Family Law Update
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Opinions Current Through: 2/15/22

1. Property

In re the Marriage of Zander,
2021 CO 12 (Colo. February 16, 2021)

Justice Samour delivered the Opinion of the Court

In dividing the marital estate, the district court recognized an alleged oral marital agreement entered into by the parties during the marriage. Husband appeals and contends the district court erred in finding the oral agreement to be valid and enforceable.

Husband contended the enactment of the Colorado Marital Agreement Act (CMAA) in 1986 displaced common law contract principles, and that only written and signed marital agreements are valid and enforceable. The Court of Appeals agreed. Wife filed a Petition for Certiorari to the Supreme Court. The Court holds the 2007 oral agreement was not a valid agreement because it was not in writing and Colorado statutory law requires that all agreements between spouses be in writing and signed by both parties.

The parties were married for 17 years at the time of their dissolution. The parties came into the marriage with separate retirement accounts and received inheritances during the marriage. Wife testified that the parties orally agreed to keep their retirement accounts and inheritances as their separate property. Some evidence supported the Wife's contention, such as the formation of a revocable living trust that excluded the retirement accounts, and an email that Husband sent to his adult son. The district court determined the oral agreement to be valid and enforceable by relying on section 14-10-113(2)(d), C.R.S. 2019, basic contract principles, and husband's conduct after the alleged agreement. The district court divided the marital property equally.

The Court of Appeals noted that the primary goal in statutory interpretation is to find and give effect to legislative intent. The Court of Appeals first looked to the plain language of the statute, and if there is a conflict between the statutes, the Court should adopt a construction that harmonizes the two provisions. Under section 14-10-113(2)(d), the statutory presumption that property acquired during the marriage is marital may be overcome by establishing that property acquired during the marriage was excluded "by valid agreement of the parties." The term "valid agreement" is not specifically defined in the UDMA. Meanwhile, section 14-2-302(1), C.R.S. 2007 of the CMAA defines marital agreement as "an agreement between…present spouses, but only if signed by both

parties prior to the filing of an action for dissolution of marriage or for legal separation." The Court of Appeals held the two statutes could be harmonized and that a "valid agreement" to exclude certain property acquired during the marriage must be a written agreement signed by both parties. The Court of Appeals concluded the more specific CMAA provision requiring a marital agreement be in writing prevails over the general UDMA provision in section 14-10-113(2)(d).

On *cert* to the Supreme Court, their analysis is in line with that of the Court of Appeals and it finds the district court's rationale is "out of sync" with sections C.R.S. §§ 14-2-302, -303, -305, and -306 of the CMAA. In the Court's view there is no conflict between the CMAA and UDMA and oral agreement is not a "valid" agreement under the CMAA. The Court was not persuaded by the partial performance argument and found that, had the legislature wanted to include partial performance of oral agreements, it would have said so.

The Court recognized the concern expressed by amici curiae that the decision may detrimentally impact couples who cannot afford to retain an attorney, but it is not for the Court to enunciate public policy.

In re the Marriage of Blaine,
2021 CO 13 (Colo. February 16, 2021)

Justice Samour delivered the Opinion of the Court

The Supreme Court held that a party may only overcome the marital property presumption in the UDMA through the four statutory exceptions. The Court finds the Court of Appeals improperly created a new exception and reversed.

The parties were married for two years. Husband argued at trial that Wife borrowed $346,500 from him and had used the funds primarily toward the separate property purchase of a $1,100,000 home in California. The trial court found that the first $50,000 Husband transferred to Wife was a gift to Wife's mother, and was given according to Chinese custom with no expectation of repayment. The trial court found that the remaining funds were a contribution to the marriage, but that because Husband signed an interspousal transfer deed conveying the California home to her as her separate property, any partial interest Husband had in the home was extinguished. The trial court awarded to Husband the increased value of the home during the marriage of $82,939.

At trial, Husband did not argue that the interspousal transfer deed should be set aside. He argued that the transfer deed created a presumption of undue influence. The evidence showed that he signed the deed voluntarily, that he had a master's degree in business, that he knew the deed was a legal document, that he had experience signing deeds, and that he read and understood the deed and the instructions transmitted with it before signing it. He acknowledged that the deed made the California home Wife's separate property and that he was okay with that when he signed the deed. He also testified that he had been divorced before and understood the concept of separate property.

The Court of Appeals had reviewed the validity of an interspousal transfer deed, even though the deed was not a marital agreement under the Uniform Premarital and Marital Agreements Act, 14-2-301 to 313. The Court of Appeals agreed with the portion of the brief provided by the American Academy of Matrimonial Lawyers proposing that property can be excluded from a marital estate by a deed conveying such property from one spouse to the other as separate property, provided that there is also evidence of the conveying spouse's intent to exclude the property.

In its opinion, the Supreme Court referred to C.R.S. § 14-10-113 and the four exceptions to the presumption that property acquired during the marriage is marital property. The Court found the Court of Appeals correctly determined that since the deed was not signed by both parties it was not a valid agreement for purposes of exception (d), but the Court of Appeals incorrectly created a new exception when it found that property could be excluded from a marital estate by a deed conveying property from one spouse to the other even when there is evidence of intent to exclude the property. The Court found the Court of Appeals' reliance on the *Bartolo* and *Vickers* decisions was misplaced because those cases fit within the statutory exceptions.

The Court reversed the decision of the Court of Appeals and remanded the case to the district court with instructions to make findings as to whether any statutory exception not previously addressed applies.

2. Maintenance

In re the Marriage of Herold and Callison, 2021 COA 16 (Colo. App. February 11, 2021)

Opinion by Judge Roman, Welling and Brown, JJ., concur

The issue on appeal is whether the court can award temporary retroactive maintenance under C.R.S. 14-10-114 (2020). The Court concluded the reenacted maintenance statute permits a court to award temporary retroactive maintenance within its discretion and a court may award retroactive temporary maintenance for the time in which the parties resided together in the same house.

The parties were married at common law for over 30 years. Almost a year after Wife filed her Petition, the parties appeared before the district court for a temporary orders hearing. Husband earned more than $50,000 per month and Wife's income was less than $4,000 per month. During the marriage the parties enjoyed a lavish lifestyle. However, Wife's standard of living had decreased dramatically during the separation. Husband continued to pay the mortgage, utilities, and other expenses, but the trial court also found Husband had curtailed Wife's access to financial resources and had "taken the low road."

At the temporary orders hearing the district court determined that Wife was incapable of meeting her reasonable needs as established during the marriage and ordered Husband to pay $12,000 in temporary maintenance retroactive to the date of the petition, which resulted in Husband owing Wife $144,000. Husband appealed and contended that the reenacted maintenance statute eliminated a court's ability to impose retroactive temporary maintenance.

The Court found the reenactment of the maintenance statute illustrated the General Assembly's intent for the district court to retain broad discretion over an award of maintenance and it expanded the district court's discretion in determining a fair and equitable term of maintenance based on the totality of circumstances. The Court found that nothing in the statute prohibits an award of temporary retroactive maintenance.

Husband had also argued that the trial court improperly awarded temporary retroactive maintenance for the time period during which Husband was paying the mortgage, utilities, and other shared living expenses. The Court did not agree. There was evidence Wife was not able to meet her reasonable needs during that time period and the court is not limited to satisfying a spouse's basic survival needs.

The Court also found the district court did not make sufficient findings to support its award of maintenance. The Court referred to the case of *In re Marriage of Wright*, 2020 COA 11, (*see below*) for the specific process the district court must follow when considering a maintenance request. First, the court must make findings as to each party's gross income, the marital property apportioned to each party, each party's financial resources, and reasonable needs established during the marriage. Next, the court must determine the amount and term of maintenance. The Court found the trial court's findings on Wife's reasonable financial needs were insufficient because it did not detail if $12,000 would meet her reasonable needs. Secondly, the Court found the trial court did not make findings related to Husband's payment of shared expenses. Due to lack of sufficient findings, the Court reversed the trial court's award of maintenance and remanded the case to make additional findings.

In re the Marriage of Stradtmann, 2021 COA 145 (Colo. App. Dec. 2, 2021)

Opinion by Judge Lipinsky, Judge Brown and Justice Martinez concur

When entering an initial order for maintenance, does the court have authority to enter an order for retroactive maintenance dating back to a time before the court obtained personal jurisdiction? In this case of first impression, the Court of Appeals held that the breadth of C.R.S. §14-10-114 (1)(a) provides the court with the authority to make such an order. Also, must a trial court make detailed findings to support its maintenance award?

The analysis by the Appellate Court began with the preamble language to the maintenance statute added with the 2014 amendment, "[t]he economic lives of spouses are frequently closely intertwined in marriage and … it is often impossible to later segregate the respective decisions and contributions of the spouses…"

The Appellate Court's opinion makes it clear that facts count, and here, Husband moved out of the parties' home one month before the petition for dissolution was filed. The trial court had ordered retroactive maintenance and child support for the month before

the filing, along with the months after filing until the hearing took place. The Appellate Court agreed with Husband's contention that the court could not award child support for the period prior to filing, because C.R.S. §14-10-115(2)(a) provides authority only to order retroactive child support to the later of filing or service of the petition on the responding party.

While it is true that personal jurisdiction is required before a court may enter enforceable orders, the Appellate Court distinguished between the date jurisdiction attaches and whether, once jurisdiction is obtained, the court may enter orders with an effective date before personal jurisdiction is obtained. Reading the maintenance statute as a whole, the court sought to give it "consistent, harmonious, and sensible effect" and to interpret the language in the manner "that best effectuates the legislative purposes."

Before 2014, the statutory provision in question read that maintenance "shall begin at the time of the parties' physical separation or filing of the petition or service upon the respondent, *whichever occurs last." (Italics added.)* §14-10-114(2)(c), C.R.S. 2013. This language was removed with the statutory amendment effective January 1, 2014, and now reads, "[t]he court shall determine the term for payment of temporary maintenance." §14-10-114(4)(a)(II), C.R.S. 2021. Elsewhere in the statute, the General Assembly provided revised language that maintenance awards are authorized "for a term that is fair and equitable to both parties." §14-10-114(2) C.R.S. 2021. Citing extensively to *In re the Marriage of Herold*, 484 P.3d 782 (Colo. App. 2021) [also in this outline], this division of the Appellate Court ruled very much in line with Judges Roman, Welling, and Brown.

On the second question of detailed findings, the Appellate Court once again confirmed that the trial court must follow the process set forth in §14-10-114(3), C.R.S. 2021: the court "shall" make initial findings concerning five factors, and then "shall" determine the amount and duration considering three specific considerations (the third of which then requires a third layer of findings). Findings must be sufficiently explicit so as to provide a reviewing court with a clear understanding of the basis for the trial court's order.

Marriage of Young

2021 COA 96 (Colo. App. July 15, 2021)

Opinion by Judge Berger; Richman and Welling, JJ., Concur

This case presents a matter of first impression: must the trial court make express findings on all of the factors listed in §14-10-114(3)(a)(I), C.R.S. 2020, when considering a motion

to modify a maintenance award under §14-10-122, C.R.S. 2020? The short answer is no, but the decision of the magistrate was reversed and remanded on other grounds.

Husband agreed to pay Wife maintenance of $20,000 per month until December 1, 2024. By agreement, the maintenance was modifiable as to amount, but not as to term. The parties stipulated that Husband earned $70,000 per month as CEO of a company; Wife earned $3,000 per month. The amount of maintenance was made modifiable due to the "variable" and "uncertain" amount of Husband's income.

Nine months later, Husband moved to modify maintenance under §14-10-122 because his income had dropped to $42,333 per month. By the time of the hearing, Husband's income had dropped to $17,333 per month.

The magistrate denied Husband's motion to modify, finding there was not a substantial and continuing change in circumstances. Husband moved for a review under C.R.M. 7(a). The district court adopted the magistrate's order.

Here, the standard of review is abuse of discretion. The district court and the Court of Appeals must adopt a magistrate's factual findings unless they are clearly erroneous.

Husband cited *In re Marriage of Thorstad*, 2019 COA 13, arguing the magistrate did not make findings under §14-10-114(3)(a)(I). The Court of Appeals rejected this argument.

Under §14-10-122, the threshold question is, did the moving party establish "changed circumstances so substantial and continuing as to make the existing terms unfair." §14-10-122(1)(a), and the moving party bears a heavy burden.

Thorstad wasn't resolved under §14-10-122, but rather under §14-10-114 as it existed in September 2001. §14-10-114 was amended in 2013 to add subsection (5) on modification. Husband argued the magistrate needed to make findings on every factor set forth in §14-10-114. However, §14-10-114(5) addressing modification provides that a court "may" consider the factors, not "must", "shall", or "is required to". As such, the Court of Appeals concluded that the magistrate was not required to address all factors enumerated in §14-10-114(3) when ruling on a motion to modify maintenance.

Instead, the Court of Appeals found the magistrate had erred in relying on irrelevant or unsupported findings to determine that Husband was voluntarily underemployed:

- In finding that Husband hadn't sought to sell the company where he worked, the Court of Appeals resolved that such a fact is not the inquiry for voluntary unemployment, and no evidence relating to selling the company, even if he could do so, suggested that it would restore his prior income.
- The magistrate's finding that the Husband was working "max 20 hours per week" had no record support.
- No evidence was introduced that Husband could get a second job making $120,000 to $150,000 per year – the amount the parties agreed was full-time pay for a computer programmer – while working as the CEO for his current employer.

In re the Marriage of Cerrone,
2021 COA 116 (Colo. App. Aug. 26, 2021)

Opinion by Judge Grove, J. Jones and Johnson, JJ., concur

Is the inclusion of a non-modification clause in a separation agreement, on its own, sufficient to overcome the statutory presumption that the obligation to pay maintenance ends on the recipient spouse's remarriage? The Court concludes it is not sufficient, and declines to follow *In re Marriage of Parsons*, 30 P.3d 868 (Colo. App. 2001). Because the separation agreement at issue did not expressly provide that maintenance would continue after wife's remarriage, the maintenance obligation terminated by operation of law at wife's remarriage.

The parties' marriage ended in 2016 after twenty-four years. The parties entered into a separation agreement that contained two provisions that are relevant for the appeal. Under the "maintenance" section of the agreement, the agreement provided:

"commencing July 1, 2016, Husband shall pay the Wife maintenance in the amount of $2,489.00 per month for a period of 138 months (totaling 11 ½ years). Payments shall be made directly by Husband to Wife. Maintenance shall terminate at the end of the contractual period of 11 ½ years, December 31, 2027. All maintenance outlined herein is contractual in nature and shall be non-modifiable for any reason whatsoever by the Court. The Court shall not retain jurisdiction to modify the maintenance either in amount or duration."

The agreement also contained a "Modification" clause, which states: "This Plan shall not be modified except by its own terms or by operation of law or by written agreement of the Parties with approval by the Court."

Three years after the divorce, the Wife remarried. Husband moved for a declaratory judgment that his maintenance obligation terminated by operation of law due to Wife's remarriage. A magistrate denied the Husband's motion on the basis the maintenance was contractual and non-modifiable because the parties had "agreed in writing" that the obligation survived wife's remarriage. Husband petitioned for district court review and the district court affirmed and adopted the magistrate's order.

The Court agreed the magistrate and district court erred in concluding Husband's maintenance obligation continued after Wife's remarriage. The Court declined to follow *Parsons* to the extent it holds that the presence of a non-modification clause on its own is sufficient for a maintenance obligation to continue after recipient spouse's remarriage. The Court first went through a review of the earlier case law interpreting the predecessor version of C.R.S. § 14-10-122. The cases included *Spratlen v. Spratlen*, 30 Colo. App. 91 (1971) (holding the statute required an express statement that maintenance continue after remarriage), *In re Estate of Kettering*, 151 Colo. 202 (1943) (holding that maintenance ends with an obligor's death unless the agreement otherwise "expressly or by clear implication" provides that maintenance payments continue). *In re Marriage of Hahn*, 628 P.2d 175 (Colo. App. 1981) (held the language "will not be subject to modification for any reason except the death of the wife" was an express provision for maintenance to continue after wife's remarriage). *Parsons* was decided twenty years after *Hahn*. The separation agreement in *Parsons* stated the maintenance is contractual and nonmodifiable by any court and shall not change for any reason. The division in *Parsons* extended *Hahn* and departed from *Spratlen* by holding that express language for termination of maintenance is preferable, but the presence of a non-modification clause can overcome the statutory presumption maintenance terminates at the recipient's remarriage.

The Court determined the *Parsons* division diverged from the plain language of C.R.S. § 14-10-122(2)(a)(III). The Court found the division in *Parsons* went far beyond the holdings of *Spratlen* and *Hahn*. The Court does not view "as talismanic the terms 'contractual' and 'nonmodifiable'" and "the language of the separation agreement must be read as a whole, and in context, to determine the meaning of those terms or any others." The Court holds that to avoid termination by operation of law due to recipient's remarriage, a separation agreement must include an express provision that maintenance will continue even if the recipient spouse remarries. Notably, the Court found the qualifier

"by the court" in referencing modifiability suggests the parties intended maintenance would not be subject to a motion to modify, but it does not follow the automatic terminating events in C.R.S. § 14-10-122(2)(a) are inapplicable.

Court concludes the magistrate and district court erred by requiring Husband to continued paying Wife maintenance after Wife's remarriage. The order is reversed and remanded to the district court with instructions to declare husband's maintenance obligation terminated due to Wife's remarriage.

3. Child Support

In re the Parental Responsibilities Concerning M.E.R.-L, 20 CA 0111 (Colo. App. December 17, 2020)

Opinion by Judge Tow, Navarro and Lipinsky, JJ., concur

At issue is whether a provision of the Uniformed Services Former Spouses Protection Act (USFSPA), 10. U.S.C. § 1408 prohibits a court from including a parent's veteran disability benefits in that parent's gross income for when calculating child support. The Court of Appeals concludes it does not. Veteran disability benefits are includible in that parent's gross income for child support purposes. The Court of Appeals affirmed the trial court's decision.

The parties were not married and are the parents of two minor children. The parties lived together for a short time and the relationship deteriorated after the birth of their second child. Father initiated the APR proceeding. The trial court determined child support based on Mother's monthly income of $5,547 and Father's monthly income of $7,504, which consisted of $4,701 per month in military retirement pay and $3,433 per month in veteran's disability benefits. This resulted in an order that Father pay Mother $1,042.31 in monthly child support.

The Court of Appeals cited *In re Marriage of Fain*, 794 P.2 1086, 1087 (Colo. App. 1990), which found that disability benefits are expressly included as gross income. "Gross income" includes income "from any source." § 14-10-115(5)(a)(I) and veteran's disability benefits do not fall within one of the statutory exceptions. The Court also found the non-taxable nature of the income is irrelevant.

Father argued that including veteran's disability benefits in gross income for purposes of child support is contrary to the USFSPA. The Court cited the United States Supreme Court case *Rose v. Rose*, 481 U.S. 619 (1987) and noted multiple state courts have read the case as explicitly authorizing the treatment of veteran's disability benefits as part of income for child support. The Father did not cite any case that supports his proposition that the USFSPA prohibits states from including veteran's disability benefits as income for purposes of calculating child support.

In re the Marriage of Flanders, 2022 COA 18 (Colo. App. Feb. 10, 2022)

Opinion by Judge Freyre, Jones, J, Concurs.
Tow, J, dissents

If a nonparent who fights for and obtains parental responsibilities can be ordered to pay child support (*In re Parental Responsibilities of A.C.H.*, 2019 COA 43) can a nonparent who assumes parental responsibilities to avoid the child being placed in foster care also be ordered to pay child support? By a 2-1 decision, this panel of the Court of Appeals decided that such a nonparent is not a "psychological parent" and is not obligated to pay child support,.

Majority Opinion: After their 2011 divorce, the State initiated dependency and neglect proceedings in 2013 and again in 2015. At the end of the second proceeding, the juvenile court pronounced both parents unfit and allocated parental responsibilities to maternal grandmother. After this decision was certified to the dissolution court, that court entered an order for both Father and Mother to pay child support to grandmother.

The majority noted the differences between this case and the facts of *A.C.H.* There:

> "Hill held himself out as A.F.'s father, almost from birth, by treating him as his own. They lived together as a family for nearly four years, and Hill is the only father A.F. has ever known. And even after the parties broke up, Hill did not take his relationship with A.F. for granted. He exercised equal parenting time with the child for the next six years. When mother wanted to relocate with the child to Texas, he initiated an allocation of parental responsibilities, including a PRE investigation, and, at all times, he insisted that he be named the child's primary parent in Colorado. In the end, after numerous hearings, the court ultimately granted him an order for parenting time and decision-making

responsibility for the child."

By contrast, "Unlike Hill, maternal grandmother voluntarily assumed parental responsibilities for the child through a dependency and neglect proceeding, not a child custody proceeding under section 14-10-123. … Thus, maternal grandmother did not, as father argues, independently fight to obtain the same parental responsibilities as a natural or adoptive parent, nor did she pursue an allocation of parental responsibilities as a nonparent under section 14-10-123, C.R.S. 2021."

Dissenting Opinion: In his dissent, Judge Tow felt the majority's emphasis on whether a party has fought for a role or whether the *A.C.H.* criteria for a "psychological parent" determination is misplaced.[1] Instead, Judge Tow notes first that the issue under these facts could possibly be considered moot: grandmother is providing for the needs of the child in her home and is already contributing to the child's needs, and since this would have to be a Worksheet A calculation based on the parenting time allocated to Father, grandmother wouldn't owe Father anything under any circumstance. But, since the first question in the case is whether grandmother can be required to provide financial disclosures, Judge Tow believes this is the issue before the court and addresses the issue on its merits.

He went on to note: "Thus, the question whether one is a psychological parent to a child is related not to whether one should be obligated to support the child but, instead, to whether one is in a position to seek parental rights. … Rather, I believe the fulcrum on which this dispute pivots is whether grandmother has a legal obligation to support the child. And I believe she does."

Judge Tow continues, discussing the term "parent" contained in the child support statute, and concludes, "Clearly, it is not always limited to a natural, legal, or adoptive parent …" In addition to the context of *A.C.H.*, he points to *IRM Rodrick*, 176 P.3d 806 (Colo. App. 2007), where the parties were deemed to have a responsibility to support a child – not because they were deemed "psychological" parents, but because they had parental responsibilities allocated to them. Here, grandmother had exactly the same form of rights allocated to her. As a result, Judge Tow would have reversed the trial court.

[1] Judge Tow doubled down on equine allusions: "Initially, it could be argued that father chose to ride the 'psychological parent' horse and is therefore stuck with that steed. … Yet, in my view, the focus on whether grandmother is a psychological parent puts the cart before the horse."

4. Parental Responsibilities

In re the Marriage of Crouch,
2021 COA 3 (Colo. App. January 14, 2021)

Opinion by Judge Pawar, J. Jones and Berger, J.J., concur

This case arose out of a post-decree motion to modify decision-making responsibility related to the vaccination of the parties' children. In modifying decision-making responsibility under C.R.S. § 14-10-131(2)(c), the Court held it was error for a court to impose an additional burden on the moving parent to show substantial harm to the children and reversed the decision of the trial court.

The parties divorced in 2017. The court approved parenting plan provided that the parties would share joint medical decision-making authority and that "absent joint mutual agreement or court order, the children will not be vaccinated." In 2018, Father had a change of heart about vaccinating the children due to his increased travel and the children's potential exposure to diseases. Mother opposed the vaccinations due to her religious beliefs. Mother also argued there was a risk of side effects from the vaccinations and vaccinations were contraindicated for their children. The parties appointed a PC/DM to decide the issue, but the PC/DM declined to render a decision, stating a decision would be akin to practicing medicine without a license. Father then filed a motion to modify medical decision-making responsibility. The matter was heard and Father presented expert testimony. Mother did not have an expert. The trial court held failing to vaccinate the children endangered their health, but that the Father had not met the additional burden to prove "substantial harm to the children" and denied his motion.

The Court found the trial court erred by misapplying the endangerment standard of C.R.S. § 14-10-131(2)(c) when it required that Father also prove "substantial harm" to the children. The trial court had erroneously applied the burden that must be met when the government interferes with a parent's constitutional right, instead of the burden when allocating sole decision-making to one parent over the other. The trial court misapplied the holding of *In re Marriage of McSoud*, 131 P.3d 1208 (Colo. App. 2006). In *McSoud*, the court was imposing restrictions on the mother's religious beliefs. Here, Father sought to make the decision for the children and a "parent's free exercise rights are not implicated by a court's allocation of decision-making responsibility between parents."

In re the Marriage of Schlundt,
2021 COA 58 (Colo. App. April 29, 2021)

Opinion by Judge Dailey, Berger and Tow, J.J., concur

In this case, the Court of Appeals considers whether a district court may substantially modify parenting time without applying the endangerment standard of C.R.S. §14-10-129 (2)(d) when implementing a remedy for parenting time violations under C.R.S. §14-10-129.5 (2)(b). In harmonizing the two statutes, this division of the Court resolves that, to substantially change parenting time, a trial court must find the child's present environment endangers the child's physical health or significantly impairs the child's emotional development and that the harm likely to be cause by a change in environment is outweighed by the advantages to the child.

After their divorce and a period of operating under a shared-time parenting plan, both parties planned to move, with Mother moving to Florida and Father moving to Ouray. Following a hearing, the Court ordered that the child would relocate with Mother and Father would have parenting time over the summer and some school breaks.

Six months later, Father filed a motion to enforce parenting time under C.R.S. §14-10-129.5, contending mother refused to communicate, was denying his parenting time, and the child was endangered in her care. Father later learned that Mother had further relocated to Georgia. A PRE report recommended flipping the existing parenting time schedule.

Following a hearing, the Court made orders adopting the PRE recommendations. No written order was ever entered.

Mother did not receive the summer parenting time she was to have under the new order; Father contended Mother's post-hearing communications with the child endangered him and asked that her summer parenting time should be restricted. Following another hearing, the Court eliminated Mother's summer parenting time.

Mother argued that (1) the endangerment standard of 14-10-129(2)(d) applies to 14-10-129.5(2)(b) motions to enforce a parenting time order by substantially changing the parenting time as well as changing the parent with whom the child resides a majority of the time; and (2) the endangerment standard was not properly applied by the district

court. Father asserted that (1) mother waived these arguments for purposes of appeal; (2) 14-10-129.5(2)(b) operates totally independently of 14-10-129(2)(d); and, in any event, (3) the district court properly applied the endangerment standard.

As to waiver of arguments, the Appellate Court held that Mother had not waived her arguments, because a waiver requires an intentional relinquishment of a known right. The Trial Court's questions and statements in the proceedings did not make clear that the court was considering one of two legal standards for resolution of the motion, so Mother's response was not a knowing waiver of a legal right. Beyond that, Mother could not waive the right of the *child*, which is implicated in this proceeding.

After holding that the endangerment standard applied, the Court considered the alternative basis of the trial court's decision, that the endangerment standard had been met. As to this, the the Appellate Court determined that the trial court's alternate findings that the endangerment standard had been met were insufficient.

14-10-129(2)(d) requires "a three-step analytical process." In re Parental Responsibilities Concerning B.R.D., 2012 COA 63, ¶¶ 19-21. First, there is a presumption that the prior order shall be retained. Second, in order to overcome that presumption, the court must find that the child is endangered by the status quo and that modifying the existing order will create advantages that outweigh any harm caused by the modification. Last, the court must find that the proposed modification is in the child's best interests. In applying these standards, a substantial change in parenting time to change a child's primary residence may not be ordered to punish a parent for an "attitude" or "demeanor."

On remand, the Court needs to apply the three-part endangerment standard test.

In re the Marriage of Thomas, 2021 COA 123 (Colo. App. Sept. 16, 2021)

Opinion by Judge Tow, Furman and Rothenberg, JJ., concur

This case presents a matter of first impression: does the presence of a provision in a parenting plan designating one parent's residence as the child's residence "for purposes of school attendance" give that parent the final say where the child will attend school? The Court holds such a provision does not give. The division also concluded that where

parents with joint decision-making responsibility cannot agree on a particular decision, the district court has authority to break the impasse.

The parties divorced in 2006. The parties' parenting plan was a now-discontinued version of the JDF 1421 form. In the decision-making section of the plan, the parties had selected the box indicating "both parties will make ALL major decisions regarding the children together." The parties also marked the boxes indicating joint decision-making responsibility for education and all other issues. In that same portion of the parenting plan the parties also marked a box that provided "that for purposes of school attendance only, the child(ren)'s residence will be with [father]." Their parenting plan also contained a section titled "compliance with state and federal statutes" indicating that mother would be "the custodian of the child(ren) solely for the purposes of all federal and state statutes which require a designation or determination of custody" and this custodial designation "shall not affect either party's rights and responsibilities under this parenting plan, or under Colorado law." The dispute resolution agreement was to try mediation and, if mediation is unsuccessful ,"the final decision will be made by the Court." Four years later the parties entered into a Stipulation that provided father will be "the primary residential custodian for the minor child."

In 2020, a dispute arose: mother wanted the child to attend high school in Jefferson County and father wanted the child to attend the neighborhood high school in Adams County based on his residence. Mother filed a motion seeking to become the sole decision-maker with respect to the child's high school or alternatively requested that the court authorize her to make a decision under the holding of *In re Marriage of Dauwe*, 148 P.3d 282 (Colo. App. 2006). Mother asserted mediation would not be fruitful and father did not dispute that assertion.

At the hearing, Mother argued that child was performing well and socially adjusted in Jefferson County schools because that is where the child had attended since kindergarten, and that changing schools would present emotional harm on the child. Father argued that based on his residence, Adams County was the proper school, and mother could not establish emotional harm due to the switch. Also, Jefferson County schools would not be providing bus service due to the pandemic and it would affect his ability to pick up the child after school. The district court denied mother's motion stating there was no change in circumstances justifying modification, mother did not demonstrate child endangered, and under § 14-10-130 the role of the court was not to exercise parental decision-making, but to allocate it. The district court found *Dauwe* distinguishable because in that case the court allocated decision-making authority where there was no mechanism to do so. District court then appointed a decision-maker under

C.R.S. § 14-10-128.3(1). Father filed a C.R.C.P. 60(b) motion on the basis the Court lacked authority to appoint a decision maker because it did not have his consent. The district court modified its order and stated the father's position created a total impasse. Given the impasse district court concluded *Dauwe* was not distinguishable and the Court would make the decision. District Court found in child's best interest for child to be enrolled in Jefferson County schools for the 2020-2021 school year. Father appealed.

On the mootness argument the Court of Appeals found that even if an issue is moot, the Court may review the matter, where, as here, it is capable of repetition yet evades review.

The Court was not persuaded by father's argument that the language regarding the child's residence for school purposes was a tiebreaker. Such an interpretation would vitiate the parties' intent to exercise joint decision-making responsibility. While the parties can agree that a particular school will be the default school if the parties cannot agree, such an agreement cannot be inferred from the standard language regarding the child's residence for "school purposes."

The Court was also not persuaded by father's reliance on the holding of *Griffin v. Griffin*, 699 P.2d 407 (Colo. 1985). The Court found the facts in *Griffin* distinguishable to the facts in this case. The mother in *Griffin* was awarded custody, and when the Supreme Court decided *Griffin*, C.R.S. § 14-10-130(4) provided that "the custodian may determine the child's upbringing, including his education." In 1998, the General Assembly made sweeping changes, whereby the terminology of "custody" was changed to "parental responsibilities." The statute no longer leads to the same outcome. Under the current version of the statute, where there is an allocation of joint decision-making, both parents may determine the child's education. The Court also noted that the parties' agreement explicitly provided that "if mediation fails, the final decision will be made by the Court."

When the parents are unable to discharge their duty, the Court is sometimes left with no alternative but to break the deadlock. Citing *Dauwe*, the Court noted the division knew of no authority that prohibited a court from resolving a dispute between two parties with joint decision-making responsibility. Appeal dismissed and order affirmed.

5. Attorney's Fees

Wesley v. Newland,
2021 COA 142 (Colo. App. Nov. 24, 2021)

Opinion by Judge Berger, Yun and Davidson, JJ, concur

While this is not a family law case, this case presents two matters of first impression which could apply in a family law context. First, do the Colorado Rules of Civil Procedure permit joinder of former counsel for purposes of post-judgment proceedings where attorney's fees are sought? Secondly, how can a court comply with the mandatory "shall allocate" language in C.R.S. § 13-17-102(3) when imposing an attorney's fee award? The Court of Appeals concludes the courts have authority under C.R.C.P. to join former counsel for purposes of post judgment proceedings in which attorney fees are sought. The Court also concludes a district court must consider the allocation of fees between the party and party's present or former counsel and make sufficient findings when imposing an attorney fee award under C.R.S. § 13-17-102(3).

In this tort action the defendant, Sarah Newland, sought an award of attorney fees against both the plaintiff, Nicole Wesley, and Wesley's former counsel under C.R.S. § 13-17-102 on the basis the litigation was frivolous and groundless. The tort action had concluded when the district court granted defendant's motion to dismiss for failure to prosecute. Plaintiff's former counsel represented the plaintiff for most of the litigation but withdrew a month before trial on the basis the plaintiff had terminated his representation. The plaintiff continued to represent herself *pro se* through the hearing and the dismissal. The defendant filed two post-judgment motions: a motion for attorney fees under C.R.S. § 13-17-102(4) and motion to join plaintiff's former counsel for post judgment proceedings under C.R.C.P. 19, 20, 21. After receipt of a response by former counsel, the district court denied the joinder motion finding that C.R.C.P. "did not contemplate such a request." Following the denial of the joinder motion, the district court granted attorney fees motion in part and only imposed fees against the plaintiff. The order did not indicate whether the court considered allocation of fees against former counsel, perhaps because the joinder was denied. The defendant appealed. The plaintiff did not file a brief in the appeal, but former counsel was permitted to intervene in appeal and filed an answer brief.

The Court found the district court misapplied the law and the district court abused its of discretion when it denied defendant's motion to join former counsel. Citing two prior cases decided before the Colorado Supreme Court which affirmed the joinder for the limited purpose of post judgment proceedings in which attorney fees were sought, the Court notes the rules "authorize joinder in situations where one party seeks to join a person who may be liable for the same debt or conduct that is already before the court" and the joinder rules "should be liberally construed." In *City of Aurora ex rel. Util. Enter. v. Colo. State Eng'r*, 105 P.3d 595 (Colo. 2005) the water court joined the *City of Aurora* as a party after trial on the grounds it had an agency relationship with one of the parties and the Supreme Court affirmed the joinder for purpose of determining liability for attorney fees. In *Stockdale v. Ellsworth*, 2017 CO 109, the Supreme Court affirmed joinder of a corporation's alter ego for purposes of seeking attorney fees.

The Court of Appeals rejected former counsel's argument that attorneys are officers of the court and not parties. The Court notes the Colorado Supreme Court has rejected the broad proposition that an attorney can never be joined as a party.

Former counsel for plaintiff also made an argument that defendant did not preserve her request for attorney's fees against him because she did not object to his withdrawal. The Court rejected this argument, finding that there is no authority supporting the proposition that an attorney may immunize oneself by withdrawing as counsel.

Defendant argued that the district court erred because it was "required" to allocate the attorney fees award under C.R.S. § 13-17-102 between the offending attorney and party. The Court notes that when a court orders attorney fees under C.R.S. § 13-17-102 the court "*shall* allocate the payment thereof among the offending attorneys and parties, jointly and severally, as it deems most just, and may charge such amount, or portion thereof, to any offending attorney or party." The Court reads "shall" as imposing a mandatory step. The Court found that while the statute does not require a district court to impose liability jointly and severally against party and an attorney, the statute "does require that a district court exercise its discretion by at least considering doing so." The Court also concluded the district court must make factual findings sufficient for an appellate court to determine whether the court properly exercised its discretion.

The order denying joinder of former counsel was reversed and case remanded for further proceedings. On remand the district court must at least consider allocating an attorney fees award against former counsel.

In re the Marriage of Turilli,
2021 COA 151 (Colo. App. Dec. 16, 2021)

Opinion by Judge Vogt, Bernard, C.J., concurs, Taubman, J., concurs in part and dissents in part

In a post-decree dispute concerning parenting time, the majority concluded that C.R.S. § 14-10-129.5(4) requires the court to award attorney fees, costs, and expenses "that are associated with an action brought pursuant to this section" and attorney fees incurred for a motion brought under C.R.S. § 14-10-129(4) were not "associated with an action brought pursuant to" section C.R.S. § 14-10-129.5.

In their 2015 agreement, the parties resolved allocation of parental responsibilities for their children, agreeing to share decision-making responsibility, outlining parenting time for father from Thursday after school until Saturday afternoon, and calling for exchange itineraries seven days in advance of travel. At midnight on March 25, 2020, the parties exchanged texts about mother's ailing mother in California and discussed the possibility of taking the children with her. Father supported mother's decision to travel but did not agree to her taking the children. A 5:41 am the next morning, while father was asleep, mother texted father a copy of the boarding pass and wrote that she and the children were at the airport and leaving at that moment. When mother failed to return the children for father's scheduled parenting time, father filed an emergency motion under C.R.S. § 14-10-129(4) and asked that mother's parenting time be restricted. A telephone hearing on father's motion was scheduled for April 3, 2020, rescheduled to May 1, 2020 at parties' request, and then continued indefinitely at parties' request on April 28, 2020.

Father withdrew his motion under § 14-10-129(4) when mother stipulated to return the children to Colorado and then on April 30, 2020 filed a motion concerning parenting time disputes under § 14-10-129.5. Father requested make-up parenting time and an award of attorney fees, costs, and expenses associated with both of his motions.

The district court found that mother had violated court orders by unilaterally deciding to take the children to California. Mother was ordered to give father 30 days of make-up parenting time over nine months and ordered mother to pay father's attorney fees as required by § 14-10-129.5. Father submitted an attorney fees affidavit incurred since March 26, 2020 and mother objected to "overbroad and unreasonable request" and asked that the court deny it in its entirety or in the alternative have a hearing on the reasonableness of the fees. The district court awarded the fees father incurred in

connection with his motion under § 14-10-129.5 but declined to award fees related to father's motion filed under § 14-10-129(4).

Mother appealed, contending she had valid reasons for traveling to California with the parties' children over father's objection, and that the court erred by excluding testimony and evidence she planned to present in her defense. She further argues the court erred by awarding make-up parenting time. Finally, she argues the district court erred by awarding attorney fees and costs without holding a hearing on the reasonableness of father's requested fees.

The Court of Appeals rejected mother's first two arguments on appeal. The Court found evidence of father's alcohol issues from six years earlier when the parties entered into the separation agreement was properly excluded. Evidence of such alcohol abuse after 2015 was allowed, but none was presented. Likewise, the court did not prohibit mother from presenting evidence concerning father's work schedule or history of exercising parenting time. The Court of Appeals found that mother did not explain why the court erred in awarding make-up parenting time.

The Court of Appeals agreed that the district court erred by awarding father his attorney fees and costs without holding a hearing on the reasonableness of the fees. Citing *Roberts v. Adams*, 47 P.3d 690 (Colo. App. 2001) among other cases, the Court found that where a party requests a hearing on the reasonableness of attorney fees, due process requires that the district court hold such a hearing.

Father also appealed from the attorney fees award. Because the issue would likely arise on remand, the Court of Appeals addressed it. Father contended the district court erred by failing to award him the fees and costs he incurred for his two motions. He contended his motion under § 14-10-129(4) and § 14-10-129.5 were a single action that entitled him to fees under § 14-10-129.5(4).

The majority disagreed with father's argument, finding that the statute is clear and fees incurred by father for his motion under § 14-10-129(4) were "not associated with" § 14-10-129.5. The majority reasons "if the legislature had wanted the mandatory fee provision within section 14-10-129.5(4) to extend to *any* action substantively related to a section 14-10-129.5 motion, it could have said so." The majority finds that father is statutorily entitled to only attorney fees, costs, and expenses incurred after the filing of his section 14-10-129.5 motion. The Court awarded father his appellate attorney fees. The attorney fees award was reversed and case is remanded for the court to determine father's reasonable appellate attorney fees.

Judge Taubman dissented in part, based on the unique language of § 14-10-129.5(4). Judge Taubman cites the four rules of statutory construction: 1) the overriding goal of statutory interpretation is to effectuate the intent of the General Assembly, 2) first look to the plain language of the statute and interpret the language according to its commonly understood and accepted meaning, 3) avoid statutory construction that would render any of the language at issue superfluous or would lead to an illogical result, 4) if the statute is clear, apply as it is written.

Judge Taubman pointed out he has not found any state or federal statute providing or an award of attorney fees "associated with" an action brought pursuant to a specific statute. Citing various Colorado statutes pertaining to attorney fees, Judge Taubman noted the General Assembly only used the phrase "associated with" in the statute at issue and we should give it meaning, as the General Assembly could have written the section to read "an action brought pursuant to this section." In applying the definition of "associated", Judge Taubman argues it leads to a conclusion that attorney fees for time spent on a motion connected to the motion filed under § 14-10-129.5. Judge Taubman also noted father's attorney fees affidavit excluded time from his emergency motion not connected to his request for return of the children and make-up parenting time. Judge Taubman also noted the use of different language in subsection (4) illustrates the different meaning with "associated with."

6. Same Sex Marriage

In re the Marriage of Hogsett,
2021 CO 1 (Colo. January 11, 2021)

Justice Marquez delivered the Opinion of the Court
Justice Hart specially concurs
Chief Justice Boatright concurs in the judgment only
Justice Samour concurs in the judgment only

The Supreme Court had granted Certiorari on the following issues:

1) What factors should a court consider in determining whether a common law marriage exists between same-sex partners?
2) Whether the Court of Appeals erred in affirming the trial court's conclusion that no common law marriage existed between the same-sex couple here.

The Supreme Court held that a common marriage may be established by agreement to enter into the legal and social institution of marriage, followed by conduct manifesting the agreement and affirmed the judgment of the Court of Appeals.

In this matter, the parties began dating in 2001 and began a long-term relationship. They exchanged rings during an impromptu ceremony at a bar, maintained joint accounts and built a home together. The relationship ended in 2014, and the parties filed a joint petition to dissolve a common-law marriage. The marriage date on the petition was made up and not reflective of the ring ceremony. The parties also signed a separation agreement.

At the initial status conference, the parties learned the court would need to determine marital status, and as a result of this information both parties agreed to jointly dismiss the petition. Hogsett filed a second petition to dissolve a common-law marriage, and Neale moved to dismiss on the basis the test enunciated in *People v. Lucero*. 747 P.2d 600 (Colo. 1987) was not met and the parties could not have legally married. After an evidentiary hearing, the district court determined that the *Lucero* test was not met and stated that it did believe it could find that a same-sex common-law marriage existed based on conduct occurring before *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

In applying the *Lucero* test, the district court recognized that some of the common-law marriage elements do not reflect the reality of the situation for same-sex couples. Pre-*Obergefell*, same-sex couples could not file tax returns as married or list each other as spouses on financial or medical documents. The district court relied on the following facts: both parties requested the initial petition be dismissed when informed by the family court facilitator that the court would have to make a status of the marriage finding in their case, it was uncontroverted Neale did not believe in marriage, and found credible Neale's belief that she was never married.

The Court of Appeals had held that the test for determining whether a common-law marriage exists as articulated in applies to same sex relationships, but the test should be applied consistently with the realities and norms of a same-sex relationship. The Court of Appeals had further determined the district court correctly applied the *Lucero* standard in determining a common-law marriage did not exist, and appropriately recognized the realities of applying the *Lucero* elements to same-sex couple prior to the *Obergefell* decision. In the special concurrence, Judge Furman separately encouraged the legislature to abolish common law marriage in Colorado. Judge Furman argued this

would be in conformance with a majority of jurisdictions and noted that common law marriage places an unnecessary burden on parties and the courts.

The Supreme Court held that a common marriage may be established by an agreement to enter into the legal and social institution of marriage, followed by conduct manifesting the agreement. The Court further held the core query is whether the parties intended to enter a marital relationship and share a life together in a committed relationship with mutual support and obligation. The new test emphasizes the importance of the parties' mutual agreement. The Court applied this refined *Lucero* test and concluded the record supported the district court's finding that no common law marriage existed and therefore affirmed the judgment of the Court of Appeals.

Notably, in its opinion the Court recognized common law marriage provides a path for marriage for marginalized groups that wanted to avoid authorities such as undocumented immigrants and may be more important for same-sex partners.

In reaching its decision the Court saw the challenges presented by the *Lucero* holding, and that many of the indicia of marriage used in *Lucero* are no longer exclusive to marital relationships today. The Court found the gendered language of *Lucero* precluded the recognition of same-sex relationships and some of the factors of *Lucero* raised a barrier to the recognition of same-sex common law marriages. Most pertinent, same-sex couples are unable to show the filing of joint taxes prior to the legal recognition of same-sex marriage. Further, modern practices are not captured by the *Lucero* test. More couples are living together unmarried and fewer spouses are changing their names.

Justice Hart in her special concurrence asserted the historic conditions that once justified common law marriage no longer exist and that a guiding principle of the justice system is consistent predictable outcomes. Therefore, she urged the legislature to abolish common law marriage.

Chief Justice Boatright worried the majority broadened the definition of marriage in a way that will present more confusion. He did not have an issue with the new factors but expressed concern that, as applied to facts of this case, the new standard presents more confusion.

Justice Samour asserted only when the state's prohibition on same-sex marriage became unconstitutional in June 2015 could Hogsett and Neale have mutually agreed and intended to enter into a legal marriage and thereby as a matter of law they could not have entered into a common law marriage during the relevant timeframe.

In re the Marriage of Lafleur,
2021 CO 3 (Colo. January 11, 2021)

Justice Marquez delivered the Opinion of the Court
Chief Justice Boatright concurs in part and concurs in the judgment
Justice Samour dissents

The Colorado Supreme Court held that a court may recognize a common law same-sex marriage entered in Colorado prior to the state recognizing same-sex couples' fundamental right to marry.

In January of 2018, Mr. Pyfer filed a petition for dissolution of marriage alleging that he and his partner, Mr. LaFleur, had entered into a common law marriage on November 30, 2003, when a ceremony was held. LaFleur argued the couple could not have entered into a common law marriage because same-sex marriages were not recognized or protected under Colorado law at the time. The District Court acknowledged that same-sex marriage was not recognized in Colorado at the time, but reasoned it was a fundamental right that could not be denied and a couple could enter into a common law marriage before Colorado recognized same-sex couples' right to marry. The District Court found Pyfer had proposed marriage and intended to be married. LaFleur had accepted the proposal in front of Pyfer's sister. Pyfer held himself out as married and listed LaFleur as spouse, LaFleur financially support Pyfer and the parties cohabited. The couple did not wear wedding rings and LaFleur did not tell his coworkers, but his work environment was not welcoming to same-sex couples. The District Court concluded the parties entered into a common law marriage on November 30, 2003. The District Court proceeded with dissolution proceedings and entered a dissolution decree and permanent orders.

Pyfer appealed the division of property and LaFleur cross-appealed and challenged the court's ruling that the parties entered into a common law marriage. After the Supreme Court grant certiorari to review *Hogsett* and *Yudkin*, LaFleur petitioned the Supreme Court under C.A.R. 50 to review the case as a similarly framed legal issue.

The Supreme Court held a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' right to marry and reached this conclusion for two reasons:

(1) a statute that is declared unconstitutional is void *ab initio* and is inoperative as if it had never existed. The fact that the marital relationship was not recognized at the time does not change the nature of the relationship.

(2) "[W]when the U.S. Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open and as to all events, regardless of whether such events predate or postdate announcement of the rule." (quoting *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86 (1993)).

Applying the refined framework for determining the existence of a common law marriage as set forth in *Hogsett*, the Supreme Court found that the record supported the District Court's conclusion the parties mutually agreed to be married and intended to be in a marital relationship.

Chief Justice Boatright disagreed with the majority's decision to announce new factors for establishing a common law marriage in *Hogsett*, but he agreed with the majority that the fundamental right to marry as outlined in *Obergefell* must be given retroactive effect.

Justice Samour issued a long dissenting opinion. Justice Samour asserted common law marriage should require mutual intent and agreement to enter into a *legal* marriage. Since such a marriage was not legal in 2003, the parties could not have entered into such an agreement. Justice Samour agreed that *Obergefell* rendered the state's restriction voice *ab initio*, but the retroactive application cannot transform the parties' intent and agreement in 2003.

7. Procedure

In re the Marriage of Martin, 2021 COA 101 (Colo. App. July 22, 2021)

Opinion by Judge Fox; Dunn and Pawar, J.J., Concur

Wife appeals district court's order reopening dissolution decree's property division under C.R.C.P. 16.2(e)(10). The Court of Appeals agreed with her and reversed.

Following a 22-year marriage, the parties divorced in 2014, dividing their property by agreement. In 2016, husband filed a C.R.C.P. 60(b)(1) motion alleging a mistake in the

property division. Rule 16.2(e)(10) was raised during the hearing, which then became the basis for husband's request. Given the fact that husband filed his motion more than 182 days after judgment was entered, he was not entitled to relief under C.R.C.P. 60(b).

The district court invoked C.R.C.P. 16.2(e)(10) to reopen the property division related to a piece of real estate ("Stagecoach") and an IRA.

In 2007, the parties purchased Stagecoach with the intention of building a house, but they experienced serious financial difficulties and quit claimed the property to wife's parents. Husband and wife then built a house on the property. Wife's parents paid all the costs for the build and paid the parties' living expenses during the year-long construction process.

In 2013, wife's parents conveyed the property to a living trust. Wife, at trial, testified she had no knowledge of the transfer. During the divorce proceedings, neither party disclosed any interest in the property.

When husband filed his motion to reopen in 2016, he alleged the parties entered into a joint venture with wife's parents and that he mistakenly did not include the property in the separation agreement.

As to the IRA, wife testified she thought the IRA was in her mother's name and was not hers. Husband acknowledged he knew about the IRA prior to divorce.

The district court reopened the property division and reallocated the Stagecoach sales proceeds and the IRA.

Following a *de novo* review as to the legal determination to re-open the judgment, the Appellate Court reversed the district court order reopening the property division as to the Stagecoach property and the IRA. In its holding, the Court noted that C.R.C.P. 16.2 establishes heightened disclosure rules for domestic cases. Under the rule, the parties "owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests."

In this case, the Appellate Court found that wife did not fail to disclose the Stagecoach property or the IRA. To the contrary, husband's claim that he was part of a joint venture regarding Stagecoach and his admission that both parties knew about the IRA refutes the very notion of non-disclosure. C.R.C.P. 16.2 (e)(10) does not provide husband a post-decree remedy under these facts. Also, Husband did not allege in his post-trial motion

a specific failure to disclose Stagecoach or that the omission of the IRA materially affected the division of assets or liabilities.

The court described the rule's reallocation remedy as "extraordinary" and "narrow" and unavailable to give a party the "legal equivalent of a mulligan." Under these facts, husband is not entitled to a redo of the separation agreement.

In re the Marriage of Evans, 2021 COA 141 (Colo. App. Nov. 18, 2021)

Opinion by Judge Furman, Brown and Martinez, JJ, concur

When allocating a previously misstated or omitted asset under C.R.C.P. 16.2(e)(10) (as it existed prior to the 2020 amendments), a court must follow §14-10-113, C.R.S., making relevant factual findings and considering the parties' financial circumstances at the time the property division is to become effective.

In 2013, the parties divorced. Wife filed a motion to modify child support in 2016, and ascertained through discovery Husband's failure to disclose a business asset, Premier Earthworks and Infrastructure, Inc. (PEI).

In 2018, a magistrate heard the case, finding Husband failed to disclose his 100% ownership interest in PEI, and awarded Wife $1,168,639 as her share and ordered Husband to provide security for payment. The magistrate increased child support from $534 to $12,000, finding the parties' combined monthly income to be $397,432. And the magistrate awarded almost $63,000 in wife's attorney and expert fees.

Husband sought review and, in 2019, the judge adopted the magistrate's decision, reopened the judgment, and upheld the child support and attorney fee orders. But the judge rejected the magistrate's allocation of the ownership interest in PEI and remanded the matter to the magistrate for further findings regarding the C.R.S. §14-10-113 factors on which the magistrate relied. The magistrate made the findings as directed and reaffirmed the equal allocation of the asset value of PEI. This ruling was adopted by the trial court judge in 2020.

Wife first contended that Husband failed to timely appeal the 2018 ruling, contending it was made file by the trial court judge's 2019 ruling. But that ruling was not a final, appealable judgment, "leaving nothing further to be done to determine the parties'

rights", so it was not a final order. Wife also contended that the appeal was barred because the petition for review of the magistrate's order was filed 22 days after the magistrate's order, but the Appellate Court noted that the 21st day was a Sunday, so the filing deadline was extended to the next business day and was timely.

Husband contended Wife waived her right to seek allocation of PEI when she signed the separation agreement, but the opinion made clear that waiver is the intentional relinquishment of a known right. This case is distinguishable from the waiver deemed to have occurred in *IRM Runge*, 415 P.3d 884 (Colo. App. 2018). While wife here signed an agreement before a business valuation was completed, that agreement was based on the assumption of full, honest, accurate disclosure, and as to assets where "no such full disclosure has been made…, this Agreement shall be null and void." Unlike the wife in *Runge*, wife here entered into the separation agreement without having all relevant information because husband did not disclose PEI. And Husband cannot rely on the notion that, had Wife proceeded with the valuation, she would "more likely than not" have discovered the existence of PEI. The duty to disclose by Husband cannot be turned into an obligation to discover by Wife. And, at any rate the valuation expert engaged to evaluate Husband's other business (Overlook Mine & Gravel, LLC) testified that he had no reason to discern that PEI was another business Husband owned.

The magistrate resolved the issue of Husband's ownership based on conflicting testimony, a decision is one committed to the sound discretion, finding it most convincing that Husband listed himself as the 100% owner on a tax document he filed and his filings with the Secretary of State's office showing him as the incorporator.

Getting to the three questions of first impression, the Court considered (1) whether the reopening required a complete reallocation of the marital estate, (2) whether C.R.S. § 14-10-113 factors are relevant when allocating previously non-disclosed assets, and (3) whether the financial circumstances to be considered are those in place at the time of the decree or presently.

On the first question, the opinion resolved that reopening does not require a complete reallocation of the marital estate. Interpreting the pre-2020 Rule 16.2 and *In re the Marriage of Durie*, 2020 CO 7, this division found the trial court could allocate just the undisclosed asset, and did not venture into a determination as to whether it could have reallocated everything.

The Court determined as well that the statutory factors contained in C.R.S. § 14-10-113 are relevant when allocating previously non-disclosed assets.

The court resolved that the financial circumstances to be considered are the parties' current circumstances. The statute provides that a court is to consider the parties' financial circumstances at the time the property division is to become effective. Trying to allocate the asset based on the circumstances at the time of the decree presents several problems, not the least of which is that it potentially allows the party who failed to disclose to reap the benefits of holding that undisclosed asset after the date of decree. Where, as here, the gross revenues of PEI a\had grown more than six-fold in the first two years following the decree, ignoring this growth would ignore the marital contributions that served as the foundation for this growth and would provide a possible windfall to a non-disclosing party.

On the child support issue, the appellate court remanded, noting the magistrate did not make findings noting all relevant factors to consider, while also noting that, as the income level far exceeds the top of the guideline chart, the trial court has the right to exercise discretion in setting the amount of support.

In re Marriage of Vega

2021 COA 99 (Colo. App. July 22, 2021)

Opinion by Judge Brown, Navarro and Casebolt, J.J. Concur

Husband appealed a default permanent orders entered by a district court magistrate, claiming that he was not in default and that the magistrate lacked jurisdiction to enter permanent orders because the parties did not consent to the magistrate as required by C.R.M. 6(b)(2).

The magistrate found husband in default because he did not file a response to the petition under C.R.C.P. 55(a). § 14-10-107(4)(a), C.R.S. 2020 permits, but does not require, the filing of a response to a petition for dissolution of marriage. Husband appeared at the initial status conference, which is required pursuant to C.R.C.P. 16.2(c)(1)(B). Additionally, husband appeared at the permanent orders hearing, *pro se*. Husband was not permitted to participate in the hearing. After being denied the ability to participate in the hearing, husband asked if he could hire a lawyer.

Husband did not receive the proposed decree, property spreadsheet, child support worksheet, exhibit list, and related documents filed with the court 10 days prior to the hearing. Husband was given the opportunity to review these documents at the time of the hearing, and he objected.

The magistrate did not permit husband to participate in the hearing and entered default permanent orders as requested by wife. The permanent orders did not include the required C.R.M. 7 notice of appeal rights related to cases heard by a magistrate. Under C.R.M. 6(b)(2), "a district court magistrate may preside over contested hearings which result in permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities" only with "the consent of the parties."

The COA found that the magistrate erred in finding husband in default, because husband was not required to respond to the petition and that he did attend the initial status conference.

Further, the COA found that the hearing was "contested" within the meaning of C.R.M. 6(b)(2), and as such, the magistrate lacked jurisdiction. Additionally, husband did not receive proper written notice of his right to object to the magistrate hearing the permanent orders.

The COA reversed the finding of default and remanded the case for further proceedings.

People in the Interest of R.J.B.,
2021 COA 4 (Colo. App. January 21, 2021)

Opinion by Judge Hawthorne, Bernard, C.J., and Graham, J., concur

In a case arising out of a dependency and neglect proceeding, the Court of Appeals determined the trial court did not abuse its discretion in a denying the mother's request for a continuance of a termination of parental rights hearing on the basis it should be conducted in-person and that the Webex hearing afforded mother due process and equal protection of the law. This case is germane given the court's continued utilization of remote video platforms.

This case arose in March 2020 when the Denver Department of Human Services ("the Department") filed a motion to terminate the legal relationship between mother and child. The child was residing with the godmother and there was a treatment plan in place, but the mother failed to meet the terms of the treatment plan and stopped contact with the Department. At about the same time the Department filed a motion to terminate mother's parental rights, the judicial department instituted measures to

mitigate the health risk associated with the Covid-19 pandemic. One of the measures instituted was that all hearings---including termination hearings—would be conducted via Webex.

Just prior to the termination hearing, the mother requested a continuance, which the court denied. After the contested termination hearing, the mother's parental rights were terminated. The mother asserted the juvenile court abused its discretion in denying her motion for continuance because the need to hold the hearing via Webex constituted good cause for a continuance.

In her motion for continuance, mother alleged that conducting the hearing via Webex would create a fundamentally unfair proceeding because of difficulties with: hearing other parties, issues with the video feed, parties' internet capabilities, making contemporaneous objections, efficacy of sequestration orders, ascertainment of witnesses using documents, impairment of use of documents to impeach and submission of exhibits, observation of witness demeanor, and ensuring an adequate record of hearing. The Court found the issues were either unfounded or adequately addressed by the juvenile court. Technical difficulties could be addressed, the system was tested, the video platform allows all parties to view one another, and mother did not show the continuance would be in the child's best interests.

With respect to the mother's lack of due process claims, the Court found the juvenile court ensured that counsel's representation of mother was not hindered by holding the hearing via Webex. The Court concluded the mother was provided with substantially similar procedures as would have been available at an in-person termination hearing.

8. Collateral Issues

In Re the Estate of Yudkin,
2021 CO 2 (Colo. January 11, 2021)

Justice Marquez delivered the Opinion of the Court
Chief Justice Boatright concurs in the judgment only
Justice Samour concurs in the judgment only

In this estate case, the issue is whether the district court misapplied *People v. Lucero*, 747 P.2d 660 (Colo. 1987) in giving more weight to the fact the parties filed separate

state and federal tax returns rather than the fact that the parties cohabitated, agreed to be married, and had a reputation as a married couple in their community.

Mr. Yudkin died intestate on March 25, 2016. Yudkin had been living with Appellant, Tatsiana Dareuskaya (Putative Wife) and her two children for eight years.

Yudkin and Putative Wife lived together in a house in Aurora, titled in Yudkin's name. They maintained separate bank accounts, did not have joint credit card accounts, and did not file joint tax returns.

Following Yudkin's death, his ex-wife, Svetlana Shtutman, sought informal appointment as the personal representative of his estate. Putative Wife did not get notice of this application. Putative Wife objected and the magistrate held a hearing on the claim of common law marriage by Putative Wife.

The magistrate found the fact that Yudkin and Putative Wife did not file joint tax returns to be the "most convincing" evidence that they were not common law married.

Interpreting *Lucero*, the Court of Appeals held that if there is an agreement to be married, the parties cohabited and have a reputation in the community as a married couple, the inquiry ends there; a common law marriage has been established. The court of appeals reversed the magistrate's order and directed entry of a decree of common law marriage.

Yudkin's ex-wife petitioned the Supreme Court for Certiorari review arguing the Court of Appeals misapplied Lucero and that the magistrate never found that Yudkin and Dareuskaya agreed to be married. The Supreme Court granted certiorari review and announced the case with *Hogsett* and *LaFleur*.

The Supreme Court applied the updated common law marriage test announced in *In re Marriage of Hogsett & Neale*, 2021 CO 1, which emphasized that a common law marriage finding depends on the totality of the circumstances. The Supreme Court determined it was unclear from the record that the parties mutually agreed to enter into a marital relationship and the treatment of certain evidence which may have been appropriate under the *Lucero* holding do not account for the legal and social changes. Those facts are the parties' separate finances and the fact Dareuskaya never took Yudkin's name. The Supreme Court also found that the Court of Appeals erred by finding that cohabitation and reputation in the community mandated a finding of a common law marriage.

Both Chief Justice Boatright and Justice Samour concurred in the judgment only. Chief Justice Boatright disagreed with the majority's decision in *Hogsett* and the potential expansion of the definition of marriage. Justice Samour reiterated his position as expressed in his concurrence in *Hogsett* and dissent in *LaFleur*, and asserted the determinative factor is whether the parties intended and agreed to enter into a *legal* marriage.

The Supreme Court remanded the case to the probate court for reconsideration of the common law marriage claim under the updated framework set forth in *Hogsett* and *LaFleur*.

9. Enforcement of Orders

In re the Parental Responsibilities of A.C.B., 2022 COA 3 (Colo. App. Jan. 6, 2022)

Opinion by Judge Welling, Dailey and Grove, JJ, concur

In a government-initiated contempt proceeding, when a jail sentence is an available remedial sanction, an alleged contemnor who is indigent has the right to court-appointed counsel. Here, the trial court violated the alleged contemnor's due process rights by failing to inquire as to his indigency status to determine whether he qualified for court-appointed counsel.

Here, Pueblo County Child Support Services (CSS) petitioned to register an Iowa administrative order as to child support, and the order was registered. Later, CSS filed a motion requesting the court issue an indirect contempt citation, and sought "a jail sentence for an indefinite period of time, not exceed six months, suspended on the condition [father] pays" support on a monthly basis and an additional amount toward the accumulated arrears.

After the citation issued, Father was told he had the right to counsel if he wanted to hire one. Father told the court then and at five subsequent status conferences that he couldn't afford a lawyer, ultimately requesting court-appointed counsel, but the trial court refused, noting the contempt was remedial and not punitive.

Finding that the Due Process Clause of the 14th Amendment to the U.S. Constitution protects citizens from the deprivation of liberty without due process, the court noted that the case was one presenting a procedural due process issue, which the appellate court considers *de novo*.

The Court then went on to consider the evolution of contempt law, from criminal contempt, which is now referred to a punitive contempt, and from civil contempt, now called remedial contempt. A finding of remedial contempt must always be accompanied by a finding that the contemnor has the ability to comply with the court order: in other words, the contemnor holds in his hand the proverbial keys to jailhouse. If he uses his present ability to meet the terms of the order, he is free.

The opinion reviews the history of U.S. and Colorado Constitutional Due Process cases surrounding the right to counsel when imprisonment is possible, concluding that *Turner v. Rogers*, 564 U.S. 431 (2011) changed the legal landscape in finding that, in a civil case, an indigent alleged contemnor *didn't* have the automatic right to court-appointed counsel, upending *People v. Lucero*, 196 Colo. 276, 584 P.2d 1208 (1978) and its progeny, including *Padilla v. Padilla*, 645 P.2d 1327 (Colo. App. 1982).

However, *Turner v. Rogers* didn't address the situation involved here, where the state is pursuing the remedial contempt. Applying the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the appellate court found there was asymmetry in representation between CSS and the Father, and there were no procedures in places to offset that lack of symmetry. As a result, the trial court needed to determine whether the alleged contemnor was indigent and, if so, to appoint counsel at the state's expense.