraton Four Points Cherry Creek Inn  
600 South Colorado Boulevard

The meeting was called to order by Chair Steve Lass.

#### **Attendees:**

Terry Bernuth	Martin Brown	Megan Combs
Steve Epstein	Beth Henson	Rob Hinds
Dave Johnson	Steve Lass	David Littman
Ron Litvak	Joan McWilliams	Marie Moses
Jackie St. Joan	Bonnie Schriener	Bob Malman

Past President(s): Frank McGuane; Russ Murray.

**Telephone Attendees:** Deb Anderson; Katie Hayes

**Absent and Excused:** Lesleigh Monahan; Fran Fontana; Dick Rotole; Lisa Dailey.

**Absent:** Angela Arkin; Kathryn Beck; Richard Zuber; Howard Zucker.

**Guests:** Melissa McClerkin.

This is a special meeting regarding legislative matters. Under our By-Laws, there are several methods for our Section to take a position concerning legislation, one of which is a 2/3rds vote of those Council members who are present at the Executive Council meeting. A discussion and possible action was held concerning the following legislation:

**H.B. 1081** – Attorney Fees in Civil Matters. The Legislative Committee advised that they believe this Bill was not going anywhere. It is a “loser pays” mechanism. The Executive Council did not vote on the Bill.

**H.B. 1083** – Termination of Child Support Based on DNA Evidence of Non-Paternity. Discussion centered around the legislation not fully addressing the Uniform Parentage Act and its affect thereon for previously determined parents, as well as psychological parents, and adoptive parents. The Executive Council voted unanimously to oppose this Bill.

**H.B. 1144** – Child Support – Payment From Unclaimed Property. The Executive Council discussed this Bill, which allows child support arrearages to be paid from unclaimed property (the Great Colorado Payback form of property). The Executive Council voted unanimously to support this Bill.

**H.B. 1297** – Presumptive 50/50 Temporary Parenting Time. A substantial discussion was held concerning this Bill. Many members spoke up. Some felt there should not be a burden to prove a negative, since that is difficult at best. Others opposed any presumption, and felt that clear and convincing standards to avoid 50/50 parenting time would place the burden in the wrong corner and do not put the child first. Several spoke in support of the Bill, though changing the presumption to a preponderance of evidence. Others felt the legislation would institutionalize something that is not widely regarded as being an accurate method to deal with children, and is a simplistic approach to put everybody in the same box, not placing the focus squarely on the children. Most agreed that you do have to look at the child, and this Bill does not accomplish that as its primary objective. The Executive Council voted 19-1 to oppose this Bill.

**H.B. 1305** – Protection Orders. The Legislative Committee and Jackie St. Joan, who has worked on the committee concerning protective orders, felt that Council did need to take a position on this Bill, as it is not calendared, and is not in final form. No vote was taken.

**H.B. 1312** – Collection of Family Data by State Judicial Department. This Bill would require State Judicial to survey information from their cases, and to do it on their own budget. The committee reported that State Judicial felt they could handle this. The Executive Council was neutral on it, and no vote was taken.

**S.B. 64** – Omnibus Child Support Bill. The CBA Legislative Policy Committee has stated that our Section cannot support section 5 of this Bill. The Executive Council voted 18-2 to support the Bill with that understanding about section 5.

**S.B. 75** – Ex-Parte Temporary Protection Orders. The Legislative Committee said the Bill was probably dead already, and it would have changed the procedures in Section 14-10-108. No vote was taken on the Bill.

**S.B. 122** – Repeal of Family Law Magistrates. There is only one family law magistrate, Magistrate Lung in Arapahoe County, who will retain his job and be deemed a District Court Magistrate. All magistrates, except Lung, are District Court magistrates with full powers as District Court magistrates and not family law magistrates. This law repeals Section 13-5-301. Council voted 19-1 to support the Bill.

**S.B. 151** – Judicial Evaluations. The Legislative Committee said no position was necessary, and no vote was taken.

Dave Johnson gave an update regarding draft rule 16.2. He said that revisions are being prepared, and they are streamlining the financial affidavit. Barbara Salomon is working on revisiting 26.2 with regard to interrogatories and request for production of documents. There will be a 3-tiered approach to discovery within the new 16.2, and there has been substantial change to the proposed Rule since the last comment. On February 27, the Supreme Court Standing Committee on Family Issues meets again to vote on the re-written draft of 16.2. The re-written draft is not now available for review by Family Law Section.

Beth Henson mentioned that special advocates, child legal representatives, and mental health professionals are being sued for working in special advocate cases. She mentioned more than a few people who have been subjected to lawsuits. The MDIC and others are working on legislation and other ideas to try to relieve this situation. It was suggested that an immunity statute would help. The Executive Council advised Beth that, if we could help in some way, we would be glad to lend support.

Regretfully, Lisa Dailey has resigned from the Executive Council because of health related issues with her son. Council will be working to fill the non-Denver metropolitan area vacancy on the Council. We wish Lisa and her family well and good health.

Respectfully submitted,  
Bonnie Schriener  
Chair Elect

**COLORADO BAR ASSOCIATION**  
**MINUTES OF MEETING OF THE FAMILY LAW SECTION**  
**EXECUTIVE COUNCIL MEETING**  
**MARCH 19, 2004**

The Executive Council Meeting was called to Order by Steve Lass, Chair. In attendance were Council Members: Bonnie Schriener, Chair-Elect; Fran Fontana, Secretary; Dave Johnson, Treasurer; Martin Brown, Marie Avery Moses, Richard Zuber, Steve Epstein, Ron Litvak, Deb Anderson by telephone, Terry Bernuth, Dick Rotole, Bob Malman, David Littman, Joan McWilliams, Katie Hays, Jackie St. Joan, Megan Combs, Steve McBride, and Guests: Melissa McClerkin and John L. Eckelberry. The following Council Members were excused: Lesleigh Monahan, Rob Hinds and Beth Henson.

A Motion to approve the Minutes of the February 13, 2004 meeting was made, seconded, and passed. The Minutes for the February 13, 2004 Special Executive Council Meeting are approved.

Steve Lass announced that a panel of Council Members was going to the DU Law School to participate in a panel presentation on March 30, 2004. Those members are: Martin Brown, David Littman, Beth Henson, and Dave Johnson.

Marie Moses repeated the request made during the luncheon for articles to be submitted for publication in the Colorado Lawyer.

Richard Zuber and Bonnie Schriener provided an update regarding the Family Law Institute which is scheduled for August 6 - 8th, in Steamboat Springs. The program will generally follow the same format as last year's, but will include a series of "hot topics" presentations of ten

minutes each, on Friday afternoon, and more attendance by members of the judiciary at the regular sessions. The Institute will also feature a new judges component, to provide additional family law information to those newer to the bench. The judge track will be mixed format, with the judges attending portions of our regular tracks and then some separate judge-only workshops.

Steve Lass, as Chair, and the entire Council, thanked Bonnie and Richard for their hard work on putting together what promises to be another successful program August 6-8, 2004, in Steamboat Springs—plan to attend!

As a follow up to the luncheon presentation on the newest draft of C.R.C.P. 16.2, Dave Johnson reported that there is still time to comment on the proposed Rule. Dave indicated that the presenters received feedback during and after the luncheon, and they will be adding a request for health insurance information to the list of mandatory disclosures as a result of such feedback. The latest draft of the Rule, with appendices, is posted on the Family Law Section website, with information regarding how to provide feedback. Feedback should be provided before April 15, 2004.

Marie Moses and Dick Rotole, reported on the following legislation:

**HB 1307** regarding Protection Orders has passed the House and went to the full Senate on March 15, 2004. Because committee hearings have been completed, no action by the Section is warranted.

**HB 1297**, regarding a presumption of substantially equal parenting time for Temporary Orders, passed out of the House Committee on a 9-2 vote. Marie Moses testified in opposition of the bill on behalf of the Section at the Committee hearing, and Steve Lass testified in opposition of the bill on behalf of the AAML. There was testimony against the bill from the Coalition Against Domestic Violence. There was also discussion about the possibility of presenting testimony from mental health professionals if and when the bill is heard in Senate Committee. It was reported that the bill is in House Appropriations, with a fiscal note of approximately \$90,000. The bill has not come before the full House or been assigned to a Senate Committee. Discussion occurred regarding members of the Council who could be available to testify if and when it is scheduled for Senate Committee hearings.

**HB 1083** regarding termination of child support based upon DNA evidence of non-parentage passed the House on March 2, 2004. It was reported that the bill now has a fiscal note of approximately \$105,000. The bill was initially assigned to Senate Judiciary committee but is being reassigned to another Senate Committee.

It was reported that the Child Support bill has passed the House and is now waiting for vote by the Senate, and that the bill affecting Family Law Magistrates is awaiting the Governor's signature.

Discussion was held about the federal lawsuits that have been filed against mental health professionals for their work as Special Advocates. It was reported that two or three cases have been filed—one of which was dismissed and then refiled. It was also reported that one of the lawsuits, filed by one of the parties to the original dissolution action, named the attorney who represented the ex-spouse as a party to the lawsuit.

It was reported that the Standards for Special Advocates are available for review on the Family Law Website, and all members were encouraged to review those guidelines.

Steve Lass reported that Lisa Dailey resigned her membership on the Executive Council due to family concerns. In accordance with the By-laws, Mike Luchetta was suggested as a replacement for Lisa, since he also practices in Colorado Springs. Mike previously practiced with Hall & Evans and opened that firm's Colorado Springs office. When Hall & Evans closed its Colorado Springs office, Mike decided to remain in the Colorado Springs area and opened his own practice. A Motion was made to approve Mike Luchetta as the replacement for Lisa Dailey on the Executive Council. The motion was seconded and unanimously approved. Steve Lass will officially notify Mike of his appointment and welcome him to the Council.

Treasurer's report: A copy of the CBA financial statement for the Family Law Section for the eight months ending February 29, 2004, was provided to Council Members. That statement reflected a \$54,000 ending balance. It was noted that the Bar Association will increase the administrative fees from \$1.50 per

member to \$3.00 per member for the 2004-2005 membership year, and \$5.00 per member for the 2005-2006 membership year.

Discussion then took place regarding whether there should be an increase in the Section membership dues. It was agreed that due to the fact that the Section has been able to hold down the costs, there is no need to increase membership dues at this time, even though we will be paying more for administrative costs.

It was reported that the Family Law Section has been approached by Colorado CLE and State IDC for contributions to their upcoming seminars. Colorado CLE filled out a formal grant request for the amount of \$5,000. State IDC made an informal request for \$1,500. Bonnie Schriener, chair of the Grant Committee, agreed to contact Steve Epstein who made the request on behalf of the State IDC, and ask him to fill out a formal Grant request.

The Colorado CLE request for \$5,000 for the Family Law Institute was discussed. At one point in the discussion, a Motion was made to approve the request and the Motion was seconded. After further discussion about the role of the Grant Committee in fielding such requests, the Motion was withdrawn.

Issues raised during the ensuing discussion on the request for funding included: The precedent-setting nature of such a large request; the possibility that another request for an additional \$5,000 would be forthcoming for judges to attend the Family Law Institute; the merits of creating a scholarship fund for young family law attorneys to attend the Institute; and the need for a look at the annual budget of the Section to determine how much money is avail-

able for grants. It was noted that \$3,000 in Grants have already been paid out this year.

Bonnie Schriener, co-chair of the Family Law Institute, indicated that she would recommend a contribution of at least \$3,000 to CLE on their current request.

Motion was then made for the Grant Committee to review the request from Colorado CLE and advise the Council how to proceed at the May Council Meeting. It was noted that perhaps Gary Abrams of Colorado CLE might want to speak in favor of the request at the May meeting.

Due to the timing of the State IDC Conference, it was agreed that upon receipt of a formal Grant request, the Grant Committee would determine a position on that request and if approved, it would be circulated to Council for vote by e-mail.

Steve Lass reported that the deadline to submit a petition to be placed on the ballot had passed and it appeared that we had close to the limit of 24 names for the ballot. Melissa McClerkin reported that she is finalizing the paperwork on those petitions and will inform the Nominating Committee of the names as soon as she completes the paperwork.

It was agreed that the issue of the Young Lawyers Division of the Family Law Section would be placed on the May Agenda so that ideas could be explored for increased involvement by that Division.

A motion was then made to adjourn, the Motion was seconded and the Council unanimously voted to adjourn the meeting.

Respectfully submitted by Frances C. Fontana, FLS Secretary

# CALENDAR OF EVENTS

## UPCOMING TOPICAL LUNCHEONS

**SEPTEMBER 17, 2004**

**OCTOBER 15, 2004**

**NOVEMBER 19, 2004**

*JUDGES LUNCHEON*

**JANUARY 21, 2005**

*ANNUAL CASE LAW UPDATE*

**FEBRUARY 18, 2005**

**MARCH 18, 2005**

**APRIL 15, 2005**

**MAY 19, 2005**

*ANNUAL LEGISLATIVE UPDATE*

TOPICAL LUNCHEONS WILL BE HELD AT THE SHERATON FOUR POINTS CHERRY CREEK HOTEL. NOTICES WILL BE SENT OUT VIA E-MAIL. CONTACT MELISSA McCLERKIN AT 303.824.5321 OR MELISSAM@COBAR.ORG IF YOU WANT TO CHECK EMAIL ADDRESS INFORMATION.

\* EXECUTIVE COUNCIL MEETINGS WILL BE HELD FOLLOWING THE LUNCHEON.

Colorado Bar Association  
1900 Grant Street #950  
Denver, CO 80203-4309

Non-Profit Organization  
U.S. Postage  
PAID  
Permit #66  
Denver, Colorado