

# HEADS UP!!! The Intersection of Criminal Law and Domestic Relations Cases



HON. JUDGE ALLISON ESSER  
DISTRICT COURT JUDGE, 19<sup>TH</sup>

HON. JUDGE ANITA CROWTHER  
DISTRICT COURT JUDGE, 19<sup>TH</sup>

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# Summary



- **Discovery and Ethical Issues**
  - Attorney representation
  - 5<sup>th</sup> Amendment
- **Civil vs. Criminal Protection Orders**
- **Criminal allegations at issue in DR:**
  - Domestic Violence (C.R.S. § 14-10-124(1.3)(a); C.R.S. § 18-6-800.3)
  - Child Abuse (C.R.S. § 18-6-401)
  - DUI (C.R.S. § 42-4-1301)
- **Consequences on parenting time and decision-making**
- **Emergency restrictions of parenting time**
- **Surreptitious Recordings**

# Discovery and Ethical Issues



- **Disclosures in DR matters are subject to C.R.C.P 16.2**
  - Section (e)(1): Parties to domestic relations cases owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case.
- **Discovery in criminal matters are governed by Crim. P. 16**
  - Materials furnished in discovery pursuant to this rule may only be used for purposes of preparation and trial of the case and may only be provided to others and used by them for purposes of preparation and trial of the case
- **5<sup>th</sup> Amendment Right to Remain Silent**
  - Nor shall be compelled in any criminal case to be a witness against himself
  - Curtis Advisements

# Privilege Against Self-Incrimination



- Found in the 5<sup>th</sup> Amendment to US Constitution and Art. 2, Section 18 of Colorado Constitution.
- Applies to both civil and criminal proceedings.
- Applies to parties and non-party witnesses.
- Consideration – whether the testimony would tend to incriminate the witness for purposes of some criminal charge that has been or could be in the future raised against the witness.
- Where this will arise – punitive contempt proceedings if jail is a potential sanction, protection orders, motions to restrict, acts of domestic violence, child abuse, harassment, stalking, etc.
- Civil court may draw adverse inference against party who invokes privilege.

# Curtis Advisement



You have a constitutional right to remain silent and if you choose to remain silent, the Court cannot infer any guilt by the fact that you chose to remain silent. You also have a constitutional right to testify, and if you choose to testify, you are then waiving or giving up your right to remain silent and you subject yourself to cross examination. If you have any felony convictions as an adult, then the opposing party may introduce that information to the court in an attempt to impeach your credibility or the believability of your testimony.

*People v. Curtis*, 681 P.2d 504 (Colo 1984)

# Civil Protection Orders



**WHO:** Against adult or a juvenile who is 10 years of age or older. Can be issued by a business.

**WHAT:** An Order that prohibits the Restrained Person from contacting, harassing, injuring, intimidating, molesting, threatening, touching, stalking, sexually assaulting or abusing any Protected Person, or from entering or remaining on premises, or from coming within a specified distance of a Protected Person or premises, or from taking, transferring, concealing, harming, disposing of, or threatening harm to an animal owned, possessed, leased, kept, or held by a Protected Person, or any other provision to protect the Protected Person from imminent danger to life or health.

**WHERE:** In any county where the acts that are the subject of the Complaint/Motion occur, or where one of the parties resides, or where one of the parties is employed

**LAW:**

- C.R.S. § 13-14-101 et seq.

# When Entered



TPO may be granted: C.R.S. § 13-14-104.5(1)(a)

- (I) To prevent assaults and threatened bodily harm;
- (II) To prevent domestic abuse;
- (III) To prevent emotional abuse of the elderly or of an at-risk adult;
- (IV) To prevent sexual assault or abuse; and
- (V) To prevent stalking.

Domestic abuse vs. Domestic violence: C.R.S. § 13-14-101(2):

- any act, attempted act, or threatened act
- of violence, stalking, harassment, or coercion
- that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship.
  - A sexual relationship may be an indicator of an intimate relationship but is never a necessary condition for finding an intimate relationship.

**Legislative Declaration:** not limited to physical threats of violence. Include mental/emotional abuse, financial control, document control, property control, other types control. C.R.S. § 13-14-100.2

# Filing a Temporary Civil Protection Order



- JDF Forms = 398, 401, 402, 404,
- Know your county's procedures – see C.R.S. § 13-14-104.5(4).
- Standard – see C.R.S. § 13-14-104.5(7)(a)
- Once issued – service of Citation, Complaint and Copy of Temporary Civil Protection Order pursuant to Rule 4 of Colorado Rules of Procedure.
  - If unable to serve – see C.R.S. § 13-14-104.5(10)
- Prepare for return date – not set more than 14 days after issuance of TPO.

# Return date for TPO to become PPO



- C.R.S. § 13-14-106 controls.
- Continuances controlled by (b) – each party may request up to 14 days – good cause finding, or both parties agreed to continue TPO to not exceed one year – good cause finding.
- Standard = preponderance of the evidence
  - Respondent has committed acts constituting grounds for issuance of civil protection order AND unless restrained will continue to commit such acts designed to intimidate or retaliate against the protected person, judge shall order TPO to become PPO.
  - Finding of imminent danger not required

# Alternatives to Adding Children to PO



What to do if no DR case exists yet?

C.R.S. § 13-14-105 (1)(3) – allows for an award of temporary care and control of any minor child of the parties involved for a period of not more than 1 year.

CRS § 13-14-106(1)(c) – when there is a pending DR case the court may, on the motion of either party if both parties agree to the continuance, continue the temporary protection order until the time of the final decree or final disposition of the action

# Criminal Protection Orders



C.R.S. § 18-1-1001 – “MPO”

May include “no contact” provisions, similar to those of a TPO/PPO.

The issuance of an MPO does not impact your ability to pursue a TPO or PPO.

If MPO and TPO/PPO – the most restrictive order applies to your client’s / opposing party’s conduct.

# Modifications of MPO / PPO



MPO – C.R.S. § 18-1-1001(3): Defendant may apply to Court at any time for modification or dismissal of MPO. Court has jurisdiction to modify until final disposition of action.

- VRA?
- Notice
- *People v. Zoller*, 2023COA117: when a defendant challenges a mandatory protection order that infringes on the fundamental constitutional right to parental association pursuant to section 18-1-1001(6), C.R.S. 2023, the district court may not deny the motion without first finding that (1) the infringement is justified by compelling circumstances, and (2) the purpose of the infringement cannot be accomplished by less restrictive means.

PPO – C.R.S. § 13-14-108(2)(a): Protected party may apply to Court at any time for modification.

PPO – (2)(b): Restrained party may apply for modification.

Time restriction – 2 years.

# Pitfalls



- Advocate for modification of MPO to allow necessary contact for family law case purposes.
- Even if alleged victim (opposing party) says contact outside of the MPO is okay, alleged victim does not have authority to modify the MPO. Only the Court does.
- If phone calls with children are to occur – watch out for client calling protected party’s phone.
- Restrained party’s attendance at school events? Doctor’s appointments?
- Be aware of firearm relinquishment -
  - Criminal: C.R.S. § 18-1-1001(9)(a)-(e)
  - Civil: C.R.S. § 13-14-105.5

# Parenting Time and Decision-Making



- **General considerations:**
  - Children have “the right to be emotionally, mentally, and physically safe when in the care of either parent; and the right to reside in and visit in homes that are free of domestic violence and child abuse or neglect.” C.R.S. § 14-10-123.4
  - Courts shall give “paramount consideration to the child’s safety...” C.R.S. § 14-10-124(1.5)
- **PT and DM governed by best interest factors under C.R.S. § 14-10-124(1.5)(a),(b)**
  - (III.5) Any report related to domestic violence...
  - (VI) The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party; *except that, if the court determines that a party is acting to protect the child from witnessing domestic violence or from being a victim of child abuse or neglect or domestic violence, the party’s protective actions shall not be considered with respect to this factor;*

# Claim of child abuse/neglect/domestic violence



- When there is a claim of child abuse or neglect, or domestic violence, prior to considering the best interest factors, the court shall consider:
  - Whether one of the parties has committed child abuse or neglect, or domestic violence, has engaged in a pattern of domestic violence, or has history of domestic violence; C.R.S. § 14-10-124(4)(a)(I),(II)
- When raised?
  - Prior to allocating parental responsibilities
    - ✦ Temporary Orders
    - ✦ Permanent Orders
    - ✦ Modification of Parenting Time or Decision-Making
    - ✦ Emergency Restriction of Parenting Time

# Establishing abuse/neglect/domestic violence



- Burden: preponderance of the evidence
- When to raise the claim?
  - Judicial notice: pending charges vs. conviction
  - Is the child protected in the criminal case?
  - Should your client testify?
- Police reports – Admissible under C.R.E. 803(8) (*See Bernache v. Brown*, 471 P.3d 1234 (Colo. App. 2020))
  - However, hearsay contained in report not automatically admissible absent additional hearsay exception

# Consequences of abuse/domestic violence finding



- No mutual decision-making; C.R.S. § 14-10-124(4)(a)(I),(II)
- Best interest factors considered in light of abuse/DV finding; C.R.S. § 14-10-124(4)(b)
- Primary concern: safety and well-being of child *and abused party* C.R.S. § 14-10-124(4)(d)
- Court may issue additional orders (C.R.S. § 14-10-124(4)(e)):
  - limiting contact between the parties
  - Exchanges to occur in protected setting
  - Supervised parenting time
  - Restriction on overnight parenting time
  - Prohibition on alcohol use during or prior to parenting time
  - Confidentiality of child or party's address
  - Domestic violence evaluation and treatment

# Emergency Restriction of Parenting Time



- Motion to restrict that alleges imminent physical or emotional danger shall be heard and ruled upon not later than 14 days after filing of the motion. C.R.S. § 14-10-129(4); *In re Marriage of Wollert and Joseph*, 464 P.3d 703 (Colo. 2020)
  - Motion must comply with the particularity requirement of C.R.C.P. 7(b); it must identify imminent danger with specificity
- The court shall not restrict parenting time unless it finds parenting time would endanger the child's physical health or significantly impair the child's emotional development. C.R.S. § 14-10-129(4); *In re Marriage of Thorburn*, 519 P.3d 736 (Colo. App. 2022)
  - Imminence need not be proved at the emergency hearing. *See Thorburn*
- Strict time limits, usually 1 hour
- Burden: preponderance of the evidence
- Court must enumerate specific factual findings supporting the restriction and may enumerate conditions the restricted party could fulfill to seek modification of the parenting plan
- If endangerment found, best interest factors govern

# Additional ERPT Considerations



- Under modification statute: C.R.S. § 14-10-129
  - “An emergency motion to restrict isn’t an alternative to a motion to modify; instead, it’s a port in the storm...nothing about the emergency motion to restrict statute...should serve as a barrier to a motion to modify.” *In re Marriage of Wenciker and Bolen*, 519 P.3d 381 (Colo. App. 2022).
- Review hearing/phased plan/motion to lift restriction
- If substantially frivolous, groundless, or vexatious, court shall require the moving party to pay attorney’s fees and costs. C.R.S. § 14-10-129(5)
- ERPT Alternative – Objection to parenting time based on certain criminal conviction, offending parent bears burden C.R.S. § 14-10-129(3)

# Surreptitious Recordings



Your client wants to place a recording device in a room in which opposing party and child will be talking alone, without your client there.

What would you advise?

- Consideration of ethical rules?

Would this be illegally obtained evidence?

Could it be excluded in a civil DR proceeding?

# Surreptitious Recordings



See C.R.S. § 18-9-304

- “(1) Any person not visibly present during a conversation...commits [M2] eavesdropping if he [or she]:
- (a) Knowingly overhears or records such conversation...without the consent of at least one of the principal parties thereto, or attempts to do so;” or
  - (b) Knowingly uses for any purpose, discloses, or attempts to use or disclose to any other person the contents of any such conversation or discussion while knowing or having reason to know the information was obtained in violation of this section; or
  - (c) Knowingly aids, authorizes, agrees with, employs, permits, or intentionally conspires with any other person to violation this section.

# IMPEACHMENT



Felony Conviction: C.R.S. § 13-90-101: “The conviction of any person for any felony may be shown for the purpose of affecting [i.e., impeaching] credibility of such witness.” A prior felony conviction is not admissible if convicted **5 yrs** prior to time of testimony in civil case.

If not admissible under C.R.S. § 13-90-101, consider other options:

- 404(b) – Spoto analysis
- 405(b) – relevant character trait evidence
- 608(b) – specific instances of conduct